OHADAC

MODEL LAW

ON

PRIVATE

INTERNATIONAL

LAW

TEXT COMMENTED ARTICLE-BY-ARTICLE

TO PROMOTE A DEBATE

APril, 2014

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ABBREVIATIONS

ACS	Association of Caribbean States
ADC	*Anuario de Derecho Civil*
AEDIPr	*Anuario Español de Derecho internacional privado*
ALBA	Bolivarian Alliance for the Peoples of Our America
Am. J. Comp. L.	*American Journal of Comparative Law*
Am. J. Int'l L.	*American Journal of International Law*
Ann. fr. dr int.	*Annuaire français de droit international*
Ann. suisse dr. int.	*Annuaire suisse de droit international*
Anuario IHLADI	*Anuario del Instituto Hispano Luso Americano de Derecho Internacional*
APPRIs	Agreements on Reciprocal Promotion and Protection of Investments
Ariz. J. Int 'l & Comp. L.	*Arizona Journal of International & Comparative Law*
British. Yearb. Int'l L.	*British Yearbook of International Law*
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
Cass.	Cour de cassation
CBI	Caribbean Basin Initiative
Cc	Civil Code
CCI / ICC	International Chamber of Commerce (Paris)
Ccom	Commercial Code
CELAC	Community of Latin American and Caribbean States
CG	European Convention on International Commercial Arbitration, concluded in Geneva on 21 April de 1961
Chi. J. Int 'l L.	*Chicago Journal of International Law*
CIADI / ICSID	International Centre for Settlement of Investment Disputes
CIDIP	Inter-American Specialized Conference on Private International Law
CISG	United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980
CJEC	Court of Justice of the European Communities
CNY	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958
Columbia J. Transn 'l L.	*Columbia Journal of Transnational Law*
CONC.	Concordance
Dir. comm. int.	*Diritto del commercio internacionale*
Dir. int.	*Diritto internazionale*
Disp. Res. J.	*Dispute Resolution Journal.*
DPCI	*Droit et pratique du commerce international*
DRB	Dispute Review Board
ECHR	European Court of Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
Fla. J. Int 'l L.	*Florida Journal of International Law*
German Yearb. Int'l. L.	*German Yearbook of International Law*
Harv. Int 'l L.J.	*Harvard International Law Journal*
Harv. L. Rev.	*Harvard Law Review*
Hous. J. Int 'l L.	*Houston Journal of International Law*
IACAC	Inter-American Commercial Arbitration Commission
IAJC	Inter-American Juridical Committee
IBA	International Bar Association

