Quaderni del Dipartimento di Giurisprudenza
dell'Università di Torino

Colombian Draft Project on Private International Law

A cura di Margherita Salvadori
e Gilbert Boutin Icaza

UNIVERSITÀ DI TORINO

UNIVERSITÀ DEGLI STUDI DI TORINO

QUADERNI DEL DIPARTIMENTO DI GIURISPRUDENZA
DELL'UNIVERSITÀ DI TORINO
34/2024

Colombian Draft Project on Private International Law

a cura di

Margherita Salvadori e Gilbert Boutin Icaza

UNIVERSITÀ
DI TORINO

Opera realizzata e finanziata con il contributo di CSI Piemonte e del Dipartimento di Giurisprudenza dell'Università di Torino

La presente opera è stata sottoposta a revisione da parte di una Commissione di Lettura di docenti del Dipartimento nominata dal Comitato Scientifico della Collana in conformità al Regolamento delle pubblicazioni del Dipartimento di Giurisprudenza dell'Università di Torino.

Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino

Colombian Draft Project on Private International Law, a cura di Margherita Salvadori e Gilbert Boutin Icaza

Via Verdi, 8 – 10124 Torino
www.collane.unito.it/oa/
openaccess@unito.it

ISBN: ISBN 9788875903022

Prima edizione: luglio 2024

Grafica, composizione e stampa: Rubbettino Editore

Contents

Preface

Following a successful meeting in Medellin, Colombia, October 2022, it was decided to give voice to the drafters of the Project on Private International Law for Colombia, elaborated by the *Istituto Antioqueño de Derecio Internacional Privado* (IADIP Draft Law - PGLPIL).

This is an interesting work that certainly has the merit of raising the awareness of the Colombian legislature on the importance of having its own private international law to better 'communicate' with other national legal systems.

From a historical perspective, we recall that Colombia was called in the 19th century the 'Great Colombia'. It was Bolivar's dream to create the Confederate Union States integrated at that time by Colombia, Venezuela, Ecuador, Peru, and Panama, as a counterbalance to the United States and, as a natural reaction against Moore's doctrine (1823). Colombia was one the most important political States, together with Mexico in the early 19th century. We should distinguish two important periods in Colombia: the first one, is constitutionalism era and it was strongly influenced by French constitutionalism; the second one, the process of codification, where the domestic legal system has belonged to the Roman-Germanic family. In other words, Colombia's legal order has been loyal to the continental law system.

Concerning our subject Project on Private International Law, it has received the influence of the three key conventions in the pre-Pan-American period. Colombia attended the elaboration of the Lima Convention in 1878-1879, which was the precursor of the Pan-Americanism movement. The Pan-Americanism period ratified the Montevideo Convention 1889-1890. Finally, in the postmodern era of Private International Law, known as the Inter-American system, Colombia was very active in targetting the review of the Bustamante Code by the most important jurist Joaquin Castillo. Identified with the necessity to codify the rules of conflicts of law, the Colombian government ratified the Convention of Conflict of Laws of Montevideo 1992.

The scholars and the academia, as well as the international community established in Colombia are aware of the imperative necessity to create a modern regulation; and, under the influence of the Germanic doctrine, prepared the draft on Private International Law. The rationalisation of the new Colombian PIL is the conflict of laws of tolerance, inspired by James Paul Goldschmidt, a great German and Latin-American jurist.

The overall work is not an article-by-article commentary. Instead, each author dealt, in full freedom, with the themes most congenial to him or her.

Gilberto Boutin Icaza has been the drafter of the Code of Private International Law of the Republic of Panama and of the rules of Private International Law in the Decree-Law No. 5 of 1999 on arbitration in Panama. Therefore, he has a first-hand experience of the importance of providing norms that allow for dialogue with other countries. It is clear that opening up national systems to values produced in other legal systems is a challenge for the national systems; but, at the same time, it is necessary to avoid unilateralist positions that are so detrimental to peaceful relations between States.

From the outset, we were aware of the enormous task that we had ahead of us, but, we certainly resolved to follow through, considering the importance of the book project and its impact on society.

For us, the book provides the reader with an opportunity to both, x-ray the past and project into future possibilities. It allows the reader to discover and equally enlighten the academia and the policy world about the situation of Private International law in Columbia.

The content and chapters of the book provides the reader with an opportunity to focus on the diversity, the nature and the manner with which each State approaches issues of Private International Law. We hope it triggers sufficient questions and further research that will make the academia and the policy sector to engage in more research. As much as we hope to have answered and resolved questions, we trust we have also opened up future gaps that will afford scholars an opportunity to further contribute to the body of knowledge.

In each of the chapters, we have attempted a glossary examination of contemporary topics.

To establish a thought of a national conflict of laws is the first one. In this way, Claudia Madrid Martinez qualifies the project of Colombian PIL, covering the following aspects: the preliminary question, the juridical validity relationship established (vested right), *le droit acquis*; adaptation, *le renvoi*, evasion law, unknown institution, and public policy.

Secondly, the project addresses the necessity to recognize through the science of PIL the multicultural approach in favour of the indigenous. This Colombian project sharing Jayme doctrine of Private International must be based in the cultural status of the individual and collective cultural conscience remind us in some way the talent Italian scholar Ennio Piovesani. In the field of recognition and enforcement of foreign decisions, the project introduces the project not only the recognition of the judicial foreign award. The project extends to assimilate the recognition and enforcement at the same level as the international arbitral awards and Administrative foreign decisions under the analysis of Jose Luis Marin.

The project keeps the traditional rule *lex rei sitae* in matters of real property. In short, the general law of Private International Law maintains the harmony with the traditional Colombian civil code envisaged by the distinguished academic Maria Julia Ochoa Jiménez.

In respect of the applicable law in international contracts, the project introduces the role of the autonomy of the parties. It recognizes the *dépeçage* as well the *lex mercatoria*. The project aims to introduce a new reality within the Colombian legal system, moving away from the territorialism tradition in the region. This is particularly evident in the area of recognizing the choice of forum agreements in international contracts. Another important section is the one regarding the status of the Colombian companies and moral juridical persons. The project establishes very clear the personal status of the moral persons. Two aspects of the nationality of the Colombian moral person are submitted at the place of the constitution, and, secondly, the new regime recognizes like the common law jurisdiction, the rule of the continuity or the mutation of the personal status.

Regarding the new implementation of rules of conflict of laws, Margie Lys Jaime affirms that even thus Colombia has had a rich experience on international investment arbitration, the new regime become disruptive in the domain of the domestic judicial procedure because the Colombian lawyers use frequently the "*Amparo or tutela action*" as the tool against foreign awards. The new regulation will have an important incidence on the behaviour of the practitioners concerning the judicial process to recognize the foreign decisions, to be in force in Colombia jurisdiction. Without doubt, the new international litigation culture is rising in the Colombia in the judicial sphere.

The application of ancient private international convention from Montevideo 1889 has to be avoiding in order modernizing the new conflict of

laws system. That is radical and intelligent allure of the critical approach made by Nestor Londoño Sepulveda.

We appreciate all the contributors to the book and hope they continue to further research that will impact policymakers and the public society towards driving a huge change in the international community. We thank the Dipartimento di Giurisprudenza dell'Università di Torino, the publishers, and the editors, for their painstaking efforts to ensure that the final product is in our hands today.

13 May 2024

Margherita Salvadori et Gilbert Boutin Icaza

Authors

Gilbert Boutin Icaza, Dr., Dr., Prof., Doctor in Private International Law from the University of Paris II Pantheon - Sorbonne. He is the drafter of the Code of Private International Law of the Republic of Panama and of the rules of Private International Law in Decree-Law No. 5 of 1999 on arbitration in Panama. Currently, he is correspondent of UNIDROIT; he is affiliated with the Association Henri Capitant Paris, France; he is Member of the Swiss Arbitration Association, Basel, and individual member of the International Chamber of Commerce.

Margie-Lys Jaime, PhD, FCIArb, is a Law Professor at the University of Panama, specializing in international law and dispute resolution. She serves as a consultant and expert in arbitration, listed on the ICSID panel by Panama (2022-2028). Currently, she advises Panama's Ministry of Finance and participates in UNCITRAL's ISDS reform. She is licensed to practice law in Panama and New York.

Nestor Raul Londoño Sepulveda, lawyer of the Universidad Pontificia Bolivariana: UPB - Medellín, Doctor Cum Laude in Law of the University of Zaragoza, research professor of the UPB, lawyer of the firm DEC Consultants, researcher of the Law Research Group GRID of the UPB Medellín - Colombia.

Claudia Madrid Martínez, PhD in Law, *Magister Scientiarum* in Private International Law and Comparative Law, Lawyer (Universidad Central de Venezuela); postdoctoral researcher at the University of Cologne (Germany); associate Professor at Universidad de Antioquia; titular Professor at Universidad Central de Venezuela and Universidad Católica Andrés Bello.

José Luis Marín Fuentes, PhD (*Suma cum Laude*) in International Law Universidad de Buenos Aires, LL.M. in Droit International des Affaires Université Paris 2 Panthéon-Assas: professor of Private International Law and International Commercial Contracts at the Universidad de Medellín.

María Julia Ochoa Jiménez, Dr. iur., University of Göttingen (Germany); professor of Private and Public International Law at Loyola University (Spain) and researcher at the University of Bonn (Germany). She has been Professor of Private International Law at the University of Antioquia (Colombia) and visiting researcher at the Max Planck Institute for Comparative and International Private Law (Germany).

Melissa Palacio Maldonado, lawyer of the Universidad Pontificia Bolivariana: UPB - Medellín, posgraduate degree in Business Law of Universidad Externado de Colombia - Bogotá, in-house lawyer of Seguros Sura Colombia Company.

Ennio Piovesani, PhD in Private International Law (University of Turin); co-chair of the Young Research Network of the European Association of Private International Law; lawyer specialized in international law at the Pistoia Bar, Italy.

Margherita Salvadori, PhD in International Economic Law, Rome; Doctor honoris causa Droit international privé - Université de Lorraine; Professor of Private International Law at the University of Turin; invited professor at Georgetown University (USA-London), Universite de Nancy (France), Universitad de Albacete (Spain), Universitad Pontificia de Medellin (Colombia) and University of Panama (Panama).

Abbreviations and Acronyms

CIDIP	=	Conferencias Especialisadas Interamericanas sobre Derecho Internacional Privado
CoCC	=	Colombian Commercial Code
EU	=	European Union (before EEC, European Economic Community)
FTA	=	Colombia-Unites States Free Trade Agreement
GATT	=	General Agreement on Tariff and Trade
HCCH	=	Hague Conference on Private International Law
IADIP	=	Istituto Antioqueño de Derecio Internacional Privado
IADIP Draft Law	=	Project of General Law for Colombia elaborated by the Istituto Antioqueño de Derecio Internacional Privado
ICSID	=	International Center for Settlement of Investment Disputes
UNIDROIT	=	International Institute for the Unification of Private Law
ICC	=	Internationa Chamber of Commerce
ILO	=	International Labour Organization
New York Convention	=	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
OEA-OAS	=	Organización de los Estados Americanos - Organization of American States
Panama Convention (CIDIP-1)	=	Inter-American Convention on International Commercial Arbitration adopted, Panama, 1975
PGLPIL	=	Proyecto de Ley General de Derecho Internacional Privato para Colombia
PIL	=	Private International Law
UN	=	United Nations
UNCITRAL	=	United Nations Commission on International Trade Law

1980 Vienna Convention	=	Vienna Convention on International sales of Goods, 1980
WHO	=	World Trade Organization
2005 Hague Convention	=	Convention of 30 June 2005 on Choice of Court Agreements

Claudia Madrid Martínez

General Institutions of Private International Law in IADIP's Draft General Act on Private International Law*

ABSTRACT: This paper will focus on the analysis of the solutions established regarding the general institutions of Private International Law, which were described by Neuhaus as the heart of the basic principles of Private International Law. These institutions have emerged throughout the evolution of Private International Law as a response to the problems inherent in the application of conflict rules and the possible application of foreign Law. They are part of the so-called general theory of Private International Law, ratify its autonomy, and contribute to the construction of the necessary scaffolding for its working. For this reason, Chapter II of the Draft General Law of Private International Law prepared by the IADIP, referring to the problems of application of the conflict of laws rules, provides some solutions in this regard, based on those contained in the Inter-American Convention on General Rules of Private International Law, ratified by Colombia. In these brief lines, I will focus on the analysis of the solutions given to the general institutions of Private International Law by the IADIP Draft, comparing them with those contained in the Inter-American Convention on General Rules and making references, where appropriate, to existing solutions. The purpose of this analysis is to contribute to the understanding of the philosophy that underlies the Draft, which is oriented toward the achievement of equitable solutions since its goal is the achievement of material justice in the concrete case.

KEYWORDS: General institutions - Characterization - Juridical relationships validly established (vested rights) - Adaptation - Renvoi - Evasion of Law (fraus legis) - Unknown institution - Public policy

* Some ideas were taken from my work: Instituciones generales de Derecho internacional privado: más allá del problema conflictual, in V.H. Guerra - C. Madrid Martínez - Y. Pérez (coord.), *Estudios de Derecho internacional privado, Homenaje a Tatiana Maekelt*, Universidad Católica Andrés Bello, Caracas, 2012, 155 ff.

I. *Introduction*

The general theory of Private International Law ratifies its autonomy and builds the necessary scaffolding for its functioning, since, as Werner Goldschmidt stated, a science without a general theory is like a person without a head[1]. It is necessary to provide the legislator and the judge with a general theory covering its essential problems of legal philosophy, method, and technique[2]. It is necessary to think of the problems of Private International Law in terms of Private International Law.

For these reasons, the importance of the general theory has been recognized by most scholars, with very few exceptions[3], but there has been no agreement as to the matters that constitute its subject. Some scholars have directly linked it to all the problems derived from the work of the conflict rule[4]. However, when it is understood that the object of Private International Law is to provide a solution to international relationships, in addition to questions of applicable law – considered through the so-called methodological plurality of Private International Law[5] – the general theory must include international procedural law and an introduction referring to the fundamental notions (object, content, sources, and history)[6].

In any case, within the disputed content of this general theory, the so-called general institutions of Private International Law stand out, considered by Neuhaus as the heart of the basic principles of Private International Law[7]. Characterization, incidental or preliminary questions, juridical relationships validly established (vested rights), adaptation, *ren-*

1. W. Goldschmidt, *Derecho internacional privado. Derecho de la tolerancia*, VIII ed., Depalma, Buenos Aires, 1995, 18.
2. J. Maury, *Règles générales des conflits de lois*, in *Recueil des Cours de l'Académie de Droit International*, 1936, III, Vol. 57, 329 ff, at 330-332 and 416.
3. The general theory, in Juenger's opinion, reveals the tensions that the lack of uniform rules of applicable law cause in the multilateral system. See: F.K. Juenger, *Derecho internacional privado y justicia material*, Trans. D. Fernández and C. Fresnedo, Editorial Porrúa, Universidad Iberoamericana, Mexico, 2006, 77.
4. M. Aguilar Navarro, *Derecho internacional privado*, II reprint, IV ed., Universidad Complutense, Madrid, 1982, Vol. I, Tome II, Part One, 94.
5. C. Madrid Martínez, *La norma de Derecho internacional privado*, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela (UCV), Caracas, 2004, Serie Trabajos de Grado Nr. 2, 28-32.
6. D. Fernández Arroyo, *Derecho internacional privado. Una mirada actual sobre sus elementos esenciales*, Advocatus, Córdoba, 1998, 42-43.
7. P.H. Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts*, II ed., Paul Siebeck, Tübingen, 1976, 41-46.

voi, evasion of Law (*fraus legis*), unknown institution, and public policy (*ordre public*), are among them.

These general institutions answer the problems inherent to the foreignness of the relationships and the consequent need to determine the law that will govern them. They are tooling the legislator gives to the judge to face the vicissitudes of the operation of the conflict rule and the possible application of foreign law. Some of them are transferred from domestic law and acquire special characteristics in Private International Law – i.e., characterization or public policy –, others depend exclusively on the methodology of Private International Law – i.e., *renvoi* or adaptation.

In the Inter-American sphere, the Inter-American Convention on General Rules of Private International Law, "the most transcendent document" of the codification promoted by the OAS, stands out[8]. This Convention, unique in Comparative Law, aims to provide general guidelines of Private International Law to ensure the proper application of foreign law[9].

For Colombia, which ratified the Convention in 1981[10], this treaty is of greater importance due to the lack of regulation of the general theory of Private International Law in its domestic system. For example, as regards the application of foreign law[11], Article 2 of the Convention has contributed to temper the interpretation given to Article 177 of the General Procedural Code[12], with the so-called mixed theory, which admits that the task of bringing foreign law into the process is the responsibility of both the parties and the judge[13]. However, it is fair to recognize that this position has been ignored on some occasions[14].

8. T. Maekelt, *Teoría general de Derecho internacional privado*, II ed., Academia de Ciencias Políticas y Sociales, Caracas, 2010, Serie Estudios Nr. 87, 128.

9. W. Goldschmidt, *Normas generales de la CIDIP-II: hacia una teoría general del Derecho internacional privado interamericano*, in *Anuario Jurídico Interamericano*, 1979, 141 ff, at 150.

10. Act 21 of 1981 (January 2022), Official Gazette 35.711, 27 February 1981.

11. See: H. Sánchez Sánchez, *La aplicación y prueba del Derecho extranjero*, in *Teoría general del Derecho internacional privado*, eds L. García and A. Aljure, Legis, Bogotá, 2016, 95 ff.

12. Act 1564 of 2012, Official Gazette Nr. 48,489, 12 July 2012.

13. «[…] foreign law is not approached as a simple factual issue inasmuch as there is an express responsibility on judges in its attainment, but neither is it a matter of pure law, since the Colombian Law recognizes that its content, scope and validity may also be alleged, proven and discussed by the parties». See: Constitutional Court, judgment SU 768, 16 October 2014.

14. In 2021, the Supreme Court of Justice heard and denied the exequatur to a Venezuelan judgment whose res judicata nature was established in the Venezuelan Law, because the

Regarding general institutions, except for the case of public policy – which even without an express rule has had an important case law development – and the *renvoi* – rejected in matters of law applicable to the merits of the arbitration –, general institutions are practically non-existent in the Colombian Private International Law. Both the Draft Civil Code of Valencia Zea[15] and the Draft Civil Code of the Universidad Nacional de Colombia[16] only refer, as I will analyze below, to public policy and *fraus legis*. Hence the importance of the IADIP Draft, which dedicates its Second Chapter to «the problems of application of the conflict of laws rules».

Thus, in addition to including regulations for general institutions – public policy, *fraus legis*, *renvoi*, juridical relationships validly established and adaptation – this chapter of the IADIP Draft regulates matters relating to overriding mandatory rules and the application and interpretation of foreign law, referring in the latter case to one of the processes included in the institution of characterization and to the unknown institution. In general, and this must be recognized, these solutions are very close to those contained in the Inter-American Convention. However, any reference to preliminary or incidental questions is omitted, considering their limited practical application.

In these brief lines, I will focus on the analysis of the solutions given to the general institutions of Private International Law by the IADIP Draft, comparing them with those contained in the Inter-American Convention and making references, where appropriate, to existing solutions. The purpose of this analysis is to contribute to the understanding of the philosophy that underlies the Draft, which is oriented toward the achievement of equitable solutions since its goal is the achievement of material justice in the concrete case[17].

plaintiff did not prove neither the executory nature of the judgment, nor the Venezuelan rule that established such nature. See: Supreme Court of Justice, Civil Cassation Chamber, judgment AC238-2021, 8 February 2021.

15. A. Valencia Zea, *Proyecto de Código Civil*, Superintendencia de Notariado y Registro, Bogotá, 1980.

16. Facultad de Derecho, Ciencias Políticas y Sociales, *Proyecto de Código Civil de Colombia - Primera versión: Reforma del Código Civil y su unificación en obligaciones y contratos con el Código de Comercio*, Universidad Nacional de Colombia, Bogotá, 2020.

17. See: F.K. Juenger, *op. cit*.

II. *Characterization*

The institution of characterization is one of the most intricate problems of all Private International Law. In principle, characterization can be defined as a complex process of subsuming a specific *quid* in the concepts that delimit the object or the scope of connection of the conflict rules[18] and, even, of the foreign law rules.

It is my belief that the complexity of the characterization comes from the three distinct processes that compose it[19]. The confusion between them does not aid in clarifying the issue[20]. Firstly, the characterization is used to refer to the process by which the judge determines the nature of the concrete case to be analyzed, to subsume it within the factual assumption of a rule. Secondly, characterization is also often used to refer to what should more appropriately be called "interpretation" of the elements of the rule, especially of the connecting factors[21] – and even of the criteria for the attribution of jurisdiction. Thirdly, this term can designate the process by which, once the applicable law has been determined, the judge will have to consider the criteria of that law to interpret its provisions. This third process does seem to be exclusively connected with the conflict rules and their main consequence: the application of foreign law.

Of these three processes, the legislator in Comparative Law has dealt to a greater extent with the third one since it is closely linked to the application of foreign law. It must be affirmed, with Quintín Alfonsín, that interpreting foreign law following its criteria is a systematic consequence of its application[22]. Thus, Article 2 of the Inter-American Convention on

18. I. De Magalhães Collaço, *Da qualificação em Direito internacional privado*, Editorial Império, Ltd., Lisboa, 1964, 215.

19. B. Sansó, *La función de la interpretación en la búsqueda y adaptación de la Ley extranjera aplicable*, in *Libro Homenaje a la Memoria de Roberto Goldschmidt*, Facultad de Derecho, UCV, Caracas, 1967, 677 ff.

20. E. Hernández-Bretón, *En materia de calificaciones, reenvío y otros asuntos de Derecho internacional privado*, in *Cuadernos Unimetanos*, 2007, Nr. 11, 227 ff, at 228-229.

21. E. Betti, *Interpretación de la Ley y de los actos jurídicos*, Trans. J.L. de los Mozos, Revista de Derecho Privado, Madrid, 1975, 95 and 102; A.L. Calvo Caravaca - J. Carrascosa González, *Derecho internacional privado*, III ed., Comares, Granada, 2002, Vol. I, 224-225; H. Barrios, *La interpretación del contrato por el juez en el Derecho interno y en el Derecho internacional privado*, in *Libro Homenaje a José Mélich Orsini*, Instituto de Derecho Privado, Facultad de Ciencias Jurídicas y Políticas, UCV, Caracas, 1982, Vol. I, 15 ff, at 26.

22. Q. Alfonsín, *Teoría del Derecho privado internacional. Introducción. Elaboración del Derecho privado internacional. Funcionamiento del Derecho privado internacional*, Ediciones Idea, Montevideo, 1982, 496 and 498.

General Rules mandates to apply foreign law «in the same way as it would be enforced by the judges of the State whose law is applicable»[23]. Thus, the interpretation of foreign law shall be made according to that foreign law.

I must point out that the IADIP Draft is aligned with the Inter-American Convention and assumes the thesis of applying foreign law as foreign law. Indeed, according to the first paragraph of Article 2,

> The judges and competent authorities shall apply *ex officio* the foreign law that is designated as applicable by the Colombian conflict of laws rules. However, if the judge or competent authority deems it convenient, they may request the cooperation of the parties to determine the content, validity, and meaning of such law.

In line with this principle, Article 3, in its first paragraph, establishes that: «The interpretation of the competent foreign law shall be made according to the foreign law itself».

Now, traditionally, scholars have proposed three solutions to the problem of characterization, which has to do with the determination of the law that will provide the interpretation of the rules involved in the specific case. In this respect, Kahn[24] and Bartin[25], recognized as the first two scholars to identify this problem, proposed, in the first place, the characterization *ex lege fori*, a thesis according to which the criteria contained in the judge's substantive law must be considered. This is the solution accepted by some scholars, legislation[26], and case law. However, exceptions related to goods, contracts, the form of the wills, and the unknown institution, among others, are admitted.

In favor of this thesis, it is argued that when the national legislator elaborates the conflict rule – or jurisdiction rule – they consider the concepts of their system. Moreover, the application of foreign law constitutes

23. This, even though the expression used by the Convention suggests the adoption of the thesis of legal use, perhaps due to the influence that Goldschmidt has exerted on Inter-American treaties. See: W. Goldschmidt (1995), *op. cit.*, 137.

24. F. Kahn, *Gesetzeskollisionen, Ein Beitrag zur Lehre des Internationalen Privatrechts*, in *Jherings-Jährbücher*, 1891, 1 ff.

25. E. Bartin, *De L'impossibilité d'arriver à une suppression définitive des conflits de lois*, in *Journal de Droit International*, 1897, 25 ff. Id., *Le doctrine des qualifications et ses rapports avec le caractère national du conflit de lois*, in *Recueil des Cours de l'Académie de Droit International*, 1930 I, Vol. 31, 561 ff.

26. For example, art. 12.1 of the Spanish Civil Code; art. 3.1 of the Hungarian Act on Private International Law; art. 3078 of the Civil Code of Quebec. See examples cited in: Hernández-Bretón, *En materia de calificaciones, reenvío y otros asuntos…*, cit., 231-232.

a diminution of the sovereignty of the forum; the least that the State can reserve for itself is the extent of that diminution. Finally, it is argued that characterizing under foreign law is difficult. On the other hand, *ex lege fori* characterization is accused of representing a closed and chauvinistic conception, which fails when it comes to unknown institutions[27].

Despite the criticisms, a logical interpretation of Private International Law leads to the understanding that the first approach to the nature of the concrete relationship, with which the competent rule is determined, must necessarily be carried out by the material criteria of the *Lex fori*[28]. There is no other way of arriving at the applicable – or presumably applicable – law that provides elements of characterization of the legal relationship. Moreover, there is no other possible way to proceed, when the judge is looking for the rule that will determine whether they have jurisdiction.

The second theory proposed is the so-called *ex lege causae* characterization. Despagnet[29], to whom this thesis is attributed, proposed that the characterization is made according to the criteria of the substantive law presumably applicable to the relationship. This thesis is somewhat complicated since it is not possible to characterize a specific relationship based on the law competent to regulate it, for a simple reason that before the characterization it is not yet known which is the applicable law, it is not even known which is the rule that will lead to that law, since the characterization is the process to follow to individualize the conflict rule to be used[30].

In practice, due to the difficulties raised, the rules through which the *ex lege causae* characterization is enshrined do not assume the consideration of the substantive law applicable to the relationship, but rather, those that order to take into account a law other than the *lex fori* are considered as such[31].

27. T. Maekelt (2010), *op. cit.*, 325-326.

28. Magalhães Collaço proposes to take a third way: «[…]na fixação do sentido e alcance próprio das categorias utilizadas pela norma de conflitos terão de estar sempre presentes as finalidades especificas da norma em questão…». See: I. De Magalhães Collaço, *op. cit.*, 211-212. Betti refers to an antinomy between the international character of the problem to be regulated and the internal character of the rules with which it is characterized. See: E. Betti, *La interpretación de los conceptos calificadores en el Derecho internacional privado*, Trans. B. Sansó, *Libro Homenaje a la Memoria de Roberto Goldschmidt*, Facultad de Derecho, UCV, Caracas, 1967, 677 ff, at 679.

29. F. Despagnet, *Des conflits de lois relatifs à la qualification des rapports juridiques*, in *Journal de Droit International*, 1898, 253 ff.

30. On the difficulties of this solution, see: Q. Alfonsín, *op. cit.*, 398-398; T. Maekelt (2010), *op. cit.*, 327; B. Sanso, *op. cit.*, 709.

31. For example, the Brazilian Civil Code (arts. 8 and 9), and Peruvian Civil Code (art. 2055).

Despite this nuance, the thesis of the *ex lege causae* characterization has not succeeded in imposing itself. The disadvantages it has, have motivated Italian scholars to propose double characterization, according to which a primary characterization of the terms of the judge's conflict rule would be carried out, according to the judge's law, after which a secondary characterization of the terms of foreign law would be carried out according to the material rule of that foreign law. The secondary would not influence the primary characterization[32].

These solutions, however, have the disadvantage of having to resort to the internal substantive law of the States to interpret the Private International Law rules. For this reason, Ernst Rabel proposed the thesis of autonomous characterization[33]. In Rabel's opinion, if the rule of Private International Law is autonomous from domestic law, it is different in its structure, nature, and function, therefore it cannot obey the same characterization criteria of domestic law. Thus, through the comparative method, it is possible to obtain unitary and universal characterizations that would be used by the judge in Private International Law cases.

According to Rabel, when the German Civil Code regulates guardianship by the national law of the person concerned, the concept of guardianship must not depend either on the substantive law of the forum or on the foreign substantive law but must be obtained by a logical operation of abstraction based on the notions provided by Comparative Law. Thus, guardianship is to be understood as what the civilized world generally understands guardianship to be: an institution of law whose purpose is the representation or protection of persons who do not have full capacity and who are not subject to the power of their parents.

This relative abundance of theoretical solutions contrasts with the absence of regulation of the various systems. In this respect, Hernández-Bretón has stated that the lack of agreement on theoretical solutions and the conceptual and practical deficiencies in the decisions of the courts have generated a negative attitude and a state of despair concerning the impossibility of a legislatively formulated solution to the problem of characterizations. Thus, the author cites, among others, the case of the Inter-American Convention on General Rules, during whose discussions the lack of consensus among national scholars and case law determined the absence of an express solution regarding this

32. R. Ago, *Règles Générales des conflits de lois*, in *Recueil des Cours de l'Académie de Droit International*, 1936, Vol. 58, 243 ff, at 323-324.

33. E. Rabel, *Das Problem der Qualifikation*, in *RabelsZ*, 5-1931, 241 ff.

problem[34]. Much better not to solve a problem than to solve it poorly, as Goldschmidt said[35].

Colombian Private International Law has some rules establishing autonomous characterization. In this line can be included the treaties that regulate issues related to children and adolescents, which generally begin by defining these persons, or in matters of arbitration, which contain rules defining the arbitration agreement. Also in domestic law, Article 21 of the Civil Code defines what is to be understood by the "form" and "authenticity" of documents for the application of the *locus regit actum* rule. But, in addition to these rules, there is no solution to the problem of characterizations.

Let us remember that the Inter-American Convention on General Rules does not give general guidelines to the judge to solve this problem, beyond the solution in the matter of interpretation of foreign law. Now the IADIP Draft – as I have stated – is limited to referring to the case of interpretation of foreign law and preferred not to bind the judge to characterize exclusively with the *Lex fori*'s material criteria, nor according to the criteria prevailing in the law presumably applicable to the relationship, with the difficulties that both solutions entail.

III. *Unknown Institution*

Applying foreign law as foreign law is not easy when this law enshrines institutions unknown to the *Lex fori*, so the effect of implementing this institution is the rejection of foreign law. Savigny, in his *System des heutigen römischen Rechts*, had already raised two exceptions to the application of foreign law within the international legal community, the first one constituted by those rules of a strict imperative nature – today overriding mandatory rules or *Lois de police* –, the second exception is the unknown institution[36].

It is certainly difficult to differentiate these two exceptions to the application of foreign law formulated by Savigny since he exemplified the unknown institution through slavery and polygamy, cases that are closer to prohibited institutions, which can for that reason fall within the over-

34. E. Hernández-Bretón, *op. cit.*, 229.
35. W. Goldschmidt (1971), *op. cit.*, 150.
36. F.C. Savigny, *Sistema de Derecho romano actual*, Trans. J. Mesía y M. Poley, II ed., F. Góngora y Cía., Madrid, 1879, Vol. 6, 138 ff.

riding mandatory rules. This has led the doctrine to think that if there are foreign institutions that are inapplicable for reasons other than the incompatibility of ethical criteria, Savigny's system lacked the precision to serve as a guide for the legislator or the judge[37].

Today, unknown institution has been progressively eliminated as an easy mechanism to reject the application of foreign law and its new conception requires a review of the judge's law to determine if there are no analogous institutions, which favors its consideration as an institution directly related to values[38].

In this regard, Article 3 of the Inter-American Convention on General Rules provides:

> Whenever the law of a State Party has institutions or procedures essential for its proper application that is not provided for in the law of another State Party, this State Party may refuse to apply such a law if it does not have any like institutions or procedures.

The first thing I highlight in this rule is the broadness of referring not only to "institutions", but also to "procedures". However, the breadth is only in this sense because Article 3 of the Convention enshrines the unknown institution in a restrictive manner since foreign law can only be excluded if there are no analogous institutions or procedures in the *Lex fori*.

In these cases, the so-called "functional characterization" is very valuable, i.e., in the absence of a certain institution in the *Lex fori*, the only solution is to determine its social function, to find the institution that in the *Lex fori* performs the social or economic function closest to the foreign institution[39].

Some scholars argue that the unknown institution is nowadays in disuse, but from the wording of the Convention's rule, it can be inferred that what it seeks is to prevent the judge from excluding foreign law out of ignorance, before having to rule out the existence of an analogous institution in their law. I must emphasize that with the expression "may",

37. J. Garde Castillo, *La "institución desconocida" en Derecho internacional privado*, Instituto Editorial Reus, Madrid, 1947, 90-91.
38. T. Maekelt, *Antecedentes y metodología del Proyecto. Parte general del Derecho internacional privado*, in *Proyecto de Ley de Derecho Internacional Privado (1996). Comentarios*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas, 1998, Serie Eventos Nr. 11, 15 ff, at 25.
39. J.C. Fernández Rozas - S. Sánchez Lorenzo, *Derecho internacional privado*, III ed., Thomson-Civitas, Madrid, 2004, 131.

its application is enshrined not as an obligation for the judge, but as a power that the judge may exercise only after examining each specific case to determine whether the exclusion of foreign law is justified.

In any case, determining the lack of knowledge of an institution will depend on the characterization, however, this characterization can only be carried out through foreign law; in fact, some legislations regulate the unknown institution in rules regarding characterization and they do so in a positive manner, that is, not as a mechanism to reject foreign law, but rather to tend to its application, since it is ordered that in the cases of unknown institutions, characterization must be made under foreign law[40]. In this sense, I think that applying unknown institution should be oriented to make the rejection of foreign law the last resort.

Precisely this reasoning is followed by Article 3 of the IADIP Draft. This rule refers to the interpretation of foreign law, and in its second paragraph provides that:

> When the competent foreign law has institutions or procedures essential for its proper application that are not provided for in Colombian law, the application of such foreign law may be refused, provided that Colombian law does not have any analogous institutions or procedures.

The fact that this rule – inspired by the Inter-American Convention – is contained in the article relating to the application of foreign law, contributes to understanding the unknown institution, not as a tool to discard foreign law, but as an instrument that tends to that application, making use of the functional characterization.

It is noteworthy how, during the discussions of the Inter-American Convention, there were numerous debates from which different positions emerged: one of them – adopted by Article 3 – considered that it was necessary to try to apply the foreign law and only reject it when there are no analogous procedures or institutions in the *Lex fori*. However, the most interesting was the one that proposed to complete the original rule with the institution of adaptation[41]; certainly, for some scholars the fact of looking for an analogous institution or procedure in the *Lex fori*, to be able to apply the foreign law, is a kind of adaptation.

40. Art. 3.2 Hungarian Decree Act on Private International Law and art. 3078 of the Civil Code of Quebec.
41. M.G. Monroy Cabra, *Tratado de Derecho internacional privado*, VI ed., Temis, Bogotá, 1995, 440.

In any case, the problem of the unknown institution is still to admit simple ignorance as a basis for the eviction of foreign law. Because of that the prior functional characterization is favored. For example, in the case of a succession discussed before the Colombian judge, in which a trust is constituted under English Law, the judge will have to make a functional characterization and will find that in Colombian law there is a fideicommissum, a figure with which a certain parallelism could be established. Thus, once the analogy is verified, the judge may apply English law; but if such an analogy is not possible, would Colombian law be applied?

In my opinion, simple ignorance should indicate to the judge the consideration of the foreign law under which such a relationship has arisen. Therefore, I consider it convenient not to exaggerate the role of the unknown institution as an exception to the application of foreign law, and to understand it rather as an institution that seeks not to exclude it without first performing the analogical examination that allows the judge to fill the void to which the ignorance of foreign legal institution may lead them.

IV. *Renvoi*

The *renvoi* arises when the conflict rule of the forum refers to foreign law, and the foreign conflict rule refers, in turn, to the law of the forum or the law of a third State[42]. Such a situation is known as a negative conflict of laws, i.e., both the *Lex fori* and the law indicated as competent by the conflict rule of the forum refrain from regulating the legal relationship, giving, initially, the impression that there is a legal gap, a possible *non liquet*[43].

For this negative conflict to occur, three conditions must be met. First, the connecting factors used by the conflict rules involved must be different. Such diversity may derive from the literalness of the connecting factor (nationality/domicile) or its interpretation (domicile in fact/domicile in law). Secondly, the *Lex fori* must admit the application of the foreign conflict rule or, in other words, it must consider the foreign law in its entirety, both its material and conflict rules. Finally, the foreign conflict rule must refer to the application of another law.

When the foreign conflict rule refers to the law of the forum, it is a first-degree *renvoi*. If the reference is made to the law of a third State that accepts to be applied, it is second-degree *renvoi*. It may also happen

42. A.L. Calvo Caravaca - J. Carrascosa González, *op. cit.*, 294.
43. M. Aguilar Navarro, *op. cit.*, Vol. I, Tome II, Part Two, 150.

that the law of that third State, in turn, refers to the law of the forum in a circular *renvoi*, or to another State in a subsequent *renvoi*.

Traditionally, scholars have been divided between those in favor of *renvoi* and those who deny its usefulness[44]. What cannot be ignored is the problem of overcoming the legal gap arising from the impracticability of the conflict rule of the forum, in cases where the competent foreign law also shows its disinterest in regulating a specific case[45].

The argument according to which, the *renvoi* facilitates the uniform solution of conflicts of laws is well known. However, this is not entirely true since the solutions vary depending on the forum in which the dispute arises. To achieve international harmony of solutions, the foreign law must not accept the *renvoi*, because if it accepts it, the solutions that the foreign courts would give to the case would be contrary to those given by the courts of the forum[46]. Thus, only a second-degree *renvoi*, under certain conditions, could be useful to achieve this international harmony of solutions[47].

Respect for the indivisibility of foreign law is also an argument in favor of the institution, since through *renvoi*, a foreign substantive rule that is not declared competent by its conflict rule could not be applied. Thus, if the principle according to which foreign law must be applied as foreign law is considered, a substantive rule cannot be applied when the legislator that issued it does not want it to be applied. Moreover, the theory of *renvoi* is justified because it discourages deliberate choice of forum by promoting uniformity of results[48].

On the other hand, opponents of *renvoi* argue that the *Lex fori* is also indivisible and its mandate is disobeyed when a law other than that indicated by the conflict rule is applied. According to Bartin, when the legislator makes a conflict rule and chooses a connecting factor, they think that the substantive law indicated is the best law to regulate the relationship, be it the law of nationality or the law of domicile, or the law of the

44. This hesitant attitude towards renvoi has existed since its first jurisprudential recognitions: the Collier vs. Rivaz case (England, 1841) and the Forgo case (France, 1878).

45. For example, Niboyet and Quadri interpret the disinterest in foreign law as a suppression of the international character of the problem and a consequent application of the substantive law of the forum, even invoking reasons of public policy. Both cited in M. Aguilar Navarro, *op. cit*., Vol. I, Tome II, Part Two, 170-171.

46. H. Lewald, *La théorie du renvoi*, in *Recueil des Cours de l'Académie de Droit International*, 1929, IV, Vol. 29, 519 ff, at 526.

47. A.L. Calvo Caravaca - J. Carrascosa González, *op. cit.*, 254.

48. T. Maekelt (2010), *op. cit.*, 348.

place where the goods are located or the law of the place where the act is performed[49] so that to apply a different law is to disobey their mandate.

The characterization of *renvoi* as a *circulus vitiosus* (Kahn), even its description as an international tennis game (Buzatti) is well known. These conceptions seek to highlight the legal uncertainty derived from the acceptance of the *renvoi* because determining the applicable law depends on the competent law to regulate the specific case[50].

The panorama described leads to evidence of the disagreement that revolves around *renvoi* among scholars, case law, and Private International Law rules[51]. However, there are certain issues on which a certain uniformity in the solutions is beginning to be perceived. For example, it is common to exclude *renvoi* in contract matters when the parties can choose the applicable law. Some systems extend this rejection to all cases where conflictual autonomy is allowed, as is the case with Article 4.2 of the Introduction Act on the German Civil Code.

Renvoi is also usually excluded when the specific case is regulated by international treaties. Such exclusion is because the purpose of the treaties' conflict rules is to replace the conflict rules of the contracting States. For this reason, it does not seem reasonable that when the conflict rule of the treaty designates the law applicable to a relationship, the reference should include the conflict rules of that law[52].

This is probably the reason for the silence that the Inter-American Convention on General Rules maintains regarding *renvoi*. Indeed, although the draft Convention expressly rejected *renvoi*, in the final text, the matter was silenced at the suggestion of Haroldo Valladão, for whom *renvoi*, together with characterization, is a «very controversial matter, not yet settled»[53]. Gold-

49. E. Bartin, *Encore le renvoi*, in *Clunet*, 1931, 1256 ff, at 1260; A. Pillet, *Contre la théorie du renvoi*, in *Revue de Droit International Privé et de Droit Pénal International*, 1913, 1 ff. at 10.

50. A.L. Calvo Caravaca - J. Carrascosa González, *op. cit.*, 254.

51. For example, the Italian Act on Private International Law (art. 13); the Swiss Act on Private International Law (art. 14); the Austrian Federal Act on Private International Law (Art. 5); the Hungarian Decree Act on Private International Law (art. 4); and the Spanish Civil Code (art. 12.2), among other systems, accept *renvoi*. On the other hand, there is rejection in the Peruvian Civil Code (art. 2048); the United States Restatement Second (Sections 7 and 8); the Egyptian Civil Code (art. 27); the Greek Civil Code (art. 32); and the Act of Introduction to the rules of Brazilian Law (art. 16).

52. H. Lewald, *op. cit*., 578.

53 As reported in G. Parra Aranguren, *Convención Interamericana sobre Normas Generales de Derecho internacional privado* (Montevideo, 1979), in *Anuario Jurídico Interamericano*, 1979, 157 ff, at 165.

schmidt, however, considers that, despite its absence, *renvoi* is "sociologized" in the theory assumed by the Convention regarding the application of foreign law[54].

In any case, the only rule in force in Colombia regarding the *renvoi* is the first paragraph of Article 101 of the Statute on National and International Arbitration[55], and what it does is exclude it. Indeed, after admitting that the parties may choose the law applicable to the merits of the arbitration dispute, the rule provides that:

> The indication of the law of a State shall be understood to refer, unless otherwise expressed, to the substantive law of that State and not to its conflict of laws rules.

The exclusion of *renvoi* in this matter is justified by the play of conflictual autonomy and the need to respect the application of the law chosen by the parties. However, the rule itself allows the parties to express the contrary, i.e., to choose a conflict rule, so that in such a case there would be *renvoi*[56].

Concerning the *renvoi*, the IADIP Draft establishes a general rule that accepts it up to the second degree and rejects the other types. Indeed, Article 8 of the Draft provides:

> When foreign law declares Colombian law applicable, Colombian substantive rules shall apply.
> When the competent foreign law declares applicable the law of a third State, which in turn declares itself applicable, the substantive law of that State shall apply.
> In all other cases, the substantive law designated by the Colombian conflict rule shall apply.
> When an international treaty applies to the disputed relationship, the provisions of the treaty itself shall apply regarding renvoi.

The inclusion of this rule – inspired by Article 4 of the Venezuelan Act on Private International Law – was considered useful, because it provides

54. W. Goldschmidt (1971), *op. cit.*, 153.
55. Act 1563 of 2012, Official Gazette Nr. 48,489, 12 July 2012.
56. F. Romero, *El Derecho aplicable al contrato internacional*, in *Liber Amicorum Homenaje a la Obra Científica y Académica de la profesora Tatiana B. de Maekelt*, Facultad de Ciencias Jurídicas y Políticas, UCV, Fundación Roberto Goldschmidt, Caracas, 2001, 203 ff, at 257.

legal certainty by clearly establishing the rules of the game. Thus, in cases other than first and second-degree *renvoi*, the law to which the Colombian conflict rule refers shall be applied, avoiding one of the criticisms made of this figure and its infinite game of remissions.

In addition to this general rule, the Draft admits the exclusion of *renvoi* in two areas where its exclusion is common in comparative law, as stated above. The first refers to cases in which an international treaty applies, in which case "the provisions of the treaty itself shall apply regarding to *renvoi*". As I have stated – although this is beginning to change[57] – in these cases, *renvoi* is usually rejected because it may undermine the harmonization or standardization sought by treaties[58].

The second case refers to international contracts. Indeed, with a clear influence of the Inter-American Convention on the Law Applicable to International Contracts and the Hague Principles on the Choice of Law in International Commercial Contracts[59], Article 80 of the Draft provides that: «For the purposes of the application of this section, 'law' means the law in force in a State, excluding its conflict rules». Thus, by excluding the possibility of applying foreign conflict rules, *renvoi* in international contracts is excluded, whether the parties have chosen the law applicable to the contract or whether it has been determined by the judge.

V. *Juridical relationships validly established (vested rights)*

One of the main obstacles encountered by the conflict rule is the possible disregard of a legal situation created under the protection of a given legal system, due to the application of the law indicated by it. For this reason, it has been necessary to establish an exception to the conflict rule of the forum and this has been found in the vested rights or, as they are known today, juridical relationships validly established.

57. A. Davi, *Le renvoi en Droit international privé contemporain*, in *Recueil des Cours de l'Académie de Droit International*, 2012, Vol. 352, 9 ff, at 254 ff.

58. J. Derruppe, *Le renvoi dans les conventions internationales*, in *Juris-Classeur International*, 1993, F. 532-3, Nr. 1, 3 ff; J. Foyer, *Requiem pour le renvoi*, in *Droit international privé: travaux du Comité français de droit international privé*, Editions du CNRS, Paris, 1981, III année, Tome 1, 105 ff, at 112-114.

59. Hague Conference on Private International Law, *Principles on the Choice of Law in International Commercial Contracts*, The Hague, Hague Conference on Private International Law, 2016 (available at https://lc.cx/y_Eees).

This institution was historically considered as the foundation of Private International Law, a tradition originating from the Dutch school of the 17th century, and later developed by the Anglo-Americans. However, today it is conceived as an exception to the normal functioning of the conflict rule according to which the judge must ascertain that a given legal situation has been validly created both in form and in substance under a legal system different from their own, and then recognize it under their law[60].

In Savigny's opinion, to determine whether rights are duly acquired, it is necessary to know beforehand according to which legislation this acquisition must be decided. This question was answered in different ways by different authors. For Pillet, for example, a right can only be considered validly acquired when its acquisition took place according to the law declared applicable by the conflict rule of the forum, consequently these acquired rights lack effectiveness *ex proprio vigore*[61]. This solution was adopted by the Peruvian Civil Code (art. 2050) and by the Bustamante Code (art. 8).

For Meijers, on the other hand, the conflict rules of the forum should not apply when all the laws connected with the legal relationship, at the time of its creation or extinction, agree in declaring only one of them as competent, an agreement that must be recognized everywhere[62]. This theory is reflected in the Inter-American Convention on General Rules, whose article 7 – referring to "juridical relationships" instead of "vested rights" – mandates that such juridical relationships must have been constituted by "all the laws" with which the relationship had contact at the time of its creation.

Understanding the difficulty of this solution, Makarov proposed that the law designated not by "all the laws", but by the "preponderant majority" of the laws connected with the factual assumption should be considered. Later, Makarov supplemented his ideas with the recommendation to investigate whether the parties, at the time of concluding the act, could have foreseen the court that could decide any eventual dispute between them[63].

60. G. Parra Aranguren, *Curso general de Derecho internacional privado. Problemas selectos y otros estudios*, III ed., Facultad de Ciencias Jurídicas y Políticas, UCV, Caracas, 1998, 193 ff.

61. A. Pillet, *Principios de Derecho internacional privado*, Trans. N. Rodríguez y C. González, General de Victoriano Suárez Librería, Madrid, 1923, Vol. I, 33-39.

62. E.M. Meijers, *La question du renvoi*, in *Bulletin de l'institut Juridique International*, 1938, Vol. XXXVIII, 191 ff, at 225-226.

63. A. Makarov, *Les cas d'application des règles de conflits étrangères*, in *Revue critique de Droit international privé*, 1955, Vol. XLIV, 431 ff, at 445-446.

Now, in the current Colombian system, in addition to the general rule of Article 5 of the Inter-American Convention, there are a couple of rules in the Montevideo Treaty on Civil Law[64] whose solutions in matters of movable conflicts are based on this institution. I refer to Article 2, which provides that: «The change of domicile does not alter the acquired capacity» and Article 30, according to which «The change of location of movable property does not affect the rights acquired under the law of the place where they exist at the time of their acquisition».

In Colombian domestic law, there is no rule regulating this institution, hence the importance of the IADIP Draft. This Draft has a general rule and a couple of special solutions that are close to the rules of the Montevideo Treaty. Regarding the general rule, Article 9 of the Draft provides:

> A juridical relationship validly created in a foreign State, according to the law of that State, shall be recognized in Colombia, provided that at the time of its creation, it had a sufficient connection with that State and is not manifestly contrary to the essential principles of Colombian public policy.

It is a rule modeled on Article 9 of the Uruguayan Act on Private International Law and seeks to simplify the work of the institution, which translates into a guarantee of recognition of juridical situations validly created according to foreign law.

In addition to the principle of recognition, both Article 5 of the Convention and Article 9 of the Draft establish the manifest contradiction to the essential principles of public policy as an exception to the recognition of these relationships.

Regarding public policy, Niboyet stated that its operation will vary in its intensity depending on whether it is the creation or recognition of rights, and, in the case of recognition, it only produces a negative effect, never a positive one[65]. Indeed, it is possible that an act, which is contrary to the local public order, may only be sanctioned regarding the consequences which, in themselves, are not compatible with the essential principles of the State hearing case[66]. Francescakis does not agree with this thesis because he understands that the difference between rights and their effects cannot be established with enough precision. Legal issues

64. Approved by Act 33 of 1992, Official Gazette Nr. 40.705, 31 December 1992.
65. J.P. Niboyet, *Manual de Droit international privé*, X ed., Recueil Sirey, Paris, 1928, 562-568.
66. A. Pillet (1923), *op. cit.*, Vol. II, 359-360.

that are presented as effects of a previous situation can also be considered independent rights[67].

In addition to this general rule, the Draft, as I have already mentioned, establishes two rules that reflect this principle. In the first place, Article 42, according to which «The change of domicile does not restrict the capacity acquired under the law of the previous domicile». Secondly, Article 67, a rule that orders to respect the legal situations validly created in case of displacement of movable property, so that the change of location does not affect the rights acquired under the Law of the previous location.

VI. *Adaptation: harmonic application*

The operation of the conflict of law rule can lead to the fragmentation of the applicable law in a legal relationship, either because it is a complex relationship in itself, as is the case with contracts governed by different laws depending on their various elements (capacity, substance, form, etc.), or because it involves several situations that arise from the same legal event, and therefore, they are closely linked, as occurs in the case of the succession rights of the surviving spouse. In these cases, it is necessary to adapt the different applicable laws to obtain a harmonious and fair solution.

In this sense, the adaptation reflects the inadequacy of the conflictual method while demonstrating how the coexistence of different solution techniques and the flexibility that derives from them is useful to improve the regulation of international private relations.

Despite being recognized since its very beginning as one of the central figures of current Private International Law[68], adaptation has been at the center of complex debates on its requirements, its scope of action, and the determination of its solutions[69]. Adaptation, in short, can be defined as a figure that responds strictly to the problems of incompatibility of laws simultaneously applicable to the same legal situation, and

67. P. Francescakis, *Ordre public*, in *Encyclopédie Juridique Dalloz, Répertoire de Droit International, F-Z*, 1969, 498 ff, at 503.

68. T. Maekelt (2010), *op. cit*., 332.

69. J. Ochoa Muñoz, *Artículo 7. Adaptación*, in *Ley de Derecho Internacional Privado comentada*, eds. T. Maekelt *et al.*, Facultad de Ciencias Jurídicas y Políticas, UCV, Consejo de Desarrollo Científico y Humanístico, UCV, Caracas, 2005, Vol. I, 265 ff, at 271.

whose operation transfers to the judge special powers to disregard and modify the rules at stake, to achieve material justice[70].

As a result of this definition, it must be understood that adaptation needs two requirements for its performance. Firstly, the fragmentation of the applicable law to a relationship[71], which is a phenomenon that is due to the application of the conflict rule[72]. Secondly, there must be an incompatibility between the various applicable laws, so that if there are several and there is no contradiction between them, but they can be applied harmoniously, there is still no need to adapt. According to Ochoa Muñoz, incompatibility derives from the local character of the material laws, in the sense that these laws have been issued to regulate domestic legal relations and, therefore, their normative groups complement and integrate each other forming harmonic systems[73]. However, it is important to add that the state legislator is not obliged to adapt to the regulations of foreign laws.

In short, the judge must use adaptation when there is a contradiction between two or more simultaneously competent substantive laws[74]. Such a process will imply a modification, either of the conflict rule or of the simultaneously or successively applicable substantive rules, so that a harmonious and coherent regulation of the international case can take place[75]. In short, following Kegel und Schurig, there is a Private International Law solution and a private substantive law solution. Indeed, according to the conflictual solution, the legal fragmentation of the relationship will be attacked by the selection of a single conflict rule. This is a special characterization for the special purpose of avoiding the contradiction of rules. It is a preventive solution. The material solution, on the other hand,

70. J. Ochoa Muñoz, *op. cit*., 272.

71. M. Wolff, *Derecho internacional privado*, Trans. A. Marín, Bosch, Barcelona, 1958, 160; L. raape, *Les rapports juridiques entre parents et enfants comme point de départ d'une explication pratique d`anciens et de nouveaux problèmes du Droit international privé*, in *Recueil des Cours de l'Académie de Droit International*, 1934, Vol. 50, 401 ff, at 496-498.

72. G. Parra-Aranguren (1979), *op. cit.*, 184.

73. J. Ochoa Muñoz, *op. cit*., 274. In this regard, Bouza Vidal argues that «*la necesidad de adaptación surge ante* la quiebra de la lógica, coherencia y sistemática con que cada derecho interno regula las relaciones jurídico-privadas». N. Bouza Vidal, *Problemas de adaptación en Derecho internacional privado e interregional*, Editorial Tecnos, Madrid, 1977, 30.

74. G. Kegel - K. Schurig, *Internationales Privatrecht*, IX ed., Verlag C.H. Beck, München, 2004, 360.

75. N. Bouza Vidal, *op. cit.*, 12 and 29.

involves the manipulation of one of the applicable material laws, to attack the incompatibility. It is a curative solution[76].

Both solutions generate certain problems, and neither is satisfactory. Concerning the conflict solution, the first problem to be faced will be determining the conflict rule that will be disapplied. Starting from the ideas of Kegel and Schurig, who do not give a special answer to this problem but propose in a general way the weighing of interests in each case[77], Ochoa Muñoz proposes sacrificing the less solid interests to protect those of greater importance, a task that is not easy[78].

Commenting on the material solution, Alfonsín stated that it does not respect the content of the applicable rules, transforming the judge into a legislator, and authorizing them to regulate extra-national relations according to their ideas of justice[79]. Therefore, according to Ochoa Muñoz, this power transferred to the judge cannot be understood as absolute freedom of decision, which could lead to outrageous and arbitrary decisions without the possibility of control by higher instances. In his opinion, the judge's freedom to decide by material justice is limited to the content of each of the conflicting laws and is therefore limited by its scope[80].

Perhaps because of the difficulties presented by each of these solutions, Maekelt stated that in matters of adaptation, there are no definitive rules, and the solution must depend, in any case, on the characteristics of each situation and on the judge, whose task will be to find the most suitable solution. She emphasizes the value-based nature of this institution, which makes it possible to combat excessive formalism and achieve a functional result according to material justice. Echoing Neuhaus'ideas, Maekelt recommends considering adaptation as an exception, which will make it possible to avoid violating legal certainty[81].

In Colombian Private International Law, only Article 9 of the Inter-American Convention on General Rules refers to adaptation, without leaning toward either of the two solutions mentioned above. The rule, instead, adopts two principles: first, the various aspects of the same relationship may be governed by different laws, configuring what the doctrine has called *dépeçage*; and, secondly, mechanical conflictual criteria

76. G. Kegel - K. Schurig, *op. cit*., 361.
77. *Ivi*, 362.
78. J. Ochoa Muñoz, *op. cit*., 279.
79. Q. Alfonsín, *op. cit*., 627.
80. J. Ochoa Muñoz, *op. cit*., 227.
81. T. Maekelt (2010), *op. cit*., 335.

are abandoned in favor of a fundamental guiding criterion: equity in the specific case[82].

The solution chosen by this rule is very well adapted to Goldschmidt's opinion, in the sense of regulating the adaptation by giving only very broad guidelines to the judge, so that They enjoy greater freedom to achieve the ends pursued by the laws involved[83]. But this cannot be translated, in any way, into the possibility of converting the adaptation into an instrument of arbitrariness in the hands of the judge, favoring the tendency of the courts to systematically apply *Lex fori*, invoking difficulties in the application of the conflict rule as an excuse[84].

Promoting the main role of the judge, who has first-hand knowledge of the specific case, the IADIP Draft assumes the solution of the Inter-American Convention, by providing in Article 10:

> The different laws that may be applicable to regulate various aspects of one and the same juridical relationship shall be applied harmoniously to attain the purposes pursued by each of such laws.
> Any difficulties that may be caused by their simultaneous application shall be resolved in light of the requirements of equity in each specific case.

Despite the benefits of this solution, several questions may arise from it. The first one refers to the moment at which the judge should make use of adaptation; the second one refers to the cases in which the application of this method should be limited.

Regarding the first question, it can be affirmed that adaptation inevitably appears in the last phase of application of the conflict rule, when applying the substantive rules designated by the conflict rules. Thus, the adaptation acts, not when the judge is selecting the applicable law, but when they are dealing with the harmonization of the various substantive laws that have been designated by the conflict rules[85].

Finally, should adaptation be limited to cases of incompatibility between the various laws applicable to the same legal situation? I must answer yes, and, in this sense, it is convenient to differentiate between the cases that give rise to adaptation *stricto sensu* and those that require "substi-

82. A similar provision is contained in the Mexican Civil Code (art. 14. V) and the Venezuelan Act on Private International Law (art. 7).
83. W. Goldschmidt (1971), *op. cit.*, 153.
84. N. Bouza Vidal, *op. cit.*, 28.
85. J.C. Fernández Rozas - S. Sánchez Lorenzo, *op. cit.*, 376.

tution" or "transposition" of institutions[86], both based on the theory of equivalence. Adaptation arises in any case in which because of several different laws applicable to the same case, there is a mismatch in the result[87].

VII. *Public Policy in Private International Law*

Public policy in Private International Law works as a mechanism for the protection of the essential principles of a given legal system, which acts in two areas: in the procedural sphere to prevent the recognition of foreign judgments[88] or arbitration awards[89], for violation of substantive or procedural principles; and, in matters of applicable law, when the law to which the conflict rule of the forum leads contains provisions whose application is manifestly incompatible with the fundamental principles of that legal system[90].

For the focus of this paper, my main interest lies in the second function. This refers to the cases where foreign law does not apply. As previously stated, Article 5 of the Inter-American Convention on General Rules establishes:

> The law declared applicable by a convention on private international law may be refused the application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (*ordre public*).

It is interesting to note that Colombian case law has similarly interpreted this concept. It is worth mentioning that the cases cited in this section pertain to the recognition of foreign judgments and awards, which

86. Substitution and transposition are problems of interpretation of applicable law as to the conditions of application, while adaptation is a problem of coordination of several applicable rules as to the results. N. Bouza Vidal, *op. cit*., 84-87.

87. J.C. Fernández Rozas - S. Sánchez Lorenzo, *op. cit*., 376-377.

88. C. Madrid Martínez, *Breves notas sobre el orden público y el reconocimiento de decisiones extranjeras en el sistema venezolano de Derecho internacional privado*, in *Libro Homenaje a Juan María Rouvier*, ed. F. Parra, Tribunal Supremo de Justicia, Caracas, 2003, 361 ff.

89. C. Madrid Martínez, *El rol del orden público en arbitraje comercial internacional*, in *Revista de la Facultad de Ciencias Jurídicas y Políticas*, in *UCV*, 2006, Nr. 126, 79 ff.

90. These two functions have been accepted by Colombian scholars. See: J.F. Roldán Pardo, *JEl estado del arte del concepto de orden público internacional en el ámbito del Derecho internacional privado y el arbitraje internacional*, in *Revista de Derecho Privado*, 2010, Nr. 44, 2 ff, at 7.

is somewhat paradoxical[91]. In a widely known exequatur decision released in 1994, the Civil Chamber of the Supreme Court of Justice recognized that there is a limit to the State's obligation to apply foreign law. This limit is determined by the specific circumstances of the case and the potential impact on essential principles that safeguard society's values[92].

The principles safeguarded by public order are unique to each society. This has led scholars to use the term public policy in Private International Law instead of "international public policy". The latter phrase implies the existence of universally recognized principles, but the principles defended by this institution are specific to each state system. Comparative law demonstrates that these principles can vary among different states[93]. It is also important to distinguish between public policy in Private International Law and public policy in domestic law. The latter limits individual autonomy, while the former limits the application of foreign law[94].

Therefore, public policy does not have an international nature since it safeguards principles that are integral to the fundamental framework of the domestic law of every State[95]. This idea was adopted by the Civil Chamber of the Colombian Supreme Court of Justice in the exequatur decision of 1994 referred to above[96]. The Chamber acknowledged that public policy is crucial for safeguarding the society it serves, encompassing principles related to political, moral, religious, and economic interests[97].

It is important to keep in mind that these principles differ between states and can also change over time. Each state has its own unique principles that continuously evolve. Therefore, it is important to consider their timely nature and how they may vary[98]. In 1994, the Colombian

91. The role of public policy in Private International Law, as an exception to the operation of the conflict rule has indeed been recognized by Colombian case law, but so far, I have not found any judgment that has ruled out foreign law as being manifestly contrary to the essential principles of the Colombian law.

92. Supreme Court of Justice, Civil Chamber, Judgment 19 July 1994, file Nr. 3894.

93. G. Parra-Aranguren (1998), *op. cit.*, 129.

94. See: C. Fresnedo de Aguirre, *Public Policy: Common Principles in the American States*, in *Recueil des Cours de l'Académie de Droit International*, 2016, Vol. 379, 73 ff, at 99-100.