ICSID Rev.	*ICSID Review—Foreign Investment Law Journal*
IDB	Inter-American Development Bank
ILM	*International Legal Materials*
IMF	International Monetary Fund
Int 'l Arb. L. Rev.	*International Arbitration Law Review*
Int 'l Bus. Law.	*International Business Lawyer*
Int 'l Comp. L.Q.	*International & Comparative Law Quarterly*
Int 'l. Law.	*The International Lawyer*
J. Int 'l Arb.	*Journal of International Arbitration*
Journ. dr. int.	*Journal du droit international*
LAFTA	Latin American Free Trade Association
LAIA	Latin American Integration Association
La Ley	*Revista Jurídica Española, La Ley*
MASC	Alternative Methods of Conflict Resolution
Mercosur	Common Market of the South
Mich. J. Int 'l L.	*Michigan Journal of International Law*
Minn. L. Rev.	*Minnesota Law Review*
NCPC	Nouveau Code de Procédure Civile
OAS	Organization of American States
OECO/OECS	Organisation of Eastern Caribbean States
OHADAC	Organization for the Harmonization of Business Law in the Caribbean
OJ	Official Journal
PIL	Private international law
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
RDEA	*Revista de Derecho Español y Americano*
RDM	*Revista de Derecho Mercantil*
Recueil des Cours	*Recueil des Cours de l'Académie de droit international de La Haye*
REDI	*Revista Española de Derecho Internacional*
Rev. arb.	*Revue de l'arbitrage*
Rev. belge dr. int.	*Revue belge de droit international*
Rev. crit. dr. int. pr.	*Revue critique de droit international privé*
Rev. dr. aff. int.	*Revue de droit des affaires internationales*
Rev. dr. int. dr. comp.	*Revue de droit international et de droit comparé*
Rev. dr. unif./Unif. L. Rev.	*Revue de droit uniforme/Uniform Law Review*
Rev. int. dr. comp.	*Revue internationale de droit comparé*
Rev. urug. DIPr	*Revista uruguaya de Derecho internacional privado*
Revista mex. DIPr	*Revista mexicana de Derecho internacional privado*
RIE	*Revista de Instituciones Europeas*
Riv. dir. civ.	*Rivista di diritto civile*
Riv. dir. int. pr. proc.	*Rivista di diritto internazionale privato e processuale*
Riv. dir. proc.	*Rivista di diritto processuale*
Riv. trim. dr. proc. civ.	*Rivista trimestrale di diritto e procedura civile*
St. Mary L.J.	*Saint Mary's Law Journal*
Stan. L. Rev.	*Stanford Law Review*
Tex.Int 'l.L.J.	*Texas International Law Journal*
TLCAN / NAFTA	North American Free Trade Agreement
Travaux Com. fr. dr. int. pr.	*Travaux du Comité français de droit international privé*
Tul. J. Int 'l & Comp. L.	*Tulane Journal of International and Comparative Law*
Tul. L. Rev.	*Tulane Law Review*
UE	European Union
UIBA	Unión Iberoamericana de Colegios y Agrupaciones de Abogados
UN	United Nation
Uncitral /Cnudmi	United Nations Commission on International Trade Law
Unidroit	International Institute for the Unification of Private Law
Va. J. Int 'l L.	*Virginia Journal of International Law*
Vand. J. Transnat'l L.	*Vanderbilt Journal of Transnational Law*

WTO	World Trade Organization
Yearbook Comm. Arb'n	*Yearbook of Commercial Arbitration*

PRESENTATION OF THE MODEL LAW

I. Economic integration and legal cooperation inside the OHADAC area

1. Legal unification as an instrument of economic integration

A) General framework

1. The elimination of economic borders between two economies at least is a fact of our times, leading to various modes of integration. Integration is understood as an economic and social process intended to facilitate relations between the businesses, institutions and States of one or several countries. The decision to integrate a regional economic bloc is no doubt revealing as to the degree of competitiveness of a nation or territory having a certain level of autonomy, and by that very fact as to its ability to converge, in terms of knowledge, with countries whose level of development is superior to its own. An economic integration process is always based on the development of trade on an international scale and aims at securing a series of advantages. Whatever the stage of the process, the purpose is to provide the entities joining it with mutual benefits and advantages superior to those they might expect by acting alone in relation to outside countries or groups of countries. Such benefits and advantages are applicable not only to economic integration processes, but also to processes of political, social or legal integration, or even to any initiative aiming at a higher level of cohesion.

Economic interdependence and the globalisation of the economy have led most governments to set up programmes for the gradual liberalisation of the economy and to accelerate the process of creation of free trade zones. This phenomenon is concomitant with the gradual abandonment of a traditional reticence and mistrust towards international trade, in which multinational corporations play an important role. In addition to this, debates have lately begun with a view to preparing a geographical map depicting the integration processes taking place within the region. Those debates are conducted, not without difficulty, with a view to overcoming reticence concerning a more pragmatic approach to the role played by States in international trade – reticence arising from the incomprehensible notion of sovereignty. In order to reinforce the effectiveness of regional agreements, it is advisable not only to move towards common macroeconomic policies, but also to contemplate a process of substantive legal harmonisation.

2. The aim of establishing liberalisation requires a distinction between two situations that are not necessarily complementary: on the one hand, economic integration; on the other hand, trade integration.

i) *Economic integration*, generally speaking, is designed to do away with customs duties between the countries making up a region or sub-region, with a view to fostering exchanges of goods. In addition to this, in the best of cases and without, however, lapsing into sub-regional protectionism ("open regionalism"[1]), a tariff schedule may be set in order to allow the group of States to act as a specific trade bloc, without, however, existing and being recognised internationally as a new entity with its own legal personality. Such integration between States, as a process of mutual elimination of economic barriers, is not a unique phenomenon. A State's decision to join in such a process is based on considerations that are not only economic, but also social, political or strategic. In that context, preferential tariff agreements at the level of a region or hemisphere take on their full meaning in the face of the progress of large-scale free trade projects with a view to stimulating exports and attracting investments and technologies.[2]

ii) *Trade integration*[3] is based on the reinforcement of trade between the integrated States due to the increase in the size of the market. It corresponds to an economic interpenetration resulting from negotiations or agreements between businesses or nation-States, via a few structural changes. This, however, does not have any overall impact, since the main objective of those States is to maintain a high degree of protection of their national sovereignty. It must be noted that sensitive industries such as automotives, equipment, petrochemicals, paper, steel and textiles enjoy special treatment in the area of trade. The positive effects of trade integration, that is, increased competition and the stimulation caused by investments, as well as technical progress, are linked to greater productive specialisation and to an increase in competitiveness. This presents advantages for both production and consumption: thanks to liberalisation, larger amounts of more diverse goods can be made available to consumers at very competitive prices.[4]

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[1] The idea of compatibility between regional integration and growing liberalisation was used to formulate the concept of open regionalism. This formulation, first used by the APEC, was adopted and disseminated in Latin America by the ECLAC. The Commission defines open regionalism as the "interdependence that stems from preferential agreements and the interdependence which basically arises from the market signals that are produced by trade liberalization in general". It is assumed that due to the current trends towards the globalisation of competition and production, countries are compelled to open their economies to international trade and investment. However, this does not exclude preferential - and thus deeper - market opening to other countries of the same region; on the contrary, general liberalisation and preferential market opening can be complementary, so as to increase competition and boost the economy. *Vid.* M.R. Agosin, "Las experiencias de liberalización comercial en América Latina: lecciones y perspectivas", *Pensamiento Iberoamericano*, nº 21, 1992, pp. 13–29, esp. p. 15. M. Kuwayama, *Open Regionalism in Asia Pacific and Latin America: A Survey of the Literature*, Santiago de Chile, Cepal, 1999, and the compiled work by the same author, *Nuevas políticas comerciales en América latina y Asia. Algunos casos nacionales*, Santiago de Chile, Cepal, 1999.

[2] J.C. Fernández Rozas, *Sistema del comercio internacional*, Madrid, Civitas, 2001, nº 98 *et seq.*

[3] It does not coincide with the notion of "economic integration". In Latin America, since its creation the ECLAC has called for commercial integration in the region and has somehow attempted to achieve it through the integration process within the framework of the Latin American Free Trade Association (LAFTA) and subsequently of the Latin American Integration Association (LAIA).

[4] P. McClauren, "The Status of Consumer Protection Policy in the Caricom Region", *L'intégration économique régionale et la protection du consommateur. Regional economic integra-*

3. But integration is not solely an economic, commercial or social phenomenon. It includes other facets of the evolution of the operators involved. First of all, it implies the intention of safeguarding peace through collective cooperation and security beyond national borders, of establishing the rule of law and of opening up development to the outside. Secondly, it requires certain initiatives in the design of the private law institutions thus induced.