95. C. Fresnedo de Aguirre, *op. cit.*, 100.

96. Supreme Court of Justice, Civil Chamber, Judgment 19 July 1994, file Nr. 3894.

97. Criteria ratified in Supreme Court of Justice, Civil Chamber, Judgment 29 February 1996, file Nr. 3626.

98. See: M. De Angulo Rodriguez, *Du moment auquel il faut se placer pour apprécier l'ordre public international*, in *Revue Critique de Droit International Privé*, 1972, Vol. LXV, 369 ff.

Supreme Court emphasizing the significance of public policy in judicial decision-making, stressed that judges must ensure that their decisions align with current principles of public policy, which are subject to changes like the so-called laws of public policy[99].

Public policy is also a flexible concept that involves the judge's assessment of the values, considering the specific case and the harm caused by the foreign law in forum[100]. Public policy is responsible for safeguarding outcomes rather than theoretical legal principles. Its role is to ensure that solutions are aligned with the core values of justice within a specific legal framework. Essentially, it acts as a defender of the fundamental principles that underpin every legal system[101].

For public policy to intervene, certain requirements must be met. The first requirement is the implementation of the conflict rule. This ensures that if a dispute is resolved using an overriding mandatory rule, there will be no need for public policy intervention[102]. If the specific case is resolved by applying a specific international rule designed for cases that involve foreign elements, the judge's conflict rule and public policy may not apply. For example, in a contract governed by the 1980 Vienna Convention on Contracts for the International Sale of Goods, this may be the case.

Secondly, it is essential that the conflict rule results in the enforcement of foreign law. When the conflict rule of the forum declares its law as applicable, the judge is not dealing with a case of public policy. Instead, the competent law to govern the corresponding relationship is simply the *Lex fori*[103]. Ironically, the public policy's intervention, which previously required the application of a conflict rule, now hinders its mission by excluding the law it had indicated.

Thirdly, it is essential to ensure that the foreign law being used does not contradict the fundamental principles of the *Lex fori*. This assessment should not depend on the theoretical aspects of foreign law but rather on

99. Supreme Court of Justice, Civil Chamber, Judgment 19 July 1994, file Nr. 3894. Criterion taken up again in Supreme Court of Justice, Civil Chamber, Judgment 13 July 1995.
100. Supreme Court of Justice, Civil Chamber, Judgment 19 July 1994, file Nr. 3894.
101. See: C. Madrid Martínez, *Artículo 8. Orden público*, in *Ley de Derecho Internacional Privado comentada*, eds. T. Maekelt *et al*., Facultad de Ciencias Jurídicas y Políticas, UCV, Consejo de Desarrollo Científico y Humanístico, UCV, Caracas, 2005, Vol. I, 289 ff, at 290-294.
102 G. Parra-Aranguren (1998), *op. cit*., 126.
103 J. Sánchez-Covisa, *Orden público internacional y divorcio vincular*, in *Obra Jurídica de Joaquín Sánchez-Covisa*, Ediciones de la Contraloría General de la República de Venezuela, Caracas, 1976, 441 ff, at 446.

its practical application and the consequences it produces, as mentioned earlier[104]. For this reason, it seems possible that the same rule of foreign law may contradict the fundamental principles in certain cases while not doing so in others. Hence, it is not crucial to assess foreign law as a complete system, but rather focus on evaluating the effects it has on a particular case.

In the public policy function, it does not matter if the foreign rule is different or even contradictory to the corresponding substantive rule of the forum. Even if that rule is mandatory, what is important is that there is a clear violation of fundamental principles[105]. Permitting its intervention in minor discrepancies may be misconstrued it as a form of public policy in domestic law. Such a misinterpretation could potentially devastate the content and principles of the conflictual system, and it must be steered clear of at all costs[106].

In Comparative Law, it is typical to require a "manifest incompatibility" between the outcome of applying a foreign rule and the fundamental principles of the forum. This phrase is commonly found in many documents from the Hague Conference[107], where it was initially approved, as well as in many of the Inter-American Conventions that Colombia has ratified[108]. In some state systems of Private International Law, the incompatibility must be obvious or manifest[109]. However, others are content with a simple incompatibility[110] and do not see it as a violation of public policy if it is merely a difference between the *Lex fori* and foreign law[111].

104. G. Parra-Aranguren (1998), *op. cit*., 127.
105. C. Fresnedo De Aguirre, *op. cit*., 100.
106. J. Sánchez-Covisa, *op. cit*., 446-447.
107. Within the Conventions to which Colombia is a party, the use of this expression in Article 24 of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Act 265 of 1996, Official Gazette Nr. 42.703, 30 January 1996) is noteworthy.
108. This expression can be found in the Inter-American Conventions on General Rules (art. 5); on Letters Rogatory (art. 17); on the Taking of Evidence Abroad (art. 16); on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (art. 2.h); on Execution of Preventive Measures (art. 12); on Return of Children (art. 25); and on Support Obligations (art. 22).
109. This is the case of articles 6 of the Introductory Act to the German Civil Code; 3081 of the Civil Code of Quebec; 8 of the Venezuelan Act on Private International Law; and 17.3 of the Paraguayan Act on international contracts.
110. This is the case of Article 2600 of the Argentine Civil and Commercial Code.
111. See Articles 86 of the Dominican Act on Private International Law and 5 of the Uruguayan Act on Private International Law.

When discussing the phrase "manifestly incompatible", Diamond explained that something is only considered incompatible when it is clearly or manifestly incompatible. However, this may cause us to assume that there is a distinction between what is incompatible and what is manifestly incompatible. The purpose of this phrase is to favor foreign law by giving it the benefit of the doubt when a judge is uncertain about its incompatibility[112].

In Colombian domestic Private International Law, there is no explicit rule concerning public policy. However, based on the Inter-American codification – especially the Inter-American Convention on General Rules – the Supreme Court in Civil Chamber has interpreted public policy as a reservation clause. This clause is designed to prevent the acceptance of a foreign law that, despite being characterized as the competent law to govern a certain matter, blatantly contradicts the fundamental principles on which the national legal system is based[113].

The IADIP Draft also understands public order as a reservation clause and, in the heading of Article 6, it establishes that:

> The dispositions of foreign law which must be applied in conformity with this Act shall be excluded only when their application will produce results manifestly incompatible with essential principles of Colombian public policy.

This formula is like the one used by the Inter-American codification.

This rule intentionally departs from the second paragraph of Article 21 of the Draft Civil Code of the Universidad Nacional, which states that: «For foreign laws to produce effects in Colombia, they must not be contrary to public policy, *bonnes moeurs*, or fundamental rights»[114]. Although the concept of *bonnes moeurs* is usually omitted in Private International Law rules, the reference to fundamental rights is of great importance for public policy, and this has been recognized by case law, as will be analyzed below.

Finally, the manifest incompatibility of the result of applying foreign law with the fundamental principles of the judge's legal system will only provoke the action of public policy if there is a sufficient connection with

112. See: A. Diamond, *Harmonization of Private International Law relating to contractual obligations*, in *Recueil des Cours de l'Académie de Droit International*, 1986 IV, Vol. 199, 233 ff, at 292.

113. Supreme Court of Justice, Civil Chamber, Judgment 5 November 1996, file Nr. 6130.

114. This rule, except for the reference to fundamental rights, reproduces the second paragraph of Article 16 of the Valencia Zea Draft.

the forum, in a clear reference to the doctrine known as *Inlandsbeziehung* or *Binnenbeziehung*[115]. This requirement, in addition to illustrating the relativity and national nature of public policy, is directly connected with the importance of the harm principle for forum[116]. Parra-Aranguren recognizes that this connection requirement can be very useful to avoid abuses by judges[117].

Following this criterion, the second paragraph of Article 6 of the IADIP Draft expressly refers to the necessary intensity of the connection between Colombia and the relationship as an element to be considered by the judge in assessing incompatibility. In addition to this element, the judge must also take into consideration «the level of social harm and the gravity that the application of such foreign rule in Colombia would produce». These criteria only reinforce the exceptional nature of public policy.

However, this conception of public policy in Private International Law necessarily leads us to the thorny terrain of determining the fundamental principles of a legal system. The judge is faced with two essential problems. In the first place, the term "principle" directly implies that it is not a positive, expressed rule. Secondly, its characterization as "fundamental" or "essential", since not all principles can be considered as such. Those of an eminently technical nature, without teleological or ethical connotation, whose respect is not necessary to ensure the coherence of a given system, are ruled out[118].

Among scholars, there have been attempts to solve the problem of determining the fundamental principles. The first is verified in the confusion of public policy with the territoriality principle that arises from the work of Mancini[119]. However, after multiple failures in the attempt to delimit the principles, it is now understood that a list of matters considered to

115. The first reference to *Inlandsbeziehung* appeared in the work of Kahn [F. Kahn (1891), *op. cit.*]. See C. Madrid Martinez (2005), *op. cit.*, 296; A. Bucher, *Droit international privé suisse*, Helbing & Lichtenhahn, Bâle, 1995, Vol. I/2, Partie générale, Droit applicable, 192; H. Batiffol - P. Lagarde, *Droit international privé*, VI ed., Librairie Générale de Droit et de Jurisprudence, Paris, 1993, Vol. I, 576.

116. A. Bucher, *op. cit.*, 189-191.

117. G. Parra-Aranguren (1998), *op. cit.*, 136-137.

118. A. Bonomi, *Le norme imperative nel Diritto internazionale privato. Considerazione sulla Convenzione europea sulla legge applicabile alle obbligazazioni contrattuali del 19 giugno 1980 nonché sulle leggi italiana e svizzera di Diritto internazionale privato*, Schulthess Polygraphischer Verlag, Zürich, 1998, 201-202.

119. Something similar was verified among Colombian scholars, when Alfredo Cock Arango affirmed that sovereignty constituted an insurmountable obstacle to the application of foreign law. See: A. Cock Arango, *Tratado de Derecho internacional privado*, Universidad Nacional de Colombia, Bogotá, 1952, 12-13.

be of public policy or cases in which the judge's law would apply directly cannot be drawn up[120]. The only instrument that echoed the aprioristic thesis of public policy, proposed by Mancini, was the Bustamante Code which has been widely criticized for it[121].

In any case, it is not the legislator's task to determine the principles whose violation would trigger public policy. This task belongs to the judge, who must analyze in each specific case whether and to what extent a fundamental principle deserves to prevent the application of foreign law[122]. But to avoid a possible arbitrariness of the judge, it is advisable that case law, as an expression of the social conscience of the time[123], performs such work, as an orientation of the judge's task, and this has been recognized by the Colombian Supreme Court of Justice[124].

To guide the judge, Erik Jayme proposed several steps to follow to determine in which cases, due to the intervention of public policy, foreign law should be excluded. Such "concretization criteria" are the determination of the meaning and purpose of the foreign law; the examination of the weakness of the legislative policy of the foreign rule; a comparative law study; consideration of the relevance of the domestic rule; and, finally, the determination of the domestic connection. These approaches make it easier to ground cases in which public policy must act, but no single step is of value on its own[125].

The IADIP Draft – closing in this sense to the Draft of the Universidad Nacional –, understands the difficulties faced by the judge in the application of public policy, and establishes, in the final part of the first paragraph of Article 6, that: «A foreign rule that is manifestly incompatible with fundamental rights shall not be applied». Such a conception, as stated above, is linked to the treatment given to public policy by the Supreme Court.

Indeed, understanding that public policy in Private International Law is limited to the basic or fundamental principles of the institutions[126] and

120. This has been recognized by the Hague Conference and the Institute of International Law.

121. W. Goldschmidt (1971), *op. cit*., 147.

122. G. Kegel - K. Schurig, *op. cit*., 530-536.

123. E. Betti (1975), *op. cit*.

124. Supreme Court of Justice, Civil Chamber, Judgment 19 July 1994, file. Nr. 3894.

125. E. Jayme, *Métodos para la concretización del orden público en el Derecho internacional privado*, Trans. E. Hernández, in *Revista de la Facultad de Ciencias Jurídicas y Políticas, UCV*, 1991, Nr. 82, 215 ff, at 215-270.

126. Supreme Court of Justice, Civil Chamber, Judgment 2007-01956, 27 July 2011, file Nr. 2007-01956-00.

that the violation of a mandatory rule is not enough[127], the Supreme Court has included in a sort of catalog, the principles regarding which public policy is usually involved. Thus, the Court mentions, for example, the prohibition of abusive exercise of rights, good faith, the impartiality of the arbitral tribunal and respect for due process[128], equality, personal and national dignity[129], and grounds of divorce[130].

In addition to these principles, the Court considers as the object of public policy protection, the standards that safeguard a minimum of morality in society[131]. In short, the Supreme Court has stated, international public policy refers to the most basic notions of morality and justice, which serve as a substrate for legal institutions, both substantive and procedural, viewed in a restrictive manner[132]. This way of looking at public policy in Private International Law has been reiterated by the Supreme Court itself in a recent decision of the Civil Chamber in which it compiles these criteria[133], which have also been reiterated by the Constitutional Court[134].

After excluding the foreign law whose application is intolerable in the forum, the judge has a new task, which is to determine the rule with which to fill the gap left by the foreign rule that has been unapplied. This task will depend on the function that each law attributes to its own rules vis-à-vis the foreign law indicated by the conflict rules.

For example, German scholars conceive public policy as a reservation clause, an exceptional provision which, as such, must be interpreted restrictively: only if the judge does not find a solution in the foreign

127. Supreme Court of Justice, Civil Chamber, Judgment 6493-2017, 12 May 2017, file Nr. 2015-01074-00.

128. Supreme Court of Justice, Civil Chamber, Judgment 2007-01956, 27 July 2011, file Nr. 2007-01956-00; Supreme Court of Justice, Civil Chamber, Judgment 5207-2017/2016-01312, 18 April 2017.

129. Supreme Court of Justice, Civil Chamber, Judgment SC10089-2016, 25 July 2016.

130. In exequatur, due to the protection of public order, the Court verifies that the grounds on which the divorce was decreed abroad are compatible with those established by Colombian law. See: Supreme Court of Justice, Civil Chamber, Judgment SC4683-2019, 5 November 2019.

131. Supreme Court of Justice, Civil Chamber, Judgment 12467, 7 September 2016, file Nr. 2014-02737-00.

132. Supreme Court of Justice, Civil Chamber, Judgment 9909, 12 July 2017, file Nr. 2014-01927-00.

133. Supreme Court of Justice, Civil Chamber, Judgment 001-2019, 15 January 2019, file Nr. 2016-03020-00.

134. Constitutional Court, Judgment T-354, 6 August 2019.

law itself may they have recourse to the *Lex fori*[135]. This is the solution adopted by the Portuguese Civil Code (art. 22.2). Although the Dominican Act on Private International Law (art. 86.II) and, paradoxically, the Italian Act (art. 16.2) admit the total eviction of the law initially indicated by the conflict rule, before ordering the application of the *Lex fori*, they establish the application of the law indicated by other connecting factors provided by the same conflict rule, assuming the thesis of the subsidiary law, which would be truncated if the conflict rule has only one connecting factor.

The classic Italian scholars, on the contrary, consider the public policy as a rule, so that the gap left by the eviction of foreign law must be filled with its rules[136]. The Peruvian Civil Code (art. 2049) and the Austrian Act (art. 6), which expressly order the application of the *Lex fori*, are aligned with this thesis. On the contrary, some legal systems, including the Venezuelan Act (art. 8), the Paraguayan Act on international contracts (art. 17.3), the Argentine Civil and Commercial Code (art. 2600), as well as the Inter-American Conventions, are silent in this respect, which leads judges to normally apply their law[137].

In Colombia, as can be inferred from the case law, the trend seems to point to the application of Colombian law in case of eviction of foreign law. Thus, the third paragraph of Article 6 of the IADIP Draft provides, particularly approaching the Peruvian rule, that: «When a provision of the competent foreign law is not applicable due to such incompatibility, Colombian law shall apply».

VIII. *Evasion of Law (fraus legis)*

Certain connecting factors allow the parties to modify them to obtain the application of a rule more favorable to the realization of their wishes, thereby evading the mandatory rules of the normally competent law, which

135. F. Kahn, *Die Lehre vom ordre public*, in *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*, 1898, Vol. 39, 1 ff; later published in *Abhandlungen zum internationalen Privatrecht*, 1928, 194 ff; A. Makarov, *Grundriss des internationalen Privatrechts*, Alfred Metzner Verlag, Frankfurt am Main, 1970, 98-100. This thesis was reflected in the Judgment of the *Reichsgericht of* 19 December 1922, RGZ 106, 82, cited in G. Kegel - K. Schurig, *op. cit*., 539.

136. Ago R., *Teoria del Diritto internazionale privato. Parte generale*, Cedam Casa Editrice Dott. Antonio Milani, Padova, 1934, 296-298.

137. G. Parra-Aranguren (1998), *op. cit*., 141.

may be the *Lex fori* or a foreign law[138]. Such situations constitute cases of fraud or evasion of law under Private International Law.

But for fraud to occur, in addition to this material element, constituted by the change of the conflict rule's connecting factor, through a technically regular procedure, a psychological or moral element is necessary, i.e., the intention to avoid the application of the normally applicable law[139].

Thus, the essence of fraud is the combination of deceitful intent (*animus fraudulentus*) and action, to obtain a result different from the one intended by the imperative rule evaded[140]. This is its main difference with the violation of the law, because while the conduct that embodies the violation directly opposes or confronts the text of the law, the act that constitutes the fraud injures its spirit and sense[141].

However, this institution has been severely criticized because of the difficulty of proving *animus fraudulentus*. It has also been argued that the same objectives could be achieved by other institutions. The most frequent confusion arises with public policy. In this respect, Goldschmidt argues that fraud is a general negative characteristic of any legal rule; on the other hand, public policy is the general negative characteristic of the legal consequence of the conflict rule, since it is only through its intervention that the possibility of applying foreign law arises. Moreover, Goldschmidt adds, public policy constitutes a value judgment on foreign law, while fraud on the law constitutes a value judgment on the attitude of the parties[142].

In this sense, Kegel and Schurig argue that while public policy guarantees material justice, since it only intervenes when the content of the foreign law grossly violates the sense of justice of the forum, fraud against the law only censures how the connecting factor is created. This is there-

138. G. Parra-Aranguren, *op. cit*., 143-144 and 150.

139. J. Maury, *L'éviction de la Loi normalement compétente: L'ordre public et la fraude à la Loi*, Cuadernos de la Cátedra del doctor James Brown Scout, Universidad de Valladolid, Valladolid, 1952, 161-162.

140. It should be noted, as Verplaetse rightly does, that the expression *fraus iuris* should be preferred to *fraus legis*, because the concept encompasses not only fraud against the law in the formal sense, but fraud against any legal rule. See: J. Verplaetse, *La fraude à la loi en Droit international privé*, Paris, 1938, 26.

141. A. Miaja de La Muela, *Derecho internacional privado*, VII ed., Atlas, Madrid, 1976, Vol. I, 400.

142. W. Goldschmidt, *Sistema y filosofía del Derecho internacional privado*, II ed., EJEA, Buenos Aires, 1952, 289-292.

fore a mere question of conflictual justice, which is why public policy is inefficient to solve the problem of fraud[143].

Despite the clear differences between public policy and fraud, the imperative nature of the rules protected through the *fraus legis* can certainly lead to applying public policy rather than fraud. Article 6 of the Inter-American Convention on General Rules does not help to clarify the picture by providing that:

> The law of a State Party shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded. The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties.

The express reference in this rule to «the basic principles of the law of another State Party» is striking, since it has traditionally been understood that the evasion must affect the mandatory rules of the *Lex fori*[144]. However, according to Maekelt, the reference to the «principles of another State party» broadens the scope of the fraud, although it also makes it more difficult to implement in practice[145]. Regarding the content of the basic principles no further explanation has been given, perhaps the difference with those principles protected by public policy is given, not by their content, but by the intervention of the fraudulent animus in the change of the connecting factor.

Despite the concerns generated by the rule of the Inter-American Convention, the IADIP Draft favors its solution, and Article 7 refers to the artificial avoidance of the essential principles of the law designated by the conflict rule. Article 7 also refers to the conflictual effect of fraudulent evasion of the law, by providing for the eviction of the law whose application has been fraudulently sought, even if it is the *Lex fori*. Although the rule does not indicate it, the gap that occurs should be filled with the rules of the evaded law.

Although Article 7 of the Uruguayan Act on Private International Law was also considered as a model, the IADIP Draft departed from that rule because it is limited to punish the evasion of Uruguayan law, and the

143. G. Kegel - K. Schurig, *op. cit*., 494.
144. Y. Loussouarn - P. Bourel, *Droit international privé*, IV ed., Précis Dalloz, Paris, 1993, 288.
145. T. Maekelt, *General rules of Private International Law in the Americas. New Approach*, in *Recueil des Cours de l'Académie de Droit International*, 1982, Vol. 177, 193 ff, at 320.

Draft preferred to privilege the fact that if fraud punishes the attitude of the parties, this sanction should be imposed regardless of whether the evaded law is Colombian or foreign. For this reason, the content of the third paragraph of Article 16, of the Valencia Zea Draft and the third paragraph of Article 21, of the Draft Civil Code was not considered, since according to both rules «No one may take advantage of a legal situation created in applying foreign law in fraud of Colombian law»[146].

Finally, regarding the material effects, directly related to the application of the *fraus omnia currumpit* principle to annul acts concluded in fraud of the law, Article 7 of the Draft is silent. However, I must admit with Loussouarn and Bourel that if the act conforms with the law of the place where it was born, the forum cannot decide on its validity. The only thing in its power is to disregard its effects on its territory. Thus, rather than nullity, it is a question of unenforceability[147].

IX. *Conclusions*

If I must conclude after this tour, my main idea is to reiterate the convenience of having a system of Private International Law that responds to the progress of this discipline and to the Colombian reality. In the Draft prepared by the IADIP, the general institutions are guided by the need to provide the judge with the necessary tools to achieve, in each specific case, material justice.

The enshrinement of the principles of the general theory of Private International Law, currently absent in Colombian Private International Law, would represent a great advance for the subject and would undoubtedly contribute to its consolidation, not as just another branch of law with little practical application, but as what it is: a fundamental tool, necessary to face the challenges of the globalization of people's lives.

146. Although Ochoa states that the rule does not expressly require the subjective element, in my opinion the use of the word "fraud" denotes the need for fraudulent intent, without which there would be no place to speak of fraud, neither in domestic law nor in Private International Law. See: M.J. Ochoa Jiménez, *Las normas de Derecho internacional privado: observaciones al Proyecto de Código Civil de la Universidad Nacional de Colombia*, in *Revista de Derecho Privado, Universidad Externado de Colombia*, 2021, Nr. 41, 373 ff., at 387.

147 Y. Loussouarn - P. Bourel, *op. cit*., 290-291.

Ennio Piovesani

Article 4 PGLPIL on Internationally Mandatory Provisions

ABSTRACT: This article is a short comment of article 4 PGLPIL on the private international law category of internationally mandatory provisions. Once introduced and defined the normative category (§§ I and II), the issues concerning the qualification of internationally mandatory provisions and their application are examined (§§ III-V).

KEYWORDS: Internationally Mandatory Provisions - Unilateralism - Conflict Rules

I. *Introduction*

Article 4 of the Instituto Antioqueño de Derecho Internacional Privado's *"Project of a General Law on Private International Law for Colombia"* (*"Proyecto de Ley General de Drecho Internacional Privado para Colombia"*; hereafter, "PGLPIL")[1], headed *"Internationally mandatory provisions" ("Normas internacionalmente imperativas")*, provides that:

1. Notwithstanding what is provided in this Law, the judge must apply the internationally mandatory provisions of Colombian Law that, according to such Law, must prevail even when Foreign Law results to be competent. 2. The judge may take into consideration the internationally mandatory provisions of other States tightly connected with the case, keeping into account the consequences of their application or non-application[2].

1. Instituto Antioqueño de Derecho Internacional Privado - IADIP, *Proyecto de Ley General de Derecho Internacional Privado para Colombia*, Medellín, 2021.

2. «1. No obstante lo previsto en esta Ley, el juez deberá aplicar las normas internacionalmente imepravitas del Derecho colombiano que, según este Derecho, deben prevalecer aun

I.1 *Terminology*

Article 4 PGLPIL addresses the private international law category of internationally mandatory provisions; a normative category which may be also referred to by employing other terminology.[3] Such different terminology may be grouped into four categories: that referring to the mandatory (imperative or preceptive) or, more specifically, to the "internationally" mandatory nature of the provisions in question (e.g. "internationally mandatory provisions"); that referring to their purpose and scope (e.g. "public policy laws"); that referring to their overriding (immediate, interfering, forced, necessary or prevailing) nature (e.g. "norms of immediate application"); and that referring both to their mandatory and overriding nature (e.g. "overriding mandatory provisions")[4].

This different terminology highlights one or more defining elements of the normative category in question[5]: in fact, internationally mandatory provisions may be defined as substantive provisions of law, mandatory even in cases characterised by an international element, and which, by reason of their purpose and scope, claim to be applicable regardless of whether the law of a country, other than that to which the same provisions belong, is designated by the bilateral conflict rules, i.e. conflict rules which may designate, alternatively, the law of the forum or foreign law[6] (§ II).

cuando un Derecho extranjero resulte competente. 2. El juez podrá tomar en consideración las normas internacionalmente imperativas de otros Estados estrechamente vinculados con el caso, teniendo en cuenta las consecuencias de su aplicación o inaplicatión».

3. See F. Mosconi - C. Campiglio, *Diritto internazionale privato e processuale*, Utet, Milano, 2022, Vol. 1, 324 and 325; N. Palaja, *L'ordine pubblico "internazionale"*, Cedam, Padova, 1974, 117.

4. Cf. the various linguistic versions of the heading of article 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4 July 2008, 6.

5. Cf. F. Mosconi - C. Campiglio, *op. cit.*, 324 and 325.

6. See, on the notion of bilateral conflict of laws rules, M.J. Ochoa Jiménez, *Las normas de derecho internacional privado: observaciones al Proyecto de Código de la Universidad Nacional de Colombia*, in *Revista de Derecho Privado*, No. 40, 2021, 382; A. Zuleta Londoño, *Las cláusulas de selección de foro y selección de ley en la contratatción internacional: una vision desde el derecho internacional private colombiano*, in *Revista de Derecho Privado*, No. 44, 2010, 10.

I.2 *Development*

Although it is believed that the theorical foundations of the private international law category of internationally mandatory provision may be traced back to the works of Savigny and Mancini[7], the normative category was "fully fledged" by scholars only at the turn of the 1950s and 1960s[8]. The category was later codified, since the late 1970s, in instruments of international, EU, national and soft-law[9].

7. See referring both to Mancini and Savigny, A. Bonomi, *Le norme imperative nel diritto internazionale privato*, Schulthess Polygraphischer Verlag, Zürich, 1998, 63 ff; Id., *Norme di applicazione necessaria*, in *Diritto internazionale privato*, ed. R. Baratta, Giuffré, Milano, 2010, 233 and 234; G. Sperduti, *Norme di applicazione necessaria e ordine pubblico*, in *Rivista di diritto internazionale privato e processuale*, 1976, 476 ff; see also, on Sperduti's reference to Mancini, E. Vitta, *Relazione al progetto di legge sul diritto internazionale privato*, in *Prospettive del diritto internazionale privato*, Istituto per la documentazione e gli studi legislativi, Giuffré, Milano, 1967, 21; but see, challenging Sperduti's reference to Mancini, G. Pau, *Richiami alla tradizione in tema di ordine pubblico internazionale*, in *Diritto internazionale*, 1959, 117 ff; see, referring to Savigny, Advocate General Szpunar, opinion of 20 April 2016 - case C-135/15, *Hellenic Republic v Grigorios Nikiforidis*, ECLI:EU:C:2016:281, para. 68.

8. See, among other Italian scholars, G. Sperduti, *op. cit.*, 469 ff; T. Treves, *Il controllo dei cambi nel diritto internazionale privato*, Cedam, Padova, 1967, 40 ff; R. De Nova, *I conflitti di leggi e le norme con apposita delimitazione territoriale*, in *Diritto internazionale*, 1959, 13 ff.

9. See, e.g. among international law codifications: article 16 of the Convention of 14 March 1978 on the Law Applicable to Agency [Retrievable at https://www.hcch.net/en/instruments/conventions/full-text/?cid=89, last accessed on 30 May 2023); article 17 of the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods [Retrievable at https://www.hcch.net/en/instruments/conventions/full-text/?cid=61, last accessed on 30 May 2023); article 7 of the 1980 Rome Convention on the law applicable to contractual obligations (OJ C 27, 26 January 1998, 34 ff); article 11 of the Inter-American Convention of 17 March 1994 on the Law Applicable to International Contracts [Retrievable at: https://www.oas.org/juridico/english/treaties/b-56.html, last accessed on 30 May 2023); article 11 of the Convention on the law applicable to certain rights in respect of securities [Retrievable at https://www.hcch.net/en/instruments/conventions/specialised-sections/securities, last accessed on 30 May 2023]; among EU law codifications: article 16 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31 July 2007, 40 ff); article 9 of the Rome I Regulation; article 30 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8 July 2016, 1 ff); among national (Latin American) law codifications: article 2599 of the Argentinian Civil and Commercial Code; article 17, paras. 1 and 2, of the Paraguayan Law No 5303 of 2015, Regarding the

However, to date, the normative category is not addressed by a specific provision of Colombian (hard) law[10] and appears to have attracted little interest among Colombian courts and scholars[11]. The reason for such little interest, may be explained as follows. On the one hand, most of the existing Colombian conflict rules[12] are (based on the principle of territoriality and) unilateral: they designate Colombian law, without envisaging the possibility that foreign law be designated as applicable[13]. On the other hand, internationally mandatory provisions (may be regarded as a *"version moderne de la territorialité absolue"*[14] and) also enshrine a

applicable law to international contracts (an English translation of which is retrievable at https://www.hcch.net/en/publications-and-studies/details4/?pid=6300&dtid=41, last accessed on 30 May 2023); article 10 of the Venezuelan Private International Law (an English version of which is retrievable at https://www.refworld.org/pdfid/4c45af962.pdf, last accessed on 30 May 2023); article 6 of the Uruguayan General Private International Law (an English translation of which is retrievable at https://www.hcch.net/en/publications-and-studies/details4/?pid=6300&dtid=41, last accessed on 30 May 2023); among soft law codifications: article 69 of the Draft OHADAC Model Law relating to Private International Law [Retrievable at https://www.ohadac.com/textes/5/draft-ohadac-model-law-relating-to-private-international-law.html, last accessed on 30 May 2023); article 11 of the Principles on Choice of Law in International Commercial Contracts (The Hague Conference on Private International Law Permanent Bureaeu, The Hague, 2015).

10. See M.J. Ochoa Jiménez, *Las normas de derecho internacional privado: observaciones al Proyeto de Código de la Universidad Nacional de Colombia*, cit., 382; M.J. Ochoa Jiménez - P. Carrillo Gamboa, *Elementos conceptuales y práticos esenciales para la solución de casos de Derecho Internacional privato en Colombia*, in *Documentos de Trabajo*, Unidersidad de Antioquia, Facultad de Derecho y Ciencias Políticas, Medellín, January 2020, 42 and 43.

11. Even the 2020 Project of Reform of the Colombian Civil Code (Facultad de Derecho, Ciencias Políticas y Sociales, Universidad Nacional de Colombia, *Proyecto de Código Civil de Colombia – Primera Versión: Reforma del código civil y su uniciación en obligaciones y contratos con el código de comercio*, Bogotá, 2020) – though it includes bilateral conflict rules – lacks a specific provision on internationally mandatory provisions. See M.J. Ochoa Jiménez, *Las normas de derecho internacional privado: observaciones al Proyeto de Código de la Universidad Nacional de Colombia*, cit., 383.

12. See, in general, on the Colombian conflict of laws system, A. Zapata Giraldo, *Colombia*, in *Encyclopedia of Private International Law*, eds. J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio, Edward Elgar Publishing, Cheltenham, 2017, Vol. 2, 1981 ff.

13. Cf. M.J. Ochoa Jiménez, Las normas de derecho internacional privado: observaciones al Proyeto de Código de la Universidad Nacional de Colombia, cit., 382; M.J. Ochoa Jiménez - J. Zapata Flórez - P. Carrillo Gamboa, *La elección del derecho aplicable en el derecho internacional privado en Colombia*, in *Estudios Socio-Jurídicos*, Vol. 21, No. 1, 2019, 109; A. Zuleta Londoño, *op. cit.*, 11.

14. Cit. L. Pereznieto Castro, *La tradition territorialiste en droit international privé dans les pays d'Amérique latine*, in *Collected Courses of the Hague Academy of International Law*, Vol. 190, 1990, 322.

unilateral nature[15]: as mentioned above, such provisions claim to be applicable regardless of whether the law of a country, other than that to which they belong, is designated by the bilateral conflict rules. In conclusion, the reason why the normative category in question has attracted little interest in Colombia depends on its little practical relevance in that country: in fact, in most cases, the application of Colombian internationally mandatory provisions is ensured by the existing Colombian (unilateral) conflict rules and not by way of exception to the latter.

Therefore, it is thus unsurprising that the drafters of article 4 PGLPIL have drawn inspiration from "outside" Colombia, namely from the above-mentioned existing foreign and international codifications. In fact, insofar as its wording is concerned, article 4 PGLPIL appears to be an almost verbatim "transplantation" of article 17, paragraphs 1 and 2, of the Paraguayan Law 5404 of 2015[16], which, in turn, implements article 11, paragraphs 1 and 2, of the Principles on Choice of Law in International Commercial Contracts[17].

15. Cf. P. Franzina, *Introduzione al diritto internazionale privato*, Giappichelli, Torino, 2021, 187 («È inevitabile una tensione fra tali norme e le norme bilaterali di conflitto: le norme di applicazione necessarie, improntate ad una logica unilateralistica, pretendono dal loro punto di vista di regolare senza intralci delle fattispecie che le norme di conflitto bilaterali potrebbero assoggettare a una legge diversa»); S. Francq, *Unilateralism*, in *Encyclopedia of Private International Law*, eds. J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio, Edward Elgar Publishing, Cheltenham, 2017, Vol. 2, 1787 (*«To a certain extent, […] unilateral conflict rules are comparable to the overriding mandatory rules mechanism»).

16. «1. The choice of the applicable law by the parties does prevent the judge from applying the mandatory provision of Paraguayan law which, according to this law, must prevail even in presence of the choice of a foreign law. 2. The judge may take into consideration the mandatory provisions of other States closely linked with the case taking into accounts the consequences of their application or non-application» («1. La elección por las partes del derecho aplicable no impide que el juez aplique las normas imperativas del derecho paraguayo que, según este derecho, deben prevalecer aún en presencia de la elección de un derecho extranjero. 2. El juez puede tomar en consideración las normas imperativas de otros Estados estrechamente vinculados con el caso teniendo en cuenta las consecuencias de su aplicación o inaplicación»). See the original-Spanish text of article 17, paras. 1 and 2, of the Paraguayan Law 5404 of 2015 [Retrievable at https://assets.hcch.net/upload/contractslaw_py_es.pdf, last accessed on 30 May 2023].

17. Article 11, paras. 1 and 2, of the Principles on Choice of Law in International Commercial Contracts provides that: «1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties. 2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law».

I.3 *Systematic Assessment*

Article 4 PGLPIL is found in the general part of the PGLPIL, the Second Chapter thereof, headed "*On the problems on application of the norms on the conflict of laws*" ("*De los problemas de aplicación de las normas sobre conflict de leyes*"), after the provisions concerning the scope of the same PGLPIL, and on the application and interpretation of foreign law (see, respectively, articles 1-3 PGLPIL). The placement of article 4 PGLIPIL in the general part of the PGLPIL, determines the applicability of the article in question to all (civil and commercial law) matters falling within the scope of the same PGLPIL. That said, article 4 PGLPIL, in its two paragraphs, respectively addresses internationally mandatory provisions of the forum and of foreign law. Article 4 PGLPIL is followed by article 5 PGLPIL, headed "*Rights of indigenous peoples or communities*" ("*Derechos de los pueblos o comunidades indígenas*"), which expressly qualifies provisions aimed at protecting the rights of indigenous peoples or communities as internationally mandatory[18]. Furthermore, article 4 PGLPIL establishes the first exception to the "normal play"[19] of the conflict rules of the PGLPIL, which are in fact mostly bilateral. For the sake of completeness, article 4 PGLPIL is followed by further exceptions: those of public policy and fraud against the law (see, respectively, articles 6 and 7 PGLPIL).

18. «The provisions aimed at protecting the rights of indigenous peoples and communities over natural resources existing on their lands, traditional knowledge, conservation of biological diversity, sustainable use of resources and plant varieties have the character of internationally imperative norms» («Las disposiciones para proteger los derechos de pueblos o comunidades indígenas sobre los recursos naturales existentes en sus tierras, los conoscimentos tradicionales, la conservación de la diversidad biológica, el uso sostenible de recursos y variedades vegetales tienen el carácter de normas incernacionalmente imperativas»). The provision is a "transplantation" of article 2049-B of the 2020 Project to Reform the Civil Code of Peru (*A Anteproyecto de modificaciones del Decreto Legislativo N° 295 Código Civil* [Retrievable at https://www.gob.pe/institucion/minjus/informes-publicaciones/429560-anteproyecto-de-modificaciones-del-decreto-legislativo-n-295-codigo-civil last accessed on 6 June 2023). See M.J. Ochoa Jiménez, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, in «Critical analysis of law», 2021, 105 and 106.

19. Cit. G. Balladore Pallieri, *Diritto internazionale privato*, *Trattato di diritto civile e commerciale*, dir. A. Cicu and F. Messineo, Giuffré, Milano, 1974, Vol. XLV, 113.

I.4 *Relationship with Public Policy*

It is worth highlighting the relationship between the exception of internationally mandatory provisions of article 4 PGLPIL and that of public policy of article 6 PGLPIL. Article 6 PGLPIL, headed *"Public policy in Private international law" ("Orden público en el Derecho internacional privado")*[20], defines public policy as the *"essential principles"* of the forum. Pursuant to article 6 PGLPIL the exception of public policy "unleashes" its effect only after the operation of the bilateral conflict rules; namely, only once that it is ascertained that the foreign law designated by the (bilateral) conflict rules is *"manifestly"* incompatible with public policy. Considering that, for the purpose of the public policy-exception, it is the application of foreign law – not foreign law itself – that must prove to be manifestly incompatible with the essential principles of the forum, and that such principles may vary over time, the existence of such manifest incompatibility must be assessed on a case-by-case basis[21].

That said, unlike that of public policy, the exception of internationally mandatory provisions of the forum unleashes its effects before, or better regardless of the functioning of the bilateral conflict rules: namely, regardless of whether foreign law is designated by the bilateral conflict rules, and thus, ultimately, regardless of such rules[22]. Therefore, internationally mandatory provisions of the forum are regarded as a "preventive" exception to the normal (bilateral) functioning of conflict rules, whereas

20. «1. The provisions of Foreing Law that must be applied in accordance with this Law, may only be excluded when the same lead to a solution manifestly incompatible with the essential principle of the Colombian public policy. 2. The foreign norm manifestly incompatible with fundamental rights will not be applied. 3. When a provision of competent Foreign Law is not applicable by reason of such incompatibly, Colombian law will apply» («1. Las disposiciones del Derecho extranjero que deban ser aplicadas de conformidad con esta Ley, solo serán excluidas cuando las mismas conduzcan a una solución manifestamente incompatible con los principios esenciales del orden público colombiano. No se aplicará la norma extranjera que resulte manifestamente incompatible con los derechos fundamentales. 2. Dicha incompatibilidad se apreciará teniento en cuenta, en particular, la intensidad de la conexión de la situación con el territorio colombiano, el nivel de daño social y la gravedad que produciría la aplicación de dicha disposición extranjera en Colombia. 3. Cuando una disposición de la Derecho extranjero competente no sea aplicable en razón de dicha incompatibilidad, se aplicará el Derecho colombiano»).

21. Cf. F. Mosconi - C. Campiglio, *op. cit.*, 306 and 307.

22. *Ivi*, 327.

public policy as a "subsequent" exception thereto[23]. In turn, similarly to that of public policy, it appears that the exception of foreign internationally mandatory provisions cannot be regarded as "preventive", but rather as a "subsequent" one: in fact, the effect of the latter exception is unleashed only after the functioning of the bilateral conflict rules; namely, only once having taken into account the consequences of the application or non-application of the law of the country (other than that to which the foreign internationally imperative provision belongs) designated by such rules (§ III).

II. *Definition*

Two defining elements can be drawn from the text of article 4 PGLPIL: those concerning the mandatory and overriding nature of internationally mandatory provisions (§§ II.2 and II.3). A third defining element, concerning the purpose and scope of the provisions in questions, may instead be drawn from the case law of the Colombian Supreme Court of Justice and from the reading of article 5 PGLPIL (§ II.4).

In the light of the three defining element, internationally mandatory provisions within the meaning of article 4 PGLPIL may be defined as substantive provision of law which: are mandatory even in cases characterised by an international element; are aimed at safeguarding public interests, or if, even though designed to protect individuals, they are also and predominately aimed at safeguarding public interests; and thus claim to be applicable regardless – i.e. by way of exception to – the bilateral conflict rules of the PGLPIL.

II.1 *Exceptional Nature*

Before examining the single defining elements mentioned above, the exceptional nature of article 4 PGLPIL within the context of the overall

23. See F. Mosconi - C. Campiglio, *op. cit.*, 327; G. Conetti - S. Tonolo - F. Vismara, *Manuale di diritto internazionale privato*, Giappichelli, Torino, 2020, 65; A. Bonomi, *Le norme imperative nel diritto internazionale privato*, cit., 198; Corte di Cassazione (Italian Court of Cassation), 1st Division, judgment of 28 December 2006, no. 27592; Advocate General Szpunar, cit., paras. 68-70; cf. J.A. Rodríguez Moreno, *La nueva guía de la organización de estados americanos y el derecho aplicable a los contratos internactionales (parte II)*, in *Revista Española de Derecho Internacional*, Vol. 73, No. 2, 2021, 281.

bilateral system of the PGLPIL must be underlined. This is important to underline especially with respect to the Colombian law system. In fact, if the existing system were reformed into one based on bilateral conflict rules – as the system enshrined in the PGLPIL –, there is a risk that the previous (and currently existing) system, which is mostly based on unilateral conflict rules, may be brought back through the window, by qualifying (and thus applying) "too lightly" provisions of Colombian law as internationally mandatory. In order to avert a similar risk, the defining elements and thus conditions upon which provisions may be qualified (and thus applied) as internationally mandatory must be interpreted restrictively[24].

II.2 *Mandatory Nature*

Article 4 PGLPIL expressly mentions the mandatory, namely "internationally mandatory" nature of the provisions in question. These provisions are thus substantive provisions of law, which are mandatory, i.e. they do not allow for derogation and thus cannot be contracted out by agreement. However, not all mandatory provisions are also "internationally" mandatory. In fact, there exist "ordinary" mandatory provisions (also referred to as "domestic public policy"), which cannot be derogated from in cases lacking an international element, but which can be derogated from in cases characterized by such an element. Instead, "internationally" mandatory provisions are "much more"[25] mandatory than ordinary ones: unlike the latter, the former cannot be derogated from even in cases characterized by an international element[26].

II.3 *Overriding Nature*

Article 4 PGLPIL also expressly mentions that internationally mandatory provisions claim to be applicable (so-called *"Anwendungswille"*) regardless of (whether the law of a country other than that to which such provisions belong is designated by) the bilateral conflict rules of the

24. Cf. F. Salerno, *Lezioni di diritto internazionale privato*, Cedam, Padova, 2022, 98; Court of Justice of the European Union, judgment of 18 October 2016 - case C-135/15, *Republic Griecheland c. Nikiforidis*, ECLI:EU:C:2016:774, para. 44.

25. Cit. Corte di Cassazione (Italian Court of Cassation), 3rd Division, judgment of 14 February 2013, no. 3646.

26. Cf. C. Holguin, *La nocion de orden publico en el campo internacional*, in *Revista de la Academia Colombiana de Jurisprudencia*, No. 290-29, 1990, 9 ff.

PGLPIL. This "overriding" claim corresponds to the unilateral nature of the provisions in question. In fact, even though substantive provisions of law, internationally mandatory provisions may be regarded as enshrining a unilateral conflict rule.

However, it is worth underlining, that the scope of the overriding claim of internationally mandatory provisions is limited to that of the provisions themselves. In fact, the scope of internationally mandatory provisions is usually limited to specific, if not marginal, aspects of a given case[27]. Therefore, it cannot be excluded that, with respect to other aspects concerning the same case, recourse to bilateral conflict rules must (still) be had in order to designate the law applicable to such other aspects[28].

II.4 *Purpose and Scope*

As mentioned above, article 4 PGLPIL does not expressly specify the purpose and scope that provisions must pursue in order to qualify as internationally mandatory, unlike other foreign and international codifications, notably article 9, paragraph 1, of the Rome I Regulation[29].

This is a missed opportunity: expressly specifying the purpose and scope of internationally mandatory provisions prevents from qualifying (and thus applying) "too lightly" provisions as such, and ultimately, at relegating the normative category in question to an exception. The lack of specification on the point is also a missed opportunity to acknowledge the findings that emerge from the landmark decision SC8453 of 2016 by the Colombian Supreme Court of Justice[30].

In fact, by that decision, the Colombian Supreme Court of Justice "transplanted" into the Colombian law system – or, at least, into the Colombian judicial formant – the distinction developed by European

27. See F. Mosconi - C. Campiglio, *op. cit.*, 330; P. Franzina, *op. cit.*, 187 and 188.

28. See F. Mosconi - C. Campiglio, *op. cit.*, 330 and 331; P. Franzina, *op. cit.*, 188; G. Conetti - S. Tonolo - F. Vismara, *Commento alla riforma del diritto internazionale privato italiano*, Giappichelli, Torino, 2001, 54 and 55.

29. «Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation».

30. Corte Suprema de Justicia, Sala de Casación Civil (Colombian Supreme Court of Justice, Civil Cassation Division), judgment SC8453-2016 of 24 June 2016.

continental scholars between *Eingriffsnormen/ordre public de direction* (i.e. norms aimed at safeguarding public interests) and *Parteischutzvorschriften/ordre public de protection* (i.e. provisions designed to protect individuals)[31]. A matter of lively debate among said scholars is whether only *Eingriffsnormen* or also *Parteischutzvorschriften* may qualify as internationally mandatory provisions. The debate in question has more recently developed with reference to the interpretation of article 9, paragraph 1, of the Rome I Regulation and has also involved Italian scholars and courts. In particular, Italian scholars have highlighted the difficulty of drawing a sharp line between provisions aimed at safeguarding public interests and those protecting individuals[32]. Therefore, even though it is admitted that article 9, paragraph 1, of the Rome I Regulation exclusively refers to internationally mandatory provisions aimed at safeguarding public interests[33], it is held that, it cannot be excluded, *a priori*, that provisions both aimed at safeguarding public interests and protecting individuals may be qualified as internationally mandatory[34]. However, it is further added that, in order to qualify as internationally mandatory, the provisions in question must be of "sig-

31. «Scholars have distinguished the existence of two types of imperative norms, those that are considered of "public policy of direction" and those of "public policy of protection". While the former, whose content may be political, economic or social, condense the fundamental principles of the institutions and of the basic structure of the State or of the community, the latter were designed by the legislator to protect a specific sector, aggregation or group, and thus, do not represent the fundamental or essential values and pricniples of the State, on which its legal order is inspired» («Ha distinguido la doctrina que existen dos tipos de normas imperativas, aquellas que se consideran de "orden público de dirección" y las de "orden público de protección". Minetras en las primeras, cuyo contenido puede ser político, económico o social, se condensan los principios fundamentales de las instituciones y la estructura bàasica del Estado o de la comunidad, las segundas fueron destinadas por el legislador a proteger un determinado sector, agremiación o grupo, y por ende, no representan los valores y principios fundamentales o esenciales del Estado, en los cuales se inspira su ordinamento jurídico»).

32. See A. Bonomi, *Le norme imperative nel diritto internazionale privato*, cit., 175.

33. See B. Ubertazzi, *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Giuffré, Milano, 2008, 122 and 123; see also M. Mcparland, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford University Press, Oxford, 2015, para. 15.42.

34. See A. Bonomi, *Article 9*, in *European Commentaries on Private International Law, Rome I Regulation, Commentary*, eds. U. Magnus and P. Mankowski, Otto Schmidt, Köln, 2017, Article 9, para. 82; N. Boschiero, *I limiti al principio d'autonomia posti dale norme generali del regolamento Roma I*, in N. Boschiero (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, 2009, 83 ff.

nificative" public relevance[35] or better, that they must be "predominantly" aimed at safeguarding public interests[36].

Overall, this method based on the "rigid" distinction between *Eingriffsnormen* and *Parteischutzvorschriften* appears to be hardly applicable in practice. Illustrative in this regard is the case of article 88-*bis* of the Decree Law No. 18/2020[37], a provision adopted by the Italian legislature and expressly qualified as internationally mandatory, on vouchers issued following the termination of contracts for the transport of passengers and package travel due to the COVID-19 pandemic[38]. The express qualification

35. See G. Biagioni, *Art. 9*, in *Commentario al Regolamento Roma I*, eds. F. Salerno and P. Franzina, Cedam, Padova, 2009, 791; cf. G. Sperduti, *op. cit.*, 747.

36. See Tribunale di Prato (Tribunal of Prato), judgment of 7 March 2015, no. 283 («[…] article 1751 of the Italian Civil Code […] responds to the ratio of protecting the commercial agent […] the public interests corresponding to Directive 86/653/EEC […] is connected with the protection of competition, more than with the protection of the rights of a contractual party»); see, although among German scholars, U. Magnus, *Art. 9 Rom I-VO*, in *Kommentar zum Bürgerlichen Gesetzbuch, Internationales Vertragsrecht I*, found. J. von Staudinger, Sellier - de Guryter, Berlin, 2016, Art. 9 Rom I-VO, para. 67.

37. Decreto-Legge 17 March 2020, No. 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19 (Measures to strengthen the National Health Service and to provide economic support for families, workers and businesses in relation to the COVID-19 epidemiological emergency), Gazz. Uff. No. 70 of 17 March 2021.

38. See, on article 88-*bis* D.L. 18/2020, S. Leuzzi, *Contratti di trasporto marittimo e forza maggiore al tempo del COVID-19*, in *Il Caso.it*, II, 1370 (citation proposed on the homepage) (https://blog.ilcaso.it/libreriaFile/1370.pdf - accessed 8 November 2021), 30ff.; M. Badagliacca, *Impedimenti alla partenza nel trasporto aereo di persone e COVID-19*, in *Rivista italiana di diritto del turismo (Special issue),* 2020, 278 ff; L. Guerrini, *Coronavirus, legislazione emergenziale, e contratto: una fotografia*, dirs. G. Conte and F. Di Marzio, *Giustiziacivile.com, Emergenza COVID-19, Speciale n. 3*, Giuffrè, Milano, 2020, 350 ff [Retrievable at https://giustiziacivile.com/system/files/allegati/speciale_covid19_-_n._3.pdf, last accessed 30 May 2023]; A. Pepe, *L'emergenza sanitaria da Coronavirus tra impossibilità sopravvenuta e impossibilità di utilizzazione della prestazione nei contratti di trasporto, di viaggio e del tempo libero (artt. 88 e 88 bis, D.L. 17 marzo 2020, n. 18, conv. con mod. dalla L 24 aprile 2020, n. 27)*, in *Le nuove leggi civili commentate*, 2020, 596 ff; F. Piraino, *La normativa emergenziale in materia di obbligazioni e di contratti*, in *I Contratti*, 2020, 508 ff; M. Pucci, *Pacchetti turistici e diritti dei viaggiatori nell'ordinamento giuridico italiano ai tempi del Coronavirus*, 2020 [Retrievable at https://idibe.org/tribuna/pacchetti-turistici-e-diritti-dei-viaggiatori-nellordinamento-giuridico-italiano-ai-tempi-del-coronavirus/, last accessed 30 May 2023]; F. Rossi Dal Pozzo, *Trasporti e turismo in epoca di emergenza sanitaria Covid-19. Il caso dei vouchers in alternativa ai rimborsi in denaro di titoli di viaggio, di soggiorno e di pacchetti turistici*, in Eurojus, *L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, Numero speciale, 2020, 52 ff [Retrievable at http://www.eurojus.it/pdf/l-emergenza-sanitaria-Covid-19-e-il%20

of the provisions of article 88-*bis* Decree Law No. 18/2020 as internationally mandatory (§ III) immediately aroused interest and sparked debates amongst (Italian and also foreign) scholars[39]. That scholarly elaboration was followed by some (Italian) court decisions: an early court order of 23 November 2020, No. 4456, by the Giudice di Pace di Busto Arsizio (Justice of the Peace of Busto Arsizio); a later judgment of 19 January 2021 by the Tribunale di Verona (Tribunal of Verona); a judgment of 23 June 2022, No. 842, by the Tribunale di Pisa (Tribunal of Pisa); and, more

diritto-dell-Unione-europea-la%20crisi-la-cura-le-prospettive_2.pdf, last accessed 30 May 2023]; R. Santagata, *Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto*, in *Le nuove leggi civili commentate*, 2020, 85 ff; Id., *Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto*, in G. Palmieri (ed.), *Oltre la pandemia*, Vol. 1, Editoriale Scientifica, Napoli, 2020, 309 ff; E. Tuccari, *Sopravvenienze e rimedi al tempo del COVID-19*, in *Jus Civile*, 2020, 490 and 491 [Retrievable at http://www.juscivile.it/contributi/2020/2_2020/08_Tuccari.pdf, last accessed 30 May 2023]; V. Villanova, *I viaggi e gli spostamenti al tempo del Covid-19: qualche riflessione sullo scioglimento del contratto e sulla tutela di passeggeri e viaggiatori*, in E. Lucchini Guastalla (ed.), *Emergenza Covid-19 e questioni di diritto civile*, Giappichelli, Torino, 2020, 71 ff.

39. See on the express qualification of article 88-*bis* D.L. 18/2020 as an internationally mandatory provision: S. Gössl, *In- und ausländische Corona-Regelungen im grenzüberschreitenden Handel*, in *Zeitschrift für Vergleichende Rechtswissenschaft*, 2021, 36 and 37; E. Piovesani, *Ex Lege Qualified Overriding Mandatory Provisions as a Response to the COVID-19 Empidemiological Emergency*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2021, No. 4, 401 ff; Z. Crespi Reghizzi, *Effetti sui contratti delle misure normative di contenimento dell'epidemia di COVID-19: profili di diritto internazionale privato*, in *Diritto del commercio internazionale*, 2020, 936 ff; P.A. De Miguel Asensio, *Medidas de emergencia y contratos internacionales*, in *La Ley Unión Europea*, 2020, Vol. 81, 11 and 12; F. Marongiu Buonaiuti, *Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria*, in E. Calzolaio - M. Meccarelli - S. Pollastrelli (eds.), *Il diritto nella pandemia*, eum, Macerata, 2020, 235 ff.; E. Piovesani, *Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus*, 2020 [Retrievable at https://conflictoflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/, last accessed 30 May 2023]; Id., *Overriding Mandaotry Provisions in the Context of the COVID-19 Pandemic*, in *Il Caso.it*, II, 1013 (citation proposed on the homepage) [Retrievable at https://blog.ilcaso.it/news_1013/18-11-20/Overriding_mandatory_provisions_in_the_context_of_the_COVID-19_pandemic, last accessed 30 May 2023]; F. Rossi Dal Pozzo, *op. cit.,* 60 ff; R. Santagata, *Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto*, cit., 97 ff; Id., *Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto*, cit., 219; E. Tuccari, *op. cit.*, 498, no. 82; G. Zarra, *Alla riscoperta delle norme di applicazione necessaria brevi note sull'art. 28 co. 8 del DL 9/2020 in tema di emergenza COVID-19*, 2020 [Retrievable at http://www.sidiblog.org/2020/03/30/alla-riscoperta-delle-norme-di-applicazione-necessaria-brevi-note-sullart-28-co-8-del-dl-92020-in-tema-di-emergenza-covid-19/, last accessed 30 May 2023].

recently, a judgment of 22 May 2023, No. 4151, by the Tribunale di Milano (Tribunal of Milan). In the first two decisions, the Justice of the Peace of Busto Arsizio and the Tribunal of Verona, without much elaboration, "confirmed" the express qualification of article 88-*bis* Decree Law No. 18/2020 as internationally mandatory[40]. In the latter two decisions, the Tribunals of Pisa and Milano elaborated in more detail, though reaching opposite conclusions. In fact, the Tribunal of Pisa held that the provision of article 88-*bis* Decree Law No. 18/2020 on the issue of so-called mandatory voucher, cannot qualify as overriding mandatory pursuant to article 9 Rome I Regulation, by stating *inter alia* that:

> it is not apparent how a collective interest can be traced in the provision according to which the organization can issue a voucher, rather than proceed with the refund, even without the traveler's acceptance; it is a favorable rule for a private subject (in our case the airline, but it could be a tour operator, a travel agency, etc.) to the detriment of another (the consumer). The conditions referred to in [Article 9 of the Rome I Regulation] are therefore not met. The provision cannot be considered as overriding mandatory.

Instead, the Tribunal of Milan stated that:

> [Article 88-bis Decree Law No. 18/2020] is a true overriding mandatory provision pursuant to [Article 9 Rome I Regulation], partially derogating from the ordinary and general discipline of […] [Reg. (EC) No. 261/2004], and the Court considers that this partial derogation was justified by the exceptional contingencies faced by the air transport and tourism industry in relation to the contracts to be performed from 3 November 2020 to 9 March 2020 due to the effects of the pandemic and the restrictions connected to mobility, having an international scope and a

40. In particular, the Justice of the Peace of Busto Arsizio has – somewhat laconically – stated: «[Art. 88-bis D.L. 18/2020], may well be included among those that prevail over any law under [art. 9 Rome I Regulation]». In a similar vein, the Tribunal of Verona has stated: «[art. 88-bis, para. 13, D.L. 18/2020] provides that the […] provisions [of that article] are overriding mandatory and thus derogate from community legislation and international law. Overriding mandatory provisions are envisaged in art. 17 L. 218/1995, whereby Italian provisions which, in the light of their object and purpose, must be applied regardless of the reference to foreign law, prevail over private international law rules. These are extraordinary provisions, adopted in situations of emergency, which prevail over other provisions applicable in ordinary situations. What follows is that the same prevail both over national legislation and foreign laws, since their application is deemed necessary to safeguard the country».

non-predeterminable duration, unlike other natural catastrophic events, such as earthquakes, eruptions, floods, which are indeed unpredictable but with effects and scope limited in time and space.

That said, by the decision mentioned above, even the Colombian Supreme Court of Justice appears to have even taken a stand in the *Eingriffsnormen/Parteischutzvorschriften*-debate. In fact, what emerges from that decision, is that, while *Eingriffsnormen* may well qualify as internationally mandatory, *Parteischutzvorschriften* may not be qualified as such if they are exclusively designed to protect individuals[41]. However, the same decision does not expressly exclude that *Parteicshcutzvorschriften* may qualify as internationally mandatory if the latter are also and predominantly aimed at safeguarding public interests.

In fact, article 5 PGLPIL appears to confirm that similar such *Parteischutzvorschriften* may be qualified as internationally mandatory, insofar as the article expressly qualifies as such provisions designed to protect individuals (namely, indigenous peoples and communities), but is still predominately aimed at safeguarding public interests (protection of the environment)[42].

III. *Qualification*

The issue of determining whether a provision is internationally mandatory is one of interpretation[43], namely of qualification[44]. This issue may

41. Cf. below n. 49.

42. Cf. though with respect to article 2049-B of the 2020 Project to Reform the Civil Code of Peru, M.J. Ochoa Jiménez, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, cit., 105 («[…] recognizing Indigenous rights would act as a protection against abusive exploitation of natural resources by multinational corporations. Though such rights are already recognized by law, the proposed rules could help avoid the concealment of human rights or environmental dimensions of a case by characterizing it as one of trade or investment. Thus, the advantages of such a rule could be differentiated in the following manner: they seem to be more directly related to the protection of the environment; they aim to protect Indigenous peoples themselves; and, finally, they are less directly (but sill) related to some type of remedy for the long-standing historic exclusion of Indigenous peoples'ways of life in the field of private international law»).

43. See G. Conetti - S. Tonolo - F. Vismara, *Manuale di diritto internazionale privato*, cit., 63.

44. See C. Von Bar - P. Mankowski, *Internationales Privatrecht*, C.H. Beck, München, 2003, Vol. I, § 4, para. 95.

be addressed by the legislature by expressly qualifying specific provisions as internationally mandatory (so-called "authentic qualification")[45], like in the case of article 5 PGLPIL (§ I.3.) and of article 88-bis Decree Law No. 18/2020 (§ II). However, authentic qualification of norms as internationally mandatory is a recent[46] and, as of today, rare practice[47].

Traditionally, and in most cases, the issue of whether a provision qualifies as internationally mandatory is left to the interpreter – namely the judge – to be solved[48]. To that aim, it must be ascertained whether all the relevant defining elements and thus conditions are met (§ II). In cases of doubt as to the existence of any such conditions, a provision must not be qualified as internationally mandatory[49].

That said, considering that article 4 PGLPIL addresses both Colombian and foreign internationally mandatory provisions, the issue arises as to which law should apply to qualify a provision as internationally mandatory. Article 4, paragraph 1, PGLPIL expressly addresses that issue, by specifying that provisions of Colombian law qualify as internationally mandatory if such *"according to Colombian Law"*. To the extent that, if enacted, article 4, paragraph 1, PGLPIL will become a part of Colombian (hard) law, the wording *"according to Colombian Law"* appears to be somehow redundant, considering that the same provision determines the conditions upon which a provision may be qualified as internationally mandatory (§ II). However, the wording appears to be intended to stress that: provisions of Colombian law are internationally mandatory if expressly qualified as such by the Colombian legislature; and that Colombian internationally mandatory provisions may be qualified as such if aimed at safeguarding public interests that are relevant to Colombia. Unlike article 4, paragraph 1, PGLPIL, the second paragraph of the same article does not expressly address the issue in question, but simply refers

45. Cf. F. Mosconi - C. Campiglio, *op. cit.*, 331; E. Piovesani, *Ex Lege Qualified Overriding Mandatory Provisions as a Response to the COVID-19 Epidemiological Emergency*, cit., 404 and 405

46. Cf. A. Cannone, *Tendenze legeforiste nelle recenti modifiche delle norme di diritto internazionale privato italiano in materia di filiazione e di rapporti tra genitori e figli: alcune riflessioni*, in *Rivista di diritto internazionale privato e processuale*, 2019, 7 and 8.

47. See B. Barel - S. Armellini, *Diritto internazionale privato*, Giuffré, Milano, 2022, 72; P. Franzina, *op. cit.*, 188.

48. See B. Barel - S. Armellini, *op. cit.*, 72; F. Mosconi - C. Campiglio, *op. cit.*, 330; P. Franzina, *op. cit.*, 188.

49. Cf. H.P. Mansel, *Rom I-VO § I Vorbemerkungen*, in *Bürgerliches Gesetzbuch*, ed. J. Othmar, C.H. Beck, München, 2018, Rom I-VO § I Vorbemerkungen, para. 53.

to "*internationally mandatory provisions of other States*". It is reasonable to assume that, in principle, the law applicable to determine whether a foreign internationally mandatory provision qualifies as such is the foreign law to which the same provision belongs[50].

IV. *Digression: The Test of Time*

A provision once qualified as internationally mandatory may subsequently no longer be qualified as such; in other words, the qualification of a provision as internationally mandatory may not stand the test of time. This assumption is demonstrated by the case law of the Colombian Supreme Court of Justice on specific provisions of Colombian commercial agency law examined below.

IV.1 *"Protection" of Commercial Agents*

Before examining that case law, it must be premised that, in some legal systems, considering that relationships arising from commercial agency contracts are often unbalanced in terms of bargaining power, the weaker parties to those contractual relationships, namely the commercial agents, are deemed as deserving of protection. Such protection is granted by establishing measures aimed at "rebalancing" the contractual relationship in favour of the commercial agent. For instance, among these protective measures are those providing that, upon the termination of the commercial agency contract, the commercial agent is entitled to a goodwill indemnity. In order to ensure the effectiveness of similar measures, the latter are often qualified as mandatory: the parties are thus prevented from derogating from said measures. However, in other legal systems, commercial agents are not deemed as deserving of protection and, consequently, in such legal systems, similar protective-mandatory measures do not exist. For instance, in the US, «State law typically does not require a compensation payment […] when a commercial agreement expires or is terminated»[51]. Hence, in those legal systems where protection instead is granted, the issue arises of extending the mandatory nature of the relevant protective measures

50. Cf. F. Mosconi C. Campiglio, *op. cit.*, 334.

51. Cit. E.D. Kuhn - A.A. Sardi Garcia, *United States*, in *International Commercial Agency and Distribution Agreements*, eds. C. Albaric and M. Dickstein, Wolters Kluwers, Alphen aan den Rijn, 2017, 1114.

also in cases characterised by an international element. This issue may be addressed by qualifying the measures in question as internationally mandatory[52].

IV.2 *Case Law of the Colombian Supreme Court of Justice*

This premised, coming to the above-mentioned case law of the Colombian Court of Justice, article 1324, paragraph 1, of the Colombian Commercial Code (hereafter, "CoCC") provides that, upon contract termination, the commercial agent is entitled to a goodwill indemnity, or better to a "redundancy payment" *("cesantía commercial")*[53]. In the 1980s, the Colombian Supreme Court of Justice held that article 1324, paragraph 1, CoCC qualified as a mandatory provision. That qualification was based, among other things, on the assumption that article 1324, paragraph 1, CoCC, besides from protecting individuals (namely, commercial agents), was also aimed at safeguarding a public interest (namely, the socio-economic organisation of Colombia).

By a decision rendered in 2011[54], concerning the recognition and enforcement of a foreign award settling a dispute between a Colombian commercial agent and a US principal, the Colombian Supreme Court of Justice overruled its previous case-law, holding that article 1324, paragraph 1, CoCC no longer qualifies as a mandatory provision. The overruling was based on the assumption that: 1) the previous case-law was developed at a time when the socio-economic context – that of *"commerce, trade relations and legal traffic"* – was characterised by unbalanced commercial agency relationships and thus by the need to protect commercial agents; 2) that the socio-economic context had changed so profoundly that article 1324,

52. Cf, in general, on commercial agency within national legals systems, F. Bortolotti, *Drafting and Negotiating International Commercial Contracts*, International Chamber of Commerce, Paris, 2013, 186 ff.

53. «The agency contract terminates for the same reasons of the mandate, and upon its termination the agent will have the right that the principal pays a sum equivalent to the twelfth part of the average of the commission, gratuities or utility received in the last three years, for each year of effectiveness of the contract, or of the average of all what has been received, it the time of contract was inferior» («El contrato de agencia termina por las mismas causa del mandato, y a su terminación el agente tendrá dereche a que el empresario le pague una suma equivalente a la doceava parte del promedio de la comisión, regalia o utilidad recibida en los tres últimos años, por cada uno de vigencia del contrato, o al promedio de todo lo recibido, si el tiempo del contrato fuere menor»).

54. Corte Suprema de Justicia, Sala de Casación Civil (Colombian Supreme Court of Justice, Civil Cassation Division), judgment of 19 October 2011.

paragraph 1, CoCC can no longer be said to be aimed at safeguarding the socio-economic organisation of Colombia[55].

By the following decision n. 8453 of 2016, which also concerned the recognition and enforcement of a foreign award settling a dispute between a Colombian commercial agent and a US principal, while referring to the findings reached in its 2011 decision on article 1324, paragraph 1, CoCC, the Colombian Court of Justice specifically addressed article 1328 CoCC, which had been earlier qualified by some scholars as an internationally mandatory provision[56]. The latter article provides that:

For all purposes, commercial agency contracts performed in the national territory are subject to Colombian laws. Any stipulation to the contrary shall be deemed not to be written[57].

By the 2016 decision, the Colombian Supreme Court of Justice held that, unlike article 1324, paragraph 1, CoCC, article 1328 CoCC is (still) a mandatory provision, namely a *Parteischtutzvorshrift*. However, to the extent that, similarly to article 1324, paragraph 1, CoCC, article 1328 CoCC can no longer be said to be aimed at safeguarding the socio-economic organisation of Colombia, the Colombian Supreme Court further came to the conclusion that:

although the precept [of article 1328 CoCC] imposes a completely valid prohibition in the national sphere, the same is not true for the effects analysed in the international context.

Therefore, what emerges from the 2016 decision is that article 1328 CoCC qualifies as an "ordinary" mandatory provision[58], but can no longer

55. But see Corte Suprema de Justicia, Sala de Casación Civil (Colombian Supreme Court of Justice, Civil Cassation Division), judgment SC19392-2017 of 9 November 2017, whereby the right to the redundancy payment under 1324, paragraph 1, CoCC may be waived only after contract termination.

56. Cf., e.g., A. Zuleta Londoño, *op. cit.*, 29.

57. «Para todos los efectos, los contratos de agencia comercial que se ejecuten en el territorio nacional quedan sujetos a las leyes colombianas. Toda estipulación en contrario se tendrá por no escrita».

58. The finding whereby article 1328 CoCC is an ordinary mandatory provision is somehow "obscure", since it appears (fairly) settled that the parties to a (domestic) commercial agency contract exclusively connected to Colombia cannot exclude, by agreement, the application of Colombian law to said contract.

be qualified as an internationally mandatory, since it no longer safeguards public interests[59].

IV.3 *Backstory: The Colombia-United States FTA*

From a purely dogmatic perspective, the Colombian Supreme Court of Justice's 2011 and 2016 decisions are flawless, especially the latter decision: if a *Parteischutzvorschrift* is not (also and predominantly) aimed at safeguarding public interests, it cannot qualify as internationally imperative (§ II.4). However, the statement contained in both decisions that the socio-economic context has profoundly changed, and that thus articles 1324 and 1328 CoCC are no longer aimed at safeguarding public interests, seems entirely apodictic. In fact, the reason why the Colombian Supreme Court of Justice by the two decisions respectively "degraded" article 1324 CoCC to a non-mandatory provision, and article 1328 CoCC to an ordinary mandatory provision, may be based on the following backstory.

59. The development described above, was summarised by the Colombian Court of Justice in its decision SC8453 of 2016 as follows: «[…] el beneficio especial otorgado a los agentes nacionales por el inciso 1° del artículo 1324 […] no es visto hoy […] como un derecho indisponible o intransigible. En efecto, en pronunciamento de 19 de octubre de 2011, la Sala rectificó la doctrina expuesta en las sentencias de 2 de diciembre 1980 respecto de la imperadividad de esa disposición y la indisponibilidad del derecho a la prestación allí prevista, porque "*los profundos cambios contemporáneos gestados en la vertiginosa mutación del comercio, las relaciones comerciales y el tráfico jurídico*" habían modificado el contexto socio-económico, debiendo precisar que su carácter era contractual y dispositivo, de ahí la "*facultad reconocida por el ordinameiento jurídico a las partes en ejercicio legítimo de su libertad contractual o autonomía privada para disponder en contrario […], desde luego que estrico sensu es derecho patrimonial surgido de una relación contractual de único interés para los contratantes, que en nada compromete el orden público, los buenas costumbres, el interés general, el orden económico o social del país, ni los intereses generales del comercio, si se quiere entendido en la época actual […]*". […]. Las condiciones actuales del desarrollo de la agencia mercantil, además, no permiten sostener que en dicha relación patrimonial cuyo intéres está circunscrito a las partes del contrato, se encuentren implicados bienes jurídicos cuya disposición no pueda dejarse al arbitrio de los contratantes […]. […]. El artículo 1328 del Código de Comercio […], pertence al segundo grupo mencionado de las normas de orden público interno […], fue creada en un contexto histórico – económico en el que el legislador consideró necesario brindar protección al gremio de los agentes nacionales. […] Aunque, […] en tanto no corresponde a una disposición que involucre los intereses, principios y valores funamentales del Estado colombiano no puede considerárle como casual para denegar el reconocimiento del laudo […]. Con otras plabras, aunque el precepto impone una prohibición completamente válida en el ámbito nacional, no ocurre lo mismo para los efectos analizados en el contexto internacional […]».

On 22 November 2006, the Colombia-United States Free Trade Agreement[60] (hereafter, "FTA") was signed. Annex 11-E, lit. a), of Chapter Eleven, of the FTA, provides that:

If a Party maintains a measure at the central level of government: (a) entitling the agent, upon termination of a commercial agency contract, to a payment from the principal equivalent to a portion of the commission, royalty, or profit the agent received pursuant to the contract […] that Party shall revise or eliminate the measure in accordance with paragraph 2 within six months after entry into force of this Agreement.

The FTA came into force on 15 May 2012, but the proposed amendment to conform article 1324 CoCC to Annex 11-E of the same FTA, discussed before the Congress of Colombia, was not implemented[61].

Therefore, by its two decisions of 2011 and 2016, the Colombian Court of Justice appears to have – perhaps unintentionally – respectively "anticipated" and "cured" the inertia of the Colombian legislature[62]: indeed, it seems no coincidence that both decisions concerned cases in which the litigants were precisely a Colombian commercial agent and a US principal, to whose contractual relationship US law applied, thereby excluding the former's right to a redundancy payment under article 1324, paragraph 1, CoCC.

60. Retrievable at https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text, last accessed on 6 June 2023.

61. See J.F. Mafla, *Colombia*, in *International Agency and Distribution Law*, ed. D. Campbell, Juris Publishing, Huntington, 2017, Release 6, Vol. 1, COL/3.

62. Cf. I.C. García Velasco, *El proteccionismo jurídico de la agencia comercial en Colombia frente a los tratados de integración económica*, Cuadernos de administración, 2011, Vol. 27, No. 46; J.S.A. Perilla Granados, *La agencia mercantil deste el tratado de libre comercio entre Colombia y Estados Unidos*, in *Civilizar Ciencias Sociales y Huamanas*, 2017, Vol. 17, No. 33, 28, according to whom Annex 11-E, lit. a), FTA has even implicitly abrogated article 1324 CoCC; M.C. Castro Castilla, *Cesantía comercial en el contrato de agencia: confrontación entre la jurisprudencia de la Corte Suprema de Justicia y el Tratado de libre comercio Colombia EE.- UU.*, Bogotá, 2021, 29, according to whom the Colombian Supreme Court of Justice must interpret Colombian commercial agency law provisions in line with the FTA; cf. also J.V. Hurtado-Palomino, *A influencia do TLC com os Estados unidos na evoluçaso do alcance do coneito de ordem pública*, Daikon, 2012, Vol. 21, No. 1, 255 and ff; A.L. López Alvarez, *El contrato de agencia commercial y los cambio introducidos en la negociación del TLC entre Estados Unitos y los Países Andinos*, in *REVIST@ e - Mercatoria*, 2011, Vol. 10, No. 1, 1 and ff.

IV.4 *Conclusion*

In conclusion, leaving out this backstory, the case law of the Colombian Supreme Court of Justice examined above, demonstrates that the qualification of a provision as internationally mandatory may not stand the test of time, since such qualification is linked to a (defining) element that may "fade", or completely "vanish" over time: the public interest[63].

V. *Application*

Article 4 PGLPIL addresses the *"judge"*. In particular, pursuant to article 4, paragraph 1, PGLPIL requires the (Colombian) judge to apply Colombian internationally mandatory provisions. The judge, in this case, has no margin of discretion: once it has ascertained that the provision of Colombian law qualifies as internationally mandatory, it must apply that provision. In turn, article 4, paragraph 2, PGLPIL addresses foreign internationally mandatory provisions. The latter provisions are applicable when the (foreign) law to which they belong is designated as applicable by the bilateral conflict rules of the PGLPIL (so-called *lex causae*). Instead, when the *lex causae* is different from the foreign law which the foreign internationally mandatory provision belongs, unlike article 4, paragraph 1, PGLPIL, the second paragraph of the same article does not require the judge to apply, but rather to *"take into consideration"* the provision in question. In the latter case, the judge enjoys a broad mar-

63. Incidentally, a similar development is unknown in the EU where the provisions contained in articles 17-19 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31 December 1986, 17), on the commercial agent's right to goodwill indemnity are – to this date – qualified as internationally mandatory. See Court of Justice of the European Union, judgment of 9 November 2000 – case C-381/90, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, 2000 I-09305; A. Junker, *Internationales Privatrecht*, C.H. Beck, Munchen, 2019, § 15, 313, para. 65; D. Martiny, *Rom I-VO Art. 9*, in *Münchener Kommentar zum Bürgerliches Gesetzbuch*, eds. F.J. Säker, R. Rixecker, H. Oetker and B. Limperg, C.H. Beck, München, 2021, Vol. 13, Rom I-VO Art. 9, para. 28; A. Ströbl, *HGB § 89b*, in *Münchener Kommentar zum Handelsgesetzbuch*, eds. I. Drescher, H. Fleischer and K. Schmidt, C.H. Beck, München, 2021, Vol. I, HGB § 89b, para. 252; M. Schmidt-Kessel, *Article 9*, in F. Ferrari (ed.), *Concise Commentary on the Rome I Regulation*, Cambridge University Press, Cambridge, 2020, 242, para. 19; U. Magnus, *op. cit.*, Art. 9 Rom I-VO, para. 40; M. Mcparland, *op. cit.*, para. 15.42 par. 15.55; G. Biagioni, *op. cit.*, 792.

gin of discretion[64]: once it ascertains that the foreign provision qualifies as internationally imperative, it may consider the same. However, article 4, paragraph 2, PGLPIL further requires that the judge may consider the foreign internationally imperative provision only if *"tightly connected"* with the case. What amounts to a tight connection is left unspecified. It is reasonable to conclude that, in order to determine whether the tight connection-requirement is met, the judge should take into account the case as a whole; namely, elements such as the parties' nationality or status, the place of performance of the obligation, the object of performance, the place where the given good is situated, etc. If such requirement is not met, even if internationally mandatory within the meaning of article 4 PGLPIL, the foreign provision in question cannot be considered by the judge[65]. However, article 4, paragraph 2, PGLPIL further requires that, when exercising its margin of discretion, the judge must take into account the *"consequences of the application or non-application"* of the foreign internationally mandatory norm in question. What these *"consequences"* are is also left unspecified. It is reasonable to conclude that, the wording implies that the judge must take into account, on the one hand, whether the foreign internationally mandatory provision in question is designed in such way as to address the different interests at stake and, on the other hand, whether they may favour a balanced and reasonable decision in the given case[66].

64. Cf, though with reference to article 9, paragraph 3, of the Rome I Regulation, F. Mosconi - C. Campiglio, *op. cit.*, 454; G. Conetti - S. Tonolo - F. Vismara, *Manuale di diritto internazionale privato*, 64; P. Franzina, *op. cit.*, 236.

65. Take, for example, the case of a dispute arising from a commercial agency contract containing a choice of Colombian law clause and a clause expressly excluding the right to a goodwill indemnity in favour of the commercial agent, who is habitually resident and has rendered his services in favour of the Colombian principal in an EU Member State. In this case, notwithstanding the chosen law and the exclusion of the right to goodwill indemnity, the EU rules (or better, the given EU Member State's rules implementing articles 17–19 Commercial Agency Directive) on the commercial agent's right to the indemnity, which qualify as internationally mandatory (§ IV), may be taken into consideration under article 4, paragraph 2, PGLPIL

66. See, though with reference to article 9, paragraph 3, of the Rome I Regulation, P. Franzina, *op. cit.*, 236.

María Julia Ochoa Jiménez

Rights of Indigenous Peoples and Communities

ABSTRACT: In Colombian private international law, which has strong territorial roots, the resolution of conflicts of laws is based on the application of the law of the Colombian state. Among other things, this implies a lack of consideration of the legal diversity linked to the existence of indigenous peoples and communities. Underlying this is a disregard of the fact that these peoples are holders of differentiated rights included in international legal instruments. Developments that led to the recognition of these rights have obliged the Colombian state to recognize them at the national level as well. The IADIP Draft Law tries to bring Colombian private international law into line with the kind of legal pluralism that lies behind the recognition of some of those rights, thus contributing to make such recognition more effective.

KEYWORDS: Colombia - private international law - indigenous peoples - indigenous communities - IADIP Draft Law

I. *Background*

Like other Latin American countries, Colombia is known for its biological and cultural diversity[1]. However, the country's private international law has traditionally ignored the diversity of indigenous normative systems that are essentially linked to its cultural diversity. This is related to the

1. Cfr. IWGIA (27 March 2023). The Indigenous World 2023: Colombia. Available at: https://www.iwgia.org/en/colombia/5082-iw-2023-colombia.html#_edn1 (last access: June 20, 2023). In Colombia, according to the 2018 national census; 3.4% of the total population (1,905,617 individuals) self-identify as members of different indigenous peoples, from which «some 58.3% live in 827 legally-constituted collectively-owned reserves [*resguardos, cfr. art. 63 Constitution*] covering an area of 29,917,516 hectares, while the remaining 41.7% of the population has, over the past few decades, migrated to urban areas».

fact that Colombian private international law has strong territorial roots[2], which leads to cases of conflict of laws being resolved by considering only the application of Colombian state law. This has occurred due to a conception of private law that exists in Latin America in general, which is centered on the legislative action of the state and is both uniform and hegemonic. Linked to the colonial history of the region, this is also interconnected to the complexities related to the reluctance to legal pluralism.

In historical perspective, it is worth considering, as Tamanaha points out, that many empires admit a certain degree of legal pluralism for their own benefit, since they

> use indirect rule and concentrate their efforts on political control and economic exploitation. This approach relies on coopting and rewarding local leaders while keeping intact much of the existing political substructure and prevailing laws[3].

This would perfectly fit what Machiavelli said in the 16th century: «[A]llow them to live with their own laws, forcing them to pay a tribute and creating an oligarchy there that will keep the state friendly toward you»[4]. It is also known that this same strategy was used by Romans several centuries earlier: «In principle, the Romans did not interfere with local communities if they could avoid it; everybody was left to live in his own traditional way by his own law»[5]. Such political approach was put into practice for centuries through conflict-of-laws mechanisms based on *personal law*, which was maintained until its displacement by the prevalence of *territorial law* that spread throughout Europe since the Peace of Westphalia[6]. Considering that such an approach to a kind of legal pluralism was adopted by the Spanish empire in the Americas allows us to understand its acceptance

2. J. Samtleben, *Internationales Privatrecht in Lateinamerika-Regionale Entwicklungen und nationale Kodifikationen (2001)*, in *Rechtspraxis und Rechtskultur in Brasilien und Lateinamerika*, coord. J. Samtleben, Aachen, Shaker Verlag, 2010.

3. B. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*, Oxford University Press, 2021, 21.

4. Cited by B. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*. Oxford University Press, 2021, 21.

5. Van den Bergh, cited by B. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*, Oxford University Press, 2021, 22.

6. M.J. Ochoa Jiménez, *Restitution of Indigenous Cultural Objects in Latin America: NAGPRA as a Model?*, in C.A. Malig Jedlicki - R. Christofoletti - N. Oosterman (eds.), *Colonial Heritage, Power, and Contestation: Negotiating Decolonisation in Latin America*, Springer (in press).

of the legal diversity that, due to the indigenous presence, existed in the American region in 1492 and certainly continues to exist today. Thus, the *Recopilación de leyes de los Reynos de las Indias*, in finding the legal rule applicable to a dispute, stated that the «order and way of living of the Indios» and «their good uses and customs» had to be recognized by authorities if they were not against the Spanish religion[7]. It can thus be said that «some colonial Spanish institutions adopted or coexisted with Indigenous legal developments»[8]. Some authors have explained this by saying that

> certain aspects of Spanish legal culture matched closely with preconquest customary law, including tribute payments, jointly held lands, slavery and other forms of forced labor, and special courts for particular classes of litigants[9].

Nevertheless, having been, on the one hand, a mechanism of domination and, on the other hand, having existed only formally and neglected in practice, this somewhat pluralistic approach to conflict of laws adopted by the Spanish empire as part of its colonial rule in the Americas does not seem to fit fully as a model to be observed in present times. Certainly, today we can – and must – rethink the ways in which private international law relates to legal pluralism *vis-à-vis* the legal manifestations of indigenous cultures and worldviews. However, regarding the current legal situation, it is more directly relevant to look at the disregard of indigenous normative orders in the state-centered legal systems developed in Latin America since the emergence of the republics, in which Colombian private international law is still rooted to a large extent.

As explained in other place[10], after independence, the codification of private law, which included conflict of laws rules, was thought to establish order amid the existing legal chaos. This was crucial to consolidate the independence already reached. Though early codification attempts failed

7. Cfr. Book 5, Title 2, Law 22; Book 2, Title 1, Law 4.
8. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin, 2004, 49.
9. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin, 2004, 49; M.J. Ochoa Jiménez, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, in *Critical Analysis of Law*, 8(2), 2021, 87-107 (see references cited there).
10. M.J. Ochoa Jiménez, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, in *Critical Analysis of Law*, 8(2), 2021, 87-107.

due to political instability and lack of funds[11], decades later in the mid-nineteenth century, not only constitutions but also private law codes were key to the new states laying the legal fundaments of sovereignty and nationalism[12]. Codification allowed them to consolidate independence in front of foreign states as well as to exert their power among the inhabitants of their territories. Thus, in private law codification, two streams come together. On the one hand, codification reflects the modern liberal thought that was the basis of the political organization of the new republics. Marked by the French Revolution, modern liberal thought followed rationality and individualism, which led to the development of an overemphasis on private property and to the bloom of contractual freedom. On the other hand, codification took place by making use of the Roman law tradition in its versions developed by glossators, especially the Bologna school[13]. In this context, Andrés Bello's work and the Chilean Civil Code of 1855 which he drafted stand out as an example of the influence of European legal institutions and legal ways of thinking in the field of private international law in Latin America[14]. Thus, as occurred throughout the region, legal conceptions based essentially on the uniform creation and administration of state law in the national territory characterize basic rules of private international law in Colombia, as they are in the Civil Code of the country since 1887.

II. *Current situation*

Today's private international law is called upon to respect the diversity of indigenous normative systems. This role of private international law can find a valid foundation in the configuration of international human rights law, as well as in the way in which these rights have been incorporated into the Colombian national legal system. Currently, it is undeniable

11. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, University of Texas Press, 2004, 135; J. Kleinheisterkamp, *Development of Comparative Law in Latin America*, in M. Reimann - R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2006, 262-263.

12. J.H. Merryman - R. Pérez Perdomo, *La Tradición Jurídica Romano-Canónica*, Fondo de Cultura Económica, Mexico, 2014.

13. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, University of Texas Press, 2004; J.H. Merryman - R. Pérez Perdomo, *La Tradición Jurídica Romano-Canónica*, Fondo de Cultura Económica, Mexico, 2014.

14. J. Kleinheisterkamp, *Development of Comparative Law in Latin America*, in M. Reimann - R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, cit.

that indigenous peoples are holders of differentiated collective rights. At this point, it is worth recalling that collective rights are rights that «affect an identifiable group of people»[15] linked together by pre-existing relationships[16]. Thus, the rights of indigenous peoples are neither private rights nor diffuse rights, the latter being held by groups whose members are linked «only by the facts of a particular transaction or occurrence»[17]. Indigenous peoples'rights are included not only in international standards, such as the Declarations the Rights of Indigenous Peoples of the United Nations of 2007 (hereafter, "UN Declaration") and the Declaration of the Organization of American States of 2016 (hereafter, "OAS Declaration"), but also in binding international instruments, especially the Convention International Labor Organization No. 169 on Indigenous and Tribal Peoples, ratified by Colombia through Act No. 21 of March 4, 1991 (hereafter, "ILO Convention). This has also occurred in decisions by the Inter-American Court of Human Rights. The developments that led to the recognition of these rights at the international and regional levels have led the Colombian state to recognize them at the national level as well. At this point, it is worth noting that in Colombia the use of term "indigenous community" has a long tradition among both indigenous and the state[18], and that there are other ethnic groups in the country, namely Afro-descendants, Raizal, Palenquero and Rrom. As explained below, the Project of General Law on Private International Law for Colombia elaborated by the *Instituto Antioqueño de Derecho Internacional Privado* (IADIP) (hereafter, "IADIP Draft Law") only contains rules relating to indigenous peoples and communities, though.

II.1 *International law*

At the international level, a whole array of rights has been recognized to indigenous peoples, from the right to self-determination through cul-

15. G. Mac Dowell, cited by C. Crawford, *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, in *Indiana Journal of Global Legal Studies*, 27(1), 2020, 78.

16. Weninger, cited by C. Crawford, *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, in *Indiana Journal of Global Legal Studies*, 27(1), 2020, 78.

17. *Ibidem*.

18. F. Semper, *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, II, 2006, 765.

tural, health or labor rights. Such rights can enter national systems through constitutional channels in the form of fundamental rights. Among all these rights, there are some that relate more directly to the rules proposed by the IADIP Draft Law, which can be organized into two groups. The first group involves some rights that are basic to the protection of indigenous peoples'ways of life, including living according to their own legal institutions. Thus, the UN Declaration contains «the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions» (article 5), which is derived from the more general right to self-determination, in whose exercise they «have the right to autonomy or self-government in matters relating to their internal and local affairs» (article 4). Additionally, the way in which the UN Declaration entails the right to access to justice includes the consideration of their «customs, traditions, rules and legal systems» (article 40). In similar terms, article 8 of the ILO Convention states as follows: «In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws». This Convention also understands that such a right presupposes indigenous peoples' «right to retain their own customs and institutions», considering fundamental rights as the only limits, what also occurs within the framework of the UN Declaration (article 46). Such rights are also included in the OAS Declaration[19]. Before the adoption of this instrument, the main organs of the Inter-American human rights system, i.e., the Commission and the Court, developed an important jurisprudence that was especially triggered through the Court's decision in the Awas Tingni vs. Nicaragua case in 2001[20]. To a large extent, decisions of the Inter-American human rights organs deal with article 21 of the American Convention on Human Rights (Pact of San José), that contains the human right to property of individuals, and interpret it considering that indigenous peoples have a special relationship with their lands from which a collective right emerges.

19. See articles VI, XIII (3), XXI (2), XXII.

20. Mayagna (Sumo) Awas Tingni Community v. Nicaragua was decided by the Inter-American Human Rights Court (IAHRC 2001). See also: Yatama vs. Nicaragua (2005); Comunidad Moiwana vs. Surinam (2005); Comunidad Indígena Sawhoyamaxa vs. Paraguay (2006); Comunidad Moiwana vs. Surinam (2006); Comunidad Indígena Yakye Axa vs. Paraguay (2006); Pueblo Saramaka vs. Surinam (2008); Comunidad Indígena Xákmok Kásek vs. Paraguay (2010); Pueblo Indígena Kichwa de Sarayaku vs. Ecuador (2012); Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano and their members vs. Panama (2014); Pueblo Indígena Xucuru and its members vs. Brasil (2018); Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina (2020).

As explained below, article 5 of the IADIP Draft Law does not establish the direct application of indigenous normative systems, but rather provisions aimed at protecting the rights of indigenous peoples and communities. Specifically, article 5 refers to rights related to «natural resources existing on their lands, traditional knowledge, the conservation of biological diversity, the sustainable use of resources and plant varieties»[21]. Thus, the second group of rights of indigenous peoples recognized at international level that directly relate to article 5 of the IADIP Draft Law are those that take consideration of the relationship of these peoples with the environment. In this regard, the following articles of the UN Declaration can be highlighted: article 25 (right to maintain spiritual relationship with their lands and other resources), article 26 (right to lands and resources), article 29 (right to the conservation and protection of the environment and the productive capacity of lands), article 32 (right to determine and develop priorities and strategies for the development or use of their lands and other resources) and article 31 (right to maintain, control, protect and develop their traditional knowledge), which is in relation to article 24 (right to traditional medicine and health practices). Relevant provisions of the OAS Declaration are in articles VI and XXV (rights to their lands, territories, and resources), in article XXVIII (right to traditional knowledge associated with genetic resources), as well as in article XIX (right to measures to mitigate adverse ecological, impacts of the implementation of development projects). In the ILO Convention, apart from general rules in article 4 (measures for safeguarding environment) and 7 (right to decide on development that affect their lands), rights that take consideration of the relationship of these peoples with the environment are included in Part II (articles 13-15).

II.2 *Domestic law*

The relatively broad recognition of rights in favor of indigenous peoples in the 1991 Political Constitution of Colombia has been paradoxi-

21. Although the protection of these rights may indirectly lead to the application of indigenous norms. An example may be the environmental administrative norms that apply in indigenous territories, according to which land use in indigenous territories must be done following their own zoning and territorial planning, for which their own norms and procedures apply. This example is based on the Land Use Planning of the Department of Beni, in Bolivia; cfr. Department of the Beni Act, October 17, 2019, that approves the Land Use Planning of the Department of the Beni (PLUS – BENI), and Administrative Resolution 129/2020 of 2020 by the Audit and Social Control Authority for Forrest and Land of the Ministry of Environment and Water, that approves the Manual to Prepare Land Use Planning.

cally associated, on the one hand, with the relatively low participation of indigenous peoples in the total population[22] and, on the other hand, with the fact that the date of its adoption was close to the celebration of the 500th anniversary of the Spanish conquest[23]. In any case, the aforementioned rights have become part of Colombia's national legal system. Thus, an article 7 of the Political Constitution «the State recognizes and protects the ethnic and cultural diversity of the Colombian nation». Such recognition extends to the language of the different ethnic groups (article 10), to the protection of such diversity in educational processes (article 68), to the definition of indigenous territories as territorial entities (articles 286, 329, 330) and to indigenous jurisdiction (article 246), as will be explained below.

The recognition of indigenous peoples'rights in the Political Constitution of Colombia occurred hand in hand with the so-called neo-constitutionalism. This has made at least two specific contributions in this context, the first contribution being the possibility of including international instruments recognizing the rights of indigenous peoples in the national legal system through the block of constitutionality[24], which is contained in article 93 of the Political Constitution of 1991:

International treaties and agreements ratified by Congress that recognize human rights […] have domestic priority. The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia […].

In this regard, article 94 adds as follows:

The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them.

22. F. Semper, *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, II, 2006, 762.

23. Corte Suprema De Justicia, *Justicia y Pueblos Indígenas. Jurisprudencia, Ritos, Prácticas y Procedimientos*, 2017, 15, available at https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20y%20pueblos%20ind%C3%ADgenas%20jurisprudencia,%20ritos,%20pr%C3%A1cticas%20y%20procedimientos.pdf (last access: June 24, 2023).

24. Cfr. Decisions of the Constitucional Court SU-510/98 and T-606/01.

In addition, the recognition of rights of indigenous peoples by the Colombian Constitutional Court has taken place through copious decisions. Such decisions have made clear, for example, that the indigenous community is a collective legal subject and not a mere accumulation of individual subjects who share common interests. In addition, the Constitutional Court expressly lists among the fundamental rights of indigenous communities the right to communal land ownership, to participate in decisions and measures that could affect them, related to the extraction of natural resources in their territories[25], as well as to the recognition and protection of traditional medicinal practices[26].

III. *The rights of indigenous peoples and communities through the prism of private international law*

Beyond discussions as to why or how legal pluralism in general can take place in this context, private international law is called upon to respect the diversity of indigenous normative systems and indigenous peoples'rights. Private international law is equipped with viewpoints and concrete legal mechanisms that can serve the configuration of a legal pluralism that, rather than confronting the control of the state in certain areas and confining the indigenous to some thematic fragments or some territorial spaces, sees the relations of indigenous peoples with state institutions in a general framework that is characterized by a certain horizontality[27]. As mentioned above, this role of private international law is based on the aforementioned rights, which have been internationally recognized and incorporated into the Colombian national legal system.

Taking into account such rights, if a case relates to an indigenous people or community, it may be necessary to consider the application of indigenous rules and practices. If this issue is approached from the perspective of the general theory of private international law, this may take place *as if* indigenous rules and practices were foreign law. In Latin

25. Decision of the Constitutional Court SU-510/98; see also art. 300 of the Political Constitution of Colombia.

26. Decisions of the Constitutional Court C-377/94 and T-214/97; see F. Semper, *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, II, 2006, 765.

27. M. Coyle, *E Pluribus Plures: Legal Pluralism and the Recognition of Indigenous Legal Orders*, in P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism*, Oxford University Press, Oxford, 2020, 805-832.

American private international law codifications, the way foreign law must be applied is usually contained in a special rule that reflects the theory of juridical use (*uso jurídico*), which was largely supported by Werner Goldschmidt[28]. Thus, the Inter-American Convention on General Private International Law Rules states in article 2 that:

> Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable.

In national codifications a similar rule has been included, e.g., in the Civil and Commercial Code of Argentina (2014) (article 2595), the Private International Law Act of Uruguay (2020) (article 2) and the Civil Code of Peru (1984) (article 2055). Following such path, the IADIP Draft Law contains the following provision in article 3: «The interpretation of the competent foreign law shall be made in accordance with the foreign law itself». Thus, if indigenous rules and practices were considered *as if* the were foreign law, their interpretation had to be conducted in a way that is respectful of their customs and traditions of the peoples or communities involved.

However, it is worth making a brief clarification here, regarding the second paragraph of article 3 of the IADIP Draft Law, which seems to be unapplicable in cases that involve an indigenous people or community. Such paragraph, which contains the so-called "unknown legal institution", reads as follows:

> When the foreign law applicable to the case establishes institutions or procedures essential for its proper application not contemplated in Colombian law, the application of such law may be denied, provided that Colombian law does not have analogous institutions or procedures.

One can find this rule, with an almost identical wording, in article 3 of the Inter-American Convention on General Private International Law Rules. In this regard, one must bear in mind the cultural particularities of indigenous peoples and communities, and the different ways in which

28. W. Goldschmidt, *Derecho Internacional Privado: Derecho de la Tolerancia, Basado en la Teoría Trialista del Mundo Jurídico*, Depalma, Buenos Aires, 1990; P.B. Mosciati Olivieri, *La Aplicación del Derecho Extranjero: Teoría del Uso Jurídico*, in *Revista Chilena de Derecho*, 20, 1993, 39.

they can distance themselves from state law. Thus, there can be cases in which it is not possible to find in state law institutions or procedures that are analogous to those of indigenous peoples and communities. In such cases, the application of the unknown legal institution rule would mean refusing the consideration and application of indigenous rules and practices, what would ultimately lead to the cancellation of indigenous peoples'rights mentioned in Section II and would clearly go against the recognition of cultural diversity made in article 7 of the Political Constitution, as already mentioned.

Another way of observing indigenous peoples'rights from a private international law perspective is considering that they are fundamental rights. As already mentioned, in Colombia this is binding according to decisions of the Constitutional Court. In this sense, article 6 of the IADIP Draft Law includes the criterion developed by the Supreme Court of Colombia, according to which fundamental rights are part of the public order: «A foreign law that is manifestly incompatible with fundamental rights shall not be applied». Thus, rights recognized to indigenous peoples can also be part of Colombia's public order and so impede the application of foreign law that undoubtedly go against them.

Considering provisions that aim to protect indigenous peoples'rights as international imperative norms, which is another way to see such rights from a private international law perspective, will be presented below in the way it is included in the IADIP Draft Law.

IV. *IADIP Law Project*

IV.1 *General rules*

Article 5 of the IADIP Draft Law states as follow:

> Provisions to protect the rights of indigenous peoples or communities over the natural resources existing on their lands, traditional knowledge, the conservation of biological diversity, the sustainable use of resources and plant varieties have the character of internationally imperative norms.

This rule reminds legal operators of the imperative nature of the provisions that recognize the rights of these peoples and communities, particularly those related to the protection of the environment, preventing the application of any foreign law that may go against them. It

aims to bring Colombian private international law into line with the provisions recognizing these rights, its main objective being to make these provisions more effective. For a better understanding of this rule, it is worth referring to the interpretation given in another contribution to this publication, where article 5 is discussed in relation to article 4[29]. There, article 5 is seen taking consideration of the distinction between *Eingriffsnormen* and *Parteischutzvorschriften*, developed in German law, the former being equated with rules aimed at pursuing public interests (or imperative norm of "public policy of direction") and the latter being equated with provisions aimed at protecting private individuals (or imperative norm of "public policy of protection"). Based on this distinction, it is argued that when article 5 refers to provisions aimed at protecting the rights of indigenous peoples and communities, it is referring to imperative norms of "public order of protection" or *Parteischutzvorschriften* (that is, provisions aimed at protecting private individuals), that can however «be qualified as internationally imperative norms» when they are «predominantly aimed at pursuing public interests». Behind this interpretation of article 5 one can see the limitations of such sharp analytical exercises with respect to the rights of indigenous peoples and communities. Indeed, provisions aimed at protecting the rights of indigenous peoples and communities are neither *Parteischutzvorschriften* nor *Eingriffsnormen*, since they are protecting neither private nor public interests.

Following such an interest-based approach and considering the legal developments concerning the rights of indigenous peoples, for example, the doctrine established by the Constitutional Court of Colombia, what can be rightly argued is that the provisions aimed at protecting the rights of indigenous peoples and communities are intended to protect collective interests, i.e., the interests of certain (indigenous) groups. Put in other words, the protection of the rights of indigenous peoples does not need to be justified by referring neither to public interests (of the state) nor to the private interests of individuals.

Even though the interpretation referred here, which is made in another contribution to this publication, is trying to rescue «findings reached at the domestic level by Colombian scholars and courts»[30], in fact they are equating national legal thinking with the narrow European conceptions of the subject, which seem inadequate for cases involving indigenous peoples

29. See contribution on "Internationally Imperative Norms" by Ennio Piovesani.
30. *Ibidem*.

and communities, and eventually reinforcing the need to have in the country a special regulation of the subject that adapts to local particularities. In general terms, the contribution that entails such considerations is, however, a highly valuable input to discussions on the way imperative norms are included in the IADIP Draft Law. It thus correctly points to the fact that, according to article 5, provisions aimed at protecting rights of indigenous peoples and communities qualify as international imperative norms.

Finally, another rule of the IADIP Draft Law, namely article 68, deals with the international restitution of indigenous cultural property. The third paragraph of this article recognizes the developing the right of indigenous peoples and communities to decide about their cultural heritage. According to this article, they must decide about the destination of a property of cultural value to them when such a property is returned to the national territory from a foreign country. In such a case, the rights on the property are «governed by the rules of that people or community, unless such people or community decides that it should be governed by the law of the State of which it is a part». In practical terms, this might mean the need to provide for assistance of interpreters, translators, experts, and specialized lawyers[31].

IV.2 *Jurisdiction*

Under the IADIP Draft Law, situations involving indigenous peoples and communities may, in principle, be subject to the general rules of procedure (Chapter Four, articles 17-33). However, two clarifications are necessary in this regard. Firstly, in interpreting such rules attention must be paid to the rights of indigenous peoples contained in the Political Constitution, including those recognized in international law instruments, as well as the above-mentioned jurisprudence of the High Courts, in particular the Constitutional Court and the Supreme Court. Secondly, the preferent application of rules on indigenous jurisdiction that can be provided for in special laws is not excluded. In this respect, it is necessary to consider the following. Article 246 of the Political Constitution recognizes indigenous jurisdiction, which can be exercised in indigenous territories in accordance with the Constitution and the laws

31. A. Valiente López, *Acceso a la Justicia de los Pueblos Indígenas*, in J.C. Martínez - C. Steiner - P. Uribe (coords.), *Elementos y Técnicas de Pluralismo Jurídico. Manual de Operadores de Justicia*, Fundación Konrad Adenauer, Mexico, 2012, 64.

of the Republic, and provides that the implementation of indigenous jurisdiction, and in particular its coordination with the state judicial system must be regulated by a special law. This is also referred to in the Statutory Law on the Administration of Justice (article 12), where it is added that such law must also provide for the control of constitutionality and legality of the proceedings of the indigenous authorities. Nevertheless, such law has not yet been adopted[32]. There have been, however, judicial decisions that recognize indigenous jurisdiction, i.e., the Supreme Court of Justice[33] has recognized the «respect for the methods to which the [indigenous] peoples concerned traditionally resort for the repression of crimes committed by their members»[34]. Thus, there is no general regulation on the scope and content of indigenous jurisdiction, but rather a recognition of situations in a particularized manner, which mostly refer to criminal matters.

V. *Summary*

Indigenous peoples and communities are holders of differentiated rights that are included not only in international standards, such as the UN Declaration and the OAS Declaration, but also in binding international instruments, especially the ILO Convention, as well as in decisions by the Inter-American Court of Human Rights. The Colombian state also recognizes these rights at the national level, including them in the national legal system through the block of constitutionality (articles 93 and 94 of the Political Constitution), with the important contribution of the Colombian Constitutional Court. The IADIP Draft Law attempts to shape the role that private international law is called upon to play in this context in two ways: (i) by reminding legal operators of the imperative nature of the norms that recognize the rights of indigenous peoples and communities, particularly those related to environmental protection, preventing the application of

32. Corte Suprema De Justicia, *Justicia y Pueblos Indígenas. Jurisprudencia, Ritos, Prácticas y Procedimientos*, 2017, 19, available at https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20y%20pueblos%20ind%C3%ADgenas%20jurisprudencia,%20ritos,%20pr%C3%A1cticas%20y%20procedimientos.pdf (last access: June 24, 2023).

33. Supreme Court of Justice, Cassation Judgment of August 14, 2000, rad.: 14711.

34. Corte Suprema De Justicia, *Justicia y Pueblos Indígenas. Jurisprudencia, Ritos, Prácticas y Procedimientos*, 2017, 20, available a https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20y%20pueblos%20ind%C3%ADgenas%20jurisprudencia,%20ritos,%20pr%C3%A1cticas%20y%20procedimientos.pdf (last access: June 24, 2023).

any foreign law that may go against them, and (ii) by recognizing right of indigenous peoples and communities to decide about the destination of a property of cultural value to them when such a property is returned to Colombian territory from a foreign country, what must be done according to their own normative systems.

Margherita Salvadori

General Overview on the PGLPIL's Rules on Choice-of-Court Agreements and on their Importance for the Colombian Legal System

ABSTRACT: This article introduces the of choice-of-court agreements, focusing on the current situation in Colombia where there is no express rule governing the agreements in question. The article highlights the importance of the PGLPIL's rules and the matter of jurisdiction clauses. It deals with the topic of written form, presents the types of choice-of-court agreements. It also examines the suggested rules of the PGLPIL on *lis pendens* with specific regard to cases involving choice-of-court agreements. The article concludes that it would be a good for the international trade if Colombia adopted the 2005 Hague Convention.

KEYWORDS: Choice-of-Court Agreements - PGLPIL draft - Written Form - *Lis pendens* - 2005 Hague Convention - Colombia

I. *Introduction*

Choice-of-court (or forum selection) agreements are often included within international contract[1]. Such contractual clauses designate the jurisdiction, the country or the court, where disputes arising from the contract where they are included will be settled[2]. Thus, by including forum selection clauses within their international contracts, the parties designate the specific jurisdiction where they wish that disputes arising from said

1. International contracts are agreements between parties from different countries. These contracts can involve a wide range of commercial transactions, including the sale of goods, services, licensing agreements, and more. International contracts often raise complex legal issues related to choice of law, jurisdiction, and dispute resolution.

2. An example of choice-of-court agreement may be worded as follows: «The [Country chosen] courts shall have jurisdiction over any disputes arising under the Agreement […] arising directly or indirectly in relation to this Agreement, be it a dispute in tort or in contract or for any other cause».

contracts be settled. The designated jurisdiction may be that where one of the parties is established or even a neutral third country.

The primary purpose of including choice-of-court agreement within international contracts is that of enhancing clarity and ensuring predictability in case of disputes. The inclusion of such clauses also mitigates the risk of so-called forum shopping that is to say that a party may opt among several jurisdictions and thus bring a claim before the *most favorable* jurisdiction[3].

Choice-of-court agreements may be of different types. The main distinction is that between exclusive and non-exclusive choice-of-court agreements. An exclusive choice-of-court agreement provides that all disputes arising from the contract may be resolved exclusively in the designated jurisdiction. In contrast, a non-exclusive agreement designates a "preferred" jurisdiction, while leaving the parties free to file suit in other jurisdictions[4].

3. When drafting or entering a choice-of-court agreement, the parties should consider factors such as the convenience of the chosen jurisdiction, the expertise of its courts, the language of proceedings, and the enforceability of judgments.

4. Choice-of-court agreements are often accompanied by choice-of-law clauses, which designate the law applicable to the contract. In that perspective a non-State body of law may be chosen. With this respect, it is worth noting that Recital (13) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4 July 2008, 6-16) provides that: «This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention». Therefore, while the Rome I Regulation excludes from its scope the case where the parties have chosen the application of a non-State body of law, it does not exclude that a similar choice may be permissible. In turn, article 3 of the 2015 HCCH *Principles on the Choice of Law in International Contracts* (https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#text), provides that: «The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise». Therefore, the 2015 HCCH *Principles*, like the Rome I Regulation, allow for the choice of a non-State body of law, to the extent that such a choice is allowed by the lex fori. That said, a non-State body of law which may be said to be generally accepted on an international level, is that of the UNIDROIT *Principles of International Commercial Contracts* 2016 (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/). The choice of said Principles may take the form of a clause worded as follows: «This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts 2016» (cf. UNIDROIT, *Model Clauses, For the Use of the UNIDROIT Principles of International Commercial Contracts*, 2013, 6).

II. *The current situation in Colombia*

Globalization of commerce has significantly expanded international trade and investments in Colombia. As a consequence, disputes arising from international contracts have become more frequent.

Nevertheless, within the Colombian legal system, most, if not all, contracts involving Colombian nationals are currently governed by Colombian law. In principle, all agreements entered into by Colombian residents are governed by and must be thus settled in accordance with Colombian law. In fact, that there is no mandatory Colombian rule preventing the parties from designating a foreign law as applicable to their international contract. In practice, Colombian courts are likely to adopt a narrow approach, restricting the cases where a choice of foreign law may be deemed permissible. Furthermore, in the event that one of the parties is established in Colombia, the contract's validity will have to be assessed in accordance with Colombian law, even if the disputed international contract calls for performance abroad or was, or ought to be, concluded abroad.

Colombia has ratified few international instruments[5] which rarely may lead to a different outcome as that described above[6]. In principle, in cases of disputes concerning assets situated in Colombia, foreign decisions rendered on said disputes are not enforceable in Colombia[7]. Disputes

5. Colombia is a party to the OAS *Inter-American Convention on Letters Rogatory* of 1975 and to the HCCH *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* of 1965.

6. I.e. the HCCH *Convention on the Service Abroad* of 1965 applies to service upon natural and legal persons and also to States, governmental agencies, State-owned companies or territorial units of the State, but it does not apply to events when the address of the person to be served is not known (article 1). Juridical channels, diplomatic or consular agents, or the central authority of the state of origin or the state of destination are used to deliver letters rogatory from the interested party to the authority to whom they are addressed. The Chancellery, Colombia's designated central authority, precisely the *Ministerio de Relaciones Exteriores Dirección de Asuntos Migratorios, Consulares y Servicio al Ciudadano*, is responsible for fielding and processing requests from foreign parties to contracts. The Inter-American Convention on Letters Rogatory, January 30, 1975, provides rules for service of process amongst signatory States; also this treay indicate the privious central authoriy.

7. The Colombian General Code of Procedure (articles 605-607) regulates the recognition of foreign judgments in Colombia and the jurisdiction is given to the Civil Chamber of the Supreme Court of Justice. According to the either legislative or diplomatic reciprocity (article 605 of the General Code of Procedure), foreign judgments will be recognized under the authority provided by existing treaties with the State of origin or, absent a treaty between the two States, if that the law of the State of origin affords judgments originating

involving Colombian parties or events occurring within the Colombian territory are governed exclusively by Colombian law[8].

In this context, with respect to the Colombian legal system, choice-of-court agreements designating the jurisdiction where disputes will be settled becomes of crucial importance. Such designated jurisdiction may be either that of Colombia jurisdiction or a foreign one. On the international plane, it should be stressed that, on the one hand, Colombia has adopted few international treaties[9], for instance: the Montevideo Treaties of 1889, ratified in Law 33 of 1992 and the Inter-American Treaty on General Rules of Private International Law of 1971, ratified in Law 21 of 1981. On the other hand, it should be further stressed, that any of such adopted treaties governs choice-of-court agreements[10]. Incidentally, the Inter-American Convention on International Commercial Arbitration, 30 January 1975 (often referred to as the Panama Convention)[11] is primarily focused on arbitration, and simply requires that an arbitral award be recognized or enforced in the same manner as if it were a decision rendered by a national or foreign ordinary court – in accordance with the procedural laws of the respective country –, without addressing the procedure to be followed by the requested court[12].

in Colombia. Recognition of foreign judgments is easily stopped by many different the requirements, between *pluris* are particular relevant the no ongoing proceeding or final decision rendered by national courts on the same matter and of the granted exequatur. Since 2005 the Constitutional Court of Colombia has held that the Supreme Court of Justice's jurisdiction to rule on the recognition of foreign judgments cannot be extended to the analysis of the content of the law that was applied to the merits of the dispute, except to the extent that it might conflict with Colombian international public policy. It is also relevant the fact that Colombia has executed few treaties for the recognition of foreign judgments: a bilateral agreement with Spain, 1908, and the *Convención Interamericana Sobre Eficacia Extraterritorial de las Sentencias y Laudos Arbitrales Extranjeros* in 1981.

8. See J.L. Marín Fuentes, *The Recognition of International Judicial Decisions in the Draft Act on Private International Law for Colombia*, in this Book.

9. See N.R. Londoño Sepulveda - M. Palacio Maldonado, *A Hypothesis about the Application of the Montevideo Treaties of 1889 in Colombia*, in this Book.

10. The Montevideo Treaties of 1889 at "Título XIV - De la jurisdicción" in art. 56 states that: «(1) Las acciones personales deben entablarse ante los jueces del lugar a cuya ley está sujeto el acto jurídico materia del juicio. (2) Podrán entablarse igualmente ante los jueces del domicilio del demandado». There exists no derogation to such rules.

11. See M.-L. Jaime, *International Arbitration in Colombia*, in this Book.

12. Article VI of the Panama Convention provides that: «An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance

In conclusion, currently, within the Colombian legal system, there is not any express rule allowing the parties to designate the court having jurisdiction over disputes arising from their international contracts. When said disputes are brought before national courts, there exists any express rule ensuring that the applicable choice-of-court agreement be enforced.

III. *The PGLPIL's provisions on choice-of-court agreements*

The Instituto Antioqueño de Derecho Internacional Privado's Project of a General Law on Private International Law for Colombia (*Proyecto de Ley General de Drecho Internacional Privado para Colombia*; hereafter, "PGLPIL")[13] contains a specific provision devoted to choice-of-court agreements.

Moving from the plane of Colombian courts and international jurisdiction, the PGLPIL provides for the jurisdiction of national courts over all types of civil and commercial cases when the defendant is domiciled in Colombia, regardless of his/her nationality, the former connecting factor – the domicile – being one commonly employed by rules on jurisdiction in matters of contract.

Choice-of-court agreements and related issues are governed by articles 24 ("*Jurisdiction over freely negotiated contracts*"), 26 ("*Express or tacit choice of Colombian courts*"), 27 ("*Choice of a foreign court*") and 34 ("*International lis pendens*") PGLPIL (see further para. V below).

Jurisdiction is bestowed upon the Colombian courts not only when the contract is concluded or the disputed obligation is, or ought to be, performed in Colombia, but also when the parties decide, either expressly or tacitly, to submit their disputes to the courts of the same country. On the one hand, the possibility of designating Colombian jurisdiction by an express prior agreement is recognized, on the other hand, the exercise of jurisdiction is allowed also in case of tacit prorogation of jurisdiction (article 24 PGLPIL).

In the first case, that of an express agreement designating Colombian courts, such agreement must be in writing, while in the second case, that of

with the procedural laws of the country where it is to be executed and the provisions of international treaties».

13. Instituto Antioqueño de Derecho Internacional Privado - IADIP, *Proyecto de Ley General de Derecho Internacional Privado para Colombia*, Medellín, 2021, also in the Appendix to this Book.

tacit agreement, what is relevant is the claimant's conduct when filing the lawsuit, coupled with that of the defendant performing any action other than that of challenging lack of jurisdiction (see article 26).

The PGLPIL distinguishes in its article 25 the case where the parties have equal bargaining power from that where the same parties have unequal bargaining power. The terminology employed to refer to the second case is: «[…] actions relating to asymmetric contracts». Incidentally, this is a terminology which is unknown in the context of the EU rules on jurisdiction, where reference is rather had to cases involving consumers, employees or insured person, the latter being qualified as weaker contractual parties[14]. Pursuant to article 25 PGLPIL in cases relating to asymmetric contracts, Colombian courts have jurisdiction if the weaker party is domiciled in Colombia, even when the said party is the claimant[15] or the disputed obligation is, or ought to be, performed in the same country[16]. An interesting provision is that found in the final part of article 25, allowing for prorogation of Colombian jurisdiction also by the means of asymmetric choice-of-court agreements, to the extent that the latter expressly or tacitly designate Colombian courts after the dispute has arisen[17].

Having recognised such ample party autonomy, the PGLPIL governs the conduct of the Colombian courts if the parties' agreement designates a foreign jurisdiction. In this case, when there is a valid choice-of-court agreement designating a foreign court, the Colombian court is required to decline its jurisdiction. This provision is of pivotal importance, especially considering that, currently, Colombian courts establish their jurisdiction whenever a Colombian, natural or legal, person is a party to the proceedings or the contract is, or ought to be, performed in Colombia. The sole exception foreseen by the provision in question concerns the case of disputes in matters relating to rights in immovable property situated in Colombia[18]. With the latter respect, it worth highlighting that article 32 PGLPIL, on exclusive jurisdiction, correctly specifies that cases falling within the purview of exclusive jurisdiction are exceptional, they must

14. In fact, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) (OJ L 351, 20 December 2012, 1) provides for rules on jurisdiction protecting the consumer, the employee and the insured.

15. Cfr. the protective forum of the consumer of art. 18 Brussels Ia Regulation.

16. Cfr. the protective forum of the employee of art. 21 Brussels Ia Regulation.

17. Also the Brussels Ia Regulation introduces similar limitations in cases involving consumers, employees and insured.

18. See M.J. Ochoa Jiménez, *Property Law*, in this Book.

by thus interpreted restrictively and they cannot be extended to other cases that may arise in connection with the same dispute. This restrictive approach mitigates the risk that the Colombian courts may broaden the scope of the derogation in question and thus, ultimately, of the cases where choice-of-court agreements may be challenged.

In conclusion, it can be noted that, if the PGLPIL will be enacted, choice-of-court agreements will be generally recognised and enforced by Colombian courts. In fact, as described above, the PGLPIL recognizes the principle of party autonomy in the field of jurisdiction.

IV. *Written form and types of choice-of-court agreements*

Written form is typically required for the validity of choice-of-court agreements. Such requirement allows to easily establishing evidence as to the parties' intention to designate a specific jurisdiction for settling their disputes. In particular, the requirement of written form implies that the choice-of-court agreement must be included in a written contract – and thus take the form of a clause –, in written communication exchanged between the parties, such as letters, emails, or in any other writing, which clearly demonstrates their intention to designate a specific jurisdiction. Furthermore, choice-of-court agreements should be drafted in a clear and comprehensible language. While there may not be a strict requirement regarding the language that must be employed, using one which both parties understand is advisable, in order to prevent potential disputes regarding the interpretation of the agreement in question. In other words, the agreement should be drafted in such way as to reflect the parties'genuine consent and intention to be bound by it. In particular, choice-of-court agreements should be unambiguous with respect to the designation of the given jurisdiction. In practice, it is common that the parties involved sign choice-of-court agreements. Signature provides further evidence of the parties' consent to the agreements in question. Written agreements, including choice-of-court agreements, may take the form of an electronic document. In fact, Colombian law generally recognizes electronic documents as valid forms of written communication. Overall, the country's legal system has embraced the use of electronic communications and digital signatures in the context of international contracts, making it thus possible to meet the requirement for a written agreement electronically. Ideally, choice-of-court agreements should be an integral part of the main contract to which they refer. However,

the agreements in question may be contained in a separate agreement expressly referring to the main contract.

Practice has embraced various types of choice-of-court agreements, reflecting the diverse needs and circumstances of parties engaged in international transactions. At least four types of choice-of-court agreements may be distinguished: exclusive; non-exclusive, asymmetric and multi-tiered clauses.

Exclusive choice-of-court agreements mentioned above are perhaps the most common type in the context of international contracts. Such agreements designate a specific jurisdiction as the exclusive jurisdiction where disputes arising from the contract may be settled. In other words, the parties agree that only the designated jurisdiction will have the power to settle the case, thereby excluding other potential jurisdictions. Therefore, choice-of-court agreements provide clarity and predictability, reducing the risk of forum shopping and parallel proceedings.

Non-exclusive choice-of-court agreements also mentioned above are also referred to as permissive or non-binding clauses. Such agreements do not restrict the parties' ability to bring their dispute in a single jurisdiction. On the contrary, they designate a specific jurisdiction as a "permissible forum", while recognising the parties'ability to bring disputes in other jurisdictions if they so choose. Therefore, non-exclusive choice-of-court agreements offer broader flexibility than exclusive choice-of-court agreements[19].

Asymmetric choice-of-court agreements allow one party to bring claims in a higher number of jurisdictions, as opposed to the other party. The former party typically has the discretion to bring the disputes before the most favourable jurisdiction. Asymmetric clauses are often employed when one party enjoys a stronger bargaining position. A specific type of asymmetric choice-of-court agreement is the so-called one-sided choice-

19. See EUCJ case *Meeth v. Glacetal*, 9 November 1978 (C-23/78), in which non-exclusive agreements are legally recognized and enforceable within the EU law. The case revolved around an agreement between parties that conferred jurisdiction under which two parties from different EU member states agree that disputes will be resolved exclusively in their own national courts, such an agreement is valid and enforceable. The case emphasized the flexibility of agreements conferring jurisdiction and allowed courts to consider set-offs related to the legal dispute even when parties had agreed on a specific jurisdiction. The European Court stated that parties could agree to confer jurisdiction on the courts of their respective countries, even if they are different. According to the European Court of Justice, this flexibility allows for efficient dispute resolution and respects the parties'freedom to shape their contractual relationships.

of-court agreement, which combines elements of both exclusive and non-exclusive choice-of-court agreements. The latter type of agreements provide that one party may exclusively bring disputes in one jurisdiction, while leaving the other party free of bringing disputes in other jurisdictions. One-sided choice-of-court agreements are designed to balance the advantages of exclusivity with the flexibility of non-exclusivity.

Finally, multi-tiered choice-of-court agreements provide for multi-step dispute resolution mechanisms, before court litigation is initiated. Similar agreements may provide that the parties be required to engage in negotiation or mediation before initiating court proceedings. These clauses aim to promote alternative dispute resolution methods, potentially reducing the caseload of ordinary courts.

In summary, recognising and fostering the use of choice-of-court agreements brings a number of advantages and implications. Choice-of-court agreements provide clarity and predictability. By designating the jurisdiction where disputes will be settled, choice-of-court agreements reduce legal uncertainty. This advantage is attained in particular by concluding exclusive choice-of-court agreements, since the latter may streamline dispute resolution by preventing parallel proceedings in multiple jurisdictions, and thus, ultimately, lead to cost and time savings. Choice-of-court agreements allow the parties to tailor dispute resolution to their preferences and needs. Parties can rely on these clauses to enforce judgments in the designated jurisdiction. However, enforcing choice-of-court agreements, especially asymmetric and multi-tiered agreements, can pose challenges in practice.

V. *The PGLIPL's rules on lis pendens*

Lis pendens refers to situations where the same dispute is being litigated in multiple jurisdictions. General rules on lis pendens in the context civil proceedings, including those related to international contracts, are established to promote legal order and prevent conflicting judgments.

The PGLPIL addressed the issue of international *lis pendens* in Section 4. In particular, article 34 PGLPIL[20] introduces a rule similar to that found

20. Art. 34 PGLPIL provides that: «(1) Colombian courts shall suspend the exercise of their jurisdiction when the same cause, with the same object and between the same parties, has been previously initiated in the court of a State that is reasonably related to the matter or the parties unless it is evident that in that forum the process will not be resolved in a fair,

in the 1968 Brussels Convention[21], and, later, in the Brussels I Regulation[22]. In order to avoid conflicting judgments, the article provides that, if a lawsuit is already pending in a Colombian court regarding the same dispute between the same parties, another court, either in Colombia or abroad, may decline jurisdiction in favour of the court where the litigation was first initiated. Accordingly, if a dispute arising from an international contract is brought before Colombian courts and foreign courts, Colombian courts may apply such rule to determine which court should proceed to hear the case: the court that first asserted jurisdiction will take precedence in order to avoid the duplication of legal proceedings. Therefore, the fundamental principle is that the first seized court – i.e., where the lawsuit was initially filed – takes priority. In other words, if one of the courts began proceedings before the other, that court will generally continue with the case, and the other court may decline jurisdiction.

The outcome of a *lis pendens* case may also be influenced by a choice-of-court agreement included in the parties' contract. The priority accorded to the court first seized rule may not fully protect a choice-of-court agreement. This is clear from the experience of the European judicial area. In fact, at the time of Article 17 of the 1968 Brussels Convention and of Article 23 of the Brussels I Regulation, the pendency of the same case before judges of two different Member States – even when the judge subsequently seized was the one designated – always and only determined the jurisdiction to the judge previously seized to verify the existence of the choice-of-court agreement. Consequently, the court subsequently seized, although the one designated in the choice-of-court agreement, could not rule until the judge previously seized had decided on the validity of the choice-of-court agreement in question[23]. This situation was at the centre of the Gasser case[24], relating to

effective and diligent manner. (2) The suspension based on lis pendens may be extended until the decision in the foreign State acquires the force of res judicata, provided that such a decision is rendered within a reasonable period and may be effective in Colombia».

21. See art. 21 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 299, 31 December 1972), 32-42.

22. See art. 27 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 12, 16 January 2001, 1-23.

23. Cf. P. Hay, *Notes on the European Union's Brussels-I "Recast" Regulation: An American perspective*, in *European legal forum: Forum iuris communis europae*, 2013, Vol. I, 2.

24. See EUCJ, judgment of 9 December 2013 - case C-116/02, *Erich Gasser v. MISAT*, 9 December 2003. The position taken in the Gasser case was subsequently confirmed in EUCJ, judgment of 3 April 2014 - case C-438/12, *Irmengard Weber v. Mechthilde Weber*.

an exclusive choice-of-court agreement in favour of Austrian jurisdiction and concluded between an Italian and Austrian party. Despite that agreement, the Italian party brought a lawsuit in Italy, based on the head of jurisdiction available under the 1968 Brussels Convention, the special forum in contractual matters[25], claiming the invalidity of the choice-of-court agreement. Thereafter, the Austrian party sought resort before the designated Austrian courts. Before the latter courts, the Italian party challenged that, according to the general *lis pendens* rule, the Austrian courts had to stay proceedings. The Austrian court referred a preliminary question to the Court of Justice which, noting that the referring judge was the second seized judge, in application of the general rule on lis pendens, confirmed the obligation to stay proceedings, pending the decision of the first seized judge on the existence, or lack, of Italian jurisdiction. The Court of Justice, answering to the intervention of United Kingdom Government, held that: «the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of» the general rule on lis pendens[26].

25. Cf. art. 5.1, 1968 Brussels Convention, modified in art. 5.1, Brussels Ia Regulation, the latter only renumbered in art. 7.1, Brussels Ia Regulation.

26. The observations presented by the Government of the United Kingdom, intervening in the proceeding in Luxembourg, are worth of being reproduced: «The United Kingdom Government states that, whilst Article 17 comes below Article 16 in the hierarchy of the bases of jurisdiction provided for in the Brussels Convention, it nevertheless prevails over the other bases of jurisdiction, such as Article 2 and the special rules on jurisdiction contained in Articles 5 and 6 of the Convention. The national courts are thus required to consider of their own motion whether Article 17 is applicable and requires them, if appropriate, to decline jurisdiction. The United Kingdom Government adds that it is necessary to examine the relationship between Articles 17 and 21 of the Brussels Convention taking account of the needs of international trade. The commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. Such clauses contribute to legal certainty in commercial relationships, since they enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it. Admittedly, the United Kingdom Government observes that, to justify the general rule embodied in Article 21 of the Brussels Convention, the Court held, in paragraph 23 of Overseas Union Insurance, that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. However, that reasoning is not applicable to cases in which the court second seised has exclusive jurisdiction under Article 17 of the Brussels Convention. In such cases, the court designated by the agreement conferring jurisdiction will, in general, be

The above-described situation has been stigmatized as Torpedo[27] actions, or also Italian Torpedo, and has been addressed by the Brussels Ia Regulation, which came into force on January 10, 2015, replacing the Brussels I Regulation, and which today represents the key legal instrument within the EU governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[28].

The newer Brussels Ia Regulation contains different provisions that govern choice-of-court agreements in the context of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU[29]. The rules on choice-of-court agreements in the Brussels Ia Regulation serve to honour the principle of party autonomy and promote legal predictability and certainty in cross-border disputes within the EU. It ensures that the parties'agreements to resolve their disputes in a specific jurisdiction are respected by courts throughout the EU, contributing to a more efficient and harmonized system for international civil and commercial litigation. In particular, article 25 Brussels Ia Regulation upholds the principle of party autonomy. It provides that parties either can agree, before or after a dispute arises, to submit their disputes to the courts of a specific EU Member State. The parties have the freedom to designate the court or jurisdiction they believe is most appropriate for resolving their disputes.

The Brussels Ia Regulation, as the previous rules, does not specify a particular form that choice of court agreements must take. They can be in writing, oral, or implied by the parties'conduct. However, to ensure clarity

in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated. Finally, the United Kingdom Government concedes that the thesis which it defends might give rise to a risk of irreconcilable judgments. To avoid that risk, it proposes that the Court hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction».

27. Torpedo is the missile that, when fired underwater, detonates on contact with the target.

28. See M. Salvadori, *Gli accordi di scelta del foro nello spazio giudiziario europeo*, Torino, 2018, 114 ss.

29. See art. 25 and 31.2 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) (Bruxelles Ia Regulation), OJ L351, 20 December 2012, 1-32.

and evidentiary value, it is advisable that such agreements be in writing or at lease evidenced in writing.

The Brussels Ia Regulation protects both exclusive and non-exclusive choice of court agreements. In particular, the Brussels Ia Regulation includes a strong mechanism for enforcing exclusive choice-of-court agreements. If a court in a Member State is seized of a dispute covered by a valid exclusive choice-of-court agreement, it is generally obligated to decline jurisdiction in favour of the court designated by the parties, unless the agreement is invalid or its enforcement is contrary to the public policy of the Member State. In cases where one party initiates proceedings in a court of an EU Member State in breach of a valid choice of court agreement, article 31(2) Brussels Ia Regulation, which exclusively applies to the case of exclusive choice-of-court agreements, introduces an exception to the general rule on *lis pendens*:

> where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement

thereby solving the issues of the so-called Torpedo actions[30]. Incidentally, the exception to the rule of first-seized jurisdiction was introduced within the Burssels Ia Regulation in order to conform to the provisions of the 2005 Hague Convention on choice-of-court agreements.

In summary, under the PGLPIL, in cases of *lis pendens*, Colombian courts will be generally obligated to respect the priority of the court first seized even in the presence of an applicable choice-of-court agreement.

VI. *The 2005 Hague Convention: a proposal to enter the Convention*

The international landscape of commercial transactions has evolved significantly over the years, with cross-border contracts becoming increasingly prevalent. As a result, the need for legal frameworks that govern jurisdiction and the enforcement of choice-of-court agreements in inter-

30. We must remember that the Court of Justice has always denied the possibility that the other party may seek an anti-suit injunction from the court chosen in the agreement, even if this injunction can restrain the party from pursuing proceedings in the court not chosen by the parties.

national contracts has grown. The 2005 Hague Convention on choice-of-court agreements stands as a landmark instrument in this regard[31].

The Hague Conference on Private International Law (often referred to simply as the "Hague Conference" or HCCH)[32], is an intergovernmental organization dedicated to developing and promoting international conventions and protocols in the field of private international law. It was established in 1893 and is headquartered in The Hague, Netherlands. The Hague Conference plays a pivotal role in facilitating international cooperation and harmonizing legal standards across jurisdictions. The establishment of the Hague Conference on Private International Law was a response to the growing need for a standardized legal framework for resolving private international law issues.

The Hague Conference's primary role is to develop international conventions and protocols that address various aspects of private international law, including family law, civil procedure, commercial law, and more. These conventions are intended to create uniform rules and procedures for cross-border legal matters. The Hague Conference promotes legal cooperation and mutual understanding between countries. It provides a platform for member states to engage in discussions, share experiences, and negotiate international agreements. By harmonizing international legal standards and simplifying procedures related to cross-border transactions, the conference contributes to the growth of international trade and commerce.

The 2005 Hague Convention is primarily concerned with facilitating the recognition and enforcement of choice-of-court agreements in international contracts.[33] Its key objectives can be summarized as follows: promotion of party autonomy; uniformity and predictability and enhanced enforcement. Central to the 2005 Hague Convention is the principle of party autonomy. It recognizes the parties' right to choose the jurisdiction where their disputes will be resolved. This principle aligns with the need to respect the freedom of

31. See the website of the Hague Conventions www.hcch.net, precisely on the 2005 Convention https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

32. Colombia it is not a party to the Hague Conference of Private International Law.

33. More recently see P. Beaumont - M. Keyes, *Choice of Court Agreements. A Guide to Global Private International Law*, 2022; Z. Mchirgui, *L'Accord exclusif d'èlection de for à travers la Convention de la Haye de 2005*, L'Harmattan, 2022; A. Briggs, *Civil Jurisdiction and Judgments*, VII ed., Routledge, London, 2021; F. Pocar, *Brief Remarks on the Relationship between the Hague Judgments and Choice of Court Conventions*, in *Liber Amicorum Monika Pauknerová*, Wolters Kluwer, 2021; R.A. Brand, *The 2005 Choice of Court Convention - the triumph of party autonomy*, Edward Elgar Publishing, 2020.

contract and the choices made by commercial entities in their international dealings. The 2005 Hague Convention aims to establish uniform rules for recognizing and enforcing choice of court agreements. By providing clarity and predictability, it seeks to reduce legal uncertainty and potential disputes arising from divergent national laws. Parties to international contracts often face challenges when enforcing judgments in foreign jurisdictions. The 2005 Hague Convention streamlines the enforcement process by obligating contracting states to recognize and enforce judgments rendered by the chosen court in accordance with the agreement.

The structure of the 2005 Hague Convention consists of a preamble and six main sections, each addressing different aspects of choice of court agreements and their enforcement: Article 1 defines the convention's scope, which is limited to exclusive choice-of-court agreements. These are agreements in which parties designate a specific court or jurisdiction as the exclusive forum for resolving disputes. Articles 8 through 16 lay out the procedures and requirements for recognizing and enforcing judgments resulting from exclusive choice of court agreements in contracting states. The convention establishes a straightforward process and sets specific conditions for enforcement. Articles 2-7 provide interpretive guidelines for understanding and applying the convention's provisions. They emphasize the importance of adhering to the convention's objectives and the principle of good faith. Article 3 of the convention specifies that choice-of-court agreements must be «in writing or evidenced in writing» to be valid and enforceable. The concept of the equivalence of the written form is a crucial aspect of the Hague Convention. It acknowledges that in the modern era, international agreements, including choice of court agreements, are often reached through electronic communications such as emails, electronic signatures, and other digital means. The convention recognizes that electronic forms of communication are a prevalent and practical means of reaching agreements, and it accommodates this reality by equating them with traditional written agreements.

Article 21 allows contracting states to make reservations when ratifying or acceding to the convention. These reservations may limit the convention's applicability in certain circumstances. Article 22 clarifies the relationship between the 2005 Hague Convention and other international agreements, such as regional conventions and bilateral treaties. It outlines the priority of the Hague Convention when conflicting obligations arise. The final clauses address various administrative and procedural aspects, including accession to the convention, entry into force, and its territorial application (articles 23-30).

The 2005 Hague Convention has gained traction since its adoption, with several countries becoming contracting parties. Notable adopters include[34] the European Union and its Member States[35], the United States, Singapore, Mexico, and United Kingdom[36]. This widespread adoption reflects the convention's potential to foster international legal cooperation and enhance the enforceability of choice of court agreements. Unfortunately, Colombia is not a party to the 2005 Hague Convention on choice-of-court agreements. There are multiple reasons to conclude that Colombia should adopt the 2005 Hague Convention, and thus take part to the related uniform legal framework for the recognition and enforcement of choice-of-court agreements, thereby promoting legal certainty in international contracts.

For international businesses and legal practitioners, the 2005 Hague Convention offers a standardized framework that promotes legal certainty in cross-border transactions. Parties can have confidence that their choice-of-court agreements will be recognized and enforced in contracting states, reducing the risks associated with jurisdictional disputes and enforcement challenges. An exclusive choice-of-court agreement and the choice of law

34. See for the status of the 2005 Hague Convention: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

35. Before Brexit, when the United Kingdom was still an EU Member State, the Brussels Ia Regulation applied in that country (see Recital (40) Brussels Ia Regualtion). After the withdrawal of the United Kindgom from the EU, the Brussels Ia Regulation no longer applies nor binds that country. According to the prevailing view, the 1968 Brussels Convention – superseded by the Brussels I Regulation –, cannot "revive", after Brexit, in the context of the relations between the United Kingdom and the EU Member States. See B. Cortese, *Brexit e diritto internazionale private tra Roma, Bruxelles e Lugano: How Can I Just Let You Walk Away?*, in *Cuad. Der. Trans*., 2021, par. 9; C. Tuo, *The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks*, in *Riv. dir. int. priv. proc*., 2019, 309, 308-309; G. Rühl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?*, in *Int'l & Comp. L. Q*., 2018., 104 ff.). Furthermore, unlike the Rome I Regulation, the Brussels Ia Regulation is not a party of the so-called retained EU law by UK law.

36. As said, before Brexit, when the United Kingdom was still an EU Member State, the 2005 Hague Convention on choice-of-court agreements was in force in that country. After Brexit, on 28 September 2020, the United Kingdom has "autonomously" acceded the 2005 Hague Convention (cfr. https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=eif). Thus, at present, teh 2005 Hague Convention is once more in force in the United Kingdom in the relations with the other parties to the Convention. As a consequence, in the post-Brexit era, in the specific area of exclusive choice-of-court agreements, a uniform set of rules applies in relations between the United Kingdom and the other parties to the 2005 Hague Convention.

are related but distinct elements in international contracts. While they both play crucial roles in shaping the dispute resolution process, they serve different purposes, and the presence of one does not necessarily imply the other. However, parties often consider them together to create a comprehensive framework for handling disputes in their contracts. The exclusive choice-of-court agreement designates a specific jurisdiction as the exclusive venue for resolving disputes arising from the contract. It provides clarity and predictability regarding where legal actions related to the contract will be heard. Parties select a jurisdiction based on various factors, including familiarity with the legal system, perceived fairness, and convenience.

The choice of law clause, on the other hand, determines the substantive law that will govern the contract and any disputes arising from it. It specifies which country's legal principles and rules will apply when interpreting and enforcing the contracts terms. The choice of law clause determines the substantive legal principles that will be applied to interpret the contract and resolve disputes[37]. It influences issues such as contract interpretation, contractual obligations, and remedies available to the parties. The exclusive forum selection clause, meanwhile, deals with procedural aspects and the jurisdiction in which disputes will be heard.

The interaction between these two clauses depends on the parties' intentions and the legal context. In many international contracts, parties include both an exclusive choice-of-court agreement coupled with a choice of law clause. These clauses work together to create a comprehensive framework for dispute resolution, i.e. complementary approach. For instance, parties might choose Medellin as the exclusive forum for disputes and specify that Colombian law will govern the contract. There may be situations where parties select an exclusive forum without specifying the governing law, or vice versa. This might occur when parties are more concerned about where disputes will be resolved than the specific laws that will apply, i.e. separate considerations. While an exclusive choice-of-court agreement is not inherently tied to the choice of law, the two

37. Incidentally, looking to EU Member States, article 1, point 2, letter e) of the Rome I Regulation – akin to article 1, point 2, let. d), of the 1980 Rome Convention – refers to the exclusion of choice-of-court and arbitration agreements from the scope of the regulation. This means that the regulation does not determine the law applicable to these types of agreements. This notwithstanding, it cannot be excluded that the Rome I Regulation or the 1980 Rome Convention may be applied by the national courts of the EU Member States indirectly to the agreements in question.

clauses are often considered together in international contracts to create a comprehensive dispute resolution framework.

The 2005 Hague Convention on could constitute a vital development in international commercial law in Colombia. As more countries adopt the convention, it has the potential to simplify and streamline dispute resolution in international contracts, benefiting businesses, legal professionals, and the global economy as a whole. Its principles reflect the ongoing efforts to harmonize international legal norms and enhance the functioning of cross-border commerce.

VII. *Conclusions*

In conclusion, choice-of-court agreements play a crucial role in the current context of international trade. The objectives of clarity and predictability that these agreements pursue are best achieved when the agreements in question are made in written form and are exclusive. At present, there are no regulations in Colombia that govern choice-of-court agreements. Therefore, the proposal contained in the PGLPIL to regulate this matter is welcomed. Indeed, such regulation is generally favourable as it primarily protects and embraces the principle of party autonomy in the context of jurisdiction. Furthermore, the regulation is comprehensive, recognizes different types of clauses, not only exclusive ones, and also addresse aspects of *lis pendens*. However, it is worth noting that the application of the general rule on *lis pendens* - which gives priority to the court first seized - could pose some challenges in the context of exclusive choice-of-court agreements. The 2005 Hague Convention introduces an exception to that rule, which ensures a greater "stability" of (exclusive) choice-of-court agreements. For this reason, and considering the importance this would also have in a broader perspective, it would be highly beneficial if Colombia adopted the 2005 Hague Convention.

José Luis Marín Fuentes

The Recognition of International Judicial Decisions in the Draft Act on Private International Law for Colombia

ABSTRACT: Today the so-called private international law has acquired a meaning that a few years ago would have been difficult to predict, especially due to its implications in the daily life of the global community. This reality leads us to carry out a writing where it is sought in a somewhat succinct, but profound way, to carry out a description of the development that this science of law has had and for certain periods of time. It is paradoxical to see that in a country like Colombia private international law is residual; hence the effort to create a draft law that can be implemented in this country. In this sense, we present a comment on how foreign judicial, administrative, and arbitral decisions should be recognized in the Colombian legal system, which shows the need for a prompt change in the subject and its future application.

KEYWORDS: International law - conflict of laws - exequatur - forum

I. *Introduction*

Although at the beginning of the 70s, private international law was an exotic subject within law schools of most countries, little by little this legal science began to develop from a global point of view. In this sense, in Latin America, most countries made significant progress in the implementation of private international law norms in their legal systems, but Colombia was the exception, not only because of the reduced number of private international law rules in its legal system, but also because it does not have legislation in this regard, which makes it one of the most backward countries in the matter worldwide.

The project o private international law which has been drafted and reviewed by a select group of professors must be presented to the Colombian parliament as the best alternative in the matter not only for the country but also for its legal system. A very complete material, that is

serious and updated, and which is urgently required in the Colombian legal environment.

In this context, this paper intends in an approximate and at the same time discreet way to demonstrate how one of the emblematic figures of private international law has been misused in the Colombian legal field, especially when it comes to recognizing judicial and administrative decisions emanating from foreign courts and also administrative authorities to have an effect, which is none other than recognizing vested rights acquired abroad, but to be enjoyed in Colombia.

So, we will show how the Private International Law Draft – onwards PILD, not only complements the existing regulations, but also revolutionizes the monopolistic way in which exequaturs are granted in Colombia, since it allows lower judges to proceed to recognize foreign judicial decisions and makes prevailing the principle of equality of citizens before the courts avoiding not only excessive expenses, but also displacements from the remote regions of Colombia to the capital. People will be being able to claim their rights before the courts of their domicile and not before the Court of Cassation as usually exists.

In this context, we believe that it is necessary to address to some of the representative figures of the Private International Law to offer a better vision of the exequatur and the way in which it should be applied. So that its results are those desired not only by the parties, but by the local legal system itself.

II. *What should we understand as public policy in private international law?*

To offer a more complete vision of the subject that is discussed here, it is pertinent to analyze the term "Public Policy" not from an internal, but from an international law perspective. Good part of the doctrine has tried to define it as the set of principles that inspire a legal system and that reflect the essential values in a society at a given moment[1]. A Public Policy exception also considered as the means that the judge uses to prevent the application in the *forum* of the generally competent foreign legal norm[2].

1. J.C. Fernández Rozas - S. Sánchez Lorenzo, *Derecho Internacional Privado*, VII ed., Thomson Reuters, Pamplona 2013, 156.
2. L. Pereznieto Castro, *Derecho Internacional Privado, Parte General*, VIII ed., Oxford University Press, México D.F. 2003, 203.

In other words, it is a concept which has been elaborated to justify that a foreign law to which the solution of the case would be in accordance with the normal set of conflict rules that are chosen to be applied, but just in certain cases[3]. The public policy exception in private international law is designed to provide a national backstop in the application of foreign laws[4]. In the same way, with such an exception, it is sought to prevent the disturbance that the application or recognition of those foreign laws could produce or even the harm to the dominant conceptions in the legal system of the forum[5]. For this reason, more than the abstract content of the foreign norm that is invoked, it is the result of its application in each specific case to which it is necessary to adhere; the mere tenor of said law cannot justify its rejection when its application does not consecrate what really conflicts with the internal order.

All of the above denotes how difficult it is to arrive at an exact meaning of public policy, since it is a term that deals with a great vagueness and that many times reveals, that beyond a strict legal content, it has a philosophical nature and an indisputable moral structure[6]. For this reason, the function of the public policy rules will be to not allow the application of a foreign law designated by the conflict rule of the country of the forum, if said application is presented as incompatible with the public policy of this country. In its normative articulation, a public policy clause is conceived as an exception or correction of the normal game of conflict rules[7].

In this sense, the figure of international public order that is used by the courts of the *forum* to admit or not a foreign law that can provide a solution to the dispute raised, should not be applied with the same standards when it comes to recognizing and giving effect to a judicial decision emanating from a foreign court, which, although it may be based on the law of the *forum*, nothing prevents it from having been based on the internal law of the country where the decision made will subsequently be recognized.

3. E. Novoa Monreal, *Defensa de las Nacionalizaciones ante tribunales extranjeros*, Editorial del Instituto de Investigaciones Jurídicas, UNAM, México D.F. 1976, 122.

4. O. Meyer - Ed. Public Policy - Private International Law, *Edwar Elgar Comparative Guides*, Northampton, 2022, 13.

5. B.A. Audit - L. d'Avout, *Droit International Privé*, *Economica*, VI éd., Paris, 2010, 264.

6. L. Klein Viera, *El Orden Público Internacional: la defensa de la identidad del Estado y los procesos de integración*, PDF version available in http://www.oab.org.br/editora/revista/users/revista/1211290246174218181901.pdf.

7. A. Bucher - A. Bonomi, *Droit International Privé*, Helbing & Lichtenhahn, Genève, 2001, 122.

III. *What kind of international public policy rules are currently applied in the Colombian legal system and how would they change with the new project?*

Currently, Colombian law on the matter is quite limited, since there is only one clear mention of public policy and can be found in article 16 of the CoCC, this establishes:

The laws in whose observance order and good customs are interested may not be restrained by particular agreements [No podrán derogarse por convenios particulares las leyes en cuya observancia están interesados el orden y las buenas costumbres].

In the field of private international law there are many kinds of public policy rules whose effect in the application of foreign law can be a) non-application at all, b) relative application, that is, recognizing some effects only, or c) resorting to a foreign law that has links to the situation at trial and applying it, this is the so-called public policy rule of proximity.

The PILD incorporates a broader and more general system of rules where the judge is granted with a new freedom and powers so that when resorting to the application of a foreign law, he can determine with greater precision the true damage or violation of the local legal system in case to apply a foreign rule in the solution of a dispute.

One of the novelties of this project of law in terms of public policy regulations is found in article 4, which develops the concept of proximity public policy rules which are based on international public policy regulations. This can be observed in its content: Article 4. Internationally mandatory rules. Notwithstanding the provisions of this Law, the judge must apply the internationally mandatory rules of the Colombian legal system which, according to this Law, must prevail even when a foreign Law is applicable. The judge may take into consideration the internationally binding rules of other States closely linked to the case, considering the consequences of their application or non-application.

Another change in terms of public policy rules when applying or recognizing a foreign law must be observed in article 5, which addresses matters relating to the protection of indigenous peoples and their environments. This one state: Article 5: Rights of indigenous peoples.

The provisions to protect the rights of indigenous peoples or their communities over the natural resources existing on their lands, traditional knowledge, the conservation of biological diversity, the sustainable use

of resources and plant varieties have the character of international public policy rules.

A rule that directs the issue in a general and more complete way than the current norms is found in article 6, which gives the judge greater powers to make a decision more in line with reality than with the fiction that many typical legal rules contain. In this sense, said rule defines: Article 6: Public Policy rules in private international law The provisions of foreign law that must be applied in accordance with this Law will only be excluded when they lead to a solution that is manifestly incompatible with the essential principles of Colombian public policy rules. A foreign law that is manifestly incompatible with the fundamental rights will not be applied. Said incompatibility will be assessed taking into account, in particular, the intensity of the connection of the situation with Colombia, the level of social damage and the seriousness that the application of said foreign provision would produce in Colombia. When a provision of the competent foreign Law is not applicable due to said incompatibility, Colombian Law will apply.

IV. *How is exequatur currently regulated in Colombia and how would it change with the new act? Remarks*

One of the most important aspects of international procedural law and, in particular, judicial cooperation, is that which refers to the recognition that a court of a certain country makes of a substantive decision made by a judicial, arbitration or administrative authority of another. country to allow its opinion to be considered in the territory where it must display its effects.

Legal systems based on a reciprocal cooperation and solidarity have decided to renounce a part of their sovereignty and have developed a class of rules that may have their "raison d'être" in the principle of the so-called International Courtesy[8], where a decision made by a foreign judicial or

8. Also known as *comitas gentium ob reciprocam utilitatem* or international courtesy, this concept developed by the Voet brothers [Paul and Juan] and Ulrich Huber, members of the so-called Dutch School [17th century], and which was basically summed up in the maxim according to which If the governors of each empire admit out of courtesy the laws of each people, in force within their limits, they will be in force everywhere, as long as they do not harm the powers or rights of other governments or their citizens. The foregoing can be understood as a form of voluntary unilateral cooperation by one State

administrative authority is allowed to be effective in its territory and consequently its effects are to be recognized.

We must understand that one of the corollaries of the law is that all people, regardless of their economic and social condition, must have access to justice in an impartial, effective, and full manner in order to defend and protect their rights. The foregoing often requires cooperation between authorities from different States, since in these cases a legal situation is linked to several countries, and although the decision is made in one, it is in another where it must be made effective, because it is in this last where the elements with which a final solution will be provided, say the assets with which the losing party in the trial will respond to the plaintiff.

Recognition through which the effect of *res judicata* is granted to the foreign sentence, that is, its legal value is recognized before the local forum, will not always be done automatically and completely; Most of the time it will be partial and subject to a new procedure, since certain requirements must be respected according to the local law. Conditions of recognition will depend on each legal system, however, many of these rules may have a conventional origin due to the conclusion of a treaty on the matter with other States; in this case, such admission may be automatic; This will depend on what the States have mutually agreed to in relation to it. In such an event, it must be borne in mind that whoever recognizes a foreign decision will always be a judicial authority, unlike the one that issues it, which may be judicial, arbitration or administrative.

In current Colombian private international law, the conditions for the exequatur are precisely determined in Article 607 of the CoCCP, which submits the act of recognition to a new process before the local authorities. In the same way, such matters must be processed exclusively before the Supreme Court of Justice in Colombia.

The fact that the parties must go exclusively before the Supreme Court to request an exequatur further complicates matters. That is why the new law seeks to allow the parties to go before a lower-ranking judge who has the necessary capacity (examining an exequatur request is not for legal geniuses) to determine whether it is feasible to grant said benefit. This project seeks to avoid unnecessary waste of time and other resources.

In the Colombian legal system, the request for enforcement of a foreign judgement necessarily implies the beginning of a new process before the judicial authorities and under the application of quite particular require-

to another regarding the recognition of a rule that must be applied in a specific case in order to provide better justice to it.

ments. For a foreign judgement to be effective within the Colombian legal system, must have the nature and effect of formal *res judicata*. The above led us to think that this kind of procedure under the current rule is much longer and more expensive than the one that has already ended in another State.

In Colombia today, as in many other countries, unlike recognition, the execution of the foreign judicial awards entails an act of the receiving State by which that foreign judicial decision is updated, and its content becomes imperative. That is, all execution implicitly implies recognition, but not vice versa; there is therefore a question of degree or nuance, when understanding the execution as a more intense internalization than the simple recognition[9].

The new project defines more precisely the consequences that must emanate from the recognition of a foreign judicial decision; for this purpose, we have the most important ones that have been identified by the doctrine[10]. In this sense we have:

a) A probative effect. This occurs when the decision is invoked so that it has probative effectiveness, that is, what is expressed therein will serve as evidence in favor of the person who invokes it.
b) A secondary or reflex effect. It occurs when the one that takes place outside the main decision and that affects the party against whom enforcement is requested.
c) A normative effect. This one refers to judgments that directly affect the objective Law of the system within which they are issued; in this case, the judge who hears the request must apply the foreign law as it is, he must do it as it has been declared, modified, or constituted by the foreign judgment.
d) An imperative effect. This one is basically the raison d'être of the enforcement, that is, that it seeks either an execution [conviction], a declaration [capacity or personal status] or the constitution of rights such as a new marital status in the territory where recognition is sought.

The fact of the recognition and enforcement of judgements in the Colombian legal system has been quite traumatic up to now, since Colombia has not been particularly a country that has not been prone to migrations and to have contact with foreigners, only in the last decades things have

9. M. de Angulo Rodríguez, *Lecciones de derecho procesal civil internacional,* Editorial Gráficas del Sur, Granada, 1974, 80.
10. E. Vescovi, *Derecho Procesal Civil Internacional - Uruguay, el Mercosur y América*, Ediciones Idea, Montevideo, 2000, 152.

changed. Now this phenomenon (immigration) has erupted in a quite brutal way in our environment and in its local community. Issues related to private international law have been quite scarce due to the precarious knowledge of the matter that our legal operators have, and the low level of legal issues in which it is necessary to give applicability to the *ius* private regulations. Lately, things in the matter have been changing and the legal traffic on it has increased. That in one of the reasons why a group of professors, including myself, decided to draft a bill on Private International Law, a writing that is analyzed in this paper.

V. *Some novelties of the PILD*

Regarding the enforcement and recognition of judicial and administrative decisions in the PILD, we can see how chapter 5 brings with it a great change compared to the text developed by the CoCCP since it reduces not only the time taken to make a decision, but the result will be more expeditious, since the judge is prohibited from reviewing the substance of the case. In the PILD a summary procedure is designed to facilitate the same recognition and execution in Colombia of judicial and administrative decisions. In this sense, requirements that must be met are quite like to those required in many States to recognize foreign judicial decisions. For this, it will be necessary that:

- The authorities of the State in which the decision was dictated are competent in accordance with a reasonable criterion.
- The decision is not subject to any appeal (*res judicata*) and is has been decided already in accordance with the Law of the State in which it was pronounced.
- The right to a due process of the parties has been respected. (The defendant was properly notified of the action)
- The object of the litigation is not within the exclusive competence of the Colombian authorities.
- The Colombian courts have not ruled on the litigation in a decision that is not susceptible to appeals through ordinary procedure between the same parties, on the same object and for the same cause; or that a foreign decision that has ruled on the cause has not been previously recognized in Colombia; and
- The judgement or administrative decision does not contravene Colombian public policy rules, for which the criteria established in article 6 of this Law will be considered.

Por otra parte, hay un gran cambio en el proyecto, ya que se le quita la competencia exclusiva que hasta el momento tiene la Corte Suprema de Justicia y se le entrega a cada uno de los Tribunales del Circuito de cada ciudad lo que significa una carga menos para el demandante y un ahorro en cuanto a su desplazamiento hasta la capital que puede estar miles de kilómetros lejos de su lugar de residencia

On the other hand, there is a big change in the project, since the exclusive jurisdiction that the Supreme Court of Justice has until now is removed and it is handed over to each of the Circuit Courts of each capital city (District), which means a benefit for the plaintiff, because it saves him a lot of money and time, all that in terms of travel to the capital, which may be thousands of kilometers away from their place of residence.

For this procedure to be successful, it is necessary that the party requesting recognition of the foreign judicial or administrative decision must accompany its request with a series of documents that are quite common to an *exequatur* demand, among these we have:

- The complete, legalized and, if applicable, translated text of the foreign administrative or judicial decision.
- A certification that proves that the decision is not subject to ordinary appeals, that it is final and that it has the quality of *res judicata*, all of it when these requirements cannot be deduced from the decision itself.
- In the case of a default judgment or decision, an official document establishing that the convicted person was legally summoned and did not take advantage of the possibility of asserting his rights.

Once the competent judge receives the formal request with all the documentation, he verifies them and if they are in accordance with the law, he proceeds to inform the defendant, who must within a period of 15 years determine if he opposes the recognition, for which must provide proof of the elements that it claims to assert and to prevent the recognition of the foreign judicial or administrative decision in Colombia. Expired the above period, the competent judge must dictate the judgement. There will be no appeal against the decision that is pronounced on the recognition and enforcement of a foreign administrative or judicial decision. If the recognition is granted, and if the party requests it, it will proceed immediately to its execution, in accordance with the procedure established in the local law.

In the previous statement, can we see some totally new functions that make this new set of rules more in line with reality and with the mission

and functions of the law, and that are none other than providing justice in the clearest, simplest, least traumatic and most equitable way and to the people who come in search of it. Among these new changes we have the following:

a) The most relevant is the one that must deal with the designated judge, which is in this case, the competent judge to hear and process a request for recognition and enforcement of a foreign judicial or administrative decision. In the current system, only the Civil Chamber of the Supreme Court of Justice can admit those kinds of proceedings. This means that its management is quite centralized, which directly threatens the right of equality of citizens to access justice under the same conditions, especially when they must move from regions far from the capital where the seat of the Court is located. With the new set of rules, this function will be decentralized, and it is granted not only to a single court, but to all those that have the status of being national courts, but also District court, and even to lower-ranking local courts.
b) A new class of procedure is established, and it is the summary (almost opposed to the ordinary one that currently exists). It is a procedure with very short terms for it to be completed. The award that is pronounced there: a judicial, and arbitral decision or a foreign administrative decision must produce effects as soon as possible in case of being recognized.
c) Another issue that is seen as a novelty for the Colombian legal system is taken from the common law systems and which is none other than the figure of the "judge made law". Here the judge is authorized to impose his own criteria to justify its decision and without having to resort to traditional mechanisms such as those of requesting certifications before foreign or national diplomatic authorities that certify or signals that a certain authority of that other State is competent to issue a decision of a judicial nature. The judge may do so resorting to what the new standard calls "reasonable criteria", which are none other than logic and reason that must prevail in the spectrum where both judges and other legal operators interact.

VI. *Requirements to recognize an enforcement a foreign judicial award*

The first part of article 38 of the PILD set of rules is not very different from the current rule and the conflictual regulations that exist in many countries. However, there is a novelty and that is that one that opens the

door to the express recognition of non-jurisdictional decisions (including arbitration awards) such as administrative ones. All that to fill the gap that exists in current national regulations and allow decisions that grant rights to be recognized, and consequently to be able to enjoy them.

In this regard, we can see how article 38 indicates:

> The request for recognition must be submitted in writing and be accompanied by: 1. the complete, legalized and, if applicable, translated text of the foreign administrative or judicial decision.

Secondly, we have issues that are "standard" in the rules on exequatur at a global level, such as: That the decision is not subject to any appeal and is final in accordance with the Law of the State in which it was pronounced. However, there is a novelty and it is the one that determines that the decision does implicitly have its validity, because the authority that issued it indicates that it is final, that it does not admit appeals and that it has the quality of *res judicata*. In this sense, it will no longer be necessary to obtain a certification from another authority that indicates those conditions. The foregoing is done especially in order to have a better procedural economy and avoid unnecessary procedures for the party who wishes to have their right recognized.

In the same way, the draft establishes a deadline, that is, 15 days. So once the judge has legally notified the defendant and the defendant has answered or not, opposing or accepting, he must issue a final judgment of recognition and enforcement against which will not fit any other class of resources. Along with the above, comes another of the novelties of the draft, and is that the party that has requested the exequatur, once the recognition is granted, can immediately request its enforcement, which added to the fact that since then it will no longer be exclusively the Court The Supreme Court of Justice that hears about exequatur proceedings, then, the hearing judge, may himself authorize the enforcement and not refer another judge to do it and thus save not only time, but also money for the party that request recognition. In the same way he will address this to his own colleagues since he himself would assume this new procedural stage.

This draft for a new regulation on the recognition of foreign judicial and administrative awards is much more advanced than the one currently in force in Colombia, since it uses much more pragmatic and specific criteria that make up global law, which seeks a unification of criteria to offer the justice more accessible to citizens. In this case, a position is taken over a legal current developed several centuries ago which is none other than

the doctrine of international courtesy or Comity[11]. In this new context, let's call it the 21st century, that stone structure of the so-called public order has begun to crack, due in part to the interconnection or integration of countries and their cultures in a context of globalization. The position that up to now has been adopted by judges in Colombia (and many countries) in the sense of rejecting the recognition of a foreign judicial decision under the pretext that it violates local public policy regulations has begun to be qualified[12]; since essentially it is left to the discretion of the judge himself who must assess the eventual social damage, and not of the legal system regarding the recognition and enforcement of the sentence or foreign law. For us, the foregoing makes sense because reality and the effects of the decision must take precedence over what may eventually be a "falsely" called law of public policy, due to their abstraction and their little relation to the situation discussed by the judge.

In terms of *exequatur* there are as many particularities as there are legal systems where it is applied. For several centuries there have been numerous authors who have advocated for a disclosure of this legal figure that seeks recognition in the forum of rights acquired under foreign law. Whoever wants them to be recognized is alien to the structure of the legal system where the right is born and to the one where its recognition is requested; the only thing that seeks who requests recognition is to be able to enjoy their vested right in another legal system. Individuals rarely participate in making laws that grant them rights and others that impose obligations on them; they are simply tributaries of its provisions. For this reason, when a judge must recognize an enforce an acquired right in the light of a foreign law, he must first look at the individual who claims it and not at his legal system, since he is the one who is in the front line and can determine with certainty if such recognition or not can be harmful to the society in which it is intended to exercise and enjoy it. Now, it is also clear that not only individuals claim rights, in terms of exequatur, States do as well.

In this sense we have the case where Germany instituted, in December 2008, proceedings against Italy before the International Court of Justice requesting the Court to adjudge and declare that Italy has failed to respect the jurisdictional immunity that Germany enjoys under international

11. J. Kosters, *Public Policy in Private International Law*, in *The Yale Law Journal*, Vol. 29, No. 7 (May, 1920), 745-766.
12. A. Mills, *The dimensions of Public Policy in Private International Law*, in *Journal of Private International Law*, 201, 4, 2008, 2.

law, in different ways, among them: 3) by declaring enforceable in Italy certain Greek judgments against Germany awarding compensation for civil damages to the successors of Greek nationals who had been victims of a massacre in the Greek village of Distomo committed by German units during their withdrawal in 1944. In this case, as Boschiero appointed[13]: the process of enforcing a foreign judgment (the claim against Italy regarding the recognition and enforcement of the decisions of Greek courts upholding civil claims against Germany). The Court decided (by a majority of fourteen to one) that the Italian courts had violated Germany's immunity from jurisdiction in upholding "request for exequatur" of judgments rendered by these foreign courts.

VII. *Effects of the recognition of a foreign judicial, arbitral, or administrative award in the draft of the new model law*

In Colombia, as in many countries, the effects of foreign judgments can be classified into two categories; one that defines the effects of the judgment as a document; the other, which establishes the effects of the judgment as a jurisdictional act. The first category includes the probative effect. The second, the material and procedural effects. Such material effects cover the substantive content of the decision, that is, the modifications to the legal-private relations. Now, the procedural effects cover the formal *res judicata* and the enforcement effect; however, each of these effects unfolds in a different way[14].

In this regard, and contrary to what has been happening in the Colombian legal system regarding exequatur or enforcement of foreign judicial, arbitral or administrative decisions, is that the new system proposed in the bill allows such a procedure to be carried out in a more fast and balanced procedure, since not only the principle of justice prevails in it, but also that of procedural economy and transparency. For this reason, once the procedure has been simplified, the favored party will be able to claim the enjoyment of their right in a more expeditious manner, which will redound

13. N. Boschiero, *Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: a private International Law Evaluation of the Recent ICJ Judgment in Germany v. Italy*, in *Stato, Chiese et Pluralismo confessionale*, Rivista telematica No. 38/2012, dicembre 2012.

14. J.A. Briceño Laborí, *Efectos de las sentencias extranjeras y procedimiento de exequátur*, in *AMDIPC*, 2019 No. 1, 427.

to their own benefit and that of the people who are positively affected by that decision. For this reason, we believe that among the most important effects that can occur once the recognition and enforcement have been carried out by the Colombian judicial authorities, the beneficiary may against, among others:

A. Claim and defend your new personal situation as it is in the case of being divorced, adopted and married, among others.
B. The applicant (creditor) may request the necessary precautionary measures in the execution of the ruling, and subsequently recover their credits via a judicial auction.
C. He may claim the certificates, documents, titles to which he is entitled.
D. Use the decision that has been recognized as an element of probative nature.

In this sense, one cannot ignore the fact that an exequatur will always imply a transfer of a very small part of the sovereignty of the States, which shows the sacrifice that must be made in favor of justice, since it is understood that a foreign judge protected by a law with the same characteristics to that one that recognized a right conformed to his local postulates of justice, and therefore had granted it. This transfer of a mainly foreign judicial decision to the local legal system should not be seen as the importation of a legal system[15], but of a scheme that grants a right that can have the connotation of universal. This question is also applicable to the Colombian case.

VIII. *Summary and conclusions*

In summary, the proposed draft of the private international law for Colombia:

– Creates new figures in the Colombian legal system in the field of private international law.
– In terms of recognition and enforcement of judgments, arbitral awards, and foreign administrative decisions, it develops a faster and less expensive system.
– Allows that more judges in Colombia can hear and process exequatur requests.

15. P. Hovaguimian, *The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns*, in *Journal of Private International Law*, 11:2, 2015, 219.

– It gives judges more freedom regarding how public policy should be appreciated when it comes to recognizing and giving effect to sentences, arbitral awards and foreign administrative decisions.
– It includes new methods in international procedural matters.

The question of the recognition and enforcement of foreign judicial awards and administrative decisions in the new bill is a work adapted to the needs of the 21st century where legal pragmatism must prevail. The new treatment that is given to the matter is in accordance with said postulates since it incorporates novelties such as the express recognition of decisions of foreign administrative authorities, an issue that does not exist so far, not only in Colombia, but in many countries where there is only space for the recognition of foreign judicial and arbitral awards. Other issues that have already been pointed out is not only the simplification of the process, but also the expansion of the number of judicial authorities that have jurisdiction for this type of procedure. With the above, it is intended to move from a single central authority such as the Supreme Court of Justice in its Civil Chamber, to multiple authorities such as regional courts, and even lower-ranking judges (District). With the foregoing, it is intended to achieve better jurisdictional coverage and better procedural and personal economy for those who must go before the courts to request recognition and enforcement of an award or foreign administrative decision.

In this context, we believe that the changes in the new bill will contribute in a significative way to improve the development of the Colombian legal system, which will be in accordance with many private international law orders that exist not only in Latin America, but on many other continents. Figures such as public policy with all its nuances, international courtesy, vested rights, common sense among others, will have their own space, but adapted to the realities and particularities of the current Colombian legal culture.

It is also important to highlight the relevance of this kind of initiatives in the different legal systems, because it leads to better legal certainty and allows legal harmonization. In the case of Colombia, its system of private international law standards will be modernized, because it is not only anachronistic, but limited with a few numbers of rules.

Taking up and adapting the words of Symeonides[16] to this academic exercise, we can say that drafting legislation is difficult enough, passing

16. S.C. Symeonides, *Choice of Law in Torts Arising from Infringement of Personality Rights*, in *Revue de droit des affaires internationales / International Business Law Journal*, Issue 6, 2022.

it even more so, especially in a multiethnic and politicized country like Colombia. But the alternative is not to stop trying or, even worse, not to begin at all. The "conflicts on steroids" discussed in this essay multiply day by day; and they call for innovative and bold solutions. As heir to the richest codification tradition and beneficiary of the finest pool of drafting talent in the country, Colombia should not shy away from its responsibility to lead the search for such solutions. In this process, the role of academics like this author, if any, is a minor one. It is to put their ideas in writing.

If they are good, they can help in the formulation of these solutions. If they are bad, they will be deservedly rejected. The readers will determine whether the ideas expressed here belong to the former or the latter category, in whole or in part.

María Julia Ochoa Jiménez

Property Law

ABSTRACT: Article 20 of the Civil Code of Colombia, which contains the same rule since its adoption in 1887, has several weaknesses, mainly the use of obsolete terms and its confusing wording. According to it, the *lex rei sitae* rule applies to any type of property, moving away from the distinction between conflicts of laws in matters of real property (governed by the law of location) and movable property (governed by the law of the owner's domicile). In general terms, the IADIP Draft Law maintains the tradition included in the Civil Code of Colombia currently in force. However, it takes several steps forward, clarifying the regulation on this matter, while considering developments in relation to certain types of property.

KEYWORDS: Private international law - Colombia - IADIP Draft General Act - property - cultural property - intellectual property - mobile conflict

I. *Background*

Cases of conflict of laws regarding property are traditionally resolved according to the *lex rei sitae* rule, according to which the law of the stated in which the respective property is located is applicable[1]. The wide acceptance of this rule, which has an obvious territorial basis, is largely explained by the relevance that such rights have for the protection of the territorial sovereignty of the state of location[2], which is evident in relation

1. See M.J. Ochoa Jiménez, *Normas de Derecho Internacional Privado en Materia de Bienes: La Regla Lex Rei Sitae en América Latina y Colombia*, in *Revista de Derecho Privado*, 37, 2019, 153-183, on which the first part of this paper is partially based.

2. E. Pérez, *El denominado estatuto real*, in A. Abarca - J. González - M. Guzmán (coords.), *Derecho Internacional Privado*, UNED, Madrid, 2001, II, 267; J.L. Bonnemaison, *Curso de Derecho Internacional Privado*, Vadell Hermanos, Caracas, 2013, 295.

to real property[3]. Other reasons are also mentioned in support of the *lex rei sitae* rule, such as the legal certainty it provides[4], its predictability[5] and its favorability with respect to the rights of third parties[6]. But the need to revise the *lex rei sitae* rule has come about as a result of recent developments that have raised new concerns in relation to new types of property, such as intellectual and cultural property or movable assets subject to security rights.

The main conflict of laws rule on property rights in the Colombian legal system is contained in article 20 of the Civil Code. This article is based on article 16 of the Chilean Civil Code drafted by Andrés Bello in the mid-19th century. Basically, it follows the trend marked by Friedrich Carl von Savigny, according to which the *lex rei sitae* rule applies to any type of property. It thus moves away from the regulation that distinguished between conflicts of laws in matters of real property (governed by the law of the place of location) and personal property (governed by the law of the domicile of the owner), which was in force for a short time in part of the Colombian territory, in articles 12 and 13 of the Civil Code of the Antioquia Department of 1864[7]. However, article 20 of the Civil Code has several weaknesses. The use of obsolete terms and its confusing wording, together with a unilateral formulation, make its revision necessary.

As will be discussed below, although the rules of the Draft General Law of Private International Law for Colombia prepared by the *Instituto Antioqueño de Derecho Internacional Privado* (IADIP) (hereinafter, "IADIP Draft Law") also contain the *lex rei sitae* rule, it takes several steps forward by clarifying the regulation on this matter, while taking

3. A. Junker, *Internationales Privatrecht*, C.H. Beck, Múnich, 2017, 362.

4. A. Herrán Medina, *Compendio de Derecho Internacional Privado*, Editorial Temis, Bogotá, 1959, 224; J.P. Niboyet, *Principios de Derecho Internacional Privado*, D.F., Editora Nacional, México, 1951, 486; S. Symeonides, *Choice of Law*, Oxford University Press, New York, 2016, 584.

5. S. Symeonides, *Choice of Law*, Oxford University Press, New York, 2016, 584.

6. This can be seen in the German system, where article 43.1 of the Introductory Act to the Civil Code provides for the *lex rei sitae* rule, the rule of article 932 of the German Civil Code being also applicable in international situations; this article refers to bona fide acquisitions: «[…] the acquirer becomes the owner even if the acquirer becomes the owner even if the thing does not belong to the seller, unless the acquirer does not act in good faith. acquirer does not act in good faith at the time he acquires ownership […]»; cfr. J. Schellerer, *Gutgläubiger Erwerb und Ersitzung von Kulturgegenständen*, Mohr Siebeck, Tubinga, 2016, 13.

7. This codification is not in force.

into consideration the developments that have occurred in relation to certain types of property.

II. *Current situation*

The principle of territoriality is central to private law in Colombia, as in other Latin American countries[8]. Framed within this principle, article 20 of the Colombian Civil Code contains the same regulation as its original version of 1887[9].

> The goods located in the *territories*, and those found in the *states*, in whose property the Nation has an interest or right, are subject to the provisions of this Code, even when their owners are foreigners and reside outside of Colombia.
> This provision shall be without prejudice to the stipulations contained in contracts validly concluded in a foreign country.
> But the effects of such contracts, to be fulfilled in any territory, or in cases that affect the rights and interests of the nation, shall be in accordance with this code and other civil laws of the *union*.

In this article, the use of the words "territories" and "states" in the first paragraph and "union" in the last paragraph immediately catch the reader's attention, because they do not correspond to current legal and political terms and concepts[10]. This shows us, on the one hand, that, despite the numerous amendments made to the Civil Code since its adoption, article 20 has not been revised and, on the other hand, that its content

8. See, e.g., Código Civil de Colombia, article 18: "The law is mandatory for both nationals and foreigners residing in Colombia" and article 14 del Código Civil chileno; cfr. E. Hernández-Bretón, *Mestizaje Cultural en el Derecho Internacional Privado de los Países de la América Latina*, Academia de Ciencias Políticas y Sociales, Caracas, 2007, 25; J. Samtleben, *Internationales Privatrecht in Lateinamerika-Regionale Entwicklungen und nationale Kodifikationen (2001)*, in J. Samtleben (coord.), *Rechtspraxis und Rechtskultur in Brasilien und Lateinamerika*, Shaker Verlag, Aachen, 2010, 443.

9. According to Mayorga, «[…] despite several drafts, the Civil Code adopted for the Republic in 1887 is the one that currently governs the country […]»; see F. Mayorga, *Codificación de la Ley en Colombia*, available at http://www.banrepcultural.org/blaavirtual/revistas/credencial/abril2002/codificacion.htm (last access: June 27, 2023).

10. For a synopsis of the history of the Colombian Civil Code, see A. Valencia Zea, *Derecho Civil. Parte General y Personas*, XV ed., Temis, Bogotá, 2000, Vol. I, 31; F. Mayorga, *Codificación de la Ley en Colombia*, available at http://www.banrepcultural.org/blaavirtual/revistas/credencial/abril2002/codificacion.htm (last access: June 27, 2023).

is not easy to understand and interpret. However, the presence of such words cannot be overlooked and must be read in the light of their current meaning[11]. Thus, "territories" should be read in the singular, as referring to the national territory, while "states" should be understood as synonymous with departments, and "union" as referring to the Republic of Colombia.

Article 20 of the Colombian Civil Code contains a unilateral conflict of laws rule, since, when referring to rights over property located in Colombia, it mandates the application of the Colombian legal system. This article can be analyzed by dividing it into three parts[12]. Firstly, it states the *lex rei sitae* rule in broad terms without distinguishing between movable and immovable property (first paragraph)[13]. Thus, all property located in Colombian territory is subject to the Colombian legal system, provided that «the Nation has an interest or right» in it. This last sentence covers, for example, property included in the cultural heritage, in respect of which the interest of the Colombian state is undeniable[14] and is evident in relation to archaeological objects (see articles 63 and 72 of the Political Constitution)[15]. Secondly, article 20 refers to the application of the *lex rei sitae* rule to contracts concluded abroad. Thus, the existence and validity of contracts entered into abroad that deal with assets located in Colombia, over which the Colombian state has some right or interest, must be recognized within the Colombian territory. This rule does not refer to contracts on assets located in the country, on which the Colombian state does not have any right or interest, nor to contracts on assets not located in the country[16].

11. Act 57 of 1887, article 2.

12. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, in *Teoría General del Derecho Internacional Privado*, coords. L. García Matamoros And A. Aljure Salame (coords.), Temis, Bogotá, 2016, 194. A rule consisting of these three parts, but only with respect to immovables, is found in article 12 of the Civil Code of the State of Antioquia (Act 20) of 1864.

13 Cfr. A. Cock Arango, *Tratado de Derecho Internacional Privado*, Universidad Nacional de Colombia, Bogotá, 1952, 262.

14. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, in *Teoría General del Derecho Internacional Privado*, cit., 192.

15. Political Constitution of Colombia, article 63: «[…] the archaeological heritage of the Nation and other assets determined by law are inalienable, imprescriptible and unseizable», and article 72: «[…] The archaeological heritage and other cultural assets that make up the national identity belong to the Nation and are inalienable, unseizable and imprescriptible […]»

16. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, in *Teoría General del Derecho Internacional Privado*, coords. L. García Matamoros and A. Aljure Salame, Temis, Bogotá, 2016, 194.

Thirdly, considering that in Colombia only the existence and validity of contracts entered into abroad must be recognized, according to the third paragraph of article 20, the national law governs the effects of contracts on goods located in Colombia that have been entered into abroad, provided that such effects occur in the national territory or affect rights and interests of the Colombian state. In the latter case it would be irrelevant, as Zapata argues, the place where such effects are produced[17].

In Colombia, as in other countries, the *lex rei sitae*-rule acts as the general rule, so that in specific cases, rules on special matters would prevail. It should be noted that, however, although according to article 1012 of the Civil Code succession is governed by the law of the last domicile of the deceased, a judgment of the Supreme Court of Justice established in 2016 that the law of the place of location of the succession property is applicable if the deceased is domiciled in another country but has Colombian nationality[18]. It is also worth noting that, at the regional level, the 1889 Treaty of Montevideo on International Civil Law includes the *lex rei sitae* rule in article 26[19]:

> Property, whatever its nature, is exclusively governed by the law of the place where it exists as to its quality, its possession, its absolute or relative alienability, and all the legal relations of a real nature to which it is susceptible.

An antecedent of this rule is found in the Treaty of Private International Law, or Treaty of Lima, of 1878, which did not enter into force, but its text is largely the same as the Treaty that Colombia and Ecuador signed bilaterally in 1903[20]. The structure of article 20 of the Civil Code coincides with the form of the *lex rei sitae* rule of the latter Treaty[21], but here an exception is made regarding successions.

17. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, cit., 196.
18. Supreme Court of Justice of Colombia, Civil Cassation Chamber, Decision AC7803-2016, rad.: 11001-02-03-000-2015-03168-00, September 16, 2016.
19. This rule was later included in article 32 of the Montevideo Treaty of 1940 on International Civil Law, to which Argentina and Paraguay are parties; cfr. J. Samtleben, Der *Kleinstaat Uruguay als Zentrum des Internationales Privatrecht*, in *Festschrift für Dieter Martiny zum 70. Geburtstag*, coords. E. Witzleb, R. Ellger, P. Mankowski, H. Merck and O. Remien, Mohr Siebeck, Tubinga, 2014, 580.
20. Cfr. J. Samtleben, *La Relación entre Derecho Internacional Público y Privado en Andrés Bello*, in *Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana*, 14, 1982, 14.
21. Treaty on Private International Law of June 18, 1903 (Colombia, Act 13 of 1905), article 3: «The assets existing in the Republic shall be governed by the national laws, even if their owners are foreigners and do not reside therein, except as provided in the title of

III. *IADIP Draft Law*

III.1 *General rule*

Chapter Twelve of the IADIP Draft Law deals with property rights. This Chapter, which is made up of three articles (i.e., articles 66 to 68), contains the rules relating to the law that must be applied by Colombian courts in cases regarding such matter. Whereas the regulation on jurisdiction, that will be mentioned below, is included in Chapter Four.

The general conflict of laws rules entailed in Chapter Twelve essentially maintain the legal tradition based on the *lex rei sitae* rule, which is followed in article 20 of the Civil Code. However, the rules proposed in the IADIP Draft Law are more comprehensive and specialized. Above all, it is worth mentioning that the general rule of article 66, first paragraph, contains the *lex rei sitae* rule in a bilateral manner: «Property and rights thereon are governed by the laws of the State in which they are located». National tribunals must thus apply Colombian law if the property is situated in Colombian territory, but foreign law if the property is located abroad. In similar terms, the *lex rei sitae* rule is included in the IADIP Draft Law (article 95, first paragraph) regarding acquisitive prescription (usucapion): «Acquisitive prescription of movable or immovable property is governed by the law of the place where it is located». The bilateral way in which the *lex rei sitae* rule is conceived in the above-mentioned articles is an important step forward vis-à-vis the strong territorial approach of article 20 of the Civil Code and its unilateral formulation. Article 66 of the IADIP Draft Law also excludes any reference to obsolete terms regarding the political and territorial organization of the country. There are no confusing allusions to international contracts either. All this together makes article 66 a rule that provides greater legal certainty.

However, nowadays the *lex rei sitae* rule alone is doubtlessly insufficient to cover the whole spectrum of situations related to property rights. In this regard, as will be described below, article 66 of the IADIP Draft Law also entails some special rules that take into account the legal developments that have taken place in relation to certain types of property.

successions. This provision does not limit the power of the owner of such property to enter into contracts valid in the other country, but the effects of such contracts, when they are to be performed in the Republic, shall be governed by its laws».

III.2 *Specific rules in article 66*

In article 66 of the IADIP Draft Law one finds four special rules regarding property in transit, property subject to security rights, ships, aircraft, and other means of transport, and publicity of acts of creation, transfer, and extinction of property rights. The second paragraph of article 66 states that: «The acquisition and loss, by legal acts, of rights over goods in transit are governed by the law of the state of destination». The application of the law of destination in this type of situation can be found in private international law codifications of different Latin American countries. In the Dominican Republic, for example, article 77 of the Private International Law Act provides a similar rule. This has been adopted in other countries, such as Switzerland (article 101, Swiss Federal Private International Law Act of December 18, 1987), Belgium (article 88, Belgian Code of Private International Law of July 16, 2004), and Korea (article 22, Korean Private International Law Act of 2001). And the same rule exists in Peru, where article 2089 of the Civil Code contains a slightly more detailed rule based on the application of the situs law (article 2088), which establishes that «tangible property in transit is considered to be located at the place of its definitive destination». It is also interesting to note that Peruvian law includes recognition of the autonomy of the parties with respect to property in transit. Indeed, the parties

> may submit the acquisition and loss of real rights over tangible goods in transit to the law that regulates the original legal act of the constitution or loss of such rights, or to the law of the place of shipment of the tangible goods.

However, the validity of the choice made by the parties is limited, since it produces inter partes effects, which is probably an influence of the Swiss Private International Law Act (article 104).

According to the third paragraph of article 66 of the IADIP Draft Law, «Movable property subject to security is governed by the law designated by the special rules on the subject». Thus, it refers to the special legislation on the matter. In this regard, it is worth noting that Colombia has been a party to the Unidroit Convention on International Interests in Mobile Equipment (Cape Town Convention, 2001) since 2007[22]. According to this Convention, the law applicable to the creation and effects of international interests in airframes, aircraft engines and helicopters;

22. Approved through Decree 4734-2007.

railway rolling stock; and space assets (article 2.3) is the law of the forum state (lex fori) (article 5.3). It is also relevant Act No. 1676 of 2013, that includes the *lex rei sitae* rule with respect to assets subject to security in article 83, according to which

> the law applicable to creation, third-party effectiveness, registration, priority and enforcement shall be the law of the state in which the property that is the object of the security interest is located.

This article also contains specific rules for certain situations that offer greater certainty, and thus serve the purpose of this Act, which consists of providing greater protection to the creditor[23]. Thus, the law of the place where the guarantor is located applies in case the property is used in more than one country (article 83, second paragraph), and the law of the place where the registration is made, in case the property is subject to a special registration (article 83, third paragraph).

Regarding the publicity of acts of creation, transfer, and extinction of property rights, article 66 of the IADIP Draft Law states in its last paragraph that this «is governed by the law of the state where the formalities of such publicity are carried out». Note that this rule is conceived in broader terms, so that it covers not only any type of property but also formalities of any kind.

Finally, it is worth highlighting that the specific conflict of laws rules of article 66 of the IADIP Draft Law also have a bilateral approach, insofar as they do not limit themselves to ordering the application of Colombian law but allow the applicability of foreign law. They are, therefore, more flexible, and modern than the general rule of article 20 of the Civil Code which, as mentioned above, was conceived in the 19th century and is still in force.

III.3 *Cultural property*

The international restitution of cultural property is considered in the IADIP Draft Law separately in article 68. This article reflects that the advantages of using the *lex rei sitae* rule are not uncontested regard-

23. R. Bejarano Guzmán, *Garantías Mobiliarias*, in *Ámbito Jurídico*, available at https://www.ambitojuridico.com/noticias/columnista-impreso/civil-y-familia/garantias-mobiliarias (last Access: June 27, 2023).

ing cultural property, since its special nature and a great value[24]. This was considered by the Constitutional Court of Colombia in case No. T-3.402.625, in which the Court was asked whether the government is obliged to take the necessary actions so that 122 pre-Columbian gold sculptures are returned by Spain to Colombia. In cases of these kinds, notwithstanding underlying challenges, there is a tendency to prefer the application of the law of the place of origin of the property (lex originis). Thus, the 1991 Resolution by the Institute of International Law entitled "The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage" says in article 2 that «The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country», and in article 3 that «The provisions of the law of the country of origin governing the export of works of art shall apply». The *lex originis* rule is followed, for example, in article 13 of Directive 2014/60/EU of the European Parliament and the Council, 15 May 2014, and in national laws of Bulgaria and Belgium[25]. Furthermore, national courts in several countries have examined the use of the *lex originis* rule in several cases: for instance, in England, Attorney General of New Zealand v. Ortiz (1983) and Iran v. Barakat (2007)[26]; in Italy, Ecuador v. Danus-

24. D. Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, in *Columbia Journal of Law and the Arts*, 32, 2008, 11-150; E. Jayme, *Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law*, in *International Journal of Cultural Property*, 6, 2, 1997, 376-378; K. Siehr, *Das IPR der Kulturgüter*, in *MHB Yil*, 22, 2001, 751-772; K. Siehr, *The Beautiful One Has Come - to Return*, in J.H. Merryman (ed.), *Imperialism, Art and Restitution*, Cambridge University Press, New York, 2006, 114-134; K. Siehr, *Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property*, in *Uniform Law Review*, 20, 2015, 503-515; S. Symeonides, *Choice of Law*, Oxford University Press, New York, 2016; M. Wantuch-Thole, *Cultural Property in Cross-Border Litigation. Turning Rights into Claims*, De Gruyter, Berlin, 2015; V. Wiese, *Der Bedeutungswandel der Situs-Regel im Internationalen Sachenrecht der Kulturgüter*, in *Kulturgüterschutz - Kunstrecht - Kulturrecht. Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars Kunst und Recht*, eds. K. Odendahl and P. Weber, Nomos Verlag, Baden-Baden, 2010, 83-100.

25. International Private Law Code of Bulgaria (2005, modified in 2009), article 70; International Private Law Code of Belgium (2004), article 90 (Symeonides, 2016; Wiese, 2010).

26. P. Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, in *The DePaul University College of Law, Technology, Law & Culture Research Series Paper*, No. 09-007, 2009, 21-48; M. Wantuch-Thole, *Cultural Property in Cross-Border Litigation. Turning Rights into Claims*, De Gruyter, Berlin, 2015.

so (1982)[27]; and in the United States, U.S. v. McClain (1989) and U.S. v. Schultz (2002)[28].

In article 68 of the IADIP Draft Law the *lex originis* rule regarding the international restitution of cultural property is included as follows:

If an object considered by a state to be part of its cultural heritage has left its territory in a manner that the law of that state considers illegitimate at the time of departure, the restitution requested by that state is governed by the law of that state or, at the choice of the latter, by the law of the state on whose territory the object is located at the time of the request for restitution.

In addition, article 68 recognizes the rights of good faith possessors:

If the law of the state that considers the property to be part of its cultural heritage does not grant protection to the possessor in good faith, the latter may invoke the protection granted by the law of the state in whose territory the property is located at the time of the request for restitution.

This shall be read together with article 4 of the 1995 Unidroit Convention on Stollen or Illegally Exported Cultural Objects, to which Colombia is a party, when dealing with cases related to other states parties to this Convention[29], and attention may be paid also to the rule proposed in article 4, paragraph 2, of the above-mentioned 1991 Resolution of the Institute of International Law.

27. L. Prott, *Witnesses to History. Documents and Writings on the Return of Cultural Objects*, Unesco, Paris, 2009; V. Wiese, *Der Bedeutungswandel der Situs-Regel im Internationalen Sachenrecht der Kulturgüter*, in K. Odendahl - P. Weber (eds.), *Kulturgüterschutz - Kunstrecht - Kulturrecht. Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars Kunst und Recht*, Nomos Verlag, Baden-Baden, 2010, 83-100.

28. P. Gerstenblith, *From Steinhardt to Schultz: The McClain Doctrine and the Protection of Archaeological Sites*, in J. Richman (ed.), *Legal Perspectives on Cultural Resources*, Altamira Press, Walnut Creek, 2004, 100-118. Together with the use of the *lex originis* rule, in this matter it is also considered the need for going beyond conflictual justice and seeking towards the satisfaction of material justice, which requires looking at the final result; cfr. J. Basedow, *El Derecho de las Sociedades Abiertas. Ordenación Privada y Regulación Pública en el Conflicto de Leyes*, Legis, Bogotá, 2017; S. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, in P. Borchers - J. Zekoll (eds.), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, Transnational Publishers, 2001, 125-140.

29. Ratified since December 1, 2012.

Finally, this article refers to property of cultural value to an indigenous people or community that is returned to Colombia. In this regard, the article states that such destination «is governed by the rules of that people or community, unless the said people or community decides that it should be governed by the law of the state of which it is a part». Thus, article 68 of the IADIP Draft Law recognizes the right of these peoples and communities to decide on such property, which is rooted in articles 11 and 12 of the 2012 United Nations Declaration on the Rights of Indigenous Peoples, which reflect «the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions», contained in article 5 of the same Declaration.

III.4 *Intellectual property*

Article 90 contains the only conflict-of-laws rule relating to intellectual property rights in the Draft IADIP Law. The first paragraph of this article establishes the *lex loci protectionis* rule as follows: «Rights relating to intellectual property are governed by the law of the state in which the intellectual property is claimed». In the absence of specific conflict-of-laws rules and since, as mentioned below, issues relating to contracts are dealt with separately, the *lex loci protectionis* rule would apply mainly to conflict of laws cases relating to non-contractual obligations. The scope of the first paragraph thus embraces questions regarding the protection of intellectual property rights, as well as limitations and exceptions, such as duration, exhaustion of rights and provisions on fair dealing in copyright. At first glance, the rule contained in the first paragraph of article 90 leads to a territorial approach. However, an interpretation in that direction should be avoided as excessively formalistic – particularly in cases regarding copyright, the protection of which is not even subject to registration - and consideration should be given to the application of the law of the place where protection is sought, and not necessarily the *lex fori*[30].

In the second paragraph, the article deals with contractual issues. Here, the IADIP Draft Law clearly distances itself from a strict territorial approach and offers space for the freedom of choice by means of a remission to Section Two of Chapter Fourteen: «Contracts relating to intellectual property shall be governed by the provisions on contractual obligations of this Law».

30. Cfr. A. Metzger, *Intellectual Property (IPL)*, in *Max-EuP 2012*, available at https://max-eup2012.mpipriv.de/index.php/Intellectual_Property (PIL) (last access: June 26, 2023).

III.5 *Mobile conflict*

Article 67 of the IADIP Draft Law, which deals with mobile conflict cases, reads as follows:

> The change of location of movable property does not affect the rights acquired under the law of the place where it was located at the time of its acquisition. However, such rights may be opposed to third parties only after the requirements of the law of the new situation have been fulfilled.

This solution, based on the respect of vested rights, has historical roots in Latin America. The 1889 Treaty of Montevideo on International Civil Law includes such a rule in articles 30 and 31, which also state the respect of the rights acquired according to the law of origin of the property.

III.6 *Jurisdiction*

The national procedural rules that are currently in force in Colombia do not refer to the competence of its national courts to decide on conflict of law cases, i.e., situations with relevant foreign elements. Because of the lack of such procedural norms, some authors[31] have argued that article 28 of the Code of Civil Procedure, which addresses domestic (non-international) cases, might be interpreted extensively covering also cross-border cases. Such an interpretation, nevertheless, does not eliminate the disadvantages linked to the lack of codified rules in this field, especially in view of the legal uncertainty that lies behind it. In this sense, the second paragraph of article 32 of the IADIP Draft Law contains the *forum rei sitae* rule as follows: «Matters relating to rights in rem over real property located in Colombia are considered matters of exclusive jurisdiction». The first paragraph of the article clarifies that

> The exclusive international jurisdiction of Colombian courts is of an exceptional nature, must be interpreted restrictively, and lacks jurisdiction over other matters that may arise with respect to the same subject.

31. V.H. Guerra Hernández, *Conflictos de Jurisdicción y Competencia en Derecho Internacional Privado*, in L. García Matamoros - A. Aljure Salame (coords.), *Teoría General del Derecho Internacional Privado*, Temis, Bogotá, 2016, 349-375.

Article 30, for its part, regulates the competence of national courts regarding conflict of laws cases related to universal property:

> Colombian courts will have jurisdiction to hear actions related to universal property if: 1. the domicile of the debtor is located in Colombian territory, or 2. assets that form an integral part of the universality are located in Colombia.

In addition, the second paragraph of article 95 entails the *forum rei sitae* rule in relation to statute of limitations, according to which extinctive prescription of actions «is governed by the law of the place where the property is located». Finally, it is worth mentioning that article 29 of the IADIP Law Project refers to international jurisdiction in intellectual property matters:

> Colombian courts shall have jurisdiction to hear actions relating to the protection of intellectual property when the defendant is domiciled in Colombia or, in the absence of domicile, when the protection is invoked before them.

IV. *Summary*

The conflict of laws rule of article 20 of the Civil Code of Colombia must be reviewed. It clearly includes, as has been seen, obsolete terms that, among other things, make the norm difficult to understand. Additionally, resorting to interpretation does not fully solve the underlying problem, which lies in the lack of clarity of its text and in its unilateral character. It thus limits the consideration of the application of a foreign legal system even when this would be the most appropriate in a specific case. Addressing this is needed, not only in terms of legal certainty but also in terms of justice. While essentially maintaining the tradition included in the Colombian Civil Code currently in force, the IADIP Draft Law takes several steps forward. It not only includes rules relating to international jurisdiction, but also clarifies how the applicable law is to be determined and considers developments in relation to different types of property, namely property in transit, property subject to security, cultural and intellectual property, as well as particular situations such as mobile conflicts and acquisitive prescription.

Claudia Madrid Martínez

Law Applicable to International Contracts

ABSTRACT: The inadequacy of the Colombian Private International Law is particularly evident in international contracts. Today, the acceptance of conflictual autonomy is the result of the interpretation of the gaps in the system made by scholars. Colombia ratified the Vienna Convention on Contracts for the International Sale of Goods, which contributes to modernizing the system, but outside its scope of application, international contracting remains in the hands of the rules contained in the 1889 Montevideo Treaties on International Civil Law and on International Commercial Law, the Civil Code of 1873 and the more recent ones contained in the Code of Commerce of 1971. For this reason, the contribution of the IADIP Draft General Law on Private International Law is fundamental, especially considering that Colombia has not ratified the Inter-American Convention on Law Applicable to International Contracts.
In this paper, I will analyze the rules of the Draft, regarding the acceptance and regulation of conflictual autonomy, the rules to determine the Law applicable in the absence of choice by the parties, and the special rules for consumer contracts and labor contracts. In addition, I will make a comparative analysis with the current system to show the advantages of this change, which, in addition to bringing the Colombian system in line with modern trends in comparative law, internally equates it with the solutions admitted in arbitration.

KEYWORDS: International contracts - Conflictual autonomy - *Lex mercatoria*

I. *Introduction*

The essential nature of the contract in international trade makes it an essential instrument for the internationalization of Colombian social and economic life. Unfortunately, the shortcomings of Colombian Private International Law are even more visible in this area. Indeed, with obsolete solutions and many gaps, Colombian scholars have had to be very careful

in order to establish the basis for conflictual autonomy and thus try to build coherent solutions for cases related to international contracting.

Although Colombia has ratified the Vienna Convention on Contracts for the International Sale of Goods (Vienna Convention)[1], there are many contracts that fall outside its scope of application and in relation to which it is necessary to resort to the conflict rules[2]. For this reason and bearing in mind the need to update the Colombian Private International Law, I will make a very brief review of the main Colombian Private International Law solutions, and then I will refer to the solutions of the Draft General Act on Private International Law prepared by the Instituto Antioqueño de Derecho Internacional Privado (IADIP).

II. *International contracts in the current Colombian Private International Law*

II.1 *International treaties in force in Colombia*

In addition to the Vienna Convention, which has been scarcely applied[3], Colombia has signed and ratified the treaties of Montevideo on Civil Law and Commercial Law, both of 1889[4] and the bilateral Treaty on Private International Law with Ecuador of 1903[5]. Despite the fact that the solutions of these treaties respond to a historical moment and are

1. Act 518 of 1999 (August 4), in *Official Journal*, Nr. 43.656, 5 August 1999.

2 . See: C. Madrid Martínez, *La contratación internacional en el Derecho internacional privado colombiano*, Tirant Lo Blanch, Ediciones UNAULA, Bogotá, 2021, 53-63.

3. Constitutional Court, Judgment C-529, 10 May 2000, constitutionality of the Vienna Convention; Supreme Court of Justice, Civil Chamber, Judgment 30 August 2011, File Nr. 11001-3103-012-1999-01957-01, *Luis Fernando González Luque vs. Compañía Nacional de Microbuses Comnalmicros S.A.* According to Mantilla Espinosa, it is not possible to know why the Vienna Convention has. Not been applied by the courts of instance, because it is not easy to get their decisions. Moreover, the time of the process in Colombia. In addition, the length of legal proceedings in Colombia, due to judicial congestion, is such that the first disputes filed after the Convention entered into force have probably not yet reached appeal. Additionally, it is not easy to access arbitral awards that, issued by arbitral tribunals in Colombia, have applied the Vienna Convention. See: F. Mantilla Espinosa, *La compraventa internacional de mercaderías*, en L.V. García Matamoros - A.A. Aljure Salame (eds.), *Estudios contemporáneos de Derecho internacional privado*, Universidad del Rosario, Legis, Bogotá, 2016, 43 ff., at 48-49.

4. Act 33 of 1992 (December 30), *Official Journal* Nr. 40.705, 31 December 1992.

5. Act 13 of 1905 (April 8), *Official Journal* Nr. 12.327, 14 April 1905.

therefore outdated – and, in fact, contribute little to the efficient working of Colombian Private International Law –, I will briefly examine their solutions before analyzing domestic Private International Law.

The Montevideo Treaty on International Civil Law, in Articles 32 and 33, states the application of the Law of the place of performance to the need for the contract to be in writing and to the quality of the document containing it; to the existence of the contract; to its nature; to its validity; to its effects; to its performance; and, in short, to everything that concerns the contract. The Montevideo Treaty also provides specific rules for certain specific types of contracts, for which it adopts solutions that suggest, according to scholars[6], that the drafters had the characteristic performance thesis in mind[7].

On the other hand, the Montevideo Treaty on International Commercial Law contains some scattered rules for specific contracts but does not provide for a general rule. For example, a company contract is subject to the Law of the commercial domicile of the company (Art. 4); land insurance contracts and carriage by inland waterways insurance contracts are governed by the law of the place where the subject matter of the insurance is located at the time of conclusion (Art. 8); contracts of affreightment are governed by the law of the domicile of the agency with which the charterer contracts (Art. 14); contracts of lend-lease are governed by the law of the place where the loan is made (Art. 16); and contracts for the

6. M.B. Noodt Taquela, *Reglamentación general de los contratos internacionales en los Estados mercosureños*, in D. Fernández Arroyo (coord.), *Derecho internacional privado de los Estados del MERCOSUR*, Zavalia, Buenos Aires, 2003, 979 ff., at 992.

7. Contracts on certain and individualized things are governed by the Law of the place where the things are at the time of the contract conclusion; those contracts dealing with things determined by their gender are governed by the Law of the debtor's domicile, at the time in which they were concluded; those contracts referring to fungible things, by the law of the debtor's domicile at the time of their conclusion; services contracts, if they affect things, are governed by the Law of the place where the things existed at the time of their conclusion; if their effectiveness is related to some special place, they are governed by the law of the place where they have to produce their effects; and outside of these cases, the law of the debtor's domicile at the time of the celebration of the contract is applied (Art. 34). Additionally, the exchange contract on things located in different places, subject to different laws, is governed by the law of the contracting parties' domicile at the time of the exchange, if common, and by the law of the place where the exchange was celebrated, if the domicile were different (art. 35); accessory contracts are governed by the law of the main obligation (art. 36); and those contracts concluded by mail or agent are governed by the law of the place from which the offer originated (art. 37).

adjustment of officers and seafarers are governed by the law of the place of conclusion (Art. 19).

I must emphasize that the 1889 Treaties of Montevideo did not reject conflictual autonomy as clearly as did the 1940 Treaties when Article 5 of the Additional Protocol provided that the jurisdiction and the law applicable according to these treaties cannot be modified by the parties unless authorized by the said law. Thus, Article 5 admits a strange kind of *renvoi*, when the law of the place of performance allows the application of the law chosen by the parties. However, the silence of the 1889 Treaties cannot be interpreted as favorable to conflictual autonomy, since it is clear, as Noodt Taquela acknowledges that they were inspired by the Savigny ideas in adopting the law of the place of performance to govern the contract[8].

Article IV of the Bilateral Treaty with Ecuador provides that the validity and effects of contracts concluded in the other Contracting State shall be governed by the law of the place where they were concluded; but if such contracts, by their nature or by agreement of the parties, are to be performed in the forum, they shall be subject to the *Lex fori*. In either case, performance is governed by the law of the forum.

This rule establishes a *dépeçage* by subjecting performance to the law of the place of performance; and validity and effects to the law of the place of conclusion, unless the place of performance coincides with the place where the courts hearing the dispute arising from the contract are located, in which case the law of the place of performance will apply. The agreement of the parties referred to in the rule is to choose the place of performance, not the applicable law, so there is no recognition of conflictual autonomy.

It is important to emphasize that, firstly, neither the Montevideo Treaties nor the Bilateral Treaty contains universality clauses that allow the application of the law of a non-party State; and, secondly, all the States party to both treaties, except for Bolivia, have also ratified the Vienna Convention. Thus, if it is a contract of sale that falls within the scope of application of the Vienna Convention, the latter will be applied by virtue of Article 1.1.b, since the rules of Private International Law of a State Party – Colombia – would be indicating the application of the law of a Contracting State.

Conflictual autonomy is recognized by three treaties in force for Colombia: two decisions of the Andean Community – Decision 398 on International Carriage of Passengers by Road and Decision 399 on International

8. M.B. Noodt Taquela, *op. cit.*, 991.

Carriage of Goods by Road, both of 17 January 1987[9] – and the Cape Town Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment of 16 November 2001[10], whose Article VIII.2[11] – which not only admits conflictual autonomy, but even voluntary *dépeçage* – was not subject to specific analysis when the Constitutional Court examined the constitutionality of the Protocol[12].

In short, except in the case of the Andean Community Decisions on international transport and the Cape Town Protocol, the treaties in force for Colombia are based on rigid connections that favor the application of the law of the place of performance of the contract, even allowing some interference with the law of the place of conclusion, a criterion whose real connection with the contract is nowadays questionable[13]. It is notable, however, the absence of approval and ratification of the Inter-American Convention on the Law Applicable to International Contracts (Inter-American Convention), which is only in force between Mexico and Venezuela.

Regarding the Inter-American Convention, the Inter-American Juridical Committee conducted a survey in 2015, and reported some reasons for the low ratification, among which the following were mentioned: problems arising from language discrepancies between the official texts, particularly in English and Spanish; the innovative and controversial conflict of laws principles which were problematic at the time of its adoption. Conflictual autonomy was a radical departure from the prevailing traditional approach; the proximity principle was an unknown concept, with no clear guidelines for its application. The references to *Lex mercatoria* were also

9 . Article 115 Decision 398 and Article 152 Decision 399 provide that any conflict or difference derived from the application or performance of an international transport contract, which does not involve *ordre public* rules of this Decision, will be governed by the law provided for in the contract. In the absence of an agreement, this Decision will be applied, and in matters not provided for, by the rules of applicable national law.

10. Act 967 of 2005 (July 13), *Official Journal* Nr. 45.979, 15 July 2005.

11. «The parties to an agreement, or a contract of sale, or a related guaranteed contract or subordination agreement may agree on the law, which is to govern their contractual rights and obligations, wholly or in part».

12. The Court only affirmed that the rule allows the States, in specific cases, to select a domestic law (Constitutional Court, Judgment C-276, 5 April 2006). The Court also highlights as a common principle of the Convention and the Protocol the recognition of the autonomy of the parties and their suitability.

13. The place of conclusion obeys more to the comfort of the parties than to a true need derived from the contract, with which it can be fortuitous. In addition, in the case of contracts concluded at a distance, common in international contracting, the problem of the characterization of that place is added.

considered problematic, with overly broad language and unclear scope; the absence of local proponents and lack of political will; and, regrettably, the lack of awareness of the Convention and its benefits[14]. In the case of Colombia, Rojas Tamayo believes that its non-ratification may be due to the scope of application of the Convention or the small number of States parties[15].

II.2 *Domestic Law*

Article 20 of the Civil Code[16] regulates property, using an unilateral rule, and it includes a reference to the contracts concluded abroad and the effects of these contracts. Thus, the first part of the rule assumes the *Lex rei sitae* principle to subject property to the law of the place where it is located[17]. The rule, however, is limited to those assets in which the State has a right or interest, without specifying which assets it refers to and which law is applicable to the others.

The second paragraph of the rule refers to contracts, by admitting that the submission of assets located in Colombia to Colombian law «shall be understood without prejudice to agreements contained in contracts validly concluded abroad». This rule has been interpreted as a recognition of the *locus regit actum* principle, and it was applied in the famous *Cuervo* case, by the Supreme Court of Justice in 1900[18].

In this case, the Court recognized a Private International Law rule that admits the application of foreign law when the formal validity of a contract is being determined, in which case it is necessary to consider the law in force in the place and at the time in which the contract is concluded. The

14. Comité Jurídico Interamericano, *Guía sobre el Derecho aplicable a los Contratos Comerciales Internacionales en las Américas*, Organización de Estados Americanos, Washington, 2019, 48-49. CJI/RES. 249 (XCIV-O/19), OEA/Ser. Q CJI/RES. 249 (XCIV-O/19) Rio de Janeiro, Brazil 21 February 2019. Available in: https://lc.cx/_ZonM9.

15. D. Rojas Tamayo, *El Derecho aplicable al contrato. Estudio comparado, crítico y prospectivo en Derecho internacional privado colombiano*, Universidad Externado de Colombia, Bogotá, 2018, 308.

16. Act 84 of 1873, (May 26), *Official Journal* Nr. 2.867, 31 May 1873.

17. Council of State, Decision 18 March 1971. The Council of State affirmed that Colombian Law applies to all legal relationships referring to assets located within the national territory. Cited in A. Zapata Dde Arbeláez, *El régimen jurídico de los contratos internacionales en Colombia*, in A. Zapata de Arbeláez (comp.), *Derecho internacional de los negocios. Alcances*, Universidad Externado de Colombia, Bogotá, 2010, Tomo III, 13 ff., at p. 18, footnote Nr. 3.

18. Supreme Court of Justice, 15 December 1900, in *Gaceta Judicial*, 1900, Tomo XV, Nos. 748-749, 121.

decision rightly affirms the need not to confuse the formal aspects of the contract with its effects.

However, this decision did not distinguish between contracts entered in Colombia and contracts entered abroad, something that was recognized in the *Tía* case, issued by the Civil Chamber of the Supreme Court of Justice in 1947[19]. In the *Tía* case, the Court understood that the principle was only applicable to contracts concluded abroad and that contracts entered in Colombia are subject to Colombian law, not because it is the law in force in the place of conclusion, but by virtue of the territoriality of law principle enshrined in Article 18 of the Civil Code[20].

In a similar sense, the Constitutional Court, in its decision C-249 of 2004, affirmed that the Article 20 of the Civil Code, based on the criterion of the place of conclusion of the contracts (*Lex loci contractus*) allows the application of foreign law to contracts validly concluded abroad if they do not deal with goods located in Colombia[21].

In any case, the solution of the second paragraph of Article 20 governs the form of the contract and, limiting the territoriality principle to contracts concluded in Colombia, regarding this subject the rule does not seem to depart from the general solutions of Comparative Law, except for the alternative character now attributed to the *locus regit actum* rule, which shares application with the law governing the substance or with the personal law of the contracting parties.

Finally, the third paragraph of Article 20 of the Civil Code provides that the effects of contracts, when they are to be performed in Colombia, or when they affect the rights and interests of the State, shall be subject to Colombian law. In the *Cuervo* case, the Court clarified that the rule admits that the effects of the contract that are to be fulfilled abroad are subject to foreign law. A similar conclusion was reached by the Constitutional Court in the judgment C-249 of 2004.

Now, the reference to the interest of the State – which does not appear in Article 16 of the Chilean Civil Code[22], the source of inspiration of the

19. Supreme Court of Justice, Civil Chamber, judgment 30 September 1947, in *Gaceta Judicial*, 1947, Vol. LXIII, Nos. 2053-2054, 35.

20. Civil Code, Art. 18: «The law is mandatory for nationals and foreigners that are residents in Colombia».

21. Constitutional Court, Judgment C-249, 16 March 2004, unconstitutionality of subsections 2, 3, and 4 of Article 13, Act 80 of 1993.

22. M.I. Vial Undurraga, *La autonomía de la voluntad en la legislación chilena de Derecho internacional privado*, in *Revista Chilena de Derecho*, 2013, Vol. 40, Nr. 3, 891 ff., at 895.

Colombian legislator – generates, according to scholars, a couple of problems for Colombian Private International Law: firstly, the lack of precision of the expression, since it is not clear in which cases the State has an interest, beyond the case of assets located in Colombia, and secondly, the law applicable to contracts in which the State does not have such an interest, since these do not seem to be included in that rule[23]. This kind of inaccuracies only complicates the Colombian Private International Law and makes it inoperative.

Now it is appropriate to refer to two rules found in the Colombian Commercial Code[24]. The first one, Article 869, subjects the performance of contracts concluded abroad and to be performed in Colombia to Colombian law. The second one is Article 1328, which subjects' commercial agency contracts to be performed in Colombia to Colombian law, which is close to the solution of Article 869. However, Article 1328 adds that «any agreement to the contrary shall be deemed not to have been written», an expression which seems to leave aside any possibility for the parties to choose a different law.

This restriction is based on the 1971 legislator's idea to establish a protectionist legal framework for local agents, giving them stability in their contractual relations and rights linked to the performance and termination of the agency contract[25], and the Supreme Court, in a 1995 judgment, justified this solution on *ordre public*[26].

To summarize, regarding these rules of the Commercial Code, the impossibility of admitting conflictual autonomy in the case of agency contracts seems clear. The same is not true for other commercial contracts, in relation to which scholars admit that the silence of Article 869 must be interpreted as favorable to the admission of conflictual autonomy[27].

II.3 *Conflictual Autonomy in Colombian Private International Law*

Although the lack of precision in Colombian domestic rules does not seem to favor the admission of conflictual autonomy, leaving the matter to the interpretation of the judge, some scholars, some regulations, and even Case Law seem to accept that the parties may choose the law applicable to

23. J. Oviedo Albán, *La Ley aplicable a los contratos internacionales*, in *Revista Colombiana de Derecho Internacional*, 2012, Nr. 21, 117 ff., at 131.
24. Decree 410 of 1971 (March 27), *Official Journal*, Nr. 33.339, 16 June 1971.
25. A. Zapata De Arbeláez, *op. cit.*, 33.
26. Supreme Court of Justice, Civil and Land Chamber, judgment 31 October 1995, File 4.701, *Sociedad Distrimora Ltda. vs. Shell Colombia S.A.*
27. J. Oviedo albán, *op. cit.*, 133-134; A. Zapata de Arbeláez, *op. cit.*, 36.

the contract. In fact, scholars construct a response based on Colombian Private International Law itself, or rather, based on its silences.

Thus, the ambiguous expression used by the second paragraph of Article 20 of the Civil Code – «This rule shall be understood without prejudice to the agreements contained in contracts validly concluded abroad» – has led some scholars to think that Colombian Private International Law admits the conflictual autonomy[28]. However, Article 20 also establishes that the effects of such contracts when they are to be performed in Colombia or when the State has an interest in the object of such contracts will be governed by Colombian law, with which the scope of the autonomy would be limited by the territoriality principle that characterizes Colombian law.

To bypass this limitation, Zapata has understood that the mandatory application of Colombian law must be limited to two cases: i. contracts concluded in Colombia, in which the State has an interest, and ii. contracts concluded abroad on property located in Colombia in whose ownership the State has an interest or right when their effects must be fulfilled in Colombia or affect the rights and interests of the State, in the latter case, regardless of where they are to be produced[29].

Rojas Tamayo disagrees, stating that this rule has never been used by Colombian courts as a basis for conflictual autonomy and has rather been invoked to deduce conflict rules with objective connecting factors from it, based on the territoriality principle. As a matter of fact, this rule was conceived at a time when the possibility for the parties to choose the applicable law was not even discussed[30].

The other argument for accepting conflictual autonomy is the silence of Article 869 of the Commercial Code, especially if it is confronted with the express prohibition of Article 1328 of the same Code in matters of agency, a rule which – as I stated above – after subjecting commercial agency contracts to be performed in Colombia to Colombian law, provides that any agreement to the contrary shall be deemed not to have been written. In the absence of such a prohibition in Article 869, it must be understood that the choice of a law other than Colombian law is valid, even if the contract is to be performed in Colombia[31].

28. See: J. Oviedo Albán, *op. cit.*, 131.
29. A. Zapata De Arbeláez, *op. cit.*, 21-22 and 26.
30. D. Rojas Tamayo, *op. cit.*, 306-307.
31. A. Zapata Giraldo, *Colombia*, in J. Basedow - G. Rühl - F. Ferrari - P. de Miguel Asensio (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Inc., Cheltenham, UK, 2017, 1981 ff., at 1987.

Zapata[32] bases the acceptance of conflictual autonomy in the framework of Article 869, firstly, on the recognition of the inappropriateness of applying local rules in matters of contracts. It does not seem reasonable to impose the pre-eminence of local rules on foreigners in a field that is particularly suitable for conflictual autonomy. Secondly, commercial rules are, in general terms, default rules, so that the mandatory application of local laws in a matter where the parties can modify the scope of certain rules and even exclude their application would not make sense.

I think that these first two reasons seem to be more linked to material autonomy in domestic law than to conflictual autonomy. It should be borne in mind that the internationality of the relationship does not lead to the application of foreign law automatically; it is necessary that a local conflict rule determines its application. The issue would rather focus on the analysis of whether the conflict rule allows the parties to choose the applicable law, and that chosen law may in fact be Colombian law. In the event that such a power is admitted, if the chosen law turns out to be foreign, it will displace the entire Colombian legal system, both its default rules and its mandatory rules. This is a fundamental difference with respect to material autonomy, which can do nothing against mandatory rules.

The third argument of Zapata is based on the internationality of the case, so that, as the contract is connected with several laws, it is appropriate to apply the one chosen by both parties. This would avoid problems of interpretation and the possibility of one of the parties imposing its law on the other. However, Zapata returns to the material perspective of autonomy in her fourth argument, stating that autonomy does not imply disregarding mandatory rules of protection. Indeed, this would only work in the case of overriding mandatory rules – *Lois de police*. Finally, Zapata relies on the acceptance of autonomy under the Vienna Convention and in international arbitration, as will be discussed below.

Rojas Tamayo, however, does not agree with accepting conflictual autonomy in the framework of Article 869. In his opinion, the model that served the legislator to issue this rule was the heading of Article 25 of the Preliminary Provisions to the Italian Civil Code, a rule that orders the application of the common national law of the parties and, in its absence, the law of the place of performance would be applied. Then Article 25 provides: «È salva in ogni caso la diversa volontà delle partile». However, the Colombian legislator preferred the law of the place of performance

32. A. Zapata de Arbeláez, *op. cit.*, 31-35.

and omitted any reference to the contrary will of the parties, which must be understood as a deliberate rejection of the conflictual autonomy[33].

The consideration of Private International Law by courts contrasts with what happens in arbitration, where there are no doubts regarding the acceptance of conflictual autonomy. In Judgment C-347 of 23 July 1997[34], which analyzed the constitutionality of articles 1 (partial) and 4 (partial) of the repealed Act 315 of 1996, which regulated international arbitration[35], the Constitutional Court considered that in commercial and international disputes, there is a rule that respects the internal supremacy of States and their independent and equal character at the international level: the power to choose the applicable law. This was the principle enshrined in Article 2 of the aforementioned Act 315 of 1996[36], and it is currently contained in Article 101 of Act 1563 of 2012, which establishes the Statute of National and International Arbitration[37], a rule according to which the arbitral tribunal shall decide in accordance with the "rules of law" chosen by the parties.

Considering this rule, Gaviria Gil has understood that the parties can choose several legal systems to govern the dispute so that *dépeçage* would be admitted; and, according to the author, the parties could even choose *Lex mercatoria*. As I have argued on other occasions, the rule would also exclude *renvoi* by establishing a direct reference to the substantive rules of the chosen law[38].

Colombian Private International Law also had no problem accepting autonomy within the framework of the Vienna Convention. This is demonstrated by the decision on the constitutionality of the Convention taken by the Constitutional Court, in which one of the grounds for endorsing the ratification of the Convention was the acceptance of autonomy in Article 6. It should be noted that Article 6 even allows the Convention to be excluded by the choice of law of a State which has not ratified it[39].

33. D. Rojas Tamayo, *op. cit.*, 307.

34. Constitutional Court, judgment C-347, 23 July 1997, unconstitutionality against Articles 1 (partial) and 4 (partial) of Act 315 of 1996.

35. *Official Journal*, Nr. 42.878, 16 September 1996. Derogated by Article 118 Act 1563 of 2012.

36. Art. 2: «[…] the parties are free to choose the rule under which the arbitrators will decide the dispute […]».

37. *Official Journal*, Nr. 48.489, 12 July 2012.

38. J.A. Gaviria Gil, *Comentarios sobre las nuevas normas colombianas en materia de arbitraje internacional*, in *Revista de Derecho Privado, Universidad Externado de Colombia*, 2013, No. 24, 59 ff., at 265-266.

39. Constitutional Court, judgment C-529, 10 May 2000.

Case Law has also contributed to the acceptance, albeit limited, of conflictual autonomy. Thus, in Judgment C-249 of 2004, cited above, referring to Article 13 of Act 80 of 1993 (General Statute of Public Administration Contracting)[40], the Constitutional Court stated that:

based on the criterion of the place of performance of contracts (Lex loci solutionis), the rule leaves it to the parties'discretion to apply foreign law in the performance of contracts signed abroad, provided that such performance is not carried out in Colombia […], the foreign law is only applicable to the performance abroad of a contract also concluded abroad.

Rojas Tamayo criticizes this decision, highlighting its gaps, particularly regarding to the law applicable to the form and perfection of the contract, and the fact that some hypotheses, such as the conclusion and performance of the contract in different foreign States, have not been regulated. This judgment, moreover, seems to extend its reasoning to contracts between private parties, even though it is analyzing contracts with the State[41].

In any case, as I stated above, scholars usually base conflictual autonomy on the silence of article 869 of the Commercial Code, but this rule is not even cited in the decisions that admit this solution. This can be seen in the 2002 decision of the Superior Court of Bogotá in which the judge stated that Colombian law «[…] tolerates the submission of certain contracts to other laws […]», without specifying either the basis for such tolerance or which are those "certain contracts" in which the choice of a foreign law would be admitted[42].

The Civil Chamber of the Supreme Court of Justice has also recognized the choice of law clauses. It did so, in a tutela decision against a court order in 2002. In this decision, the Court distinguished *forum* and *ius* to reject the will of the parties in the choice of forum and admit it in the choice of law. This implies, moreover, that the fact that a particular law is applicable does not automatically lead to the jurisdiction of the courts of that State, nor vice versa[43].

40. Act 80 of 1993 (October 28), *Official Journal*, Nr. 41.094, 28 October 1993.
41. D. Rojas Tamayo, *op. cit.*, 300-301.
42. Superior Court of the Judicial District of Bogotá, Civil Chamber, judgment 27 March 2009, File Nr. 242001429 01, 30 April 2002, *Ace Seguros, S.A. vs. Gecolsa, S.A. et al.*
43. Supreme Court of Justice, Civil Chamber, judgment 18 April 2002, File T-1100122030002002-0109-01.

In 2016, the Supreme Court decided a case related to the recognition of an award rendered by an arbitration court based in Houston, which applied the rules of the International Chamber of Commerce to the procedure and the law of the State of Texas, which was the law chosen by the parties for the agency contract. Despite admitting that Article 1328 of the Commercial Code is a rule of *ordre public* of protection, the Court preferred to apply Article 101 of Act 1563 of 2012, understanding that the application of Article 1328 is not justified in matters of international arbitration, since in arbitration the parties are free to choose the applicable law[44].

Although there is a certain favorable trend in Colombian Private International Law regarding the admission of conflictual autonomy, some authors are not very optimistic about it. This is the case of Zuleta Londoño, who, after examining the Colombian system, concludes that conflictual autonomy "is today lost in a universe of constitutional pronouncements whose ultimate result gives the impression of being a prohibition of its occurrence". Such confusion seems to advise the parties to refrain from exercising such power[45].

II.4 *Brief reference to the* Lex mercatoria

In Comparative Law there is a certain reticence regarding the application of the *Lex mercatoria*. Among the systems that admit its application, there are some that admit it through conflictual autonomy – such as Venezuela or Paraguay –, and those that admit it as a contractual clause by incorporation – whose validity is subject to the law governing the contract – such as Argentina. In the case of Colombian Private International Law, there is also a notable difference in this matter depending on whether the matter is brought before a court or an arbitral tribunal.

Indeed, regarding arbitration, Article 101 of Act 1563 of 2012 refers to "rules of law", a very common expression in the world of arbitration and

44. Supreme Court of Justice, Civil Chamber, judgment Nr. SC8453-2016, 24 June 2016, Request for recognition of the final partial arbitral award issued on 31 March 2014 by the International Court of Arbitration of the International Chamber of Commerce, Houston, Texas, United States of America, promoted by HTM LLC.

45. This is the so-called publicist approach of Colombian Case Law referred to by Rojas Tamayo. See: D. Rojas Tamayo, *op. cit.*, 302-303.

understood as a reference to the *Lex mercatoria*[46]. Thus, the rule admits the possibility of applying *Lex mercatoria* by means of conflictual autonomy and even by determination of the judge in the absence of choice of law by the parties.

It is fair to acknowledge that, prior to the enactment of Act 1563 of 2012, arbitration practice already admitted the application of the *Lex mercatoria*. Indeed, in addition to some awards of the Conciliation and Arbitration Center of the Chamber of Commerce of Bogota in which the UNIDROIT Principles are cited as Comparative Law, there are several awards in which these Principles have been applied to govern the specific case.

Thus, the UNIDROIT Principles have been applied to the right to receive interest in the event of non-performance of joint venture contracts[47]; to the obligation of cooperation between the parties to an agency contract[48]; to the interpretation of an energy supply contract[49]; to the characterization of the type of contract[50]; to the unilateral determination of the price in a contract for the removal of waste material from a mine[51]; to the duty to cooperate in a contract for the maintenance of facilities[52]; to the applicability of hardship in a concession contract for the construction of highways[53]; to the termination in case of breach of a

46. J. Oviedo Albán, *Contratación y arbitraje internacional*, Tirant Lo Blanch, Bogotá, 2022, 187.

47. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 10 May 2000, *Guillermo Alejandro Forero Sáchica vs. Consultoría Óscar G. Grimaux y Asociados, SAT, and Citeco Consultora S.A.*, in https://lc.cx/77Hu01.

48. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 12 July 2004, *Intercelular de Colombia S.A. vs. Bellsouth de Colombia S.A.*, in https://lc.cx/QlMGmj.

49. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 21 October 2004, *Empresa de Energía de Boyacá S.A. E.S.P. vs. Compañía Eléctrica de Sochagota S.A. E.S.P*, in https://lc.cx/aVp3Fo.

50. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 11 November 2005, *Compañía de Remolcadores Marítimos S.A. (Coremar, S.A.) vs. Rosales S.A.*, in https://lc.cx/rGczrJ.

51. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 30 November 2005, *Sociedad Colombiana de Construcciones (SOCOCO S.A.) vs. Carbones del Cerrejón LLC*, in https://lc.cx/CcGTK8.

52. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 5 March 2007, *Construcciones C.F. Ltda. vs. Banco de la República*, in https://lc.cx/B2xzVl.

53. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 1 September 2008, *Consorcio Arabia vs. Instituto Nacional de Vías (INVIAS)*, in https://lc.cx/bgMMEE.

supply contract[54]; to the interpretation of a partnership contract[55], among others[56].

Outside of arbitration, scholars[57] have tied the *Lex mercatoria* to Article 7 of the Commercial Code[58], a rule that refers to international commercial treaties not ratified by Colombia, international commercial custom, and the principles of commercial law, sources whose application depends on the existence of a gap, if they are in accordance with the Law[59].

The consideration of non-ratified treaties, as recognized by Case Law, is because they

> […] surely contain principles or practices of commercial law, of universal recognition, or at least very generalized, which are the summary of valid experiences for commercial relations. The fact that in order to solve certain cases or questions and when the national real and formal sources are not suitable, they can be used by the contracting parties or by the Judge does not mean a breach of the Constitution[60].

This first source could give rise to the *Lex mercatoria*. Consider, for example, that the Vienna Convention contains solutions that can be char-

54. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 11 June 2008, *Jairo Gómez Rueda vs. PRODAIN, S.A.*, in https://lc.cx/Ie25aS.

55. Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 18 June 2009, *Ecopetrol S.A. vs. Hupecol Caracara LLC and Cepsa Colombia S.A. (CEPCOLSA)*, in https://lc.cx/9F5X_i.

56. Even in state contracting, despite the contrary opinion of some scholars (E.I. León Robayo, *Principios y fuentes del Derecho comercial colombiano*, Universidad Externado de Colombia, Bogotá, 2015, 251-252) there have been cases of application of the UNIDROIT Principles. See: Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 5 March 2007, *Construcciones C.F. Ltda. vs. Banco de la República*, in https://lc.cx/9F5X_i; Conciliation and Arbitration Center of the Chamber of Commerce of Bogotá, Award 1 September 2008, *Consorcio Arabia vs. Instituto Nacional de Vías (INVIAS)*, in: https://lc.cx/8fCwFZ.

57. C.M. Mira González, *La* Lex mercatoria *como fuente del Derecho internacional*, in *Revista CES / Derecho*, 2013, Vol. 4, Nr. 2, 48 ff.

58. «International trade treaties not ratified by Colombia, international trade custom meeting the conditions of Article 3, as well as the general principles of commercial law, may be applied to commercial issues that cannot be resolved according to the preceding rules».

59. M. Rodríguez Fernández, *Reconocimiento de la* Lex mercatoria *como normativa propia y apropiada para el comercio internacional*, in *Revist@ e-Mercatoria*, 2012, Vol. 11, No. 2, 45 ff., at 72.

60. Supreme Court of Justice, Plenary Chamber, 6 December 1972.

acterized as *Lex mercatoria* for States that have not ratified it[61], a view that would also find support in a couple of Awards of the International Chamber of Commerce[62] and in the Legal Guide to Uniform Instruments in the Area of International Commercial Contracts with a focus on Sales, jointly developed by UNCITRAL, UNIDROIT and the Hague Conference on Private International Law[63].

In addition, in a decision of 16 December 2010, the Civil Chamber of the Colombian Supreme Court of Justice applied the Convention to fill the gaps in Colombian law with respect to the obligation to mitigate damages, enshrined in Article 77 of the Vienna Convention, even though in this case the Convention was not formally applicable[64].

Secondly, Article 7 of the Commercial Code refers to the international commercial custom which, according to Castro de Cifuentes, contains «[…] trade usages observed by several nations, and which reflect their wide acceptance by consensus and their binding nature (*opinio iuris necessitatis*)»[65]. The consideration of this source depends on the fulfillment

61. That is my opinion expressed in: C. Madrid Martínez, *Venezuelan Contracts - domestic and private international - Law and the Vienna Convention on International Sales of Goods*, in I. de Aguilar Vieira - G. Cerqueira (eds.), *La Convention de Vienne en Amérique. 40e anniversaire de la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, Société de Législation Comparée, Paris, 2020, 301 ff. See also: M.F. Vásquez Palma - Á. Vidal Oliveros, *Diálogos entre la Convención sobre la Compraventa Internacional de Mercaderías y la* Lex mercatoria, in *Revista de Derecho Privado, Universidad Externado de Colombia*, 2018, Nr. 34, 233 ff., at 258-266.

62. Indeed, in a case decided in 1994, although the Vienna Convention applies because it is in force between the States involved, it is recognized that the Convention contains «[g]eneral principles of international commercial practice, including the principle of good faith…», that must be applied to the case (ICC Arbitration Case Nr. 7331 of 1994, *Cowhides*, in https://lc.cx/1dAJvR). In 1996, the arbitrators applied the Vienna Convention on the understanding that the parties'references to the INCOTERMS and to the rules on documentary credit gave rise to the understanding that «[…] this question should be examined in light of generally admitted principles of international trade as contained for example in international treaties […]», and therefore applies the Vienna Convention, considering that it contains «[…] widely accepted trade usages and commercial rules […]» (ICC Arbitration Case Nr. 8502 of 1996, *Rice*, in https://lc.cx/-fqJyq).

63. UNCITRAL - HCCH - UNIDROIT, *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales*, United Nations, Vienna, 2021, 13, par. 46.

64. Supreme Court of Justice, Civil Chamber, judgment 16 December 2010, File 11001-3103-008-1989-00042-01, *Marítimas Internacionales Limitada vs. Caja de Crédito Agrario Industrial y Minero, and Distribuidora Petrofert Limitada*.

65. M. Castro De Cifuentes, *Derecho comercial: actos de comercio, empresas, comerciantes y empresarios*, Ediciones Uniandes / Temis, Bogotá, 2016, 176.

of the requirements established by Article 3 of the same Code, i.e., the custom must not manifestly or tacitly contradict the law; and the facts constituting it must be «[…] public, uniform, and reiterated in the place where the services are to be rendered or the relations to be regulated by it have arisen». Together with these objective elements – although the rule does not expressly refer to it – it must be understood that the *opinio iuris* is also necessary so that the binding nature of the custom would derive from the conviction that, by complying with it, a rule of law has complied with[66].

Commenting on Article 7 of the Commercial Code, León Robayo states that the international commercial custom originates and is observed in identical and successive business transactions entered into in commercial relations between nationals of several States and, due to the economic globalization and the increase of commercial relations, it will transcend its subsidiary character to become a true source to be taken into account, both to create rules and to regulate important commercial matters. But nowadays, this source seems to maintain its supplementary function, whose application depends on the silence of the law[67].

Let us bear in mind, in any case, that the subjective element that defines custom[68] is not present in the *Lex mercatoria*, characterized, precisely, by not having a binding character *ex proprio vigore*. This element makes it difficult to understand the reference made to international trade custom in Article 7 of the Commercial Code including the *Lex mercatoria*[69].

However, the Supreme Court of Justice has also resorted to the *Lex mercatoria*, so far, in three cases in which the UNIDROIT Principles have been applied[70]. Additionally, in a decision issued in 2008, although it does

66. E.I. León Robayo, *op. cit.*, 133-134.

67. M. Castro de Cifuentes, *op. cit.*, 177.

68. This element has been recognized by Case Law. See: Constitutional Court, Plenary Chamber, judgment C-224, 5 May 1994, unconstitutionality of Article 13 of Act 153 of 1887.

69. León Robayo mentions, within these principles, the customary formation of Commercial Law, the tendency to internationalization, the professional nature of commercial activity, specialty, freedom of enterprise, priority, legal analogy, expansiveness, commerciality, opposability and unenforceability regarding third parties, indivisibility of the faith due to the books of the entrepreneur, consensuality, passive solidarity, hardship, mass acts, non-abuse of rights, non-unjust enrichment and good faith. E.I. León Robayo, *op. cit.*, 169-170.

70. E.I. León Robayo (2015), *op. cit.*, 270-280. See also: Id., *La nueva* Lex mercatoria *en el Derecho latinoamericano de contratos*, Universidad del Rosario, Tirant Lo Blanch, Bogotá, 2019, 185-193.

not properly apply the *Lex mercatoria*, the Supreme Court recognized the importance of the «new forms of regulation of commercial relations»[71].

Now, in a first decision, issued in 2011, the Civil Chamber reiterated the importance of the *Lex mercatoria*, and in analyzing the validity of a liability exoneration clause, to guarantee a minimum compensation to the victims of the damage, the Court interpreted article 1644 of the Colombian Civil Code, in the light of the UNIDROIT Principles (art. 7.1.6), the Rotterdam Rules (art. 6) and the Hamburg Rules (arts. 59 to 61), as «[…] a reflection of the trends of the matter in legal transactions […]»[72].

Secondly, in view of the silence of Colombian law on unilateral termination of the contract, the Civil Chamber refers again to the UNIDROIT Principles, whose solution on this point is evidence of a «[…] real and undeniable trend in contracting […]»[73].

Finally, in 2012[74], the Civil Chamber of the Supreme Court of Justice recognized, referring to the UNIDROIT Principles, that «[…] the parties may regulate the international commercial contract by its rules […]». However, the Chamber did not provide a normative basis for this. In this case, the Court applied hardship in a loan contract between a bank and two Colombian nationals who alleged changed circumstances resulting from the 1998 crisis in Colombia. The Court recognized the usefulness of the *Lex mercatoria* «[…] to appreciate the modern orientation […]» and, referring specifically to the UNIDROIT Principles, the Court recognized their normative function, whereby

> the parties may regulate the international commercial contract by their rules, in which case, they apply in preference to the non-mandatory national law, and the judge in his/her discrete hermeneutic work of the law or the legal transac-

71. Supreme Court of Justice, Sala Civil, judgment 1 July 2008, File Nr. 2001-00803-01, *Mónica Adriana Matajira Santos et al. vs. Corporación Grancolombiana de Ahorro y Vivienda Granahorrar (today Granahorrar Banco Comercial S.A.) and Rafael Francisco Navarro Diazgranados*.

72. Supreme Court of Justice, Sala Civil, judgment 1 August 2011, File Nr. 11001-3103-026-2000-04366-01, *Compañía Suramericana de Seguros S.A. vs. Compañía Transportadora S.A.*

73. Supreme Court of Justice, Sala Civil, judgment 30 August 2011, File Nr. 11001-3103-012-1999-01957-01, *Luís Fernando González Luque vs. Compañía Nacional de Microbuses Comnalmicros S.A.*

74. Supreme Court of Justice, Sala Civil, judgment 21 February 2012, File Nr. 11001-3103-040-2006-00537-01, *Rafael Alberto Martínez Luna and María Mercedes Bernal Cancino vs. Granbanco S.A.*

tion, may refer to them to interpret and integrate international instruments and domestic legal rules.

Although the Court has not ruled again on the matter, the value of this last decision remains and allows affirming the favorable view of Colombian law towards the *Lex mercatoria* and even towards conflictual autonomy.

III. *Reform of Colombian private international law*

This brief overview makes evident the need to renew the Colombian Private International Law, which is nothing more than an obsolete set of rules[75] that creates more difficulties than coherent solutions for private international relationships[76]. This regulatory scenario contrasts Colombia's current growth and development. It is not in vain that Zapata has stated that the Colombian system lacks articulated legislation. In her opinion, a complete and updated regulation must be adopted that is compatible with the growing social and economic internationalization of the country[77].

This, in fact, seems a good time for Colombia to explore the adoption of international contracts solutions. Its membership in the Organization for Economic Co-operation and Development (OECD), an organization that encourages its member States to improve «[…] the quality of regulation for business and citizens […]»[78] could provide an impetus for such an initiative.

A renewal of the Colombian Private International Law in this sense should begin with the express recognition of conflictual autonomy. This is the idea that IADIP has had in mind with the Draft General Act on Private International Law for Colombia (2021), as I will analyze below. But first, it should be mentioned, albeit briefly, the initiative of the Facultad de Derecho, Ciencias Políticas y Sociales of the Universidad Nacional de Colombia and its Draft Civil Code of Colombia[79], which includes rules

75. A. Zapata Giraldo, *op. cit.*, 1981.
76. D. Rojas Tamayo, *op. cit.*, 69.
77. A. Zapata Giraldo, *op. cit.*, 1983.
78. Organisation for Economic Co-Operation and Development, *Roadmap for the accession of Colombia to the OECD Convention* (Adopted by Council at its 1285th session on 19 September 2013), in https://lc.cx/AkAqpO.
79. Facultad de Derecho, Ciencias Políticas y Sociales, *Proyecto de Código Civil de Colombia - Primera versión: Reforma del Código Civil y su unificación en obligaciones y contratos con el Código de Comercio*, Universidad Nacional de Colombia, Bogotá, 2020, 45.

of Private International Law under the anachronistic title of "conflict of laws in space". Both the Draft Civil Code and the IADIP Draft accept, in contractual matters, the validity of conflictual autonomy.

III.1 *Draft Civil Code of Universidad Nacional de Colombia*

The second paragraph of Article 27 of the Draft Civil Code provides that, unless prohibited by law, contracts shall be governed by the law expressly chosen by the parties, provided that such law has some connection with the contract. Although this rule accepts conflictual autonomy, it does so in a very limited manner and contrary to current developments in Comparative Law. Indeed, the rule requires that the choice of the applicable law be express - without referring to the possibility of a tacit choice - and that the chosen law must necessarily have a connection with the contract. This need for a connection has been rejected in Comparative Law and has been expressly rejected by the Hague Principles on Choice of Law in International Commercial Contracts[80].

In the absence of choice by the parties, Article 27 provides for the application of the law of the domicile of the benefactor in the case of charitable contracts. In other contracts, when the place of performance cannot be determined, the law of the place of conclusion shall apply and, vice versa, when the place of conclusion cannot be determined, the law of the place of performance shall apply. This solution is based on Article 21 of the Draft Civil Code of Valencia Zea[81] and reflects the fact that its general solution, in Article 20, provided for the application of the law of the place of conclusion of contract[82]. Moreover, Article 27 does not establish anything regarding the *dépeçage*, the moment of the election and the possibility of its modification, the validity of the choice of law agreement and its severability, or the exclusion of *renvoi*, among other important issues.

Also of interest regarding international contracts is Article 707. This rule provides that in case of sales, when one party has his/her place of

80. The Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts*, 2015, in https://lc.cx/y_Eees.

81. A. Valencia Zea, *Proyecto de Código Civil*, Superintendencia de Notariado y Registro, Bogotá, 1980, 75.

82. Although the National University Draft has no explanatory memorandum, in a note addressed "to the distinguished reader", it is recognized that the project is "inspired" by the Valencia Zea Draft. See: Facultad de Derecho, Ciencias Políticas y Sociales, *op. cit.*, 2.

business in Colombia and the other abroad, or when the place of performance of a substantial part of the obligations is more closely related to a different State, or when the parties provide for the application of Private International Law rules, the rules of international contracting shall apply. Regarding this rule, it is not clear if the term "international contracting rules" must be understood as a reference to the Vienna Convention, and if so, it is also unclear why the rule exceeds the scope of application of the Vienna Convention.

Some scholars consider that Article 707 intends to include the Vienna Convention in national law[83]. Others understand correctly that the rule is inconvenient and incurs several inaccuracies, including the criteria used for the characterization of the contract as international and the possibility for the parties to internationalize the contract by providing for the application of Private International Law rules[84].

Even though the rules on international contracts contained in this Draft Civil Code constitute some progress, they still show some delay by not considering the advances that have been made in this area and that have been adopted by the most modern codifications in Comparative Law.

III.2 *The IADIP Draft*

To fulfill the need to update Colombian Private International Law, adapting it to the developments of Comparative Law, particularly in the Inter-American context, without leaving aside the country's own tradition, the IADIP Draft has formulated, in Section Two of Chapter Fourteen, a regulation for international contracts that begins by distinguishing between freely negotiated contracts and those not bilaterally negotiated[85]. Within the latter, the Draft deals with labor contracts and consumer contracts.

83. M.J. Ochoa Jiménez, *Las normas de Derecho internacional privado: observaciones al Proyecto de Código Civil de la Universidad Nacional de Colombia*, in *Revista de Derecho Privado, Universidad Externado de Colombia*, 2021, Nr. 41, 373 ff., at 393.

84. J. Oviedo Albán, *La Ley aplicable a los contratos internacionales en la propuesta de Código Civil de la Universidad Nacional*, in *Reflexiones Críticas sobre la propuesta de Código Civil presentado por la Universidad Nacional de Colombia* (Red Colombiana de Profesores de Derecho Privado), Tirant Lo Blanch, Bogotá, 2020, 35 ff., at 39-40.

85. See: C. Madrid Martínez, *Los contratos no bilateralmente negociados: más allá del consumidor*, in D. Fernández Arroyo - J.A. Moreno Rodríguez (dirs.), *Contratos internacionales*, ASADIP, Departamento de Derecho Internacional de la Secretaría de Asuntos Jurídicos de la OEA, Buenos Aires, 2016, 437 ff.

With respect to free discussion contracts, with an evident influence of the Inter-American Convention on the Law Applicable to International Contracts and the Hague Principles, Article 73 of the Draft provides as follows:

The contract is governed by the law chosen by the parties. The parties may choose:
1. The law applicable to the whole contract or to a part of the contract; or
2. Different laws for different parts of the contract.
The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not affect its formal validity or the rights of third parties.
No connection is required between the law chosen and the parties or their transaction.

This rule takes up the main statements recognized by Comparative Law: the admission of voluntary *dépeçage*, the possibility of choosing the law at any time during the life of the contract; the power to modify the chosen law while preserving the formal validity of the contract and the rights of third parties. Following the solution of the Hague Principles, this rule does not require any link between the contract and the chosen law, which in turn represents a change with respect to the Draft Civil Code of the Universidad Nacional.

The conflictual autonomy is complemented by the possibility of choosing, as the law applicable to the contract, rules of law that are generally accepted on an international, supranational, or regional level as a neutral and balanced set of rules (Art. 74), in a clear reference to the *Lex mercatoria* – already accepted by scholars and Case Law. Moreover, the choice of applicable law, or its modification, may be express or tacit, i.e., clearly resulting from the provisions of the contract or from the circumstances. The IADIP Draft, in line with Article 7 of the Inter-American Convention, provides that the choice of a court or arbitral tribunal does not imply the choice of the applicable law (Art. 75), so the rule according to which *quid eligit iudice eligit ius* is set aside.

Concerning the formal validity of the choice, unless the parties provide otherwise, the IADIP Draft does not require a particular form (Art. 76). The determination of whether the parties agreed on a particular choice is subject to the law presumed to have been chosen by the parties, *Lex hipothetici contractus*, but the determination of whether each party expressed it will depend on the law of its own domicile (Art. 77).

Finally, for the assessment of the choice when both parties use standard terms – a situation known as a "battle of forms" – the Draft as-

sumes the solution of the Hague Principles (Art. 6.1.b), with a rule that establishes two hypotheses: according to the first, in the event that the general contracting conditions used by the parties refer to different laws that recognize the prevalence of such conditions, this reference will be taken into account. According to the second hypothesis, the parties have chosen different laws containing different solutions, in which case it will proceed as if there had been no choice (Art. 78).

The IADIP Draft, recognizing the tradition of Colombian Private International Law, provides, in Article 79, that in the absence of choice or in case of ineffective choice, the law of the place of performance of the obligation in dispute shall apply. It may be advisable, with respect to this rule, to rethink the solution it contains and consolidate, as the Paraguayan legislator did, an approach to the Inter-American Convention and its principle of proximity[86].

In any case, whether it is the law chosen by the parties or the law of the place of performance of the contract, *renvoi* is excluded, since according to Article 80, references in these rules to "law" shall be understood as references to the law in force in a State, excluding its conflict of law rules.

Another innovation of the IADIP Draft is the determination of the scope of application of the *Lex contractus*. Indeed, with a marked influence of Article 14 of the Inter-American Convention, Article 81 of the Draft provides that the law applicable to the contract will mainly regulate its interpretation; the rights and obligations of the parties; the performance of the obligations established by the contract and the consequences of the breach of the contract, including assessment of damages; the various ways of extinguishing obligations, including prescription and limitation periods; and the consequences of nullity or invalidity of the contract. In line with the Hague Principles, the rule adds the burden of proof and legal presumptions; and pre-contractual obligations.

Regarding labor contracts[87], the IADIP Draft separates from the current solution, which provides for the application of Colombian labor law throughout the Colombian territory to all its inhabitants, regardless of their nationality (Art. 2 of the Substantive Labor Code[88]) and admits

86. See: M.M. Albornoz, *Une relecture de la Convention interaméricaine sur la loi applicable aux contrats internationaux à la lumière du règlement 'Rome I'*, in *Journal du Droit International*, 2012, Nr. 1, 4 ff.

87. See: N.R. Ordóñez Penagos, *Controversias laborales con elementos extranjeros en el derecho colombiano*, in *Misión Jurídica*, 2018, Vol. 11, Nr. 15, 235 ff.

88. *Official Journal* Nr. 27.622, 7 June 1951.

conflictual autonomy (Art. 82). This solution is not entirely unknown to Colombian law, since in 2017 the Labor Chamber of the Supreme Court[89], although it did not expressly admit conflictual autonomy, did not question the argument of the court of instance that applied Swiss law, as it had been chosen by the parties in a labor contract.

Under the IADIP Draft, the choice will have no effect in labor matters if it leads to a law that deprives the employee of the protection afforded by the overriding mandatory rules of law applicable in the absence of choice. The same rule allows that, in the absence of a choice of law, labor contracts may be governed either by the law of the State in which the employee, in performance of the contract, habitually carries out his work, even if he/she has temporarily begun work in a different State; or by the law of the place of business where the employee is employed, provided that he does not habitually carry out his work in the same State.

Finally, in the case of consumer contracts, the IADIP Draft fills a gap in Colombian Private International Law, which leaves the consumer exposed to the application of the general rules on the determination of the law applicable to contract[90]. The solution of the Draft assumes the definition of consumer enshrined in Act 1480 of 2011[91] and it does not exclude the possibility of choosing the law applicable to the contract. Notwithstanding this acceptance, the rule establishes a condition according to which the chosen law may not imply a deterioration of the consumer's rights recognized by the law of his/her domicile, which law is applicable in the absence of choice (Art. 83).

IV. *Conclusion*

If there is one thing I can conclude after exposing these ideas, it is the need for a Colombian Private International Law adapted to today's reality. A system that, without implying a rejection of the distinctive characteristics of Colombian society, incorporates the most modern trends in Private

89. Supreme Court of Justice, Labor Chamber, judgment SL4085-2017, 22 March 2017, cassation, Alfredo Zwinggi Granados, against the judgment rendered by the Labor Chamber of the Superior Court of the Judicial District of Bogotá D.C., on 10 March 2010, in the proceeding brought by the appellant against Credit Suisse.

90. C. Madrid Martínez, *op. cit.*, 273-276.

91. Act 1480 of 2011 (October 12), Consumer Statute, *Official Journal*, Nr. 48.220, 12 October 2011.

International Law of the contracts. Colombia cannot continue to be bound by a system marked by the territoriality principle. The insecurity generated by the interpretation of existing rules to extract principles from them that are foreign to their genesis must be replaced by the certainty of solutions conceived based on the developments of Private International Law of contracts while taking into account – I must insist – the Colombian reality.

With this goal in mind, and embracing the models developed by the Hague Principles, the Inter-American Convention on the Law Applicable to International Contracts, and the Latin American systems, the IADIP has put forth a proposal that, in addition to being a valuable tool for modernizing the Colombian Private International Law, provides legal certainty to the contracting parties.

Margie-Lys Jaime

International Arbitration in Colombia

ABSTRACT: Colombia is a member of 11 Specialized Conferences on Private International Law (CIDIPs) and has adopted several international conventions related to arbitration, including the Panama Convention, the New York Convention, and the ICSID Convention. The Colombian Constitution recognizes arbitration as a form of administering justice. In 2012, Colombia enacted Law 1563 to modernize its arbitration system, replacing a multiplicity of texts that could lead to conflicting interpretations. This paper discusses the regulation of international commercial arbitration in Colombia, the challenges of enforcing international arbitral awards under Colombian law, Colombia's experience with ISDS, and provides some final remarks.

KEYWORDS: Colombia - international arbitration - Investor-State Dispute Resolution Reform

I. *Introduction*

Colombia is part of 11 Specialized Conferences on Private International Law (CIDIPs), including the Inter-American Convention on International Commercial arbitration adopted in Panama 1975 ('Panama Convention'- CIDIP-1)[1]. Colombia is also a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('New York Convention')[2];

1. Colombia Congress, Law 44 of 1986, which approved the Inter-American Convention on International Commercial arbitration signed in Panama on 30 December 1975.
2. Colombia Congress, Law 39 of 1900, which approved the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

and to the International Centre for Settlement of Investment Disputes (ICSID) Convention of 1965[3].

The Political Constitution of Colombia includes a reference to arbitration in the following terms:

> Individuals may be temporarily invested with the function of administering justice in the capacity of conciliators or in that of arbitrators authorized by the parties to enact decisions in law or in equity, in the terms determined by law[4].

In this sense, arbitration is seen as a form of administering justice.

In 2012, Colombia took an important step towards a modern system favouring arbitration with the enactment of Law 1563 of 2012[5]. Before Law 1563 the regulation of arbitration was contained in Decree 2279 of 1989, "By which conflict resolution systems are implemented between individuals and other provisions are issued", Law 23 of 1991, "By which mechanisms are created to decongest the Judicial Offices", Law 446 of 1998, "which develops alternative dispute resolution mechanisms", as modified by Law 640 of 2001[6], and regulated by Decree 1818 of 1998, and the Code of Civil Procedure.

Under this multiplicity of texts, many inconveniences may appear in terms of conflicting interpretations regarding the applicable law to arbitration, which cannot provide legal certainty to operators and users of arbitration[7].

This paper will cover the regulation of international commercial arbitration in Colombia (Section II), before turning to the challenges of international arbitral awards as per Colombian Law (Section III). Furthermore, Section IV will focus on Colombia's experience in ISDS and, finally, Section V will provide some final remarks.

3. Colombia Congress, Law 267 of 1996, which approved the International Centre for Settlement of Investment Disputes Convention (ICSID Convention), entered into force on 14 October 1966.

4. Political Constitution of Colombia 1991, article 116.

5. Colombia Congress, Law 1563 of 2012, which approved the statute of national and international arbitration in Colombia.

6. Colombia Congress, Law 640 of 2001 was abrogated by Law 2220 of 2022.

7. For an example of this incompatibilities, see Decision 1038 of 2002 of the Constitutional Court, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=7546.

II. *Regulation of International Commercial Arbitration in Colombia*

II.1 *Legislation*

The Colombian Arbitration Act (Law 1563 of 2012) defines arbitration as an alternative conflict resolution mechanism through which the parties defer to arbitrators the solution of a controversy related to matters of free disposal or those the law authorizes (article 1). The Act differentiates between two types of arbitration: *ad hoc* if it is conducted directly by the arbitrators, or institutional, if it is administered by an arbitration centre. In the absence of agreement regarding its nature or when the parties remain silent in the arbitration agreement, the arbitration will be institutional (article 2).

Furthermore, the Colombian Arbitration Act establishes a dualistic system in arbitration matters, setting some rules for domestic arbitration and others for international arbitration. Thus, it is necessary to distinguish whether arbitration is domestic or international. According to the Colombian Act, arbitration is international when the domiciles of the parties are in different countries at the time the arbitration agreement is signed. This scenario is based on the UNCITRAL Model Law, article 1(3)(a)11. On the other hand, it is also international when the place of performance of a substantial part of the obligations of the contract or the place most closely connected to the matter in dispute is outside the countries where the parties have their domiciles. This scenario is based on the UNCITRAL Model Law, article 1(3)(b)(ii).

The Colombian statute, however, did not include article 1(3)(b)(i) of the UNCITRAL Model Law, which establishes that arbitration is international when its seat is located in a country other than the States in which parties have their domiciles. This can be explained by Colombian prior jurisprudence which declared unconstitutional part of article 4 of Law 315 of 1996, stating that an international arbitration is not possible where there is no foreign element in the dispute[8]. Thus, it is not possible for the parties to agree in an international arbitration if the requirements established by Law are not met.

Notwithstanding the above, the parties may agree to follow the international arbitration proceedings to a domestic arbitration. In this case, the arbitration will continue to be domestic even if the procedural rules are

8. Constitutional Court. Judgment C-347 of 1997 (vailable at https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=32526).

those for international arbitration. As a result, the grounds for annulment will be those provided for domestic arbitration and the competent judge will be the Superior District Court of the seat of the arbitration. On the contrary, if the arbitration is international, the grounds for annulment will be those provided for an international arbitration and the competent judge will be the Supreme Court of Justice[9].

In this regard, the Supreme Court of Justice decides an annulment against an international award issued in an arbitration where the parties had stipulated the application of domestic arbitration rules. Pursuant to the Supreme Court, without an imperative provision in the national and international arbitration statute, «it is the rules of domestic arbitration contained in Law 1563 of 2012 the ones to be applied in a subsidiary manner», and failing this, those rules of the General Procedural Code, «as long as they do not conflict with the general principles that govern international arbitration»[10].

The Colombian Arbitration Act recognizes the principle of Competence-Competence by means of which the arbitral tribunal is competent to decide on its own jurisdiction and its decision prevails over any other issued to the contrary by an ordinary judge or administrative court. The foregoing, without prejudice to the provisions regarding the possibility of annulment (article 18).

According to article 69 of the Colombian Arbitration Act, the arbitration agreement must be in writing. This provision is based on the UNCITRAL Model Law 16, which establishes that a written agreement exists when the content of the arbitration agreement is documented in any way, regardless of whether said agreement has been concluded orally, through the conduct of the parties, or by any other means.

Furthermore, article 101, based on article 28(1) of the UNCITRAL Model Law, establishes that the arbitration tribunal must resolve the dispute in accordance with the applicable law that the parties have stipulated. Although the statute is silent on this issue, the parties could stipulate that two or more national laws are applicable to different aspects of the dispute (allowing for a *dépeçage*).

9. J.P. Cárdenas Mejía, *Módulo Arbitraje Nacional e Internacional*, Confederación colombiana de cámaras de comercio, 2019, 144 (disponible en https://escuelajudicial.ramajudicial.gov.co/sites/default/files/biblioteca/m1-1.pdf).

10. Supreme Court of Justice, judgment of 18 April 2017, SC5207-2017 (Entry n° 11001-0203-000-2016-01312-00) (available at https://cortesuprema.gov.co/corte/wp-content/uploads/2017/06/SC5207.pdf).

The parties could also stipulate that the rules of private international law, such as the Convention on the International Sale of Goods (CISG) or the UNIDROIT Principles for International Commercial Contracts, will be the only applicable rules for the resolution of the dispute. It will also be possible to stipulate that the general principles of international commercial law or the so-called *lex mercatoria* will be the applicable law or, even, the parties may agree that the contract is self-sufficient and, therefore, no legal norm other than its clauses is applicable to his controversy.

Pursuant to article 80 of the Arbitration Act, which is based on article 17 of the UNCITRAL Model Law, the arbitral tribunal is authorized to order interim measures unless the parties have stipulated otherwise. An interim measure, is one through which an arbitral tribunal orders one of the parties to: (i) maintain or restore the status quo; (ii) take any action that prevents damage to the arbitration process or avoid taking any action that could cause such damage; (iii) keep assets that can be used to enforce a future award or preserve evidence that may be relevant and material to the resolution of the dispute.

II.2 *Main institutions and rules*

The Ministry of Justice and the Law is the entity in charge of authorizing the arbitration and conciliation centres to provide administrative services for arbitrations and conciliations[11]. According to this, Non-profit legal persons, law schools of universities, and public entities. may request authorization from the Ministry of Justice and Law to establish an arbitration centre. Arbitration and conciliation rules must also be approved by the Ministry before it can get into effect. Specifically, the Alternative Dispute Resolution Department within the Ministry is in charge of authorizing the creation of conciliation and arbitration centres, and performing the activities of inspecting, monitoring, and surveillance.

Pursuant to article 12 of the Colombian Arbitration Act, conflicts of jurisdiction that may arise between arbitration centres will be resolved by the Ministry of Justice and Law.

Besides, in cases in which a public entity is sued, the corresponding arbitration centre must send a communication to the National Agency for Legal Defence of the State, informing of the request for arbitration against the public entity (article 12 of Colombian Arbitration Act).

11. The President of Colombia, Decree 1829 of 2013, by which is regulated some provisions of Laws 23 of 1991, 446 of 1998, 640 of 2001 and 1563 of 2012.

Colombia has a wide range of arbitration centres through its Chambers of commerce[12]. The most known arbitration centre in Colombia is perhaps the Centre of Arbitration and Conciliation of the Bogota Chamber of Commerce, although the Centre of Arbitration and Conciliation of the Barranquilla Chamber of Commerce and the ones of the Cali and Medellín Chambers of Commerce are also well known within the international community.

The Centre of Arbitration and Conciliation of the Bogota Chamber of Commerce administers international arbitration cases in Spanish, English, and Portuguese, and has been a promoter in Colombia and Latin America of the application of Alternative Dispute Resolution (ADR) proceedings[13].

The arbitration centres cannot fulfil any jurisdictional functions; therefore, their actions are limited to advancing the initial proceedings in order to set the arbitral tribunal and provide administrative services to the parties and the tribunal. The parties may delegate the designation of one or more arbitrators to an arbitration centre, which may result from your agreement to abide by the rules of the centre. In this case, the law requires that the designation be made by a raffle from the list of arbitrators and within the respective specialty, ensuring an equitable distribution among the arbitrators.

III. *Challenges of Arbitral Awards*

III.1 *Recourse against the arbitral award*

Pursuant to the Colombian Arbitration Act, annulment is the only legal remedy against an arbitral award (article 107). The annulment of an arbitral award will only proceed under the grounds exhaustively established in the statute. Consequently, the judicial authority will not rule on the merits of the controversy, nor will it qualify the criteria, evidentiary evaluations, motivations, or interpretations pursued by the arbitral tribunal. However, when none of the parties has their domicile or residence in Colombia, the parties may, by means of an express declaration in the

12. 53 Chambers of Commerce have Centres of Conciliation and Arbitration, which cover 28 departments and 60 cities of the country. See, https://confecamaras.org.co/enlaces.
13. The arbitration rules currently in force entered into effect on 1 July 2014. Approved by the Arbitration Court and the Ministry of Justice and Law through Writ No. 14-0014303-DMA-2100 from 24 June 2014, as amended by Resolution No. 0348 of 8 March 2022.

arbitration agreement or by means of a subsequent written agreement, exclude the annulment proceeding, or limit it to one or several of the grounds contemplated in the statute.

The grounds for annulment may be requested, proving that the party making the application furnishes proof that:

a) a party to the arbitration was affected by some incapacity; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under Colombian law; or
b) the party making the application was not duly notified of the appointment of an arbitrator or of the initiation of the arbitral action or could not, for any other reason, enforce his case; or
c) the award deals with a dispute not provided for in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
d) the composition of the arbitral tribunal or the arbitral proceeding did not conform to the agreement between the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate or, in the absence of such agreement, that did not comply with the norms contained in this section of the law.

The annulment may proceed ex officio, when: a) according to Colombian law, the subject-matter of the dispute is not capable of settlement by arbitration; or b) the award is contrary to the international public order of Colombia (article 108).

These grounds are certainly inspired by the UNCITRAL Model Law article 34 (*application for setting aside*). Article 34 is limited to action before the competent national court. However, article 34 does not preclude a party from seeking court control by way of Defence in enforcement proceedings.

The Civil Cassation Chamber of the Supreme Court of Justice is the competent authority to decide an annulment. However, in the case of annulment of awards made by arbitral tribunals based in Colombia in which a public entity is a party or who exercises Colombian administrative functions, the Plenary Chamber of the Third Section of the Administrative Chamber of the Council of State is the competent authority to hear the annulment.

Even though the annulment is the only recourse against the arbitral award, the 'constitutionalization'of arbitration has produced not only the judicialization of arbitration in Colombia but also the assimilation between arbitrators and judges. In this sense, arbitrators are recognized within the category of public authorities, given the fact that they are temporarily invested in the function of administering justice in the condition of arbitrators authorized by the parties to issue decisions in law and equity[14]. This explains why the courts in Colombia have accepted the recourse to constitutional protection actions (known as 'Tutela' or 'Amparo') against arbitrator's acts or against arbitral awards. Pursuant to the Colombian Constitutional Court (2011):

The *tutela* action proceeds exceptionally against arbitral awards when they disregard the fundamental rights of the parties. However, the admissibility of the Amparo request in these cases is subject to compliance with the following two requirements: (i) the exhaustion of the remedies provided by law to attack the arbitral decision and (ii) the configuration of a remedy fact, when verifying the existence of a manifestly capricious and unreasonable act by the arbitrators, based in any of the flaws developed by the aforementioned constitutional jurisprudence[15].

Likewise, in a 2015 decision, the Constitutional Court has expressed:

The possibility of reproaching an arbitral decision through the protection action obeys to an equivalence, at least material, of the arbitral award with a judicial decision, as indicated in Judgement C-242 of 1997 such awards are also decisions eminently jurisdictional. As is the case with court decisions, there is also room for the protection action as a mechanism for the protection of fundamental rights that may be affected by the decisions issued by arbitration courts. For this, the reproach of an award through the protection action is subject, in principle, to the same procedural requirements that constitutional jurisprudence has developed with respect to judicial decisions, and that in Judgment C-590 of 2005, were classified into two groups: (i) the general procedural requirements that must be fully satisfied to enable the procedural viability of the amparo and (ii) the special requirements or causes, which determine the eventual success

14. G. Poveda Cubillos, *Tutela contra laudo arbitral: una controversia sin fin*, in *Revista de Derecho Público*, No. 38, enero-junio 2017, 5.
15. Constitutional Court, Decision T-466/11 (available at https://www.corteconstitucional.gov.co/RELATORIA/2011/T-466-11.htm).

of the action, since in the presence of one of them, a violation of the right to due process is set[16].

As it can be noted, parties may use the *tutela* protection action against arbitral awards regardless of the fact that the annulment proceeding should be the only recourse against the award. Nonetheless, the Court has stressed that the protection action cannot become a new procedural space to re-examine the legal and factual issues that were the subject of the arbitration process[17].

III.2 *Recognition and enforcement of foreign awards*

The Civil Cassation Chamber of the Supreme Court of Justice is the competent authority to decide on the recognition and enforcement of foreign awards. In the event of recognition and enforcement of awards made by arbitral tribunals based outside of Colombia in which a Colombian public entity or who exercises Colombian administrative functions is a party, the competence to hear the recognition and enforcement will correspond to the Plenary Chamber of the Third Section of the Administrative Chamber of the Council of State.

Article 112 of the Colombian Arbitration Act stipulates the grounds for refusing recognition or execution of international arbitral awards. The grounds are equivalent to those of article V of the New York Convention. In this sense, recognition and enforcement of the award may be refused, only if the party against whom it is invoked furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) It was under some incapacity at the moment of the arbitral agreement, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains deci-

16. Constitutional Court, Decision SU500-15 (available at https://www.corteconstitucional.gov.co/relatoria/2015/SU500-15.htm).
17. Constitutional Court, Decision T-225/10 (available at: https://www.corteconstitucional.gov.co/relatoria/2010/t-225-10.htm).

sions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under Colombian law; or (b) The recognition or enforcement of the award would be contrary to the public policy of Colombia.

The draft general law of private international law (GLPIL) of Colombia, unlike the Code of Private International Law of Panama (CPIL), does not contain provisions related to arbitration[18]. Specifically, article 159 of the CPIL provides the grounds for refusing the recognition and enforcement of arbitral awards. These grounds are the same as those of the Panama and the New York Conventions. The value of including this provision in the CPIL lies in the relevance of the post-award control exercised by the local courts, for instance, the Supreme Court of Justice in Panama. This control involves the notion of international public policy of the requested country and other important aspects such as the due process of law and the arbitrability of the dispute.

The draft GLPIL, however, recognizes as one of its purposes, the determination of international judicial jurisdiction as well as the effectiveness of foreign judicial decisions in Colombia[19].

Pursuant to article 36 of the draft GLPIL, foreign judicial or administrative judgments or decisions will produce effects in Colombia, *without*

18. Code of International Private Law enacted by Law 61 of 2015. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/2010/2015/2015_620_0734.pdf.

19. Instituto antioqueño de Derecho Internacional Privado. Proyecto de Ley General de Derecho Internacional Privado para Colombia, Art. 1.

substantive review, through a summary procedure, provided they meet the following requirements:

1. The authorities of the State in which the decision was rendered are competent in accordance with reasonable criteria.
2. The decision is not subject to any appeal and is final in accordance with the Law of the State in which it was pronounced.
3. The right to due process of the parties has been respected.
4. The object of the litigation is not within the exclusive competence of the Colombian authorities.
5. The Colombian courts have not ruled on the litigation in a decision that is not susceptible to appeals through ordinary channels between the same parties, on the same object and for the same cause; or that a foreign decision that has ruled on the cause has not been previously recognized in Colombia.
6. The decision does not contravene Colombian public policy.

As it can be noted, the regime for the recognition and enforcement of arbitral awards in Colombia is different from the one applied to foreign judicial decisions. Still, both regimes include the possibility to refuse recognition and enforcement of the decision if it contravenes Colombian public policy.

Regarding the violation of Colombian public policy, the Supreme Court has differentiated between 'public policy' within the meaning of the New York Convention and a violation of public policy in the national context. In this sense, public policy under the New York Convention relates to fundamental principles such as good faith, prohibition of abuse of rights, and due process. As such, «a violation of a mandatory rule of the State where enforcement is sought cannot in itself amount to a violation of public policy»[20]. Furthermore, the Court held that an act contrary to a rule of public law has to be of such magnitude as to impede the award's enforcement in Colombia; and, that no violation of the fundamental rules of Colombia had occurred.

In another case regarding the arbitrability of the dispute, the Supreme Court of Justice held that rights over property located in Colombia were not a ground for non-enforcement under article V of the New York Convention and that the award dealt with personal rights. Furthermore, re-

20. Supreme Court of Justice, *Drummond Ltd. v. ferrovías en liquidación*, Ferrocarriles Nacionales de Colombia S.A. (FENOCO), 19 December 2011. Available at http://www.cortesuprema.gov.co.

garding the argument that the arbitration agreement was not valid under article V(1)(a) of the New York Convention because Colombian law does not allow the conclusion of arbitration agreements in public contracts, the Supreme Court considered that the arbitration agreement was not in the public contract for oil exploitation but in the Consortium Agreement and as such had been validly entered into[21]. The Supreme Court also noted that the parties had been given an equal opportunity to present their Defence and rejected the request. The Court correctly analysed each of the grounds submitted by the petitioning party, without making a substantive review of the case.

IV. *Experience of Colombia in ISDS*

IV.1 *Colombia's National Agency for Legal Defence of the State*

In 2011, Colombia enacted Decree No. 4085 by which the objectives and structure of the National Agency for Legal Defence of the State are established. The Agency was established to design strategies and actions to comply with policies of legal national defence and evaluate and disseminate the prevention of unlawful conduct by public servants and entities[22]. Within the Agency, the International Litigation Division is the office in charge of coordinating the defence of the State in international investment arbitrations.

In addition, the International Litigation Division provides support to public entities, as requested by the competent entity or materially exercising the function of defence or defence support, in cases other than those processes arising from international investment disputes.

The Division also coordinates and assumes the legal defence of the State in the processes that are carried out before the supervisory bodies of the System Inter-American Human Rights, in accordance with the treaties and agreements that regulate the matter.

In 2017, Decree 915 modified part of the functions and structure of the National Agency for Legal Defence of the State, with the aim of co-

21. Supreme Court of Justice, *Petrotesting Colombia SA & Southeast Investment Corporation v. Ross Energy S.A.* 27 July 2011 (available at http://www.cortesuprema.gov.co).
22. The President of Colombia, Decree 4085 of 2011 by which the objectives and structure of the National Agency for Legal Defence of the State are established (available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=44542).

ordinating and assuming the defence of the Colombian State in international investment disputes with the support of the Ministry of Commerce, Industry and Tourism[23].

In 2019, once again, the structure of the National Agency was modified by Decree 1698 of 2019, expressing that the Agency has within its functions:

> Assume and coordinate the functions related to the defence of the Colombian State in international investment disputes, with the support of the Ministry of Commerce, Industry and Tourism, as well as developing the rules for the attention of such controversies. The National Agency for Legal Defence of the State will participate, in accordance with the guidelines given by its Board of Directors and together with the entity public body involved, as a facilitator of amicable settlements in international disputes of investment, acting as sole spokesperson with respect to the investor party to the dispute[24].

The Colombian government recognises that the early termination of international investment disputes at the direct settlement stage generates considerable savings in the costs of these proceedings, which explains the need to expand its function of coordinating or assuming the defence of the Colombian State in the other stages of international investment controversies, to include the direct settlement stage among its competences and to enable it to take action aimed at the guarantee of the rights of the State, in order to safeguard the effective protection of the public interest.

IV.2 *Colombia's experience and current status*

The first investment arbitration case against Colombia was registered before ICSID in 2016 (*Glencore International*), five years after the establishment of the National Agency for Legal Defence of the State. To date, Colombia has faced twenty investment arbitration cases, thirteen still

23. The President of Colombia, Decree 915 of 2017 by which the objectives and structure of the National Agency for Legal Defence of the State are established (vailable at https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=81857).
24. The President of Colombia, Decree 1698 of 2019 by which the structure of the National Agency for Legal Defence of the State is modified, article 1 (available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=100252).

pending[25]. Colombian investors have also initiated investment disputes in four instances[26].

In *Glencore International,* one of the only cases where Colombia has lost, involved claims arising out of the Government's alleged unlawful interference with the coal concession contract, including its initiation of proceedings to challenge the validity of the amendment agreed by the parties in 2010 and imposition of royalties allegedly in excess of what is owed under the contract[27].

Other cases like *America Móvil* have decided in favour of Colombia. This case involved claims arising out of measures that allegedly prevented the claimant's Colombian subsidiary "Comcel" from freely using or selling its wireless telecommunications assets after the termination of its concession contracts. The challenged measures include, among others, the Colombian Constitutional Court's decision of 2013 ordering the reversion of certain telecommunication assets to state control on a concession's expiry or termination and the subsequent refusal of the Government to recognize Comcel's property rights over those assets following the contract termination[28].

Under this context, Colombia has participated as a member of the United Nations Commission on International Trade Law (UNCITRAL), in Working Group III on Investor-State Dispute Resolution Reform (ISDS) since its origin in 2017[29]. Within the past 6 years, Colombia has made submissions about possible reforms of ISDS, either alone or with other member countries. For instance, in 2019, Colombia submitted a proposal on potential procedural solutions for reform[30].

25. UNCTAD, Investment Dispute Settlement Navigator (available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/45/colombia/investor).

26. UNCTAD, Investment Dispute Settlement Navigator (available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/45/colombia/investor).

27. *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6 (information available at https://www.italaw.com/cases/7539).

28. *América Móvil S.A.B. de C.V. v. Republic of Colombia* (ICSID Case No. ARB(AF)/16/5) (information available at https://jusmundi.com/en/document/decision/es-america-movil-s-a-b-de-c-v-v-republic-of-colombia-laudo-friday-7th-may-2021).

29. Colombia is currently a member since 1998 and its appointment is until 2028. Prior, it has been a member from 1968 to 1971 and from 1977 to 1983.

30. UNCITRAL, Submission from the Government of Colombia, Note by the Secretariat. A/CN.9/WG.III/WP.173 (available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/049/53/PDF/V1904953.pdf?OpenElement).

In its submission, Colombia proposed the use of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*,[31] as a model for establishing a multilateral instrument for ISDS reform. Specifically, the structure of this proposal is as follows:

> First, a brief introduction to the OECD Model used in the taxation treaties domain; second, an explanation of how it would work, detailing the functions and operation of the Model; third, an explanation of how this model could be a point of reference to follow in ISDS discussions; fourth, some thoughts on the benefits of replicating this model within our current UNCITRAL discussions; and finally, a proposed outline/menu of the movable parts that could comprise a UNCITRAL ISDS reform model[32].

As recognized by the Colombian government in its submission, Colombia does not present a solution to each of the concerns raised by Member States, but rather a methodology of how to address each of them in an effective manner in order to move forward. As such, Colombia has been contributing for almost 30 years to the development of UNCITRAL's guidelines and regulations, and in the past 6 years to the development of international investment law through Working Group III.

V. *Conclusion*

Colombian experience in Private International Law and, more specifically, in the practice of international arbitration is rich in expertise that could serve as a guide for the rest of the countries in the region. In particular, its experience in ISDS could help other countries less experienced. Despite this experience, actions before the Constitutional Court or the Supreme Court may represent a challenge to international arbitration, as the abusive use of procedural tools such as the Tutela

31. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The Organization for Economic Cooperation and Development (OECD) (available at https://www.oecd.org/tax/treaties/multilateralconvention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm).

32. UNCITRAL, Submission from the Government of Colombia, Note by the Secretariat, 3. A/CN.9/WG.III/WP.173 (available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/049/53/PDF/V1904953.pdf?OpenElement).

or Amparo actions could create disruption in the natural procedural arbitration process. In any event, one can expect more developments in international arbitration in Colombia, either in commercial or investment matters.

Gilbert Boutin Icaza

Comparative law between Panama and Colombia regarding private international law companies under the Code of Private International Law of Panama and The Project of Private International Law in Colombia

ABSTRACT: This article shall explain how the different conflict of law systems apply to the problem concerning the legal criteria when establishing the nationality of companies as legal entities in both Panama and Colombia. It shall consider re-domiciliation for tax and commercial purposes.

KEYWORDS: Conflict of laws - nationality of companies - re-domiciliation for tax and commercial purposes - comparative private international law - intertermporal conflicts of laws

I. *Introduction*

This paper focuses on Comparative Private International Law in matters regarding Panamanian and Colombian company law. It is pertinent to highlight two Colombian names on the branch of Pan-American and InterAmerican Private International Law (PIL): José Joaquín Caicedo Castilla[1] and Marco Gerardo Monroy Cabra[2].

The paper shall remark on some significant aspects of the conflicts of law in the company; firstly, determining the nationalities of the companies in both jurisdictions, and secondly the problem of the intertemporal conflicts of law when changing domicile of the companies.

1. See J.J. Caicedo Castilla, *Derecho Internacional Privado*, V ed., Editorial Temis, Bogotá, 1960, 619. See also G. Parra-Aranguren, *Codificación de Derecho Internacional Privado en América*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Caracas, 1982, 255.

2. M.G. Monroy Cabra, *Tratado de Derecho Internacional Privado*, Editorial Themis, Bogotá, 2006, 438-440. A. Herrán Medina, *Compendio de Derecho Internacional Privado*, Editorial Themis, Bogotá, 1959, 275.

II. *Determining the Nationality of Companies in Panamian and Colombian Jurisdictions*

II.1 *Historical Approach*

There is much debate among Latin American scholars regarding the concept of the nationality of the companies as moral persons in terms of PIL. This is largely due to the Calvo Doctrine, which distinguishes the public and private definition of nationality. The Calvo Clause, in the international commercial context, regulates the investment and migration of European and American companies in our hemisphere[3].

II.2 *Criteria for Nationality of a Company*

a) Calvo Doctrine Criterion

The Calvo doctrine has given rise to the debate that investment companies have a nationality. Before the inter-American system, the Calvo Clause predicated the solution excluding the diplomatic protection over foreign investment companies in Latin America. The solution to the conflict of interest between the host State and the foreign company must be viewed through two lenses: the foreign company does not have nationality and consequently does not belong in any State. Secondly, the company is arguably a simple contract and as such a forum would resolve any contentious issues arising between the parties of the host State and those of any foreign investment.[4] However, Latin American doctrine has always considered codifying PIL. In the Western Hemisphere, Pana-American ideology chiefly inspired the codification of rules of choice of laws. The Lima Convention was the first codification of PIL. This Treaty was ratified by Peru and Costa Rica and was the legal basis for building the new Conventional PIL.

b) Treaty on International Civil Law of 12 February 1889

In 1939, the movement of Pan-American PIL addressed the topic of the nationality of the companies and therefore of moral persons. Despite the Calvo Clause, the Pan-American movement imposed and recognized

3. D.R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*, Minnesota Archive Editions, 1955, 323.

4. See A. Boggiano, *Curso de Derecho Internacional Privado*, Derecho de las relaciones privadas internacionales, cuarta edición ampliada y actualizada, 2003, 351-352.

the attribute of the nationality of the legal entity. In principle it was against what could be called the *Calvo Spirit*.

On this occasion, Colombia acceded to the Montevideo Convention of 1889[5] through Law 33 of 30 December 1992[6]. This International Civil Law Treaty became one the most important sources on this matter[7]. However, the spirit of the PIL convention of Montevideo remained unclear regarding the nationality of the moral person in general. Article 4 of this treaty establishes:

> The existence and capacity of private legal persons are governed by the laws of the country in which they have been recognized as such.
> The character they have fully enables them to exercise outside the place of their institution all the actions and rights that correspond to them […][8].

Article 4 could be interpreted as stating that the connecting factor of recognition is the place of the constitution. The wording of this provision affects the juridical and genuine link to the State as it is laconic.

It is important to acknowledge that the Montevideo Convention ignored the parallel notion of defining nationality as the criteria of headquarters and place of incorporation. It was not until 40 years later with the arrival of the Bustamante Code was this criterion introduced in the field of nationality of the moral person.

III. *Code of Private International Law ("Bustamante Code")*

The Bustamante Code is arguably the most important code of PIL in Latin America. Panama ratified the Bustamante Code through Law 15 of 1928 published in Official Gazette No. 5428 of 7 January 1929.

5. Los Tratados de Montevideo de 1889 y su interpretación judicial, Vol. 1, parte 1ra, publicación de la Universidad Nacional de La Plata, Facultad de Ciencias Jurídicas y Sociales, Instituto de Jurisprudencia, 1940, 33.
6. M.G. Monroy Cabra, *Tratado de Derecho Internacional Privado*, Temis, Bogotá 2006, 49.
7. M.I. Vial Undurraga, *International Contracts in Latin America: History of a Slow Pace towards the Acceptance of Party Autonomy in Choice of Law*, in *Revista de Derecho Privado*, N° 38, 2020, January-June, 250. A. Delić, *The Birth of Modern Private International Law: The Montevideo Treaties (1889, amended 1940)*, 201 (available at http://opil.ouplaw.com/page/Treaties-Montevideo).
8. Treaty on International Civil Law, signed in Montevideo on February 12, 198 (available at http://www.secretariasenado.gov.co/senado/basedoc/ley_0033_1992.html).

The Code is the legal instrument to realize the systematic codification of conflict of laws and contains 437 rules of choice of laws. This is more complex that European counterparts of its time.

The Code categorically establishes the nationality of the moral person under Article 9as follows:

> Each Contracting State shall apply its law to the determination of the nationality of origin of any individual or legal person and its acquisition, loss, or subsequent reintegration, which has been carried out inside or outside its territory when one of the nationalities subject to dispute is that of said State. In the other cases, the provisions established in the remaining articles of this chapter shall govern[9].

Paragraph one of Article 9 introduces the notion of the nationality of the legal person. It differs to Provision 4 of the Montevideo Conventions and thus causes conflict.

PIL in Latin America cannot agree on the statute personnel. It tends to remain divided, and the case of *Story vs. Stanislao Mancini*, concerning the legal category of the nationality, has set precedent.

However, there is another criterion to classify the person. Under the Bustamante Code, we appreciate two categories of private companies: Shares Companies, as per Article 19, and Civil, Commercial, and Industrial Companies, as per Article 18. Article 18 establishes:

> Commercial or industrial civil companies that are not Anonymous will have the nationality established in the social contract and, where appropriate, that of the place where its management or main address is habitually located.

III.1 *Shares Companies*

The Bustamante Code introduced an important criterion in 1928. It established the role of the autonomy of parties as a connecting factor determines nationality.

This supports why the company is a simple contract. In other words, the Code appoints that the General Assembly of shareholders or the Board of Directors empowered by a special proxy can manage and decide what kind of law shall govern the company law. Article 19 reads as follows:

9. The Bustamante Code (Spanish: Código de Derecho Internacional Privado) is a treaty intended to establish common rules for private international law in the Americas.

For corporations, nationality will be determined by the social contract and, where appropriate, by the law of the place where the board normally meets and, failing that, by that of the place where its principal is located.

III.2 *Civil and Personal, Commercial, Industrial Companies*

Implicitly, the convention regime distinguishes the capital company and the civil, professional, and individual person in commercial and industrial activities.

Similar to Article 19 of the capital company, the connecting factor based on autonomy is foreseeable in incorporation. In other words, the shareholder could be appointed by incorporating what is the law governing the company. However, the rule of conflict of laws is usually established as a subsidiary connecting factor to the regular place of the board directors.

IV. *Panamanian - Colombian Position*

IV.1 *The Current Conflict of Law Scheme on The Legal Person*

Panama implicitly recognizes the nationality of a company based on the laws of the place of its incorporation[10]. This rule is observed in the Panamanian Private International Law Code, Law 131, 2013, Article 24, which establishes the following:

Legal persons are governed by the law of the jurisdiction under which incorporation falls.
The law of the jurisdiction of incorporation shall apply to legal persons in their creation, existence, capacity, rights, obligations, operation, dissolution, and merger.
Panamanian courts shall rule on the dissolution and liquidation of legal persons that have been established under Panamanian jurisdiction […][11].

10. G. Boutin, *Derecho Internacional Privado*, Editorial Mizrachi & Pujol, 2018, 511-513.
11. Private International Law Code of the Republic of Panama, Law 61, October 7, 2015, which subrogates Law 7 of 2014, which adopts the Code of International Private Law of the Republic of Panama (available at https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/2010/2015/2015_620_0734.pdf).

On the other hand, Colombia does not adopt[12] a conflict solution in PIL. Article 469 of the Colombian Commercial Code determines when a company should be considered "foreign":

Concept of Foreign Company. The companies are foreign when incorporated under the law of another country and with main domicile abroad.

IV.2 *Colombian Private International Law Code Project*

Panama and Colombia have a dichotomy regarding the growth of the connecting factors and formation of companies. Article 15 of the Colombian General Law of Private International Law defines the domicile of the juridical person as the place of the central activity of the company. This notion is more economical than juridical. This normative is adopted by the New Regime of Private International Law Project as the same connecting factor to declare judicial transnational insolvency.

Uncial convention proposes the place of the main activities of the companies in the forum to applicable law.

Nevertheless, the "legal domicile" could be interpreted as a simple substantive law without relevance to determining the nationality of the

Colombian company. The domicile link to central activities is a complementary criterion of judicial competence rather than a connecting factor determining the nationality of the company.

Effectively, the Project of Colombian PIL lays down the criteria of the constitution under Article 62 as follows. Concerning the Code of PIL, one must distinguish the formal wording and practical phenomenon for constitutional commercial companies, better known as offshore companies. Panama adheres to the notion that the place of incorporation is binding. Theoretically, the constitution company refers only to a single document or minute recognized by a notary. To understand the company's legal system accurately, one must bear in mind that Panama has two types of company: (i) onshore companies or domestic companies and (ii) offshore companies. The commercial activities of the former are internal or local commerce, but the latter is a legal instrument able to work internationally.

12. M.J. Ochoa Jiménez - J. Zapata Flórez, *Private International Law Rules Regarding Personal Status in Colombia: a System in Need of an Overhaul*, in *Anuario Mexicano de Derecho Internacional*, Nº. 22, 2022, 565.

They are regulated by Law No. 32 of 1927[13], The Trust Regime Law 1 of 5 January 1984[14], and finally the legal status of the Private Foundation Law 25 of 1995[15].

IV.3 *Something Difficult regarding the Issue of Nationality*

The conflict of laws on Comparative Private International Law is a branch that cannot escape the confluence of political, economic, and cultural sources. In particular, the notion of a company has been created by the English system[16]. In the case of the analysis between Panama and Colombia, such notion is an important influence over the concept, movability, and globality of the company in the international market. Although Panama and Colombia belong to the civil system, Panamanian-Colombian PIL is heavily influenced by the United States of America (USA) and the USA in turn is influenced by English common law notions.

Dealing with the issue of nationality is imperative to distinguish the goals of USA PIL and indeed that of Latin-America.

As in the USA, we study PIL in Latin America in the light of the conflict de laws, alien conditions, conflict of jurisdiction, and nationality. Nevertheless, the USA conflict of laws is abording in three aspects. Firstly, whenever two or more states have a connection to a case and an issue arises as to which their respective laws differ, a choice of law must be made. Secondly the recognition and thirdly the enforcement of foreign judgments must both be addressed[17].

The USA conflict of law system, which does not consider the category of nationality as an object of PIL, is alluring[18].

For an expert in Comparative Law, the only way to conciliate the USA System and Continental (European) PIL is to examine the nationality through the problematic of alien conditions. This means that in every case we confront the question of the alien's condition as a moral person.

13. Law No. 32 of February 26, 1927 (Official Gazette 5,067 of March 16, 1927), *About Limited Companies* (available at https://www.oas.org/juridico/spanish/mesicic3_pan_ley32.pdf).
14. The Trust Regime Law 1 of January 5, 1984 (available at https://www.superbancos.gob.pa/documentos/fiduciarias/leyes/Ley1_1984_Fideicomisos.pdf).
15. Law 25 of June 12, 1995, regulates Private Interest Foundations in Panam (https://docs.panama.justia.com/federales/leyes/25-de-1995-jun-14-1995.pdf).
16. A. Tunc, *Le droit anglais des sociétés* anonymes, Editorial Dalloz, II. ed., 1978, 6.
17. D. Siegel, *Conflict of Laws,* Publishing West, 1982, 470.
18. D. Hill, *Private International Law*, Edinburgh University Press, 2014, 1.

A moral person is international, implicitly bringing the notion of nationality. For example, Nestle is a multinational company but as a moral person it enjoys national identity, and the USA judge is most likely to assess Nestle under the law of the constitution or that of the domicile of the board of directors. The case of the Nestle serves as an example of the confluence of political and economic criteria to define the company as having international activities.

IV.4 *Economic Law and the International Company*

Both the project of PIL from Colombia and the Panamanian Code of Private International Law address any international activities of the companies. Nowadays it is impossible to talk about international commercial activities excluding companies as instruments of capital and innovation. Consequently, the Company is important in many branches of international law. The markets and the companies have become more global and are thus more complex.

The role of a merchant is extensive in legal sources when determining the nationality of a company. We have multinational companies, transnational companies, and international companies, and they give rise to a new economic criterium regarding legal entities. Furthermore more, Professor Hurta points out a new connecting factor such as Human Resource[19] when discussing a company exploiting mines.

The professor explained that a mine's investors could be from Zambia while its workers could be from Malaysia, and its capital could come from China via Swiss Bankers while its company could have been incorporated in Liechtenstein. What is the mine's nationality?

What is the genuine link between the place of exploitation and the place of incorporation? At what point does the nexus between a state and a corporation become sufficient to permit that a State to adopts the corporation's interest? Is it when the principal office of the corporation is located in that state?

Professor Willis L. M. Reese has stated:

> Now let us suppose that instead of being an individual, the insured is a corporation which is incorporated and has its principal place of business in State X, would in

19. H. Hurta, *Identifying the factors influencing the nationality of a company*, Conference: 2nd International Conference Contemporary Issues in Theory and Practice of Management At: Czestochowa, Poland, April 2018.

all probability have jurisdiction over the Y insurance company in proceedings against the policy. State X would probably have such jurisdiction because of its proximity with the transaction and its interest in protecting the rights of the locally insured against their respective insurance company[20].

There are other confluence factors to help define the nationality of companies such as finance sources, governance, supplier, innovation, market, and culture perception. In conclusion, all these direct or indirect connecting factors reveal that the moral person has an attribute of nationality because it is a category that explains the applicable law and to caste the State as authority over this moral person.

IV.5 *Philosophical Foundation to Justify the Recognition of the Foreign Company*

In principle, the debate among academia in the XIX century regarding the process of recognition of the foreign company was linked to the theory of the moral personality of the company and the doctrine of Private International Law of Recognition. One part of the unilateralism doctrine contests the theory of the moral person because, the company born under foreign jurisdiction by foreign legislation is a legal fiction. Being a simple juridical fiction, the foreign company cannot cross the border; such doctrine asserts the company can only exist under local and territorial legislation to promulgate legal entity. For this reason, the foreign company is already non-existent in a third country. However, French scholars, led by Antoine Pillet[21], justify the foreign company as the subject of PIL in virtue of the doctrine of the vested right, known as *droit acquis*.

The position of the doctrine of vested right maintains that once a right is created in one place, its existence should be recognized everywhere. It therefore allows the moral entity rights and obligations that all States must recognize.

Finally, the idea in favour of the recognition of the moral person is based on the rule of the respect of the foreign legal system in an international relationship. We might conclude that the act of recognizing the foreign company is defined as the attitude of the one State to recognize a foreign subject, taking into consideration foreign law, which allows the

20. W.L.M. Reese, *General Couse on Private International Law*, Recueil des Cours, Tome 150, II - 1976, 31.

21. A. Pillet, *Des personnes morale en droit international privé*, Paris, 1914, 132.

existence over this juridical subject. The original in German reads as follows: *Mit der Anerkennung nimmt der Staat Kenntnis von der rechtlichen Existence einer Gesellschaft, die ihre Rechtspersonlichkeit au seiner fremden Rechtsordnung ableitet*.

IV.6 *The Recognition of Comparative Company Law*

The legal term *recognition* has many meanings in Comparative Law and in particular regarding the growth of international relationships. In domestic law such as Family Law, for example, it is "recognized as a child". In Public International Law, we use recognition to refer to a new government or a newly emerged State. In Private International Law, the conflict of laws recognizes foreign judgments or a legal person. Certainly, the legal and administrative process is not part of the conflict of laws. That is the wrong interpretation for some authors adhering to Common Law culture[22].

All the problems regarding the recognition of the moral person concern aliens'condition of the companies. The English and USA reduced the scope of PIL to three aspects: conflict of jurisdiction or international civil procedure, choice of applicable law, and the recognition of foreign judgment. Following the tradition of Continental PIL, the scope is: conflict of laws, conflict of jurisdiction, nationality, and aliens'conditions. The latter is a singular subject we are now examining. Recognition of the moral person depends s on the economic and political will of the States.

Analyzing the economic criteria for the process of recognition[23], one may bring the European Economic Community (EEC) as a Regional Community like an international subject. At the beginning, the EEC was integrated by six nation-states (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. The EEC embraced four freedoms: freedom of movement of goods, freedom of movement of workers, freedom of movement for individuals and companies to enter business, and freedom of movement of capital throughout the territory of the community. One of the pillars for building the European economic law was to recognize the freedom of European companies. The good standing of the companies incorporated or having a social site was the only legal requirement.

22. E. Stein, *Conflict of laws rules by treaty: recognition of companies in a regional market*, in *Michigan Law Review*, 1970, 326.
23. Rome Treaty March 25, 1957, see also Treaty Establishing the European Coal and Steel Community, April 18, 1951.

It is important to point out that despite the divergence of criteria regarding the law governing the companies of the EEC, the treaty assimilated and coordinated in terms of the protection afforded to shareholders, investors, and creditors of the companies linked to the six nation-states. The uniformity of the European company law was not real because most of the nation states submitted the criteria of real sit or the headquarters but for example, the Netherlands followed the common law criteria for the place of incorporation.

In conclusion, it can be understood that European commercial pragmatism establishes that if a company organized in one member state wishes to do business in another member state, it must be recognized in the receiving state as a legal person.

V. *English Legal System*

In England, the recognition of the company is subordinated to international public law. If the United Kingdom has a diplomatic relationship with a state, it will imply the process of recognition of the company created under foreign law. In other words, the recognition is "ipso jure". England practices general recognition[24].

In principle the law governing the recognition strikes a balance between foreign law stemming from the constitution foreign company and the law of the receiving country, IE, England.

VI. *The Netherlands*

The system in the Netherlands follows the criteria of general recognition vis a vis the foreign companies. Dutch company law follows the connecting factor based on the place of incorporation, as does England. However, the control of foreign companies falls on their object. The object of the foreign moral person must not be contrary to public order or morality[25] despite the Netherlands having ratified the Hague Convention of 25 July of 1959, which states the place of the incorporation continuously

24. J.F. Perrin, *La Reconnaissance des Société étrangers et ses effects*, Georg Libraire de l'Université Genèvea, 1969, 17.

25. P. Sander, *Dutch Company Law*, European Commercial Law Library, N° 6, Editor R. Pennington LL.D, Oyez Publishing London, 1977, 15.

governs the applicable law for constitutional companies. The supranational rules of the European Union have tempered the tender of the rear seat proposed by France and Germany[26].

VII. *Latin American Countries*

Traditionally some countries belong to the Montevideo treaties, colloquially referred to as the countries of *Rio de la Plata*. These countries include Peru, Bolivia, Brazil, and Mexico They are known for disregarding Company Law as a juridical fiction because they deny the personal status of the company. This conservative position is a consequence of the Calvo doctrine.

VIII. *France and the Recognition of Foreign Companies*

In the past, French PIL made a serious distinction between civil and commercial foreign law. Nowadays, the recognition of foreign companies is based on an international source: the Hague Convention. This convention has developed important legal and factual conditions for recognizing the foreign company and Article 5 puts forth the legal conditions for foreign companies.

It could be argued that Article 5 does not contribute to stimulating the free movement of legal entities internationally. However, France has a second important legal source, namely the rules of the European Union.

In the context and physical space of the European Market, not all the members follow the same connecting factor regarding the companies[27]. We find an internal European system with little tolerance of the European legal company because the European Union permits coexistence: the real sit and place of incorporation govern the legal constitution. The partial success is the acceptance of the criteria for incorporation in the European Market.

26. S. Clavel, *Droit International Privé*, Dalloz, 2021, 520.
27. *Ibidem*.

IX. *Recognition of Foreign Companies under Panamanian Jurisdiction*

The conflict of Company Law regarding the recognition of foreign companies is addressed in Article 90 of Law 32 of 1927 as follows:

A foreign corporation may have offices or agencies and engage in business within the Republic after having presented the following documents for their inscription at the Public Registry:
1. Notarial Instrument of protocolization of its Articles of Incorporation.
2. A copy of its last balance sheet together with a declaration of the portion of the corporate capital utilized or to be utilized in business in the Republic.
3. A certificate stating that it is organized by the laws of the respective country, extended, and legalized by the Consul of the Republic in said country and, in default thereof, by one of a friendly nation[28].

Panama's legal regime of the company has been inspired by Delaware company law from the U.S.A. One particular difference in the Panamanian system is the role of the Public Registry. The Panamanian company is a contract, but it is also an institution because it must be registered in the Public Commercial Register to produce the *erga onmes* effects toward third parties. This public obligation subordinated to one legal public entity does not exist under the Delaware jurisdiction.

The role of Agent Resident arguably makes Panamanian PIL attractive. The Agent Resident is the lawyer with expertise in drafting a company's Articles of Incorporation and then presenting them to Public Notary and Registry.

X. *Recognition of Foreign Companies under Colombian Jurisdiction*

Article 61 of the Colombian General Law of Private International Law pertains to bringing a foreign company into existence in the modern world. Furthermore, Colombia recognizes the moral person.

Colombia has a flexible system to recognize foreign companies. This philosophy of the Colombian lawmaker is because Colombia is the main door to the Andean Market; indeed, Colombia has more borders than any other South American country and it sits on the shore of two oceans.

28. Law Nº 32 of February 26, 1927 on corporations. Promulgate in the Official Gazette Nº 5,067 of March 16, 1927.

The first paragraph of Article 61 regards the moral person and stipulates that if it is incorporated in a foreign State, it will be recognized ipso iure by Colombian authorities. This is an interesting position for the new PIL in Colombia as it evidences a more liberal approach to the international market. The impact of this provision is incommensurable because a new chapter of the new regime of the foreign company ensures the political position in favor of free corporation movement by the multinational and foreign companies in Colombia.

X.1 *Method of Conflict of Laws Concerning the Personal Status of Foreign Companies*

PIL is one branch of the national domestic law for any legal order. The distinction between domestic law and PIL must be found in extraterritorial effects.

It is possible to apply the conflictual method in the domain of personal status of foreign companies and consequently we can approach the aspect of conflict as the problem of the alien's condition of the foreign legal entities.

In the XVI Century, the jurist Bretton Bertrand D'Argentre[29] made the distinction between the right of enjoyment and the right of exercise over the foreigner. In other words, all foreign individuals have a personal status that contains inherent right but when this person crosses the border, the new order lays down the recognition of this person's rights. In other words, the potential right afforded to the individual can be tempered by the new State's regulation.

Taking aviation as an example, the aviation company that carries out domestic flights under domestic law must be Panamanian. This activity is reserved for Panamanian shareholders. Another example is the restriction of all the details of activities that can be exercised only by local Panamanian companies. We can extrapolate the same situation concerning the foreign person. The evident example is about the "liberal profession", including but not limited to medics, lawyers, and engineers. Panamanian Constitutional Law stipulates that only Panamanian citizens can do liberal professions in Panama. In Panama, the issue regarding the foreign company pertains to the issue of alien conditions about the moral person. In this field, the applicable law is Municipal Law, Administrative Law,

29. B. Ancel, *Éléments d›histoire du droit international privé*, Prix du livre juridique, Editeur: Éditions Panthéon-Assas, Collection: Essais, 2017, 218.

and Constitutional Law, and the function of the Articles Incorporation of the company.

X.2 *The Intertemporal Conflict of Laws over Company Law in Panama and Colombia*

Both legal sources deal with the change of the domicile of a company via the *rules of continuity* or movement of the legal company incorporated in one State to another State's system. The phenomenon of migrating companies is recognized in general in the Continental System as well as the Common Law System.

In Company Law, the autonomy of the shareholder is the body competent to decide to change the incorporation system to transfer the company to another jurisdiction. One must define the lege ferenda concept in order to qualify this fact under the scope of intertemporal conflict of laws at one time. One must comprehend, in both systems, the legal process for a company to be able to migrate to another country.

X.3 *The Meaning of the Intertemporal Conflict of Laws over Company Law*

Conflict of law arises when certain events take place at the "limit" of the temporal duration of two successive and incompatible laws and as such render unclarity. The conflict of laws in time must be differentiated between internal–transitory collision and the mobile conflict of laws. The former is the branch of civil law to regulate internal successive laws as a consequence of the will of the national lawmakers. The latter is the changing of the applicable law not due to the State but instead due to the will of the parties. The requirements of the foreign Public Register and the local Public Register must both be met.

The problem of the conflict of law in the company and in general of the moral person is the confluence of two bodies of laws being applicable in successive ways. Regarding the migration of companies, the applicable laws are the those regarding the incorporation of the company and where the company first carries out its commercial activities. This is a Common Law notion. However, when the company moves to another jurisdiction, what is the applicable law? Hermeneutically, the interpretation is to apply the new law and not favour any "retroactivity". In this context, one may read the following by Trahan J.R. published in the Louisiana Law Review 1999 on p. 672: «[…] the rule of non-retroactivity […] is justified, in a

word by a clear economic interest. Human transactions need security if they are to be developed and extended». When someone accomplishes a juridical act, «he has the right to demand that the validity of his act will always be appreciated in conformity with the laws under which he accomplished it».

Ostensibly one approach to the implication of the change of the jurisdiction to another Public Register is that we change the personal status of the company because it is not wound up and dissolved. That is a clear advantage of the change of jurisdiction and in turn nationality. Transferring the headquarters or real sit of the company is not the same as transferring it to another country yet continuing to govern it under the former country's law. The migration of a company brings the problem of the unitary legal regime to govern the same company regarding the harmonization between the former and current laws concerning the same international subject. Without a doubt, this causes two concomitant jurisdictions to be applied: the former law is applicable for all commercial activities carried out when the legal entity was registered in the Register where the company was incorporated. Subsequent activities, carried out when the company was registered in the new Register, must be viewed through the lens of the new country's law.

Regarding the intertemporal conflict of laws on PIL in order to distinguish the former law's application and that of the new law, the company gets a new personal status.

One can appreciate the combination of two bodies of law at one given time. One company registered in Panama, assumes a mortgage debt over an immobile situs in Panama, and three years later the company moves to Nassau, Bahamas jurisdiction and takes out a loan for Commercial Banking from Bahamas. The new domicile is the new place of incorporation but what is the applicable law for the former Panamanian company entering the Banking system of the Bahamas? However, should the mortgage contract signed in Panama be breached, proceedings can be started against the formerly-Panamanian company in the Bahama's jurisdiction because it is the new domicile of the company. However, the applicable law will be the Panamanian law as it was applicable at the time of taking out the mortgage. That is a clear example of successive laws for the same company. In the field of the conflict of laws, this method appeals to distributive law application in an international scenario. The lesson one can draw from the changing the Registry is that the new Register does not annul any rights arising from the former/original law.

Philosophically, one might say that the traditional conflictual method recognizes the vested right born under the former law vis a vis the phenome of the rule of continuation of the company. At the same time, the conflictual method excludes the retroactivity of the new law. The no retroactivity makes common sense to guarantee the security of international subjects at the proper law.

X.4 *Over Rules of Choice of Laws; the Company's Status in Panama and Colombia*

In this segment, we are going to examine the particularity of the rule of choice of law in Colombia when addressing the changing of jurisdiction considering Article 65 of the Colombian General Law of the PIL. The Article reads as follows:

> If the foreign law that regulates the legal entity allows, it may be subject to Colombian law without the need to liquidate it or form a new company. The legal entity must satisfy the conditions established by foreign law and adapt to one of the forms of legal entities in Colombia.

Certainly, in the General Law regarding Colombian PIL, once encounters a special rule that unveils the path of the new Colombian Academia in the branch of conflict of laws because Article 65 as a law governing the changing of the international Public Registry is an achievement of the Colombian conflict of laws system in abandoning the traditional territorialism approach to PIL[30].

All the structure of the intertemporal rule of choice of law is sustained by this singular provision regulating not only the company law but the moral person too.

Article 65 of Colombian PIL introduces the legal category about changing the Register and can be analyzed as follows:

> The legal hypothesis that introduces Article 65 concerning the changing of personal status is direct and simple, and it brings a necessary interpretation to understand such an institute. It addresses the change of the applicable law of the foreign company having counted on the idea to move the personal jurisdiction

30. L. Pereznieto Castro, *La tradition territorialiste en droit international privé dans les pays d'Amérique latine (Volume 190)*, Collected Courses of the Hague Academy of International Law, 280.

for the company. In other words, it is permissible to change from the applicable law of the foreign company if the law of the constitution of the company allows that change. The new legal regime ignores the question of the change of Register e as not being a problem of applicable law. The idea of changing the personal status is directly linked to the Public Registry. A company may be incorporated in one specific law and the Articles of Incorporation may appoint a different law to that of the place of incorporation. In these circumstances, this phenomenon is not considered a conflict of law for changing the domicile. It is just a problem of applicable law. Article 65 remains silent on the process of changing implicating the Public Register. For a good understanding of the context of changing the place of incorporation, it is essential to denote the concurrence of the role of the Public Register on both sides. The intervention of administrative authorities is imperative for the recognition and the international security of the transition of the alien's company received by the Registry in Colombia.

In a closer analysis of Article 65[31] we can clarify that the *change of applicable law* over the alien's company having the intention to be incorporated in another Register is not enough. This is because changing to another Register evokes the conflict of authorities as a part of the aim of the conflict of law. To be more accurate, the French author explains not all international relationships enter this type of conflict of law, and sometimes one stumbles upon authority conflict as well. That is the case regarding the migration companies. The weak position is that Article 65 does not address the intervention of the cumulative role of authorities to control the process of migration engaged between two jurisdictions. All mobility of the moral person to abdicate from the former jurisdiction requires the coordination of at least two authorities.

Here are two hypotheses to explain the process of changing to another Register: The Articles of Incorporation for a company incorporated in Panama stipulate that applicable law should be that of Liechtenstein. This is not an example of the company migrating. It is merely the shareholders choosing which applicable law they want for their Panamanian-registered company. Regarding Article 65, one must acknowledge the role of each Public Registry engaged in the process of migrating the company.

The code of PIL in Panama has collected this legal body, the traditional experience in the field of industrial overseas services having general and particular rules about migration or changing the Public Registry over the

31. General Project Law of Private International Law for Colombia, IADIP Draft Law.

moral person[32]. Panamanian jurisdiction applies the rules of migration or mutation towards foreign jurisdiction not only for company law, but the rule of changing the Register would apply to foundation and trust deeds too. The explanation of the flexibility of this system is the economical ways of the country.

32. See Article 18 - Private International Law Code of the Republic of Panama: «Foundations and corporations incorporated under a foreign law may choose to benefit from the laws of the Republic of Panama and continue their existence by becoming a Panamanian legal entity on the condition that the law of the jurisdiction under which the original company was incorporated does not contradict the Panamanian law. To become a Panamanian legal company must be registered at the Public Registry of Panama, the required documents for which are as follows: 1. Letter of certification from the country of the company's origin confirming the existence and compliance of the foundation or corporation. 2. Certification or certified copy of the agreement or resolution of the competent body stating the authorization to continue the existence of the foundation or corporation pursuant to the laws of the Republic of Panama. 3. Memorandum of Association signed in accordance with the requirements of Panamanian law and indicating the subrogated foundation or company. Documentation issued in foreign jurisdictions must be certified by the Consul of the Republic of Panama in that jurisdiction or failing that by a Consul of the Republic of Panama in another country». Private International Law Code of the Republic of Panama. Law 61 of October 7, 2015, which subrogates law 7 of 2014, which adopts the Code of International Private Law of the Republic of Panama. Available at https://www.gacetaoficial.gob.pa/pdfTemp/27885_A/GacetaNo_27885a_20151008.pdf.

Nestor Raul Londoño Sepulveda, Melissa Palacio Maldonado

A Hypothesis About the Application of the Montevideo Treaties of 1889 in Colombia

ABSTRACT: Private International Law (Conflict Law) in Colombia is characterized by the absence of a domestic regulatory system that proposes solutions to civil and commercial international situations that affect people's daily lives. No chapter or section of the Colombian Civil Code is devoted to this topic, and there is no special law that defines international jurisdiction, resolves international procedural issues, or specifies the applicable law. However, the nation has ratified a number of international agreements on the subject. Therefore, if we investigate in Colombia which treaties contain rules of conflict and rules of international jurisdiction, we find two fundamental texts of Private International Law: on one hand, Law 13 of 1905, which ratifies the Convention on Private International Law between Colombia and Ecuador in 1903, and on the other hand, the Treaties of Montevideo of 1880, ratified by Law 33 of 1992, and the Inter-American Convention on Child support and family maintenance. In addition, the Inter-American Treaty of General Rules of Private International Law of 1971, which was ratified by Law 21 of 1981, has been ratified as norms of functionality. In Colombia, however, these agreements are frequently disregarded or misapplied. The purpose of this paper is to determine their correct method of application and to emphasize the need for the country to have a Private International Law system in accordance with the internationalization of Colombian society.

KEYWORDS: Private International Law in Colombia, Colombian Conflict Law - International Treaties in Colombian Private International Law - Absence of Domestic Regulation in Private International Law - Application of International Agreements in Colombia - Treaties of Montevideo

I. *Introduction*

The twentieth and twenty-first centuries have brought many changes to the international arena, including the manner in which trade transactions between two or more states or territories are settled and carried out. In the past, there were many obstacles in negotiating freely with foreign-based individuals or businesses, including prohibitive import lists and high tariffs. Until the Bretton-Woods Agreements of 1943 and the General Agreement on Tariffs and Trade of 1947 (GATT 1947) laid the groundwork for freer economic exchange, it was not possible to conclude legal acts that crossed international borders due to protectionist policies imposed by states.

Despite ratifying the GATT in 1983, Colombia was almost closed to international trade due to its high tariffs and exchange controls. In 1991, however, the new Political Constitution brought about a change in Foreign Trade. Colombia created a new institutional framework more suitable for international trade, in tandem with the openness policy of President Cesar Gaviria's administration (which lasted from 1990 to 1994) and the new institutional structure established by the new constitution. Colombia ratified the agreement establishing the World Trade Organization (WTO), signed in Marrakesh (Morocco) on April 15, 1994, through Law 170 in 1994, and joined the organization in April 1995. All of the aforementioned factors gave rise to a new commercial dynamic in the country, which became an importer and exporter of goods and services that is dynamic and growing.

Despite advancements in international trade policy, the civil and commercial legal regime has remained largely out of touch with the globalized world. Aside from the ratification of the Inter-American Treaty of General Rules of Private International Law of 1971 ratified by Law 21 of 1981, the ratification of the Vienna Convention on the International Sale of Goods of 1980, and the specific modernizations in private international matters, the Colombian system of Private International Law, which is composed almost entirely of international treaties from the nineteenth century, has remained static since then. Rules created by CAN Decisions, particularly in the field of international road transport; Law 1258 of 2008, which creates the Simplified Joint Stock Company; and Law 1563 of 2012, which regulates international arbitration, represent the most significant developments.

Article 62 of this most recent law regulates the internationality of arbitration, introducing rules that refer explicitly to the international

nature of acts and contracts. Thus, a case is international when, for instance, both parties of a relation are domiciled in different states or when enforcement occurs in a state other than the parties'domicile. In such a way that, if a contract is international, it is necessary to establish the applicable law and, consequently, the limits of the freedom of the will to enter into contracts.

As private international law is comprised of national laws, international treaties, and supranational regulations with a territorial scope limited to its members, there is currently no international legal rule that is universally applicable to all private international situations. The Vienna Convention of 1980 on the international sale of goods ratified by Colombia through Law 518 of 1999, which has 95 Member States as of the date of the completion of this article, is the international treaty with the largest territorial scope in the world regarding a particular international situation, and which demonstrates the change in the way business is conducted in the world (UN, 2023).

Particularly in Colombia, there are few internal rules of Private International Law, which has led to the matter being viewed as extremely precarious in our environment. However, this paper argues that the Colombian International Private Law would have sufficient rules to assist in resolving international private cases. For this reason, a hypothesis is proposed regarding the application of Law 33 of 1992, which ratified the Montevideo Treaties of 1889 known as the "Treaty of International Civil Law" and the "Treaty of International Commercial Law"; as treaties of private law content, their application does not follow the logic of treaties whose matter is Public International Law.

The methodology employed, which is fundamentally dogmatic, is based on the identification and interpretation of the current legislation on Private International Law in Colombia, the analysis of what Colombian and foreign authors from member countries of conventions in force in the country, the advance in applicable law by foreign legislation and international arbitration regulations, the verification of the legislative situation in Colombia, and finally the proposal of solutions for the problems identified.

II. Conflict of law regulation in Colombia

Private International Law indicates that the competent judge must be identified prior to analyzing the legal norms that govern an international private case. This is due to the fact that the latter determines the applicable law at the time of sentencing based on the conflict rules and material rules available in its system.

Therefore, it has been said that, in the international context, any prospective judgment on the applicable substantive law is predicated on a prior prospective judgment regarding competent jurisdiction (Garcimartín Alférez, 2016, 60).

Therefore, the consideration of the law applicable to a private international case will depend on the authority with the authority to adjudicate its disputes. Not only regarding the nationality of the judge or tribunal that will decide the case, but also with regard to whether an international arbitral tribunal will do so, which, as will be seen, has considerations regarding the rules applicable to international disputes that are fundamentally distinct from those of a national judge, particularly in Colombia.

Despite the fact that some of them were created in the nineteenth century, there is no doubt about the role that treaties played in the regulation of international cases at the end of the twentieth century and how they have expanded in their application at the beginning of the twenty-first. It could be argued that an idea has been imposed according to which conventional sources are superior to national law, consolidating a vision of international law and domestic law in which they are recognized as a single body of law, and what has been termed moderate monism with international law as the preeminent legal system (Valencia Restrepo, 2008, 144). This trend can be identified in Colombian jurisprudence in a number of decisions that have recognized the primacy of treaties, such as the 2005 Constitutional Court decision C-401:

Consequently, in resolving "the controversial case" – pursuant to article 19 of the Substantive Labour Code accused in the present proceedings – these conventions (the ILO conventions ratified by Colombia) are primarily and directly applicable norms, and must influence the determination of the scope of the other applicable legal norms.

The Inter-American Treaty of General Rules of Private International Law of 1971, which was ratified by Law 21 of 1981, stipulates that in determining the applicable law, the judge must first apply the conflict rules of the international treaties that the member state has ratified.

Article 1: The determination of the applicable legal norm to govern situations governed by foreign law shall be subject to the provisions of this Convention and other international conventions signed or to be signed bilaterally or multilaterally in the future by the States Parties. In the absence of an international standard, State Parties shall apply the conflict rules of their national law.

Thus, if we study in Colombia which treaties contain conflict rules, we find essentially four texts of Private International Law: on the one hand Law 13 of 1905 that ratifies the Convention of Private International Law between Colombia and Ecuador in 1903, and on the other hand, the Montevideo Treaties of 1889 formulating the applicable law between articles 1 to 55 in the "Treaty on *International Civil Law*" and the sections devoted to specific commercial matters in the "Treaty on *International Trade Law*" and the Interamerican Convention on Maintenance Obligations of Montevideo of 1989, ratified in Colombia in Law 449 of 1998.

In contrast, domestic law contains a few conflict rules and substantive regulation of certain international aspects. First, we have article 18 of the Civil Code, which states that the (Colombian) law is mandatory for both Colombian nationals and foreigners residing in the country. The territorial nature of articles 19, 20, and 21 determines when Colombian law applies to civil status, family relations, rights in rem, and property-related contracts. Article 1012 establishes that the succession is decided and governed by the law of the deceased's last domicile. Articles 1084 and 1085 govern foreign wills, while articles1053 and 1054 govern the succession of foreigners. Article 163, which governs divorce from an abroad-celebrated marriage. In addition, articles 469 to 497 of the Colombian Commercial Code regulate foreign companies with permanent operations in the country. 646 foreign security title. 869 addresses the execution of contracts concluded abroad. The international commercial agreement in 1328.

Article 13 of Law 80 of 1993 established the possibility of applying a foreign right to international state contracts executed abroad, with an express prohibition on being subject to foreign law when they are to be executed in Colombia. The Constitutional Court addressed this issue in its 2004 ruling C-249.

Under the supranational system of the Andean Community of Nations, International Multimodal Transport Contracts are governed by Decision 331 as amended by Decision 393; however, the question of applicable law was not considered. Similarly, through Decisions 398 and 399, it regulated international road transport, which will be discussed in the following section.

It is possible to comprehend how various organizations have attempted to regulate a subject that is exceedingly difficult to approximate: the law applicable to private relationships. It is problematic for a judge, particularly a Colombian one, to determine which law applies because there are so many options, some of which they may not be aware of,

and because, as explained, there is no clarity regarding the scope of application or interpretation of these rules. As a result, judges frequently declare themselves incompetent to decide based on the existence of external jurisdiction, as has occurred in several instances (Supreme Court of Justice, 2002).

I.1 *Choice of law before the judge in Colombia*

In Colombian law, discussions regarding the choice of applicable law based on private autonomy have been restricted to international contracts. Nonetheless, a general rule governing this issue is absent in the country's regulatory structure. Colombian commercial law appears to suggest the possibility of a choice of law agreement, despite the fact that article 1328 of the Commercial Code expressly prohibits it for the commercial agency contract that is executed in Colombia, but not for the remaining contracts based on article 869.

It is important to note that this type of agreement was included in Decisions 398 and 399 of the Andean Community of Nations, applicable to contracts for international road transport. Articles 115 and 152 of these decisions state:

> Any dispute arising from the application or performance of an international carriage contract that does not involve rules of public policy in this Decision shall be governed by the law specified in the contract. In the absence of an agreement, the provisions of this Decision and its supplementary rules, as well as the rules of the applicable national law, shall govern.

The judge could determine the applicable law to the contract based on an express agreement between the parties, or the conduct of the parties during the process. For instance, the plaintiff and defendant in an international contractual claim brought before a Colombian judge must adhere to a particular right in the complaint and response. Frequent occurrences that tend to apply the law of the forum *(lex fori)*.

The effect of recognizing the choice of law agreement is enormous, but it is the same as that produced by the rules of conflict when they require the application of foreign law: to replace the obligatory and supplementary norms of Colombian private law with those of the chosen system. This, unless the parties, based on their own autonomy, decide not to include them, a position that Argentine law expressly codifies in article 2561 of its new Civil and Commercial Code:

c) the parties may, by mutual agreement, determine the material terms of their contracts and even include contractual clauses that displace obligatory rules of the chosen law.

On the issue of conflictual autonomy in Colombia, authors have held various positions. Given the absence of positive law, Zuleta Londoño (2010) prefers to err on the side of caution and notes: «In the best of cases, there is great uncertainty on the subject, which would advise, of course, against entering into such agreements» (p. 33). On the other hand, there are those who guarantee the binding nature of the conflict rules that determine the applicable law. Aljure Salame (2011), for instance, notes that article 869 of the Commercial Code is mandatory, and thus the applicable law agreement is ineffective in international commercial contracts executed in Colombia (p. 97). In the same vein, Suescun Melo (2003) had ruled that this article constitute public policy (p. 157).

In contrast, Oviedo Alban (2012) takes a favorable stance toward the agreement, stating:

Consequently, there is a clear tendency in contemporary law to admit the validity of the choice of law agreement applicable to international contracts, which is admissible in Colombia based on the above-described criteria, particularly when the jurisprudence has been embracing a broad concept of international public order as seen in the preceding paragraphs, as well as the possibility of agreeing as the law of the contract an instrument of soft law, which certainly relaxes the strict application of the law of the contract (p. 35).

This position is supported by the contrast of jurisprudence favorable to the choice of the UNIDROIT Principles, the comparison of articles 869 and 1328 of the Commercial Code, the possibility in arbitration to choose the applicable law under article 101 of Law 1563 of 2012, and the absence of an express general prohibition to agree on the applicable law in international contracts (Oviedo Albán, 2012).

To these arguments must be added the fact that article 869 has been implicitly repealed based on a general application of the Treaty of Montevideo of 1889 (Law 33 of 1992) pursuant to article 1 of the Treaty of General Rules of Private International Law (Law 21 of 1981), as will be explained below. Thus, the determination of the applicable law must begin with the conflict rules of Law 33, specifically articles 34 to 37, and, for contracts for which no applicable formula of law was expressly agreed upon, the law of the place of performance would apply according to articles 32 and 33.

Determining whether the articles of the Treaty of Montevideo's civil and commercial section pertaining to contracts are mandatory or dispositive is therefore necessary. Given that the Treaty of Montevideo was silent on the subject, it is not simple to answer this question. However, the additional protocol in article 5 states: «The jurisdiction and law applicable according to the respective treaties may not be modified by the autonomy of the parties, except to the extent permitted by said law», leaving the issue of whether or not to authorize the choice of law agreement to the national law of the nation that ratified the treaty. However, Colombia did not ratify this protocol.

Moreno Rodriguez (2014) considers, in a historical interpretation of the treaty, that had it been made under the universalist theories of Private International Law, there would have been no room for private autonomy, but to the extent that the State unilaterally allows it (p. 99). It is considered, however, that this is an outdated interpretation of the treaty, like the universalist theories themselves. It should be borne in mind that, despite the old international treaties on the subject and the appearance in the twentieth century of supranationalism, as in the case of the European Union or the Andean Community under which some conflictual solutions have been unified in regions of the world, the configuration of Private International Law continues to be an attribute of the sovereignty of States and has been done by them following different trends and theories.

Consequently, and based on the same arguments stated previously, the private autonomy should predominate in determining the rules of law applicable to the contract, as this is the global trend despite the absence of an express regulation. With the understanding that the conflict of law rules in matters of contracts would be merely supplementary to the party autonomy, articles 32 to 37 of Law 33 of 1992 and those articles dedicated to contracts in particular, would have this nature.

Such conflict of law autonomy could be demonstrated expressly or implicitly, so the same parties could choose the applicable law based on their behavior before the national court. Thus, despite having chosen the applicable law in a clause, a tacit choice of the applicable law will have been made if one party promotes the application of a certain legal system in the process and the other party not only does not object to it but bases its argument on that legal system. Without forgetting, of course, to carry out the procedural requirement established by article 2 of Law 21 of 1981 and article 177 of the Code of Civil Procedure, when applicable, of proving the foreign law invoked. This tacit form of

choice of law is not giving rise to the doubts raised by Professor Sánchez Lorenzo (2009) and permits the parties to fix the applicable law in advance, thereby eliminating the risk and weight of an attack or defense in multiple applicable rights (Panov, 2017)

I.2 *Choice of law in international arbitration*

Under Colombia's current Arbitration Statute, parties may select the rules of applicable law that they deem most appropriate for any subject amenable to arbitration, not just contractual disputes. This is possible, regardless of whether it is subject to institutional arbitration rules, or the rules established by Law 1563 of 2012. Regarding the first possibility, it is interesting to note that the arbitral rules of the world's arbitral institutions have included the possibility of autonomy of the conflicting will in the following manner:

The ICC Rules (2017) article 21.1 provide that: "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate" (International Chamber of Commerce, 2021, pág. 29).

Article 34.1 of the Rules of Procedure of the International Centre for Dispute Resolution (ICDR) states:

The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate (ICDR, 2021, 34).

The rules of the London Court of International Arbitration (LCIA) state:

22.3. The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate (LCIA, 2020).

The JAMS Rules state:

18.1 The Tribunal will decide the merits of the dispute on the basis of the rules of law agreed upon by the parties. In the absence of such an agreement, the Tribunal will apply the law or rules of law that it determines to be most appropriate (JAMS, 2021).

The arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce state:

Article 27 Applicable law (1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate (Stockholm Chamber of Commerce, 2023, 18).

The rules of procedure of the United Nations Commission on International Trade Law express article 35. 1:

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate (UNCITRAL, 2021).

In accordance with an arbitration agreement before the aforementioned institutions or under Colombian law, the parties are free to choose the applicable law, as demonstrated by the evidence. This even enables the configuration of the rules to be applied to a private situation, with or without reference to a national legal system, and thus submission to the *lex mercatoria* or Transnational Trade Law. This gives the parties a great deal of autonomy freedom, in excess of what is permitted by divergent national laws.

Thus, when the parties agree on the application of an a-national rule, a transnational instrument, or pretend that the *lex mercatoria* is in some way the governing law of the contract, they must include an arbitration clause to resolve their disputes. Since national judges are bound by the rules of their systems' Private International Law to apply a national law, national judges must apply that legal system.

There is also the question of whether arbitrators can infer the applicable law. In other words, the parties have not agreed on the applicable law, but this can be determined based on the language of the contract, the circumstances of the case, or the behavior of the parties. In this regard,

there are awards that have taken this route, recognizing the possibility of a tacit choice of applicable law based on identifying characteristics.

Now, in the absence of an express indication as to the domestic law of a third country, the most appropriate solution in the case in which the parties express their desire for a neutral solution is to apply the general rules and principles of international contracts, the so-called lex mercatoria.
Now, in the absence of an express indication as to the domestic law of a third country, the most appropriate solution in the case in which the parties express their desire for a neutral solution is to apply the general rules and principles of international contracts, the so-called lex mercatoria.
In this context, for questions concerning general contract law, reference can be made to the "UNIDROIT Principles of International Commercial Contracts" which represent – except for a few provisions (such as for example the provisions on hardship: see ICC Award N° 8873 of 1998, in Journal droit int., 1998, 1017) – a "restatement" of the rules that parties engaged in international trade consider to be consonant with their interests and expectations. This has been recognised in numerous arbitral awards in which the UNIDROIT Principles have been applied as an expression of the lex mercatoria or of international trade usages (ICC International Court of Arbitration, 2001).

In this award, the arbitrators decide to apply the UNIDROIT principles in the absence of an express agreement on the applicable law, based on a statement made by the parties in which they indicated their desire for a neutral solution. The arbitrators interpret that in order to achieve this objective, it is appropriate to use the *lex mercatoria* as a neutral normative system.

In this regard, Professor Sánchez Lorenzo (2009) identifies the following as indications that the arbitrator could use for the determination of the applicable law, especially because of the fact that, under the cited regulations and statutes, he would be authorized to determine the right he deems most appropriate:

The use in the contract of idiosyncratic terminology or a certain language, the inclusion of a clause determining the seat of arbitration, the behavior before and after the conclusion of the contract, their previous links, their words during negotiations, the use of certain general conditions, etc., may be considered to determine the existence of a implicit agreement of the parties to a certain law applicable to the transaction (Sánchez Lorenzo, 2009, 46).

However, it warns of the risks associated with this type of designations, as they are susceptible to a problem of interpretation that could result in unexpected solutions for the parties or negative effects for the contract.

I.3 *Theory regarding the application of the 1889 Treaties of Montevideo*

It is typical for treaties to contain rules that determine their material and territorial scope. In other words, the treaty itself restricts, on the one hand, the material issues it purports to regulate and, on the other, the international connection required for it to be applicable by judge whether or not is treaty member state. The 1980 Vienna Convention on the International Sale of Goods is among the best examples of this form of limitation. Article 1 of this document establishes a portion of its scope and the aforementioned application formulas:

> Part I. Sphere of application and general provisions
> Chapter I. Sphere of application
> Article 1
> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State… (UNCITRAL, 2010).

This precept's paragraphs a) and b) illustrate the application of the direct method in its autonomous and dependent forms, respectively. Thus, in subparagraph (a), the application of the Convention is autonomous when the States where the parties'places of business are located are States that have ratified the Convention (a connecting element of the rule). In addition, when necessary to fill gaps in the convention or to regulate matters not expressly contemplated therein, reference should be made to articles 7 and 9, which govern the application of the convention and its supplementary rules.

In contrast, subparagraph (b) establishes the dependent system, because when the article refers to the rules of private international law, it does so in the traditional sense of the branch of law. Therefore, it should be interpreted as a reference to the conflict rules of the court or authority with jurisdiction. Therefore, when ordering the application of the law of a state that has ratified the convention, it must be applied in preference to all other domestic laws, provided the conditions for

the treaty's material application are met (Sánchez Lorenzo & Fernándes Rozas, 2013, 73).

This area has raised unique issues, such as which non-member states have applied the convention when a case under the jurisdiction of a judge of a non-member state determines that the law of a country that has ratified the convention applies to a contract of international sale and accordingly applies it as part of its private law, as shown in the Compendium of Case Law of the Convention (UNCITRAl, 2016, 6)[1].

Article 3 of the Convention on the Limitation Period in the International Sale of Goods (UNCITRAL) from 1974, the Convention on Representation in the International Sale of Goods (UNIDROIT) from 1983, the Convention on International Factoring (UNIDROIT) from 1988, and the Convention on International Leasing (UNIDROIT) from 1988 all contain the same formula.

In similar terms, the Inter-American Convention on Maintenance Obligations of Montevideo of 1989 in Law 449 of 1998 in its first article determines a restricted scope of application as follows:

The purpose of this Convention is to determine the law applicable to maintenance obligations, as well as to jurisdiction and international procedural cooperation,

1. See Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 9 October 1996, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 8 November 1995, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 18 October 1995, Rechtskundig Weekblad, 1995, 1378 ff.; Commercial Court of Levelling, Belgium, 19 September 1995, Unilex; Commercial Court of Brussels, Belgium, 5 October 1994, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 16 March 1994, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 23 February 1994, Unilex; Commercial Court of Brussels, Belgium, 13 November 1992, Unilex; The case CLOUT No. 98 [Rechtbank Roermond, Netherlands, 19 December 1991]; Amtsgericht Ludwigsburg, Germany, 21 December 1990, available on the Internet www.cisg-online.ch; The case CLOUT No. 5 [Landgericht Hamburg, Germany, 26 September 1990]; Rechtbank Dordrecht, Netherlands, 21 November 1990, Nederlands Internationaal Privaatrecht, 1991, No. 159; Landgericht Hildesheim, Germany, 20 July 1990, available on the Internet www.cisg-online.ch; Landgericht Frankfurt a.M., Germany, 2 May 1990, available on the Internet www.cisg-online.ch; The case CLOUT No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990]; The case CLOUT No. 46 [Landgericht Aachen, Germany, 3 April 1990]; Oberlandesgericht Koblenz, Germany, 23 February 1990, Recht Der internationalen Wirtschaft, 1990, 316 ff.; Rechtbank Alkmaar, Netherlands, 8 February 1990, Nederlands Internationaal Privaatrecht, 1990, No. 460; Rechtbank Alkmaar, Netherlands, 30 November 1989, Nederlands Internationaal Privaatrecht, No. 289; The case CLOUT No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; The case CLOUT No. 3 [Landgericht München, Germany, 3 July 1989].

where the maintenance creditor is domiciled or habitually resident in a State Party and the maintenance debtor has his domicile or habitual residence, property or income in another State Party.

On the other hand, the Convention on Private International Law between Colombia and Ecuador of 1903 does not establish a particular scope of application, but in the field of international contracts it establishes the following:

Article IV. Contracts concluded in the other contracting country shall, as to their validity and legal effects, be judged by the law of the place of their conclusion; but if such contracts by their nature or by agreement of parties are to be performed precisely in the Republic, they shall be subject to the laws of the Republic. In either case, the manner in which they are to be implemented shall be governed by national law.
Article V. The external forms or solemnities of contracts or any other legal acts shall be governed by the law of the place where they were concluded.

As a result, the treaty has a limited scope of application to the relationship between Colombia and Ecuador, as stated in the treaty's explicit text regarding contracts. The same applies to marriage (article VII), so this can be disregarded as a general rule of international private law.

On the other hand, it emphasizes that the Treaties of Montevideo of 1889 lack a rule that specifically stablished their territorial scope of application, such that it gives the impression of not being limited to international cases that link elements with the Member States, and was issued with the intention of constituting a system of harmonized conflict rules on the south American continent (Moreno Rodriguez, 2014, 99), In light of this, this paper argues that it should be applied by the Colombian judge regardless of whether or not the national elements associated with the international private situation originate from member countries.

In this regard, it is important to cite the 1969 Vienna Convention on the Law of International Treaties, which states:

Article 26, "Pacta sunt servanda". Every treaty in force is binding upon the parties to it and must be performed by them in good faith
Article 29, Territorial scope of treaties. Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.
Article 34, General rule regarding third States. A treaty does not create either obligations or rights for a third State without its consent (UN, 2003).

Therefore, a Colombian judge deciding an international matter would be bound by the Montevideo Treaties, as they would integrate the private normative system of Colombian law and their conflict rules would take precedence over purely domestic ones, as established by the Convention on General Norms - Law 21 of 1981. This is due to the fact that the treaty is binding on the state that signs it. In this case, the treaty transforms the Colombian domestic regime into the country's Private International Law system, a legal situation that has gone unnoticed by legal authors and most of the case law despite the clear mandate of Law 21 of 1981.

In addition, there has been a great deal of confusion in academia and case law regarding the application of the Montevideo Treaties, particularly because they contain two types of rules whose nature and operation are entirely distinct despite their structural similarity, causing difficulties for judges in applying them.

On the one hand, they establish choice of law rules, which occupy the majority of the treaty, by which a court of a Member State must determine the applicable law regardless of the origin of the elements of an international private situation (domicile, goods location, place of performance, and others). On the other hand, it contains rules of choice of jurisdiction that, due to their procedural nature, allow only the judges of member countries to establish their own jurisdiction (Colombia, Peru, and Bolivia in their original version and Argentina, Uruguay, and Paraguay in the 1940 version).

Regarding the latter, a few number of peculiar decisions can be identified. For instance, the Superior Court of the Judicial District of Pereira ruled the lack of jurisdiction in a divorce proceeding based on the "Treaty on International Civil Law" argument that it fixed jurisdiction in the Iranian judge, which resulted in an action based on the Constitution to protect civil rights, with the Supreme Court of Justice (2007) stating:

> Put this way, it is necessary to protect the fundamental right to due process of the plaintiff; to this end, the impugned order shall be rendered null and void and the accused Court shall be ordered to rule again on the consultation of the judgment within 20 days of receipt of the file, and at the time of deciding it shall, with special care, examine whether the Treaty on International Civil Law, signed in Montevideo on February 12, 1889, approved by Colombia through Law 33 of 1992; in which the court based the final decision establishing the jurisdiction of Iranian authorities to process the divorce requested by the plaintiff, was also signed and ratified by Iran.

On the other hand, some scholars, when discussing the Treaty, tend to imply that it only applies to relations between member states, which, as demonstrated, would not be necessary because the treaty itself does not establish a scope of application limited to member states and therefore restricts the application of its conflict rules:

> Three of the member states of Mercosur – Argentina, Paraguay and Uruguay – are bound by the Montevideo Treaty of International Civil Law of 1889, although not among themselves, but only with respect to the three associated States that are also parties to that treaty – Bolivia, Colombia and Peru. The 1940 Treaty on International Civil Law binds Argentina, Paraguay and Uruguay (Albornoz, 2009, 638).

The question posed by the cited author can be related solely to the rules of choice of jurisdiction and not on the conflict rules, which were included in the legal system of each member country in accordance with the ratified text and applied unilaterally by the judge of the member country, particularly if it ratified the additional protocol (which Colombia has not) or the Treaty on General Rules.

The Colombian Constitutional Court in Judgment SU768 of 2014 tangentially analyzed the problem of determining the applicable law in a case, ruled that it is the judge's responsibility to make such a determination, invoked both Law 21 of 1981 and Law 33 of 1992, but does not clearly define the application of the Treaties of Montevideo, and merely indicates that its additional protocol is not applicable in Colombia, as it has not been ratified in the country. Nonetheless, it expressly acknowledged the application of the Inter-American Convention on Private International Law:

> The contested ruling, on the other hand, failed to take into account the Inter-American Convention on General Norms of Private International Law, which was ratified by Colombia through Law 21 of 1981. Article 2 of the Constitution states, "[t]he judges and authorities of the States Parties shall be required to apply foreign law as would the judges of the State whose law is applicable, notwithstanding that the parties may allege and prove the existence and content of the foreign law invoked".
> In light of the foregoing, the judgment issued on May 9, 2012 incurred a substantive flaw by opting for a regressive and insufficient interpretation of Article 188 C.P.C., which is contrary to the guiding principles of the predominance of the substantive right and the validity of a just order, mandatory in the administration of justice. When the Code of Civil Procedure itself warns of the informal responsibility of local judges in obtaining such evidence, it is illegitimate to conclude

that the plaintiff is solely responsible for bringing evidence on the content and scope of a foreign norm to the process. Postulate reiterated by the treaty ratified by Law 21 of 1981, which stipulated that foreign law should be applied by judges as if it were their own legal system.

In contrast, recent Tutela, Cassation, and Exequatur decisions of the Supreme Court of Justice have utilized the Treaty of Montevideo as a fundamental standard for determining the applicable law.

As a guarantee of the real jurisdiction recognized under private international law, the first requirement is that the provided judgment does not define matters pertaining to rights in rem over real estate located in Colombia.
The previous rule, lex rei sitae, is based on article 26 of the Montevideo Treaty of 1889 on International Civil Law, which was incorporated into national law by Law 33 of 1992, namely: "Goods, whatever their nature, are exclusively governed by the law of the place where they exist as to their quality, to their possession, to their absolute or relative alienability and to all legal relations of real character to which they are susceptible" (Supreme Court of Justice, 2022).

In a cassation case involving an international commercial agency contract, the same was true.

5.1. - The homeland constitutes the geographical limit within which the commercial agency regulated by the Commercial Code is executed, since article 1317 states that the order carried out by the agent is intended to promote or exploit the business of a national or foreign entrepreneur "within a predetermined area in the national territory", and article 1328 states that contracts of this nature "executed in the national territory are subject to the provisions of the Commercial Code". Such provisions are the logical extension of the provisions of the Treaty on International Civil Law and International Commercial Law of Montevideo (1888-1889), ratified in Colombia by Law 33 of 1992, which rule the principle that contracts are governed by the law of the place of performance, in judgment of 30 October 1986, this Court stated: In the present case, the legislator has only recognized principles of private international law, based on Savigny's thesis and universally accepted, according to which contracts concluded between persons of different states must be governed by the law applicable at the place of performance ("lex loci executionis") and legal disputes must be resolved by the local judges ("lex fori").

In this way, commercial agency contracts whose execution occurs in a foreign country are exempt from the national commercial requirement; i.e., its components are not subject to the rights and duties arising from national law. Therefore, without losing their nature as commercial agency contracts, they lack the protection afforded by the Commercial Code to contracts involving the agent's implementation of activities overseas (Supreme Court of Justice, 2021).

All of the above leads to Law 33 of 1992, which, in accordance with Law 21 of 1981, forms the basis of Colombian Private International Law and overlaps with articles 19 and 20 of the Civil Code and article 869 of the Commercial Code in contractual matters. Despite the flaws and rigidity of these treaties, which are becoming more apparent today, the aforementioned is true (Moreno Rodriguez, 2014, 97).

In jurisdictions such as Colombia, International Private Law is currently extremely weak, unknown, and therefore unapplied. Thus, if the parties are satisfied with the application of the law of the forum, the judge will not ordinarily be inclined to order the parties to adjust their claims or exceptions to the applicable foreign law and will apply the law of the forum directly.

This is due to the fact that the most pertinent conflict rules in the Colombian legal system are territorialist, making them subject to national law (articles 19, 20 of the Civil Code -1887- and 869 of the Commercial Code -1971-). The others are based on the aforementioned treaties and are supplemented by the Inter-American Treaty of General Rules of Private International Law's functional norms, whose application is very limited and whose relevance in domestic law has been disregarded.

II. *Conclusions*

In Colombia and the rest of Latin America, Private International Law shaped by International Treaties, such as those of Montevideo in 1889 and 1971, has resulted in an International Private system that raises significant doubts amongst both legal experts and authorities when it is applied.

This paper argues that the Montevideo Treaties of 1889, ratified in Law 33 of 1992, and the Inter-American Treaty of General Rules of Private International Law of 1971, ratified in Law 21 of 1981, constitute the fundamental basis of Colombian Private International Law, with the Inter-American Convention on Maintenance Obligations of Montevideo

of 1989, ratified in Law 449 of 1998, and other conventional and supranational rules serving as complements.

The analysis presented here underscores the need for a modernization of Colombian Private International Law that begins with the creation of a unified norm of the subject that addresses both the problems of jurisdiction and applicable law and that, among other things, expressly establishes, as was done for arbitration with Law 1563 of 2012, the possibility of choice of law, putting an end to this unnecessary debate.

All of this must be accompanied by the necessary termination of the Treaties of Montevideo in order to establish a modern system that takes into account the recent developments in the United States, Europe, and Asia. To provide Colombia with a more appropriate and secure international private framework for multinational social relations in a globalized world, thereby contributing to a largest increase in international business and strengthen our international family, civil, commercial, and consumer relations.

Appendix

Appendix 1

Proyecto de Ley General de Derecho Internacional Privado para Colombia (IADIP Draft Law - PGLPIL)

Capítulo Primero
Del objeto de la Ley

Artículo 1: Objeto de la Ley

La presente Ley tiene por objeto la determinación de la competencia judicial internacional y el Derecho aplicable a cuestiones jurídicas vinculadas a Derechos extranjeros. Igualmente regulará la eficacia de los actos y decisiones de autoridades judiciales y administrativas extranjeras en Colombia.

Los tratados o convenios internacionales que hayan sido suscritos y ratificados por Colombia y que se encuentren vigentes en el ordenamiento jurídico colombiano tendrán aplicación preferente a las disposiciones de la presente Ley.

Capítulo Segundo
De los problemas de aplicación de las normas sobre conflicto de leyes

Artículo 2: Aplicación del Derecho extranjero

Los jueces y autoridades competentes aplicarán de oficio el Derecho extranjero que sea designado como aplicable por las normas colombianas sobre conflicto de leyes. Sin embargo, si el juez o autoridad competente lo estima conveniente, podrá solicitar a las partes su colaboración para determinar el contenido, vigencia y sentido de dicho Derecho.

Todos los recursos otorgados por la ley procesal colombiana serán igualmente admitidos para los casos de aplicación del Derecho extranjero designado por la norma de conflicto.

Cuando en el Derecho extranjero que resulte competente coexistan diversos ordenamientos jurídicos, el conflicto de leyes que se suscite entre esos ordenamientos se resolverá de acuerdo con los principios vigentes en el correspondiente Derecho extranjero.

Artículo 3: Interpretación del Derecho extranjero

La interpretación del Derecho extranjero competente se realizará de acuerdo con el propio Derecho extranjero.

Cuando el Derecho extranjero aplicable al caso establezca instituciones o procedimientos esenciales para su adecuada aplicación que no estén contemplados en la legislación colombiana, podrá negarse la aplicación de icho Derecho, siempre que el Derecho colombiano no tenga instituciones o procedimientos análogos.

Artículo 4: Normas internacionalmente imperativas

No obstante lo previsto en esta Ley, el juez deberá aplicar las normas internacionalmente imperativas del Derecho colombiano que, según este Derecho, deben prevalecer aun cuando un Derecho extranjero resulte competente. El juez podrá tomar en consideración las normas internacionalmente imperativas de otros Estados estrechamente vinculados con el caso, teniendo en cuenta las consecuencias de su aplicación o inaplicación.

Artículo 5: Derechos de los pueblos o comunidades indígenas

Las disposiciones para proteger los derechos de pueblos o comunidades indígenas sobre los recursos naturales existentes en sus tierras, los conocimientos tradicionales, la conservación de la diversidad biológica, el uso sostenible de recursos y variedades vegetales tienen el carácter de normas internacionalmente imperativas.

Artículo 6: Orden público en el Derecho internacional privado

Las disposiciones del Derecho extranjero que deban ser aplicadas de conformidad con esta Ley, solo serán excluidas cuando las mismas conduzcan a una solución manifiestamente incompatible con los principios esenciales del orden público colombiano. No se aplicará la norma extranjera que resulte manifiestamente incompatible con los derechos fundamentales.

Dicha incompatibilidad se apreciará teniendo en cuenta, en particular, la intensidad de la conexión de la situación con el territorio colombiano, el nivel de daño social y la gravedad que produciría la aplicación de dicha disposición extranjera en Colombia.

Cuando una disposición del Derecho extranjero competente no sea aplicable en razón de dicha incompatibilidad, se aplicará el Derecho colombiano.

Artículo 7: Fraude a la Ley

No se aplicará el Derecho designado por la norma de conflicto, cuando artificiosamente se hubieren evadido los principios esenciales del Derecho designado como aplicable por las normas de conflicto.

Artículo 8: Reenvío

Cuando el Derecho extranjero designado por la norma de conflicto colombiana indique como aplicable al Derecho colombiano, se aplicarán las normas materiales colombianas.

Cuando el Derecho extranjero designado por la norma de conflicto colombiana indique como aplicable al Derecho de un tercer Estado, que a su vez se considere aplicable, se aplicarán las normas materiales de ese Estado.

En los demás casos se aplicará el Derecho material designado por la norma de conflicto colombiana.

Cuando a la relación controvertida le sea aplicable un tratado internacional se atenderá, respecto del reenvío, a lo que disponga el propio tratado.

Artículo 9: Situaciones jurídicas válidamente creadas fuera de Colombia

Una relación jurídica válidamente constituida en un Estado extranjero, de conformidad con el Derecho de ese Estado, será reconocida en Colombia, siempre que al momento de su creación haya tenido una conexión suficiente con ese Estado y no sea manifiestamente contraria a los principios esenciales del orden público colombiano.

Artículo 10: Aplicación armónica

Los diversos Derechos que puedan ser aplicables para regular los diferentes aspectos de una misma relación jurídica, serán aplicados armónicamente, procurando realizar las finalidades perseguidas por cada uno de dichos Derechos. Las posibles dificultades causadas por su aplicación simultánea se resolverán teniendo en cuenta las exigencias impuestas por la equidad en el caso concreto.

Capítulo Tercero
Del domicilio

Artículo 11: Domicilio de las personas físicas

El domicilio de una persona física se encuentra en el territorio del Estado en el cual reside habitualmente con la intención de ejercer allí sus derechos.

Artículo 12: Domicilio de incapaces

El domicilio de las personas incapaces estará en el lugar en el que tengan su residencia habitual, en los términos del artículo 11.

Artículo 13: Domicilio de los cónyuges

El domicilio de los cónyuges será aquel en el cual estos vivan de consuno, sin perjuicio del derecho de cada cónyuge de fijar su domicilio en la forma prevista en el artículo 11.

Artículo 14: Domicilio de los funcionarios diplomáticos

El domicilio de los funcionarios diplomáticos será el último que hayan tenido en el territorio del Estado acreditante. El de las personas físicas que residan temporalmente en el extranjero por empleo o comisión de su Gobierno, será el del Estado que los designó.

Artículo 15: Domicilio de las personas jurídicas

El domicilio de una persona jurídica se encuentra en el Estado donde se halla el centro principal de sus actividades profesionales o comerciales.

Artículo 16: Ámbito de aplicación de este capítulo

Las normas de este Capítulo se aplicarán cada vez que esta Ley, o cualquier otra norma del sistema de Derecho internacional privado colombiano, se refiera al domicilio de las personas a los efectos de la determinación del Derecho aplicable o del tribunal o autoridad competente.

Capítulo Cuarto
Del proceso internacional

Sección Primera
Del Derecho aplicable a la forma del procedimiento

Artículo 17: Derecho aplicable a la forma del procedimiento

La competencia de los tribunales colombianos y la forma del procedimiento llevado en Colombia se rigen por el Derecho colombiano.

Sección Segunda
De la competencia judicial internacional general

Artículo 18: Competencia general

Los tribunales colombianos serán competentes para conocer de todo tipo de causas civiles y comerciales cuando el demandado, sin importar su nacionalidad, esté domiciliado en territorio colombiano.

Artículo 19: Acceso transnacional a la justicia

Los tribunales colombianos podrán asumir competencia, aunque esta Ley formalmente no se las atribuya, cuando la realización de un proceso judicial en el extranjero se presente como imposible. En este caso, será competente el tribunal colombiano del lugar que tenga los vínculos más estrechos con el objeto del litigio.

Artículo 20: Acciones contra personas domiciliadas en el extranjero

Si el demandado no estuviere domiciliado en Colombia, la competencia de los tribunales colombianos se determinará de conformidad con las reglas establecidas en la Sección Tercera de este Capítulo.

Sección Tercera
De los criterios especiales de competencia judicial internacional

Artículo 21: Competencia en materia de matrimonio

1. Las autoridades civiles o judiciales colombianas serán competentes para presenciar la celebración del matrimonio si uno de los prometidos está domiciliado en territorio colombiano o si tiene la nacionalidad colombiana.

2. Los extranjeros no domiciliados en Colombia podrán casarse en territorio colombiano ante la autoridad competente, cuando el matrimonio pueda ser reconocido en el Estado de su domicilio.

3. Los tribunales colombianos son competentes para conocer de toda demanda concerniente a la validez del matrimonio y sus efectos cuando uno de los esposos tiene su domicilio en territorio colombiano.

Artículo 22: Competencia en materia de filiación y demás relaciones entre padres e hijos

Los tribunales colombianos serán competentes para conocer de las acciones relativas a la filiación y demás relaciones entre padres e hijos, si:

1. la persona de cuya filiación se trate tiene su domicilio en territorio colombiano al momento de la introducción de la demanda;

2. la persona cuya paternidad o maternidad es invocada o impugnada tiene su domicilio en territorio colombiano al momento de la introducción de la demanda, o

3. la persona de cuya filiación se trate y la persona cuya paternidad o la maternidad es invocada o impugnada tienen nacionalidad colombiana al momento de la presentación de la demanda.

Artículo 23: Competencia en materia de adopción

Los tribunales colombianos serán competentes para conocer de las acciones relativas a la adopción, si la persona de cuya adopción se trate está domiciliada en Colombia al momento de la adopción.

Artículo 24: Competencia en materia de contratos libremente negociados

En caso de acciones relativas a contratos libremente negociados, entendidos como aquellos en los cuales las partes tienen el mismo poder de negociación, los tribunales colombianos tendrán competencia judicial internacional cuando:

1. el contrato ha sido celebrado en Colombia;
2. la obligación discutida ha sido o debe ser cumplida en Colombia; o
3. las partes deciden someterse expresa o tácitamente a ellos.

Artículo 25: Competencia en materia de contratos asimétricos

En caso de acciones relativas a contratos asimétricos, entendidos como aquellos en los cuales una las partes no tengan igual o equivalente poder de negociación, los tribunales colombianos tendrán competencia judicial internacional si:

1. la parte con menor poder de negociación está domiciliada en Colombia, incluso cuando actúe como demandante.
2. la obligación discutida ha sido o debe ser ejecutada en Colombia.
3. las partes hayan elegido expresa o tácitamente los tribunales colombianos, después de iniciada la controversia.

Artículo 26: Elección expresa o tácita de tribunales colombianos

La elección expresa de los tribunales colombianos constará por escrito. La elección tácita derivará de la conducta del demandante al interponer la demanda y por parte del demandado al realizar cualquier actuación en juicio distinta de oponer la falta de jurisdicción.

Artículo 27: Elección de un tribunal extranjero

Cuando las partes en su acuerdo elijan válidamente un tribunal extranjero, el tribunal colombiano deberá declinar su competencia, salvo que se trate de un caso de competencia exclusiva de los tribunales colombianos.

Artículo 28: Competencia en materia de responsabilidad civil extracontractual

Los tribunales colombianos serán competentes en materia de responsabilidad civil extracontractual cuando:

1. el hecho generador de la obligación haya ocurrido en territorio colombiano;
2. el efecto dañoso haya ocurrido o amenace con ocurrir, en todo o en parte, en territorio colombiano; o

3. las partes hayan decidido someterse expresa o tácitamente a los tribunales colombianos, siempre que tal sumisión ocurra después de ocurrido el hecho generador de la responsabilidad civil.

Artículo 29: Competencia en materias relativas a la protección de la propiedad intelectual

Los tribunales colombianos tendrán competencia para conocer de las acciones relativas a la protección de la propiedad intelectual cuando el demandado esté domiciliado en Colombia o, a falta de domicilio, cuando la protección sea invocada ante ellos.

Artículo 30: Competencia en materia de universalidades de bienes

Los tribunales colombianos serán competentes para conocer de acciones relativas a universalidades de bienes si:

1. el domicilio del deudor se encuentra en territorio colombiano, o

2. bienes que formen parte integrante de la universalidad se encuentran ubicados en Colombia.

Artículo 31: Competencia para actos de jurisdicción voluntaria

Los tribunales colombianos serán competentes para conocer de los actos de jurisdicción voluntaria cuando la persona que los motiva tenga o haya tenido su domicilio en Colombia.

Artículo 32: Competencia judicial internacional exclusiva

La competencia judicial internacional exclusiva de los tribunales colombianos tiene carácter excepcional, debe interpretarse restrictivamente, y carece de fuero de atracción sobre otras cuestiones que puedan plantearse respecto del mismo asunto.

Se considera materia de competencia exclusiva las cuestiones relativas a derechos reales sobre bienes inmuebles situados en Colombia.

Artículo 33: Foro de necesidad

Los tribunales colombianos podrán dictar medidas de protección a personas que se encuentren en territorio colombiano, aunque carezcan de competencia para conocer del fondo del litigio.

Sección Cuarta
De la litispendencia internacional

Artículo 34: Litispendencia internacional

Los tribunales colombianos suspenderán el ejercicio de su competencia cuando la misma causa, con el mismo objeto y entre las mismas partes, se hubiere iniciado con

anterioridad en el tribunal de un Estado que estuviere razonablemente vinculado con el asunto o con las partes, a menos que resulte evidente que en ese otro foro el litigio no será resuelto de manera justa, eficaz y diligente.

La suspensión fundamentada en la litispendencia podrá extenderse hasta que la decisión en el Estado extranjero adquiera fuerza de cosa juzgada, siempre que dicha decisión se pronuncie dentro de un plazo razonable y pueda tener eficacia en Colombia.

Sección Quinta
De la cooperación jurídica internacional

Artículo 35: Cooperación jurídica internacional

Los tribunales colombianos podrán dirigirse a cualquier autoridad competente extranjera, mediante exhortos y comisiones rogatorias, para la práctica de citaciones, diligencias probatorias o de cualquier otra actuación judicial que resulte necesaria para el buen desarrollo del proceso. Así mismo evacuarán, dentro de la mayor brevedad, los exhortos y comisiones rogatorias provenientes de tribunales extranjeros que se ajusten a los principios del Derecho Internacional aplicables en la materia.

Capítulo Quinto
De la eficacia de las decisiones extranjeras

Artículo 36: Requisitos de eficacia

Las sentencias o decisiones judiciales o administrativas extranjeras producirán efectos en Colombia, sin revisión de fondo, mediante un procedimiento sumario, siempre que cumplan con los siguientes requisitos:

1. que las autoridades del Estado en el cual la decisión fue dictada sean competentes de conformidad con criterios razonables;

2. que la decisión no sea susceptible de recurso alguno y sea definitiva de acuerdo con el Derecho del Estado en el cual ha sido pronunciada;

3. que se haya respetado el derecho al debido proceso de las partes;

4. que el objeto del litigio no sea de competencia exclusiva de las autoridades colombianas;

5. que los tribunales colombianos no se hayan pronunciado sobre el litigio en una decisión no susceptible de recursos por las vías ordinarias entre las mismas partes, sobre el mismo objeto y por la misma causa; o que no se haya reconocido previamente en Colombia una decisión extranjera que se haya pronunciado sobre la causa; y

6. que la sentencia no contravenga el orden público colombiano, para lo cual se tendrán en cuenta los criterios establecidos en el artículo 6 de esta Ley.

Artículo 37. Autoridad competente

La solicitud de reconocimiento de los efectos probatorio y de cosa juzgada de una sentencia extranjera se podrá presentar ante la autoridad ante la que se deseen hacer valer tales efectos.

Para proceder a la ejecución, la solicitud de reconocimiento deberá presentarse ante la Sala de Casación Civil de la Corte Suprema de Justicia para las solicitudes de ejecución en Distrito Especial de Bogotá.

Para ejecuciones en los demás departamentos, serán competentes los Tribunales Superiores del Distrito en lo Civil.

Artículo 38: Requisitos formales

La solicitud de reconocimiento deberá ser presentada por escrito y estar acompañada de:

1. el texto completo, legalizado y, de ser el caso, traducido, de la decisión administrativa o judicial extranjera;

2. una certificación que pruebe que la decisión no es susceptible de los recursosordinarios, que la misma es definitiva y que tiene la calidad de cosa juzgada, cuandode la propia decisión no se puedan deducir estos requisitos; y

3. en caso de una sentencia o decisión por contumacia, un documento oficial queestablezca que el condenado fue citado en forma legal y que no aprovechó laposibilidad de hacer valer sus derechos.

Artículo 39: Procedimiento

La solicitud de reconocimiento deberá estar acompañada de los requisitos formales establecidos en el artículo 38. La autoridad competente rechazará la solicitud sifaltare alguno de tales requisitos formales. Además deberá acompañarse de la prueba de los requisitos establecidos en el artículo 36 de esta Ley.

De la solicitud se dará traslado a la parte contra la cual obrará la sentencia extranjera, la cual dispondrá de 15 días para oponerse al reconocimiento, aportar la pruebas de tal negativa y hacer valer sus derechos. Vencido este plazo, la autoridad competente deberá dictar la sentencia.

Contra la decisión que se pronuncie sobre el reconocimiento de una decisión administrativa o judicial extranjera no cabrá recurso alguno.

En caso de concederse el reconocimiento, si la parte así lo solicita, se procederá de inmediato a su ejecución, de conformidad con el procedimiento establecido en la normativa correspondiente.

Capítulo Sexto
De las personas físicas

Artículo 40: Existencia, estado y capacidad de las personas físicas

La existencia, el estado y la capacidad jurídica de las personas físicas se rige por el Derecho del Estado de su domicilio.

Si el Derecho que regule el acto para el cual se quiere determinar la capacidad prescribe condiciones especiales en cuanto a la capacidad de una persona, ese Derecho será tomado en cuenta.

Artículo 41: Principio de igualdad

No producirán efectos las limitaciones a la capacidad establecidas en el Derecho del domicilio, que se basen en diferencias de nacionalidad, raza, sexo, idioma, religión,opinión política o de otra índole, origen, condición económica o social u otra cualquiera.

Artículo 42: Cambio de domicilio

El cambio de domicilio no restringe la capacidad adquirida conforme al Derecho del anterior domicilio.

Artículo 43: Nombres

Los nombres y apellidos de una persona se rigen, a su elección, por el Derecho del Estado del cual es nacional o en el que tiene su domicilio.

Artículo 44: Ausencia

Los presupuestos y los efectos de la ausencia, la desaparición y la muerte presunta de una persona se rigen por el Derecho de su último domicilio.

Capítulo Séptimo
Del matrimonio y las uniones no matrimoniales

Artículo 45: Capacidad y requisitos de fondo del matrimonio

El Derecho del lugar del domicilio de cada uno de los contrayentes rige la capacidad para contraer matrimonio y los demás requisitos de fondo para su celebración.

Artículo 46: Capacidad y requisitos de fondo de las uniones no matrimoniales

La capacidad y los demás requisitos de fondo para la formalización de uniones no matrimoniales se rigen por el Derecho del lugar de su constitución.

Artículo 47: Efectos personales y patrimoniales del matrimonio

Los efectos personales y patrimoniales del matrimonio se rigen por el Derecho elegido por los cónyuges, quienes podrán optar entre:

1. el Derecho del Estado en el que los cónyuges o futuros cónyuges, o uno de ellos, tengan su domicilio, o

2. el Derecho del Estado de la nacionalidad de cualquiera de los cónyuges o futuros cónyuges.

El Derecho aplicable a los efectos del matrimonio en virtud de este artículo se aplicará a todos los bienes incluidos en el régimen patrimonial del matrimonio, independientemente del Estado en que estén situados.

Artículo 48: Ausencia de elección del Derecho aplicable

En ausencia de elección del Derecho aplicable por los cónyuges, los efectos del matrimonio se rigen por el Derecho del Estado del domicilio común; o, en su defecto, por el Derecho del Estado de su último domicilio común.

Artículo 49: Efectos personales y patrimoniales de las uniones no matrimoniales

Los efectos personales y patrimoniales de las uniones no matrimoniales se rigen por el Derecho del lugar donde se pretenda hacerlas valer.

Capítulo Octavo
Del divorcio, la separación de cuerpos y la nulidad del matrimonio, y de la disolución de uniones no matrimoniales

Artículo 50: Divorcio y separación de cuerpos

El divorcio y la separación de cuerpos se rigen por el Derecho del Estado del domicilio común; o, en su defecto, por el Derecho del Estado del último domicilio común.

Artículo 51: Nulidad del matrimonio

La nulidad del matrimonio se rige por el Derecho que regula la causa de tal nulidad.

Artículo 52: Disolución de las uniones no matrimoniales

La disolución de las uniones no matrimoniales se rige por el Derecho del domicilio común o, en su defecto, por el Derecho del último domicilio común.

Capítulo Noveno
De las relaciones de familia

Artículo 53: Interés superior

Si en los casos regulados por este capítulo hubiere menores de edad involucrados, el juez o autoridad deberá tomar siempre en cuenta el interés superior de estos.

Artículo 54: Filiación y demás relaciones entre padres e hijos

La filiación y demás relaciones entre padres e hijos se rigen, en cuanto a su establecimiento y efectos, por el Derecho del domicilio de la persona de cuya filiación se trate.

Artículo 55: Adopción

La capacidad para adoptar y ser adoptado, así como las condiciones y limitacionesde la adopción, se rigen por el Derecho del domicilio de la persona de cuyaadopción se trate.

Artículo 56: Protección de incapaces

La tutela y demás instituciones de protección de incapaces se rigen por el Derechodel domicilio del incapaz.

Artículo 57: Obligaciones alimentarias

Las obligaciones alimentarias se rigen por el Derecho del domicilio del acreedor de la obligación.

Artículo 58: Restitución y protección de menores

La restitución y la protección de menores se rigen por los tratados sobre la materia vigentes en Colombia.

Capítulo Décimo
De las sucesiones

Artículo 59: Sucesiones

La sucesión por causa de muerte se rige por el Derecho del Estado del último domicilio del causante.

Artículo 60: Capacidad para testar

La capacidad para disponer por testamento, para modificarlo o para revocarlo se rige por el Derecho del domicilio del otorgante al momento de la realización de dichos actos.

Capítulo Décimo Primero
De las personas jurídicas

Artículo 61: Reconocimiento de las personas jurídicas

Las personas jurídicas de carácter privado debidamente constituidas en un Estado serán reconocidas de pleno derecho en Colombia.

El reconocimiento de pleno derecho no excluye la facultad de las autoridades colombianas para exigir comprobación de la existencia de la persona jurídica conforme al Derecho del lugar de su constitución.

En ningún caso, la capacidad reconocida a las personas jurídicas constituidas en el extranjero podrá ser mayor que la capacidad que el Derecho colombiano otorgue a las personas jurídicas constituidas en Colombia.

Artículo 62: Derecho aplicable a las personas jurídicas

La existencia, la capacidad, el funcionamiento, la fusión y la disolución de las personas jurídicas de carácter privado se rigen por el Derecho del lugar de su constitución.

Se entiende por lugar de su constitución, aquel en donde se cumplan los requisitos de forma y fondo requeridos para la creación de dichas personas.

Artículo 63: Capacidad de obrar

Para el ejercicio directo o indirecto de los actos comprendidos en el objeto social de las personas jurídicas, estas quedarán sujetas al Derecho del Estado donde realizaren dichos actos.

Artículo 64: Sucursales

Las sucursales de personas jurídicas que tengan su sede principal en el extranjero pueden establecerse en Colombia y estarán regidas por el Derecho colombiano.

Artículo 65: Cambio de Derecho aplicable

Si el Derecho extranjero que regula la persona jurídica lo permite, esta podrá someterse al Derecho colombiano sin que sea necesario que se liquide, ni que se cree una nueva sociedad. La persona jurídica deberá satisfacer las condiciones fijadas por el Derecho extranjero y adaptarse a una de las formas de personas jurídicas existentes en Colombia.

Capítulo Décimo Segundo
De los bienes y derechos reales

Artículo 66: Derecho aplicable a los bienes y derechos reales

Los bienes y derechos reales se rigen por el Derecho del Estado donde se encuentran ubicados.

La adquisición y pérdida, por actos jurídicos, de derechos reales sobre bienes en tránsito se rigen por el Derecho del Estado de destino.

Los bienes objeto de garantía mobiliaria se rigen por el Derecho designado por las normas especiales sobre la materia.

Están reservadas las disposiciones de otras leyes relativas a los derechos reales sobre las naves, aeronaves y otros medios de trasporte.

La publicidad sobre los actos de constitución, transferencia y extinción sobre derechos reales se rige por el Derecho del Estado donde son llevadas a cabo las formalidades de dicha publicidad.

Artículo 67: Cambio de situación

El cambio de situación de los bienes muebles no afecta los derechos adquiridos con arreglo al Derecho del lugar en donde se encontraban al tiempo de su adquisición.

No obstante, tales derechos solo pueden ser opuestos a terceros, después de cumplidos los requisitos que establezca al respecto el Derecho de la nueva situación.

Artículo 68: Bienes culturales

Si un bien considerado por un Estado como parte de su patrimonio cultural ha abandonado su territorio de una manera que el Derecho de ese Estado considera ilegítima al momento de la salida del territorio, la restitución que dicho Estado solicite se rige por el Derecho de ese Estado o, por elección de este último, por el Derecho del Estado en cuyo territorio se encuentra el bien al momento de la solicitud de restitución.

Si el Derecho del Estado que considera que el bien es parte de su patrimonio cultural no otorga protección al poseedor de buena fe, este último puede invocar la protección que le atribuye el Derecho del Estado en cuyo territorio se encuentra el bien al momento de la solicitud de restitución.

Si un bien de valor cultural para un pueblo o comunidad indígena es devuelto al territorio nacional, el destino final de dicho bien se rige por las normas de ese pueblo o comunidad, a menos que dicho pueblo o comunidad decida que debe regirse por el Derecho del Estado del cual hace parte.

Capítulo Décimo Tercero
De la forma y prueba de actos jurídicos

Artículo 69: Forma de los actos jurídicos

Los actos jurídicos serán válidos en cuanto a su forma, si cumplen con los requisitos establecidos en alguno de los siguientes ordenamientos jurídicos:

1. el del lugar de celebración del acto;
2. el que rige el contenido del acto; o
3. el del domicilio de su otorgante o del domicilio común de sus otorgantes.

Artículo 70: Prueba de los actos jurídicos

Los medios de prueba, su eficacia y la determinación de la carga de la prueba se rigen por el Derecho que regula la relación jurídica correspondiente, sin perjuicio de que su sustanciación procesal se ajuste al Derecho del tribunal o funcionario ante el cual se efectúa.

Capítulo Décimo Cuarto
De las obligaciones

Sección Primera
De los negocios jurídicos

Artículo 71: La promesa unilateral

La promesa unilateral se rige por el Derecho del Estado en el cual ha sido manifestada.

Artículo 72: La representación voluntaria

La representación voluntaria se rige por el Derecho del Estado en el cual el representante tiene la sede de sus negocios, siempre y cuando actúe a título profesional y dicha sede sea conocida, o pueda haber sido conocida por los terceros.

En ausencia de tales condiciones se aplicará el Derecho del Estado en el cual el representante ejerce de forma principal sus atribuciones.

Sección Segunda
De los contratos

Artículo 73: Contratos libremente negociados

El contrato se rige por el Derecho elegido por las partes. Las partes pueden elegir:

1. el Derecho aplicable a la totalidad o a una parte del contrato; o
2. diferentes Derechos para diferentes partes del contrato.

La elección puede realizarse o modificarse en cualquier momento, pero una elección o modificación realizada con posterioridad a la celebración del contrato no debeafectar su validez formal ni los derechos de terceros.

No se requiere vínculo alguno entre el Derecho elegido y las partes o su operación.

Artículo 74: Normas de Derecho

Las partes pueden elegir, como Derecho aplicable al contrato, normas de Derecho generalmente aceptadas a nivel internacional, supranacional o regional como un conjunto de normas neutrales y equilibradas.

Artículo 75: Elección expresa o tácita

La elección del Derecho aplicable, o toda modificación de la elección del Derecho aplicable, debe efectuarse de manera expresa, o resultar claramente de las disposiciones del contrato o de las circunstancias.

Un acuerdo entre las partes para otorgar competencia a un tribunal judicial o arbitral para resolver los conflictos vinculados al contrato no constituye, en sí mismo, una elección de Derecho aplicable.

Artículo 76: Validez formal de la elección del Derecho aplicable

La elección del Derecho aplicable no está sometida a condición alguna en cuanto a la forma, a no ser que las partes establezcan lo contrario.

Artículo 77: Validez sustancial de la elección del Derecho aplicable

El Derecho del Estado en el que una parte tiene su domicilio determina si esa parteprestó su consentimiento sobre la elección del Derecho aplicable. No obstante, para determinar si las partes llegaron a un acuerdo respecto de la elección del Derecho aplicable, se utiliza el Derecho presuntamente elegido por las partes.

Artículo 78: Batalla de formularios

Si las partes utilizaron cláusulas estándar que designan dos Derechos diferentes y según ambos Derechos prevalecen las mismas cláusulas estándar, se aplica el Derecho indicado en esas cláusulas estándar; si según estos Derechos prevalecen distintas cláusulas estándar, o si no prevalece ninguna, se procederá como si no hubiera habido elección del Derecho aplicable.

Artículo 79: Derecho aplicable en ausencia de elección

En ausencia de elección o en caso de elección ineficaz, se aplicará el Derecho del lugar de ejecución de la obligación discutida.

Artículo 80: Exclusión del reenvío

Para los efectos de la aplicación de esta sección, se entenderá por "Derecho" el vigente en un Estado, con exclusión de sus normas de conflicto.

Artículo 81: Ámbito de aplicación del Derecho que rige el contrato

El Derecho indicado en esta sección rige todos los aspectos del contrato, en particular:

1. su interpretación;

2. los derechos y obligaciones derivados del contrato;

3. la ejecución del contrato y las consecuencias de su incumplimiento, incluso la valoración de los daños y perjuicios;

4. los diferentes modos de extinción de las obligaciones, incluidas la prescripción y la caducidad;

5. la validez y las consecuencias de la nulidad del contrato;
6. la carga de la prueba y las presunciones legales; y
7. las obligaciones precontractuales.

Artículo 82: Contratos de trabajo y relaciones laborales de personas individuales

En el caso de contratos de trabajo y relaciones laborales, la elección del Derecho aplicable por las partes no tendrá efecto si priva al trabajador de la protección concedida por las disposiciones obligatorias contenidas en el Derecho aplicable en ausencia de elección.

A falta de elección del Derecho aplicable, los contratos de trabajo se rigen por el Derecho del Estado:

1. en el que el trabajador, en cumplimiento del contrato, realiza habitualmente su labor, incluso cuando provisionalmente este haya iniciado su labor en un Estado distinto; o

2. en el que se encuentra el establecimiento donde se ha empleado al trabajador, con tal de que este no desempeñe habitualmente su trabajo en el mismo Estado.

Artículo 83: Contratos con consumidores

Los contratos con consumidores, entendidos como aquellos en los cuales una de las partes, como destinatario final, adquiera, disfrute o utilice un determinado producto o servicio para la satisfacción de una necesidad propia, privada, familiar o doméstica y empresarial cuando no esté ligada intrínsecamente a su actividad económica, se rigen por el Derecho del domicilio de consumidor.

Las partes podrán acordar la aplicación de un Derecho diferente, siempre que este no suponga una desmejora de los derechos del consumidor reconocidos por el Derecho de su domicilio.

Sección Tercera
De las obligaciones nacidas de la Ley

Artículo 84: Obligaciones nacidas de la Ley

La gestión de negocios ajenos, el enriquecimiento sin causa, el pago de lo no debido y las demás obligaciones legales, se rigen por el Derecho del Estado en el cual se ha verificado el hecho del cual se deriva la obligación.

Sección Cuarta
De la responsabilidad civil extracontractual

Artículo 85: Derecho aplicable a la responsabilidad civil extracontractual

La responsabilidad civil extracontractual se rige, a opción de la víctima, por el Derecho del Estado donde se produjo la causa generadora o donde se produjo el efecto del daño.

Cuando el autor del daño y la víctima tienen su domicilio en el mismo Estado, se aplicará el Derecho de ese Estado.

Artículo 86: Responsabilidad civil derivada de productos defectuosos

Además de lo dispuesto en el artículo anterior, en caso de responsabilidad derivada de productos defectuosos, la víctima también podrá elegir el Derecho del Estado:

1. en el cual el fabricante tiene su sede;

2. en el cual el producto fue adquirido, a menos que el fabricante pruebe que el producto fue puesto en circulación allí sin su aprobación; o

3. en donde la víctima tiene su domicilio.

Artículo 87: Responsabilidad civil derivada de accidentes de tránsito

La responsabilidad civil derivada de accidentes de tránsito se rige por el Derecho del lugar del accidente.

Cuando la víctima esté domiciliada en el Estado donde está matriculado el vehículo causante del accidente, se aplicará el Derecho de ese Estado.

Artículo 88: Responsabilidad civil derivada de contaminación ambiental

En caso de responsabilidad derivada de contaminación ambiental, además de los Derechos indicados en el artículo 85, la víctima podrá elegir el Derecho de su domicilio.

Artículo 89: Ámbito de aplicación del Derecho aplicable

El Derecho aplicable a la responsabilidad civil extracontractual regirá especialmente:

1. las condiciones y extensión de la responsabilidad;

2. las causas de exoneración, así como toda limitación de responsabilidad, excepción echa de la que corresponda al asegurador por franquicia o delimitación objetiva del riesgo;

3. la responsabilidad por los actos o hechos de terceros;

4. la responsabilidad del propietario de la cosa por los actos o los hechos de sus dependientes o subordinados, o de cualquier usuario legítimo;

5. la existencia y la naturaleza de los daños susceptibles de reparación;

6. las modalidades y la extensión de la reparación; y

7. la prescripción y la caducidad de la acción.

Capítulo Décimo Quinto
De la propiedad intelectual

Artículo 90: Propiedad intelectual

Los derechos relativos a la propiedad intelectual se rigen por el Derecho del Estado en el cual la propiedad intelectual es reivindicada.

Los contratos relativos a la propiedad intelectual serán regulados por lasdisposiciones sobre las obligaciones contractuales de la presente Ley.

Capítulo Décimo Sexto
De los títulos valores

Artículo 91: Circulación de créditos, títulos valores u otros derechos crediticios

La puesta en circulación de créditos, títulos valores u otros derechos crediticios, se regulará por el Derecho elegido por las partes. La elección de este Derecho no será oponible a terceros.

A falta de elección del Derecho aplicable, se aplicará el Derecho del lugar de pago.

Artículo 92: Principio de autonomía

La inexistencia o invalidez de una obligación derivada de un título valor, de conformidad con el Derecho aplicable, no afectará a las otras obligaciones que sean válidas de acuerdo con el Derecho que las rige.

Artículo 93: Procedimientos y plazos

Los procedimientos y plazos para la aceptación, la presentación al cobro, el pago, el protesto y otras diligencias necesarias para evitar la caducidad del derecho del portador del título, se rigen por el Derecho del lugar de pago y subsidiariamente, por el del lugar donde el acto deba realizarse.

Artículo 94: Pérdida, sustracción o destrucción

El Derecho del Estado donde el título valor deba pagarse determina las medidas que han de tomarse en caso de hurto, robo, falsedad, extravío, destrucción o inutilización material del documento.

Sin perjuicio de ello, si se trata de títulos valores emitidos en serie y ofertados públicamente, el portador desposeído deberá cumplir con las disposiciones del Derecho del domicilio del emisor.

Capítulo Décimo Septimo
De la prescripción

Artículo 95: Derecho aplicable

La prescripción adquisitiva de bienes muebles o inmuebles se rige por el Derecho del lugar en que estén situados.

La prescripción extintiva de las acciones reales se rige por el Derecho del lugar de situación del bien.

La prescripción extintiva de las acciones personales se rige por el Derecho al que están sujetas las obligaciones respectivas.

Capítulo Décimo Octavo
Disposiciones finales

Artículo 96: Derogatorias

Esta Ley deroga todas las normas que sean contrarias a sus disposiciones.

Artículo 97: Entrada en vigencia

Esta Ley entrará en vigencia seis meses después de su publicación en el Diario Oficial.

Appendix 2

Draft General Act on Private International Law for Colombia (IADIP Draft Law - PGLPIL)*

Chapter 1
Purpose of the Act

Article 1: Purpose of the Act

The purpose of this Act is to determine the jurisdiction and the law applicable to legal matters connecting with foreign laws. It shall also regulate the effectiveness of acts and decisions of foreign judicial and administrative authorities in Colombia.

International treaties signed and ratified by Colombia and in force in the Colombian legal system shall have a preferential application to the provisions of this Act.

Chapter 2
Problems in the application of conflict of law rules

Article 2: Application of foreign law

The judges and competent authorities shall apply ex officio the foreign law that is designated as applicable by the Colombian conflict of laws rules. However, if the judge or competent authority deems it appropriate, it may request the cooperation of the parties to determine the content, validity, and meaning of such law.

All remedies granted by Colombian procedural law shall also be admitted in cases of application of foreign law designated by the conflict rule.

When in the competent foreign law there coexist diverse juridical systems, the conflict of laws arising between those systems shall be resolved in accordance with the principles in force in the corresponding foreign law.

Article 3: Interpretation of foreign law

The interpretation of the competent foreign law shall be made in accordance with the foreign law itself.

* Translation by Claudia Madrid Martínez and María Julia Ochoa Jiménez.

When the competent foreign law has institutions or procedures essential for its proper application that are not provided for in Colombian law, the application of such foreign law may be refused, provided that Colombian law does not have any analogous institutions or procedures.

Article 4: Overriding mandatory rules

Notwithstanding the provisions of this Law, the judge shall apply the overriding mandatory rules of Colombian Law which, according to this Act, must prevail even when a foreign law is competent.

The judge may take into account the overriding mandatory rules of other States closely connected with the case, considering the consequences of their application or non-application.

Article 5: Rights of indigenous peoples or communities

Provisions to protect the rights of indigenous peoples or communities over the natural resources existing on their lands, traditional knowledge, the conservation of biological diversity, the sustainable use of resources, and plant varieties have the character of overriding mandatory rules.

Article 6: Public policy in private international law

The provisions of foreign law which must be applied in conformity with this Act shall be excluded only when their application would lead to a result manifestly incompatible with essential principles of Colombian public policy. A foreign rule that is manifestly incompatible with fundamental rights shall not be applied.

Such incompatibility shall be assessed by taking into account, in particular, the intensity of the connection of the situation with Colombia, the level of social harm, and the gravity that the application of such foreign rule in Colombia would produce.

When a provision of the competent foreign law is not applicable due to such incompatibility, Colombian law shall apply.

Article 7: Evasion of law (fraus legis)

The law designated by the conflict rule shall not apply when the essential principles of the law designated as applicable by the conflict rules have been artificially evaded.

Article 8: Renvoi

When foreign law referred to by the Colombian conflict rule declares Colombian law applicable, Colombian substantive rules shall apply.

When the competent foreign law declares applicable the law of a third State, which in turn declares itself applicable, the substantive law of that State shall apply.

In all other cases, the substantive law designated by the Colombian conflict rule shall apply.

When an international treaty applies to the disputed relationship, the provisions of the treaty itself shall apply regarding renvoi.

Article 9: Juridical relationship validly created outside Colombia

A juridical relationship validly created in a foreign State, according to the law of that State, shall be recognized in Colombia, provided that at the time of its creation, it had a sufficient connection with that State and is not manifestly contrary to the essential principles of Colombian public policy.

Article 10: Harmonic application

The different laws that may be applicable to regulate various aspects of one and the same juridical relationship shall be applied harmoniously to attain the purposes pursued by each of such laws.

Any difficulties that may be caused by their simultaneous application shall be resolved in light of the requirements of equity in each specific case.

Chapter 3
Domicile

Article 11: Domicile of Natural Person

The domicile of a natural person is found in the territory of the state where he/she has his/her habitual residence with the intention of exercising his/her rights there.

Article 12: Domicile of incapable persons

The domicile of incapable persons shall be in the place where they have their habitual residence, according to Article 11.

Article 13: Domicile of the spouses

The domicile of the spouses shall be that in which they live together, without prejudice to the right of each spouse to fix his or her domicile as provided for in Article 11.

Article 14: Domicile of diplomatic officials

The domicile of diplomatic officials shall be that which they last had in the territory of the accrediting State. The domicile of natural persons temporarily residing abroad for employment or commission of their Government shall be that of the State that designated them.

Article 15: Domicile of legal entities

The domicile of a legal entity is in the State where the principal place of business or professional activities of the legal entity is located.

Article 16: Scope of application of this chapter

The rules of this Chapter shall apply whenever this Act, or any other Colombian Private International Law rule, refers to the domicile of persons to determine the applicable law or the competent court or authority.

Chapter 4
International process

Section 1
The law applicable to the form of the procedure

Article 17: Law applicable to the form of the proceeding

The jurisdiction of the Colombian courts and the form of the proceedings conducted in Colombia are governed by Colombian law.

Section 2
General international jurisdiction

Article 18: General jurisdiction

Colombian courts shall have jurisdiction to hear all types of civil and commercial cases when the defendant, regardless of his/her nationality, is domiciled in Colombia.

Article 19: Transnational access to justice

Colombian courts may assume jurisdiction, although this Act does not formally attribute it to them, when the performance of a judicial proceeding abroad appears to be impossible. In this case, the Colombian court of the place having the closest links with the object of the litigation shall have jurisdiction.

Article 20: Actions against persons domiciled abroad

If the defendant is not domiciled in Colombia, the jurisdiction of the Colombian courts shall be determined by the rules established in Section 3 of this Chapter.

Section 3
Special criteria of international jurisdiction

Article 21: Jurisdiction in matters of marriage

1. Colombian civil or judicial authorities shall be competent to witness the marriage celebration if one of the engaged parties is domiciled in Colombia or if he/she is Colombian.

2. Foreigners not domiciled in Colombia may marry in Colombia before the competent authority, when the marriage can be recognized in the State of their domicile.

3. Colombian courts are competent to hear any lawsuit concerning the validity of the marriage and its effects when one of the spouses is domiciled in Colombia.

Article 22: Jurisdiction over filiation and other relations between parents and children

Colombian courts shall have jurisdiction to hear actions relating to filiation and other relations between parents and children, if:

1. the person whose filiation is disputed is domiciled in Colombia at the time the lawsuit is filed;

2. the person whose paternity or maternity is invoked or contested has his/her domicile in Colombia at the time the lawsuit is filed, or

3. the person whose filiation is disputed and the person whose paternity or maternity is invoked or contested are Colombian at the time the lawsuit is filed.

Article 23: Jurisdiction over adoption

Colombian courts shall have jurisdiction to hear actions relating to adoption if the person whose adoption is involved is domiciled in Colombia at the time of the adoption.

Article 24: Jurisdiction over freely negotiated contracts

In the case of actions relating to freely negotiated contracts, understood as those in which the parties have equal bargaining power, Colombian courts shall have jurisdiction when:

1. the contract has been concluded in Colombia;

2. the disputed obligation has been or must be performed in Colombia; or

3. the parties decide to submit expressly or tacitly to them.

Article 25: Jurisdiction over asymmetric contracts

In the case of actions relating to asymmetric contracts, understood as those in which one of the parties does not have equal or equivalent bargaining power, Colombian courts will have jurisdiction if:

1. the party with the least bargaining power is domiciled in Colombia, even when it acts as a plaintiff.

2. the disputed obligation has been or should be performed in Colombia.

3. the parties have expressly or tacitly chosen the Colombian courts after the dispute has been initiated.

Article 26: Express or tacit choice of Colombian courts

The express choice of the Colombian courts must be established in writing. The tacit choice will derive from the conduct of the plaintiff when filing the lawsuit and on the part of the defendant when performing any action at trial other than opposing the lack of jurisdiction.

Article 27: Choice of a foreign court

When the parties in their agreement validly choose a foreign court, the Colombian court must decline jurisdiction, unless it is a case of exclusive jurisdiction of the Colombian courts.

Article 28: Jurisdiction over non-contractual civil liability

Colombian courts shall have jurisdiction over non-contractual civil liability when:

1. the event giving rise to the obligation has occurred in Colombia;

2. the harmful effect has occurred or threatens to occur, in whole or in part, in Colombia; or

3. the parties have decided to submit to the Colombian courts expressly or tacitly, provided that such submission occurs after the occurrence of the event giving rise to civil liability.

Article 29: Jurisdiction over intellectual property protection

Colombian courts shall have jurisdiction to hear actions relating to the protection of intellectual property when the defendant is domiciled in Colombia or, in the absence of domicile, when the protection is invoked before Colombian courts.

Article 30: Jurisdiction over entire estates

Colombian courts shall have jurisdiction to hear actions relating to entire estates (universitas iuris) if:

1. the debtor's domicile is in Colombia, or

2. property that is part of the entire estate is situated in Colombia.

Article 31: Jurisdiction over acts of voluntary jurisdiction

The Colombian courts shall have jurisdiction to hear acts of voluntary jurisdiction when the person who motivates them has or has had his/her domicile in Colombia.

Article 32: Exclusive jurisdiction

The exclusive jurisdiction of Colombian courts has exceptional nature, must be interpreted restrictively, and cannot be extended to other issues that may arise concerning the same matter.

Matters relating to rights in immovable property located in Colombia are considered matters of exclusive jurisdiction.

Article 33: Forum necessitatis

Colombian courts may order protective measures for persons who are in Colombia, even if they lack jurisdiction to hear the merits of the dispute.

Section 4
International lis pendens

Article 34: International lis pendens

Colombian courts shall suspend the exercise of their jurisdiction when the same cause, with the same object and between the same parties, has been previously initiated in the court of a State that is reasonably related to the matter or the parties unless it is evident that in that forum the process will not be resolved in a fair, effective and diligent manner.

The suspension based on lis pendens may be extended until the decision in the foreign State acquires the force of res judicata, provided that such a decision is rendered within a reasonable period and may be effective in Colombia.

Section 5
International legal cooperation

Article 35: International legal cooperation

Colombian courts may request any competent foreign authority, using commissions (exhortos) and letters rogatory (comisiones rogatorias) for the carrying out of citations, probative steps, or any other judicial actions necessary for the proper development of the proceeding. They shall also comply promptly with those commissions and letters rogatory sent by foreign tribunals which conform to the applicable principles of international law.

Chapter 6
Effectiveness of foreign decisions

Article 36: Effectiveness requirements

Foreign judicial or administrative judgments or decisions shall produce effects in Colombia, without substantive review, through a summary proceeding, provided they comply with the following requirements:

1. that the authorities of the State in which the decision was rendered are competent according to reasonable criteria;

2. that the decision is not subject to any appeal and is final according to the law of the State in which it was rendered;

3. that the due process rights of the parties have been respected;

4. that the subject matter of the dispute does not fall within the exclusive jurisdiction of the Colombian authorities;

5. that Colombian courts have not ruled on the dispute in a decision not subject to appeal through ordinary channels between the same parties, on the same subject matter

and for the same cause of action; or a foreign decision that has ruled on the case has not been previously recognized in Colombia; and

6. that the decision is not contrary to Colombian public policy, for which purpose the criteria established in Article 6 of this Act shall be considered.

Article 37: Competent authority

The application for recognition of the probatory and res judicata effects of a foreign judgment may be filed with the authority before which such effects are sought.

To proceed with the enforcement, the request for recognition must be filed before the Civil Chamber of the Supreme Court of Justice for enforcement requests in the Special District of Bogotá.

For enforcement in other departments, the Superior Civil District Courts shall have jurisdiction.

Article 38: Formal requirements

The application for recognition must be submitted in writing and be accompanied by:

1. the complete text, legalized and, if applicable, translated, of the foreign administrative or judicial decision;

2. a certificate proving that the decision is not subject to ordinary appeals, that it is final, and that it has the force of res judicata when these requirements cannot be deduced from the decision itself; and

3. in case of a judgment or decision by default, an official document stating that the convicted person was lawfully summoned and did not take advantage of the opportunity to assert his/her rights.

Article 39: Procedure

The application for recognition must be accompanied by the formal requirements established in Article 38. The competent authority shall reject the application if any of such formal requirements are missing. The application shall also be accompanied by proof of the requirements established in Article 36 of this Act.

The party against whom the foreign judgment is to be enforced shall be notified of the application and shall have 15 days to oppose the recognition, to provide evidence of such refusal, and to assert its rights. Upon expiration of this period, the competent authority shall issue the decision.

No appeal shall lie against a decision on the recognition of a foreign administrative or judicial decision.

Once the recognition has been granted, if the party so requests, it shall be enforced immediately, by the procedure established in the corresponding regulations.

Chapter 6
Natural persons

Article 40: Existence, status, and capacity of natural persons

The existence, status, and legal capacity of natural persons are governed by the law of the State of their domicile.

If the law governing the act for which capacity is to be determined prescribes special conditions as to the capacity of a person, that law shall be taken into account.

Article 41: Principle of equality

Limitations on capacity established in the law of domicile, which are based on differences of nationality, race, sex, language, religion, political or any other opinion, origin, economic or social condition, or any other, shall have no effect.

Article 42: Change of domicile

The change of domicile does not restrict the capacity acquired under the law of the previous domicile.

Article 43: Names

The names and surnames of a person are governed, at his/her choice, by the law of the State of which he/she is a national or in which he/she is domiciled.

Article 44: Absence

The conditions and effects of the absence, disappearance, and presumed death of a person are governed by the law of the person's last domicile.

Chapter 7
Marriage and non-marital unions

Article 45: Capacity and substantive requirements of the marriage

The law of the place of domicile of each of the contracting parties governs the capacity to contract marriage and the other substantive requirements for its celebration.

Article 46: Capacity and substantive requirements of non-marital unions

The capacity and other substantive requirements for the formalization of non-marital unions are governed by the law of the place of their formation.

Article 47: Personal and patrimonial effects of marriage

The personal and patrimonial effects of marriage are governed by the law chosen by the spouses, who may choose between:

1. the law of the State in which the spouses or future spouses, or one of them, have their domicile, or

2. the law of the State of nationality of either of the spouses or future spouses.

The law applicable to the effects of marriage under this article shall apply to all property included in the matrimonial property regime, regardless of the State in which it is located.

Article 48: No choice of applicable law

In the absence of a choice of applicable law by the spouses, the effects of the marriage are governed by the law of the State of their common domicile or, failing that, by the law of the State of their last common domicile.

Article 49: Personal and patrimonial effects of non-matrimonial unions

The personal and patrimonial effects of non-matrimonial unions are governed by the law of the place where they are intended to be enforced.

Chapter 8
Divorce, legal separation and nullity of marriage, and dissolution of non-matrimonial unions

Article 50: Divorce and legal separation

Divorce and legal separation are governed by the law of the State of the common domicile or, failing that, by the law of the State of the last common domicile.

Article 51: Nullity of marriage

The nullity of marriage is governed by the law which governs the cause of such nullity.

Article 52: Dissolution of non-marital unions

The dissolution of non-marital unions is governed by the law of the common domicile or, failing that, by the law of the last common domicile.

Chapter 9
Family relations

Article 53: Best interests of the child

If in the cases regulated by this chapter there are children involved, the judge or authority shall always take into account their best interests.

Article 54: Filiation and other relations between parents and children

Establishment and effects of filiation and other relations between parents and children are governed by the law of the domicile of the person whose filiation is involved.

Article 55: Adoption

The capacity to adopt and to be adopted, as well as the conditions and limitations of adoption, are governed by the law of the domicile of the person whose adoption is involved.

Article 56: Protection of incapable persons

Guardianship and other institutions for the protection of incapable persons are governed by the law of the domicile of the incapable person.

Article 57: Maintenance obligations

Maintenance obligations are governed by the law of the domicile of the creditor of the obligation.

Article 58: Restitution and protection of children

The restitution and protection of children are governed by the international treaties in force in Colombia.

Chapter 10
Successions

Article 59: Successions

Successions are governed by the law of the last domicile of the decedent.

Article 60: Testamentary capacity

The capacity to dispose by testament, to modify it or to revoke it is governed by the law of the testator's domicile at the time of testament.

Chapter 11
Juridical persons

Article 61: Recognition of juridical persons

Juridical persons of a private nature duly constituted in a State shall be recognized by operation of law in Colombia.

Recognition by operation of law does not exclude the power of the Colombian authorities to require verification of the existence of the juridical person in accordance with the law of the place of its constitution.

In no case may the capacity recognized to juridical persons constituted abroad be greater than the capacity that Colombian law grants to juridical persons constituted in Colombia.

Article 62: Law applicable to juridical persons

The existence, capacity, operation, merger, and dissolution of juridical persons of a private nature are governed by the law of the place of their constitution.

The place of their constitution is understood to be the place where the requirements of form and substance required for the creation of such juridical persons are fulfilled.

Article 63: Capacity to act

For the direct or indirect exercise of the acts included in the corporate purpose of juridical persons, they shall be subject to the law of the State where they perform such acts.

Article 64: Branches

Branches of juridical persons that have their principal place of business abroad may be established in Colombia and shall be governed by Colombian law.

Article 65: Change of the applicable law

If the foreign law that regulates the juridical person allows it, this may be subject to Colombian law without the need to be liquidated or to create a new society. The juridical person must comply with the conditions set by foreign law and adapt to one of the forms of juridical persons existing in Colombia.

Chapter 12
Property

Article 66: Law applicable to property

Property and rights in it are governed by the law of the state where the property is located.

The acquisition and loss, by legal acts, of rights in property in transit are governed by the law of the State of destination.

Property subject to movable guarantees is governed by the law designated by the special rules on the subject.

The provisions of other acts regarding property rights over ships, aircraft, and other means of transport are reserved.

Publicity of acts of creation, transfer, and extinction of property rights is governed by the law of the State where the formalities of such publicity are carried out.

Article 67: Change of situation

The change of location of movable property does not affect the rights acquired under the law of the place where it was located at the time of its acquisition.

However, such rights may be opposed to third parties only after the requirements of the law of the new situation have been fulfilled.

Article 68: Cultural property

If an object considered by a State as part of its cultural heritage has left its territory in a manner that the law of that State considers illegitimate at the time of departure from its territory, the restitution requested by that State is governed by its own law or, at its choice, by the law of the State on whose territory the object is located at the time of the request for restitution.

If the law of the State that considers the property to be part of its cultural heritage does not grant protection to the possessor in good faith, the possessor may invoke the protection granted by the law of the State in whose territory the property is located at the time of the request for restitution.

If a property of cultural value to an indigenous people or community is returned to the national territory, the final destination of such property is governed by the rules of that people or community, unless such people or community decides that it should be governed by the law of the State of which it is part.

Chapter 13
Form and proof of legal acts

Article 69: Form of legal acts

Legal acts shall be valid as to their form if they comply with the requirements of one of the following laws:

1. that of the place of conclusion of the act;
2. that which governs the content of the act; or
3. that of the domicile of the person doing the act, or of the common domicile of the persons doing the act.

Article 70: Proof of legal acts

The modes of the proof, their efficacy, and the determination of the burden of the proof, are governed by the law governing the juridical relationship concerned, without prejudice to adjustment of their procedural implementation to the law of the court or official before which they take place.

Chapter 14
Obligations

Section 1
Legal transactions

Article 71: Unilateral Promise

A unilateral promise is governed by the law of the State in which it is made.

Article 72: Voluntary representation

Voluntary representation is governed by the law of the State in which the representative has his/her place of business if he/she acts in a professional capacity and that such place of business is known or could have been known to third parties. In the absence of such conditions, the law of the State in which the representative primarily exercises its powers shall be applied.

Section 2
Contracts

Article 73: Freely negotiated contracts

A contract is governed by the law chosen by the parties. The parties may choose:

1. the law applicable to the whole or a part of the contract; or
2. different laws for different parts of the contract.

The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not affect its formal validity or the rights of third parties.

No connection is required between the law chosen and the parties or their transaction.

Article 74: Rules of law

The parties may choose, as the law applicable to the contract, rules of law generally accepted at the international, supranational, or regional level as a set of neutral and balanced rules.

Article 75: Express or implied choice of law

A choice of the applicable law, or any modification of a choice of law, must be made expressly, or appear clearly from the provisions of the contract or the circumstances.

An agreement between the parties to confer jurisdiction on a court or arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

Article 76: Formal validity of the choice of law

The choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 77: Substantial validity of the choice of law

The law of the State in which a party is domiciled determines whether that party consented to the choice of law.

However, in determining whether the parties agreed on the choice of the applicable law, the law presumed to have been chosen by the parties shall be used.

Article 78: Battle of forms

If the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law indicated in those standard terms shall apply; if under these laws different standard terms prevail, or if no standard term prevails, it shall be treated as if there had been no choice of law.

Article 79: Law applicable in the absence of choice

In the absence of choice or in case of ineffective choice, the law of the place of performance of the obligation in dispute shall apply.

Article 80: Exclusion of renvoi

For the purposes of this section, "law" means the law in force in a State, excluding its conflict rules.

Article 81: Scope of the law applicable to the contract

The law indicated in this section governs all aspects of the contract, in particular:

1. its interpretation
2. the rights and obligations arising from the contract;
3. the performance of the contract and the consequences of its non-performance, including the assessment of damages;
4. the various ways of extinguishing obligations, including prescription and limitations periods;
5. the validity and the consequences of the nullity of the contract;
6. the burden of proof and the legal presumptions; and
7. the pre-contractual obligations.

Article 82: Employment contracts and employment relations of natural persons

In employment contracts and employment relationships, the choice of law by the parties shall have no effect if it deprives the employee of the protection afforded by the mandatory provisions of the law applicable in the absence of choice.

In the absence of choice of law, employment contracts are governed by the law of the State:

1. in which the employee, in performance of the contract, habitually performs his/her work, even if he/she has temporarily commenced his/her work in a different State; or

2. in which the place of business where the employee is located, provided that the employee does not habitually carry out his/her work in the same State.

Article 83. Consumer contracts

Consumer contracts, understood as those in which one of the parties, as the final recipient, acquires, enjoys, or uses a certain product or service for the satisfaction of an own, private, family, or domestic and business need when it is not intrinsically linked to its economic activity, are governed by the law of the domicile of the consumer.

The parties may agree on the application of a different law if this does not prejudice the rights of the consumer recognized by the law of his/her domicile.

Section 3
Obligations arising from the law

Article 84: Obligations arising from the law

Management of affairs (*gestión de negocios*), undue payment (*pago de lo indebido*), unjust enrichment (*enriquecimiento sin causa*), and other legal obligations are governed by the law of the State in which the act giving rise to the obligation occurs.

Section 4
Non-contractual civil liability

Article 85. Law applicable to non-contractual civil liability

Non-contractual civil liability is governed, at the choice of the victim, by the law of the State where the cause of the damage has occurred or where the effect of the damage has occurred.

Where the tortfeasor and the victim are domiciled in the same State, the law of that State shall apply.

Article 86: Product liability

In addition to the provisions of the preceding article, in case of liability arising from defective products, the victim may also choose the law of the State:

1. in which the manufacturer has his/her place of business;

2. in which the product was purchased, unless the manufacturer proves that the product was put into circulation there without his/her approval; or

3. in which the victim is domiciled.

Article 87: Civil liability arising from traffic accidents

Civil liability arising from traffic accidents shall be governed by the law of the place of the accident.

When the victim is domiciled in the State where the vehicle causing the accident is registered, the law of that State shall apply.

Article 88: Liability arising from environmental pollution

In case of liability arising from environmental pollution, in addition to the laws indicated in Article 85, the victim may choose the law of his/her domicile.

Article 89: Scope of the applicable law

The law applicable to non-contractual civil liability shall govern in particular:

1. the conditions and extent of liability;
2. the grounds for exemption, as well as any limitation of liability, except for the liability of the insurer for excess or objective delimitation of the risk;
3. the liability for acts or facts of third parties;
4. the liability of the owner of the thing for the acts or facts of his/her dependents or subordinates, or of any legitimate user;
5. the existence and nature of the damages susceptible to reparation;
6. the modalities and extent of the reparation; and
7. the prescription and limitations periods.

Chapter 15
Intellectual property

Article 90: Intellectual Property

Rights relating to intellectual property shall be governed by the law of the State in which the intellectual property is claimed.

Contracts relating to intellectual property shall be governed by the provisions on contractual obligations of this Act.

Chapter 16
Securities

Article 91: Circulation of credits, securities, or other rights of credit

The law chosen by the parties shall govern the circulation of credits, securities, or other credit rights. The choice of law shall not be enforceable against third parties.

In the absence of choice of law, the law of the place of payment shall apply.

Article 92: Principle of autonomy

The non-existence or invalidity of an obligation arising from a security under the applicable law shall not affect other obligations which are valid under the law governing them.

Article 93: Procedures and time limits

The procedures and time limits for acceptance, presentation for collection, payment, protest, and other formalities necessary to avoid forfeiture of the right of the holder of the security shall be governed by the law of the place of payment and, subsidiarily, by the law of the place where the act is to be performed.

Article 94: Loss, theft, or destruction

The law of the State where the instrument is to be paid shall determine the measures to be taken in case of theft, robbery, forgery, loss, destruction, or physical uselessness of the document.

Notwithstanding the foregoing, in the case of securities issued in series and publicly offered, the dispossessed holder shall comply with the provisions of the law of the domicile of the issuer.

Chapter 17
Prescription

Article 95: Applicable law

The acquisitive prescription of movable or immovable property is governed by the law of the place where it is located.

The extinctive prescription of real actions is governed by the law of the place where the property is located.

The extinctive prescription of personal actions is governed by the law to which the obligations concerned are subject.

Chapter 18
Final provisions

Article 96: Repeals

This Act repeals all rules that are contrary to its provisions.

Article 97: Entry into force

This Act shall enter into force six months after its publication in the Official Gazette.

Bibliography

Ago R., *Teoria del Diritto internazionale privato. Parte generale*, Cedam, Padova, 1934.

Règles Générales des conflits de lois, *Recueil des Cours de l'Académie de Droit International*, 1936, Vol. 58, 243.

Aguilar Navarro M., *Derecho internacional privado*, IV ed., II reprint, Universidad Complutense, Madrid, 1982.

Albornoz M.M., *El derecho aplicable a los contratos internacionales en los Estados del MERCOSUR*, in *Boletín Mexicano de Derecho Comparado*, 2009, 631.

– *Une relecture de la Convention interaméricaine sur la loi applicable aux contrats internationaux à la lumière du règlement 'Rome I'*, in *Journal du Droit International*, 2012, No. 1, 4.

Alfonsín Q., *Teoría del Derecho privado internacional. Introducción. Elaboración del Derecho privado internacional. Funcionamiento del Derecho privado internacional*, Ediciones Idea, Montevideo, 1982.

Aljure Salame A., *El contrato internacional*, Legis, Bogotá D.C., 2011.

Ancel B., *Éléments d'histoire du droit international privé*, Prix du livre juridique, Essais, Éditions Panthéon-Assas, Paris, 2017.

Angulo Rodríguez M. de, *Lecciones de derecho procesal civil internacional*, Editorial Gráficas del Sur, Granada, 1974.

Audit B. - D'Avout L., Droit International Privé, VI ed., Economica, Paris, 2010.

Badagliacca M., *Impedimenti alla partenza nel trasporto aereo di persone e COVID-19*, in *Rivista italiana di diritto del turismo (Special issue),* 2020, 278.

Balestra R.R., *Derecho internacional privado*, AbeledoPerrot, Buenos Aires, 2006.

Balladore Pallieri G., *Diritto internazionale privato*, *Trattato di diritto civile e commerciale*, eds. Cicu A. and Messineo F., Giuffré, Milano, 1974, Vol. XLV.

Barrios H., *La interpretación del contrato por el juez en el Derecho interno y en el Derecho internacional privado*, *Libro Homenaje a José Mélich Orsini,* Instituto de Derecho Privado, Facultad de Ciencias Jurídicas y Políticas, UCV, Caracas, 1982, Vol. I, 15.

Bartin E., *De L'impossibilité d'arriver à une suppression définitive des conflits de lois*, in *Journal de Droit International*, 1897, 25.

– *Le doctrine des qualifications et ses rapports avec le caractère national du conflit de lois*, in *Recueil des Cours de l'Académie de Droit International*, 1930, Vol. 31, 561.

– *Encore le renvoi*, *Clunet*, Paris, 1931, 1256.
Basedow J., *El Derecho de las Sociedades Abiertas. Ordenación Privada y Regulación Pública en el Conflicto de Leyes*, Legis, Bogotá 2017.
Batiffol H. - Lagarde P., *Droit international privé*, VI ed., Librairie Générale de Droit et de Jurisprudence, Paris, 1993.
Beaumont P. - Keyes M., *Choice of Court Agreements. A Guide to Global Private International Law*, 2022.
Betti E., *La interpretación de los conceptos calificadores en el Derecho internacional privado*, *Libro Homenaje a la Memoria de Roberto Goldschmidt*, Facultad de Derecho, UCV, Caracas, 1967, 677.
– *Interpretación de la Ley y de los actos jurídicos*, in *Revista de Derecho Privado*, Madrid, 1975.
Boggiano A., *Derecho Internacional Privado en la estructura jurídica del mundo*, AbeledoPerrot, Buenos Aires, 2008.
Bonnemaison J.L., *Curso de Derecho Internacional Privado*, Vadell Hermanos, Caracas, 2013.
Bonomi A., *Le norme imperative nel diritto internazionale privato*, Schulthess Polygraphischer Verlag, Zürich, 1998.
– *Norme di applicazione necessaria*, *Diritto internazionale privato*, Roberto Baratta (ed.), Giuffré, Milano, 2010, 233.
– *Article 9*, *European Commentaries on Private International Law, Rome I Regulation, Commentary*, eds. Magnus U. and Mankowski P., Otto Schmidt, Köln, 2017, Article 9.
Bortolotti F., *Drafting and Negotiating International Commercial Contracts*, International Chamber of Commerce, Paris, 2013.
Boschiero N., *I limiti al principio d'autonomia posti dale norme generali del regolamento Roma I*, *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Boschiero Nerina, ed., 2009, 83.
Bouza Vidal N., *Problemas de adaptación en Derecho internacional privado e interregional*, Editorial Tecnos, Madrid, 1977.
Brand R.A., *The 2005 Choice of Court Convention - the triumph of party autonomy*, Edward Elgar Publishing, 2020
Briceño Laborí J.A., *Efectos de las sentencias extranjeras y procedimiento de exequátur*, *AMDIPC*, 2019 No. 1, 427.
Briggs A., *Civil Jurisdiction and Judgments*, VII ed. Routledge, London, 2021.
Bucher A., *Droit international privé suisse*, Helbing & Lichtenhahn, Bâle, 1995.
Bucher A. - Bonomi A., *Droit International Privé*, Helbing & Lichtenhahn, Genève, 2001.
Caicedo Castilla J.J., *Derecho Internacional Privado*, V ed., Editorial Temis, Bogotá, 1960.
Calvo Caravaca A.L. - Carrascosa González J., *Derecho internacional privado*, III ed., Comares, Granada, 2002, Vol. I.

Castro Castilla M.C., *Cesantía comercial en el contrato de agencia: confrontación entre la jurisprudencia de la Corte Suprema de Justicia y el Tratado de libre comercio Colombia, EE.- UU.*, 2021, Bogotá.

Castro De Cifuentes M., *Derecho comercial: actos de comercio, empresas, comerciantes y empresarios*, Ediciones Uniandes / Temis, Bogotá, 2016.

Clavel S., *Droit International Privé*, Dalloz, 2021.

Cock Arango A., *Tratado de Derecho Internacional Privado*, Bogotá, Universidad Nacional de Colombia, 1952.

Conetti G - Tonolo S. - Vismara F., *Manuale di diritto internazionale privato*, Giappichelli, Torino, 2020.

Coyle M., *E Pluribus Plures: Legal Pluralism and the Recognition of Indigenous Legal Orders*, *The Oxford Handbook of Global Legal Pluralism*, eds. Berman P.S., Oxford University Press, Oxford, 2020, 805.

Crawford C., *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, *Indiana Journal of Global Legal Studies*, 2020, Vol. 27, No. 1, 2020.

Davì A., *Le renvoi en Droit international privé contemporain*, *Recueil des Cours de l'Académie de Droit International*, 2012, Vol. 352, 9.

De Angulo Rodriguez M., *Du moment auquel il faut se placer pour apprécier l'ordre public international*, in *Revue Critique de Droit International Privé*, 1972, Vol. LXV, 369.

De Magalhães Collaço I., *Da qualificação em Direito internacional privado*, Editorial Império, Ltd., Lisboa, 1964.

De Miguel Asensio P.A., *Medidas de emergencia y contratos internacionales*, in *La Ley Unión Europea*, 2020, Vol. 81, 1.

De Nova R., *I conflitti di leggi e le norme con apposita delimitazione territoriale*, in *Diritto internazionale*, 1959, 13.

Derruppe J., *Le renvoi dans les conventions internationales*, in *Juris-Classeur International*, 1993, F. 532-3, No. 1, 3 ff.

Despagnet F., *Des conflits de lois relatifs à la qualification des rapports juridiques*, in *Journal de Droit International*, 1898, 235.

Diamond A., *Harmonization of Private International Law relating to contractual obligations*, in *Recueil des Cours de l'Académie de Droit International*, 1986, Vol. 199, 233.

Fernández Arroyo D., *Derecho internacional privado. Una mirada actual sobre sus elementos esenciales*, Advocatus, Córdoba, 1998.

Fernández Rozas J.C. - Sánchez Lorenzo S., *Derecho internacional privado*, III ed., Thomson-Civitas, Madrid, 2004.

Fernández Rozas J.C. - Sánchez Lorenzo S., *Derecho Internacional Privado*, VII ed., Thomson Reuters, Pamplona, 2013.

Fincham D., *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, *Columbia Journal of Law and the Arts*, 2008, Vol. 32, 11.

Foyer J., *Requiem pour le renvoi*, *Droit international privé: travaux du Comité français de droit international privé*, Editions du CNRS, Paris, 1981, Tome 1, 105.

Francescakis P., *Ordre public*, *Encyclopédie Juridique Dalloz*, in *Répertoire de Droit International, F-Z*, 1969, 498.

Francq S., *Unilateralism*, *Encyclopedia of Private International Law*, eds. Basedow J., Rühl G., Ferrari F. and De Miguel Asensio P., Edward Elgar Publishing, Cheltenham, 2017, Vol. 2, 1787.

Fresnedo De Aguirre C., *Public Policy: Common Principles in the American States*, in *Recueil des Cours de l'Académie de Droit International*, 2016, Vol. 379, 73.

García Velasco I.C., *El proteccionismo jurídico de la agencia comercial en Colombia frente a los tratados de integración económica*, in *Cuadernos de administración*, 2011, Vol. 27, No. 46.

Garde Castillo J., *La "institución desconocida" en Derecho internacional privado*, Instituto Editorial Reus, Madrid, 1947.

Gaviria Gil J.A., *Comentarios sobre las nuevas normas colombianas en materia de arbitraje internacional*, in *Revista de Derecho Privado, Universidad Externado de Colombia*, 2013, No. 24, 259.

Gerstenblith P., *From Steinhardt to Schultz: The McClain Doctrine and the Protection of Archaeological Sites*, *Legal Perspectives on Cultural Resources*, ed. Richman J., Walnut Creek, Altamira Press, 2004, 100.

Gerstenblith P., *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, *The DePaul University College of Law*, in *Technology, Law & Culture Research Series Paper*, No. 09-007, 2009, 21.

Goldschmidt W., *Sistema y filosofía del Derecho internacional privado*, II ed., EJEA, Buenos Aires, 1952.

– *Normas generales de la CIDIP-II: hacia una teoría general del Derecho internacional privado interamericano*, in *Anuario Jurídico Interamericano*, 1979, 141.

– *Derecho internacional privado. Derecho de la tolerancia*, VIII ed., Depalma, Buenos Aires, 1995.

Gössl S., *In- und ausländische Corona-Regelungen im grenzüberschreitenden Handel*, in *Zeitschrift für Vergleichende Rechtswissenschaft*, 2021, 23.

Guerra Hernández V.H., *Conflictos de Jurisdicción y Competencia en Derecho Internacional Privado*, *Teoría General del Derecho Internacional Privado*, eds. García Matamoros L. snd Aljure Salame A., Temis, Bogotá, 2016, 349.

Hay P., *Notes on the European Union's Brussels-I "Recast" Regulation: An American perspective*, in *European legal forum: Forum iuris communis europae*, 2013, Vol. I, 2.

Hernández-Bretón E., *En materia de calificaciones, reenvío y otros asuntos de Derecho internacional privado*, in *Cuadernos Unimetanos*, 2007, No. 11, 227.

– *Mestizaje Cultural en el Derecho Internacional Privado de los Países de la América Latina*, Academia de Ciencias Políticas y Sociales, Caracas, 2007.

Herrán Medina Á., *Compendio de Derecho Internacional Privado*, Editorial Temis, Bogotá, 1959.

Hill D., *Private International Law*, Edinburgh University Press, Edinburgh, 2014.

Hovaguimian P., *The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns*, in *Journal of Private International Law*, 2015, Vol. 11, No. 2, 219.

Hurta H., *Identifying the factors influencing the nationality of a company*, *2nd International Conference Contemporary Issues in Theory and Practice of Management*, Czestochowa, Poland, April 2018.

Hurtado-Palomino J.V., *A influencia do TLC com os Estados unidos na evoluçaso do alcance do coneito de ordem pública*, in *Daikon*, 2012, Vol. 21, No. 1, 255.

Jayme E., *Métodos para la concretización del orden público en el Derecho internacional privado*, (Trans. E. Hernández), in *Revista de la Facultad de Ciencias Jurídicas y Políticas, UCV*, 1991, No. 82, 215.

– *Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law*, in *International Journal of Cultural Property*, 6, 2, 1997, 376-378.

Juenger F.K., *Derecho internacional privado y justicia material*, (Trans. D. Fernández and C. Fresnedo), Editorial Porrúa, Universidad Iberoamericana, Mexico, 2006.

Junker A., *Internationales Privatrecht*, C.H. Beck, München, 2017.

Kahn F., *Gesetzeskollisionen, Ein Beitrag zur Lehre des Internationalen Privatrechts, Jherings-Jährbücher*, 1891, 1.

– *Die Lehre vom ordre public*, in *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*, 1898, Vol. 39, 1.

Kegel G. - Schurig K., *Internationales Privatrecht*, IX ed., Verlag C.H. Beck, München, 2004.

Klein Viera L., *El Orden Público Internacional: la defensa de la identidad del Estado y los procesos de integración*, 2012 (http://www.oab.org.br/editora/revista/users/revista/1211290246174218181901.pdf).

Kleinheisterkamp J., *Development of Comparative Law in Latin America*, *The Oxford Handbook of Comparative Law*, eds. Reimann M. and Zimmermann R., 2006.

Kosters J., *Public Policy in Private International Law*, in *The Yale Law Journal*, Vol. 29, No. 7, 745.

Kuhn E.D. - Sardi Garcia A.A., *United States*, *International Commercial Agency and Distribution Agreements*, eds. Albaric C. and Dickstein M., Wolters Kluwers, Alphen aan den Rijn, 2017.

León Robayo E.I., *Principios y fuentes del Derecho comercial colombiano*, Universidad Externado de Colombia, Bogotá, 2015.

– *La nueva* Lex mercatoria *en el Derecho latinoamericano de contratos*, Universidad del Rosario, Tirant Lo Blanch, Bogotá, 2019.

Lewald H., *La théorie du renvoi*, in *Recueil des Cours de l'Académie de Droit International*, 1929 IV, Vol. 29, 519.

Lópes Alvarez A.L., *El contrato de agencia commercial y los cambio introducidos en la negociación del TLC entre Estados Unitos y los Países Andinos*, in *REVIST@ e - Mercatoria*, 2011, Vol. 10, No. 1, 1.

Loussouarn Y. - Bourel, P., *Droit international privé*, IV ed., Précis Dalloz, Paris, 1993.

Madrid Martínez C., *El rol del orden público en arbitraje comercial internacional*, in *Revista de la Facultad de Ciencias Jurídicas y Políticas*, *UCV,* 2006, No. 126, 79.

– *Instituciones generales de Derecho internacional privado: más allá del problema conflictual*, in *Estudios de Derecho internacional privado, Homenaje a Tatiana Maekelt*, eds. Guerra V.H., Madrid Martínez C. and Pérez Y., Universidad Católica Andrés Bello, Caracas, 2012, 155.

– *Venezuelan Contracts - domestic and private international - Law and the Vienna Convention on International Sales of Goods*, *La Convention de Vienne en Amérique. 40e anniversaire de la Convention des Nations Unies sur les contrats de vente internationale de marchandises*, eds. de Aguilar Vieira I. and Cerqueira G, Société de Législation Comparée, Paris, 2020, 301.

– *La contratación internacional en el Derecho internacional privado colombiano*, Tirant Lo Blanch, Ediciones UNAULA, Bogotá, 2021.

Maekelt T., *General rules of Private International Law in the Americas. New Approach*, in *Recueil des Cours de l'Académie de Droit International*, 1982, Vol. 177, 193.

– *Antecedentes y metodología del Proyecto. Parte general del Derecho internacional privado*, *Proyecto de Ley de Derecho Internacional Privado (1996). Comentarios*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas, 1998, Serie Eventos Nr. 11, 15.

– *Teoría general de Derecho internacional privado*, II ed., Academia de Ciencias Políticas y Sociales, Caracas, 2010, Serie Estudios Nr. 87.

Mafla J.F., *Colombia*, *International Agency and Distribution Law*, ed. Campbell D., Juris Publishing, Huntington, Release 6, 2017, Vol. 1, COL/3.

Magnus U., *Art. 9 Rom I-VO*, *Kommentar zum Bürgerlichen Gesetzbuch, Internationales Vertragsrecht I*, found. J. von Staudinger, Sellier - de Guryter, Berlin, 2016, Art. 9 Rom I-VO.

Makarov A., *Les cas d'application des règles de conflits étrangères*, in *Revue critique de Droit international privé*, 1955, Vol. XLIV, 431 ff.

– *Grundriss des internationalen Privatrechts*, Alfred Metzner Verlag, Frankfurt am Main, 1970.

Mansel H.-P., *Rom I-VO § I Vorbemerkungen*, *Bürgerliches Gesetzbuch*, ed. Jauernig O., C.H. Beck, München, 2018, Rom I-VO § I Vorbemerkungen.

Martiny D., *Rom I-VO Art. 9*, in *Münchener Kommentar zum Bürgerliches Gesetzbuch*, eds. F. Jürgen Säker, R. Rixecker, H. Oetker and B. Limperg, C.H. Beck, München, 2021, Vol. 13, Rom I-VO Art. 9.

Maury J., *Règles générales des conflits de lois*, in *Recueil des Cours de l'Académie de Droit International*, 1936, III. Vol. 57, 329.

– *L'éviction de la Loi normalement compétente: L'ordre public et la fraude à la Loi*, *Cuadernos de la Cátedra del doctor James Brown Scout*, Universidad de Valladolid, Valladolid, 1952.
Mchirgui Z., *L'Accord exclusif d'èlection de for à travers la Convention de la Haye de 2005*, L'Harmattan, 2022.
Mcparland M., *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford University Press, Oxford, 2015.
Meijers E.M., *La question du renvoi*, in *Bulletin de l'institut Juridique International*, 1938, Vol. XXXVIII, 191.
Merryman J.H. - Pérez Perdomo R., *La Tradición Jurídica Romano-Canónica*, Fondo de Cultura Económica, Mexico, 2014.
Meyer O., *Public Policy and Private International Law*, Edwar Elgar Comparative Guides, Northampton, 2022.
Miaja de la Muela A., *Derecho internacional privado*, VII ed., Atlas, Madrid, 1976.
Mills A., *The dimensions of Public Policy in Private International Law*, in *Journal of Private International Law*, 2008, Vol. 4, No. 201, 2.
Mira González C.M., *La Lex mercatoria como fuente del Derecho internacional*, in *Revista CES / Derecho*, 2013, Vol. 4, Nr. 2, 48.
Mirow M., *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, University of Texas Press, 2004.
Monroy Cabra M.G., *Tratado de Derecho internacional privado*, IV ed., Temis, Bogotá, 1995.
Moreno Rodriguez J.A., *Contratación y arbitraje internacional*, Temis, Bogotá, 2014.
Mosciati Olivieri P.B., *La Aplicación del Derecho Extranjero: Teoría del Uso Jurídico*, in *Revista Chilena de Derecho*, 1993, Vol. 20, No. 1, 39
Mosconi, F. - Campiglio C., *Diritto internazionale privato e processuale*, UTET, Milano, 2022, Vol. 1.
Neuhaus P.H., *Die Grundbegriffe des Internationalen Privatrechts*, II ed., Paul Siebeck, Tübingen, 1976.
Niboyet J.P., *Manual de Droit international privé*, X ed., Recueil Sirey, Paris, 1928.
– *Principios de Derecho Internacional Privado*, D.F., Editora Nacional, México, 1951.
Noodt Taquela M.B., *Reglamentación general de los contratos internacionales en los Estados mercosureños*, *Derecho internacional privado de los Estados del MERCOSUR*, coord. D. Fernández Arroyo, Zavalia, Buenos Aires, 2003.
Novoa Monreal E., *Defensa de las Nacionalizaciones ante tribunales extranjeros*, Editorial del Instituto de Investigaciones Jurídicas, UNAM, México D.F., 1976.
Ochoa Jiménez M.J., *Normas de Derecho Internacional Privado en Materia de Bienes: La Regla Lex Rei Sitae en América Latina y Colombia*, *in Revista de Derecho Privado*, 2019, Vol. 21, 121.
– *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, in *Critical Analysis of Law*, 2021, Vol. 8, No. 2, 87-107.

– *Las normas de derecho internacional privado: observaciones al Proyecto de Código de la Universidad Nacional de Colombia*, in *Revista de Derecho Privado*, No. 40, 2021, 373.
– *Restitution of Indigenous Cultural Objects in Latin America: NAGPRA as a Model?*, *Colonial Heritage, Power, and Contestation: Negotiating Decolonisation in Latin America*, eds. Malig Jedlicki C.A., Christofoletti R. and Oosterman N., Springer (in press).
Ochoa Jiménez M.J. - Zapata Flórez J., *Private International Law Rules Regarding Personal Status in Colombia: a System in Need of an Overhaul*, in *Anuario Mexicano de Derecho Internacional*, 2022, No. 22, 565.
Ochoa Jiménez M.J. - Zapata Flórez J. - Carrillo Gamboa P., *La elección del derecho aplicable en el derecho internacional privado en Colombia*, in *Estudios Socio-Jurídicos*, Vol. 21, No. 1, 2019, 91.
Ochoa Muñoz J., *Artículo 7. Adaptación*, *Ley de Derecho Internacional Privado comentada*, eds. T. Maekelt et al., Facultad de Ciencias Jurídicas y Políticas, UCV, Consejo de Desarrollo Científico y Humanístico, UCV, Caracas, 2005, Vol. I, 265.
Ordóñez PenagoS N.R., *Controversias laborales con elementos extranjeros en el derecho colombiano*, in *Misión Jurídica*, 2018, Vol. 11, No. 15, 235.
Oviedo Albán J., *Ley aplicable a los contratos internacionales*, in *Revista Colombiana de Derecho Internacional*, 2012, No. 21, 117.
– *La Ley aplicable a los contratos internacionales en la propuesta de Código Civil de la Universidad Nacional*, *Reflexiones Críticas sobre la propuesta de Código Civil presentado por la Universidad Nacional de Colombia* (Red Colombiana de Profesores de Derecho Privado), Tirant Lo Blanch, Bogotá, 2020, 35.
– *Contratación y arbitraje internacional*, Tirant Lo Blanch, Bogotá, 2022.
Palaja N., *L'ordine pubblico "internazionale"*, Cedam, Padova, 1974.
Parra Aranguren G., *Convención Interamericana sobre Normas Generales de Derecho internacional privad*, in *Anuario Jurídico Interamericano*, 1979, 157.
– *Codificación Del Derecho Internacional Privado En América, Universidad Central De Venezuela*, Facultad De Ciencias Jurídicas Y Políticas, Caracas, 1982.
– *Curso general de Derecho internacional privado. Problemas selectos y otros estudios*, III ed., Facultad de Ciencias Jurídicas y Políticas, UCV, Caracas, 1998.
Pau G., *Richiami alla tradizione in tema di ordine pubblico internazionale*, in *Diritto internazionale*, 1959, 116.
Pérez E., *El denominado estatuto real*, *Derecho Internacional Privado*, eds. Abarca A., González J. and Guzmán M., UNED, Madrid, 2001, Vol. II.
Pereznieto Castro L., *Derecho Internacional Privado, Parte General*, VIII ed., Oxford University Press, México D.F. 2003, p 203.
Perilla Granados J.S.A., *La agencia mercantil deste el tratado de libre comercio entre Colombia y Estados Unidos*, in *Civilizar Ciencias Sociales y Huamanas*, 2017, Vol. 17, No. 33.
Perrin J.F., *La Reconnaissance des Société étrangers et ses effects*, Georg Libraire de l'Université Genève, 1969.

Pillet A., *Contre la théorie du renvoi*, in *Revue de Droit International Privé et de Droit Pénal International*, 1913, 1.

– *Principios de Derecho internacional privado*, Trans. N. Rodríguez y C. González, General de Victoriano Suárez Librería, Madrid, 1923, Vol. I, 33.

Piovesani E., *Ex Lege Qualified Overriding Mandatory Provisions as a Response to the COVID-19 Empidemiological Emergency*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2021, No. 4, 401.

Pocar F., *Brief Remarks on the Relationship between the Hague Judgments and Choice of Court Conventions*, in *Liber Amicorum Monika Pauknerová*, Wolters Kluwer, 2021.

Poveda Cubilllos G., *Tutela contra laudo arbitral: una controversia sin fin*, in *Revista de Derecho Público*, 2017, No. 38, 4-20.

Prott L., *Witnesses to History. Documents and Writings on the Return of Cultural Objects*, Unesco, Paris, 2009.

Raape L., *Les rapports juridiques entre parents et enfants comme point de départ d`une explication pratique d`anciens et de nouveaux problèmes du Droit international privé*, in *Recueil des Cours de l'Académie de Droit International*, 1934, Vol. 50, 401.

Rabel E., *Das Problem der Qualifikation*, in *RabelsZ*, 1931, 241.

Rodríguez Fernández M., *Reconocimiento de la Lex mercatoria como normativa propia y apropiada para el comercio internacional*, in *Revist@ e-Mercatoria*, 2012, Vol. 11, No. 2, 45.

Rodríguez Moreno J.A., *La nueva guía de la organización de estados americanos y el derecho aplicable a los contratos internactionales (parte II)*, in *Revista Española de Derecho Internacional*, Vol. 73, No. 2, 2021, 281.

Rojas Tamayo D., *El Derecho aplicable al contrato. Estudio comparado, crítico y prospectivo en Derecho internacional privado colombiano*, Universidad Externado de Colombia, Bogotá, 2018.

Roldán Pardo J.F., *El estado del arte del concepto de orden público internacional en el ámbito del Derecho internacional privado y el arbitraje internacional*, in *Revista de Derecho Privado*, 2010, No. 44, 2.

Romero F., *El Derecho aplicable al contrato internacional*, *Liber Amicorum Homenaje a la Obra Científica y Académica de la profesora Tatiana B. de Maekelt*, Facultad de Ciencias Jurídicas y Políticas, UCV, Fundación Roberto Goldschmidt, Caracas, 2001, 203.

Salazar Parra B., *Tutela contra laudos arbitrales en Colombia*, in *Revista ALARB, Arbitraje y Constitución*, 131.

Salcedo Franco C.M., *El Arbitraje Internacional y la acción de tutela contra laudos internacionales*, Editorial Temis, 2020.

Salvadori M., *Gli accordi di scelta del foro nello spazio giudiziario europeo*, Torino, Giappichelli, 2018

Samtleben J., *Der Kleinstaat Uruguay als Zentrum des Internationales Privatrecht*, *Festschrift für Dieter Martiny zum 70. Geburtstag*, eds. Witzleb E., Ellger R., Mankowski P., Merck H. and Remien O., Tubinga, Mohr Siebeck, 2014, 580.

Samtleben J., *La Relación entre Derecho Internacional Público y Privado en Andrés Bello*, *Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana*, Vol. 14, 1982.

– *Internationales Privatrecht in Lateinamerika-Regionale Entwicklungen und nationale Kodificationen (2001), Rechtspraxis und Rechtskultur in Brasilien und Lateinamerika*, coord. Samtleben J., Shaker Verlag, Aachen, 2010.

Sánchez Lorenzo S.A. - Fernándes Rozas J.C., *Derecho Internacional Privado*, Civitas S.A., Madrid, 2013.

Sánchez Sánchez H., *La aplicación y prueba del Derecho extranjero*, *Teoría general del Derecho internacional privado*, eds. García L. and Aljure A., Legis, Bogotá, 2016, 95 ff.

Sánchez-Covisa J., *Orden público internacional y divorcio vincular*, *Obra Jurídica de Joaquín Sánchez-Covisa*, Ediciones de la Contraloría General de la República de Venezuela, Caracas, 1976, 441.

Sander P., *Dutch Company Law*, European Commercial Law Library, N° 6, R. Pennington LL. D, Oyez Publishing, London, 1977.

Sansó B., *La función de la interpretación en la búsqueda y adaptación de la Ley extranjera aplicable*, *Libro Homenaje a la Memoria de Roberto Goldschmidt*, Facultad de Derecho, UCV, Caracas, 1967, 677.

Savigny F.C., *Sistema de Derecho romano actual*, Trans. J. Mesía y M. Poley, II ed., F. Góngora y Cía., Madrid, 1879, Vol. 6.

Schellerer J., *Gutgläubiger Erwerb und Ersitzung von Kulturgegenständen*, Tubinga, Mohr Siebeck, 2016.

Schmidt-Kessel M., *Article 9*, *Concise Commentary on the Rome I Regulation*, ed. Ferrari F., Cambridge University Press, Cambridge, 2020, Article 9.

Semper F., *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, 2006, Vol. II, 765.

Shea D., *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*, Minnesota Archive Editions, 1955.

Siegel D., *Conflict of Laws*, Publishing West, 1982.

Siehr K., *Das IPR der Kulturgüter*, in *MHB Yil*, 2001, Vol. 22, 751.

– *The Beautiful One Has Come - to Return*, *Imperialism, Art and Restitution*, ed. Merryman J.H., Cambridge University Press, New York, 2006, 114.

– *Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property*, in *Uniform Law Review*, 2015, Vol. 20, 503.

Sperduti G., *Norme di applicazione necessaria e ordine pubblico*, in *Rivista di diritto internazionale privato e processuale*, 1976, 476.

Ströbl A., *HGB § 89b*, in *Münchener Kommentar zum Handelsgesetzbuch*, eds. Drescher I., Fleischer H. and Schmidt K. (eds.), C.H. Beck, München, 2021, Vol. I, HGB § 89b.

Symeonides S., *Material Justice and Conflicts Justice in Choice of Law*, *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, eds. Borchers P. and Zekoll J., Transnational Publishers, 2001, 125.
– *Choice of Law*, New York, Oxford University Press, 2016.
– *Choice of Law in Torts Arising from Infringement of Personality Rights*, in *International Business Law Journal*, 2022, Issue 6.
Tamanaha B., *Legal Pluralism Explained. History, Theory, Consequences*, Oxford University Press, 2021.
Treves T., *Il controllo dei cambi nel diritto internazionale privato*, Cedam, Padova, 1967.
Tunc A., Le droit anglais des sociétés anonymes, II ed., Dalloz, Paris, 1978.
Ubertazzi B., *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Giuffré, Milano, 2008.
Valencia Restrepo H., *Derecho internacional público*, Comlibros, Bogotá, 2008.
Valencia Zea A., *Proyecto de Código Civil*, Superintendencia de Notariado y Registro, Bogotá, 1980.
– *Derecho Civil. Parte General y Personas*, XV ed., Temis, Bogotá, 2000, Vol. I.
Valiente López A., *Acceso a la Justicia de los Pueblos Indígenas*, *Elementos y Técnicas de Pluralismo Jurídico. Manual de Operadores de Justicia*, eds. Martínez J.C., Steiner C. and Uribe P., Fundación Konrad Adenauer, Mexico, 2012.
Vásquez Palma M., Vidal Oliveros Á., *Diálogos entre la Convención sobre la Compraventa Internacional de Mercaderías y la Lex mercatoria*, in *Revista de Derecho Privado, Universidad Externado de Colombia*, 2018, No. 34, 233.
Verplaetse J., *La fraude à la loi en Droit international privé*, Paris, 1938, 26.
Vescovi E., *Derecho Procesal Civil Internacional - Uruguay, el Mercosur y América*, Ediciones Idea, Montevideo, 2000.
Vial Undurraga M.I., *La autonomía de la voluntad en la legislación chilena de Derecho internacional privado*, in *Revista Chilena de Derecho*, 2013, Vol. 40, No. 3, 891.
– *International Contracts in Latin America: History of a Slow Pace towards the Acceptance of Party Autonomy in Choice of Law*, in *Revista de Derecho Privado*, 2020, No. 38.
Vitta E., *Relazione al progetto di legge sul diritto internazionale privato*, *Prospettive del diritto internazionale privato*, Istituto per la documentazione e gli studi legislativi, Giuffré, Milano, 1967.
Wantuch-Thole M., *Cultural Property in Cross-Border Litigation. Turning Rights into Claims*, De Gruyter, Berlin, 2015.
Wiese V., *Der Bedeutungswandel der Situs-Regel im Internationalen Sachenrecht der Kulturgüter*, *Kulturgüterschutz - Kunstrecht - Kulturrecht. Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars Kunst und Recht*, eds. Odendahl K. and Weber P., Nomos Verlag, Baden-Baden, 2010, 83.
Wolff M., *Derecho internacional privado*, Trans. A. Marín, Bosch, Barcelona, 1958.

Zapata de Arbeláez A., *El régimen jurídico de los contratos internacionales en Colombia*, *Derecho internacional de los negocios. Alcances*, comp. A. Zapata de Arbeláez, Universidad Externado de Colombia, Bogotá, 2010, Tomo III, 13.

Zapata Giraldo A., *Colombia*, *Encyclopedia of Private International Law*, eds. J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio, Edward Elgar Publishing, Cheltenham, 2017, Vol. 2, 1981.

– *La Ley Aplicable al Contrato Internacional*, *Teoría General del Derecho Internacional Privado*, coords. García Matamoros L. and Aljure Salame A., Temis, Bogotá, 2016.

Zuleta Londoño A., *Las cláusulas de selección de foro y selección de ley en la contratatción internacional: una vision desde el derecho internacional private colombiano*, in *Revista de Derecho Privado*, No. 44, 2010, 10.

STAMPATO IN ITALIA
nel mese di luglio 2024
da Rubbettino print
88049 Soveria Mannelli (Catanzaro)

The Project on Private International Law for Colombia, elaborated by the *Istituto Antioqueño de Derecio Internacional Privado* (IADIP Draft Law – PGLPIL), presents an opportunity for everyone interested in Private International Law to have a holistic view into the subject. The book brings together a team of international experts in the area covering different perspective. It presents an excellent mapping of how Colombia can build a strong synergy with the comity of nations in its international affairs and to better 'communicate' with other national legal systems.

Margherita Salvadori, PhD in International Economic Law, Rome; Doctor honoris causa Droit international privé - Université de Lorraine; Professor of Private International Law at the University of Turin; invited professor at Georgetown University (USA-London), Universite de Nancy (France), Universitad de Albacete (Spain), Universitad Pontificia de Medellin (Colombia) and University of Panama (Panama).

Gilbert Boutin Icaza, Dr., Dr., Prof., Doctor in Private International Law from the University of Paris II Pantheon - Sorbonne. He is the drafter of the Code of Private International Law of the Republic of Panama and of the rules of Private International Law in Decree-Law No. 5 of 1999 on arbitration in Panama. Currently, he is correspondent of UNIDROIT; he is affiliated with the Association Henri Capitant Paris, France; he is Member of the Swiss Arbitration Association, Basel, and individual member of the International Chamber of Commerce.

ISBN 978-88-7590-302-2

9 788875 903022

€ 20,00