Traditionally, the development of cooperation policies between States in civil and commercial matters is a response to a weakness and is based on friendship and goodwill between them, and always on the principle of reciprocity. However, as a logical sequel of the integration process, cooperation has come to be considered not as an end in itself, but, in a majority of cases, as a condition, since cross-border disputes or disputes involving an element of foreign status are increasingly frequent and numerous. The process leading, among other things, to harmonisation between norms and legislations does not imply *prima facie* the creation of common norms for a regional bloc, as this would entail the risk of uselessly giving rise to conflicts between rules and of leading, outside that context, to rivalry between the national rules in force. On the contrary, the harmonisation between the legal rules relating to trade and to the exchange of goods and services (such as the rules protecting free competition[5] and sanctioning unfair competition, those protecting consumers or intellectual property) has or should have as its main objective the suppression of distortions between the domestic law of States, especially when those distortions asymmetrically benefit the operators of one member State to the detriment of the others.[6]

In that context, and although its place has been considered to be secondary,[7] private international law plays an important role in legal regulation and proves indispensible for the harmonisation of the legislations of the States that are part of an integration process. The proper operation of any integrated market, whose starting point is diversity between legislations, rests on the contributions of a private international law that is uniform and whose substance is well defined. Uniform, because the rules of the game must be common to all the participants, and whose substance is well defined in order to ensure the proper operation of this "market of normative products".[8]

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tion and consumer protection. La integración económica regional y la protección del consumidor, Cowansville, Québec, Blais, 2009, pp. 277-294.

[5] G. Ibarra Pardo, "Políticas de competencia en la integración en América latina", *Integración Latinoamericana*, September 1993, pp. 45-51.

[6] J.C. Fernández Rozas, *"Un nuevo mundo jurídico: la lex mercatoria en América Latina", Estudios sobre Lex Mercatoria. Una realidad internacional*, Mexico D.F., Instituto de Investigaciones Jurídicas. Universidad Nacional Autónoma de México, 2006, pp. 61-127.

[7] M.M. Fogt, "Private International Law in the Process of Harmonization of International Commercial Law": the 'Ugly Duckling'?", *Unification and Harmonization of International Commercial Law: Interaction or Deharmonization?*, Alphen aan den Rijn, Kluwer Law International, 2012, pp. 57-103.

[8] *Cf.* M. Virgós and F.J. Garcimartín Alférez, "Estado de origen vs. Estado de destino", *InDret. Revista para el análisis del Derecho*, 4/2004, p. 6. http://www.indret.com/pdf/251_es.pdf.

This leads one to state that the development of such policies has become the means of ensuring the right to justice for citizens within the integrated supranational area.[9] Hence also the idea that the regional sphere allows better integration based on overall economic democratisation, through compatibility between currencies, through free trade, through the establishment of common rules, and especially through a common will to set the rules of the game so as to respect the interests of the entire region. It also allows convergence between interests and often between more general values in other areas, such as investment, competition, labour law or environmental rules.

4. In Latin America, the concepts of "integration", "cooperation" and "consultation" are generally used interchangeably, whereas they do not have the same meanings. Integration, which we have just referred to, is a deep and intense process which arises and gains strength at the economic level, but diffuses widely between States in other areas (*v.gr*., MERCOSUR). Cooperation assumes that the parties adapt their conduct and prefer it to others. It results from an interaction based on principles and is encouraged by objectives. Finally, consultation is a mechanism through which governments act together within the framework of their sovereignty, usually at the diplomatic level and for mainly political ends, in relation to other individual or collective operators (*v.gr*., UNASUR).

Trade relations in the Caribbean depend largely on the possibilities offered by the processes described above, and more particularly by the first one. It suffices to observe the results produced to date by the main integration processes inside the region or by those in which States belonging to the Caribbean zone participate, such as the Central American Common Market (CACM), the Association of Caribbean States (ACS), the Caribbean Community (CARICOM) and the Bolivarian Alliance for the Peoples of our America (ALBA in Spanish), in order to note a significant increase in trade relations inside the zone and the reinforcement of important economic sectors. Such experiences have led, as a common denominator and principally, to the liberalisation of trade in goods and services, to greater protection for foreign investment flows and to increased transparency of domestic rules, for instance as regards government procurement. However, some areas, such as freedom of movement and travel, have remained outside the scope of integration, although they are vital to any advanced integration process.

5. Although the content of the term "integration", as used, is mainly economic, it nevertheless remains that any movement aiming at unity between different countries constitutes an economic and commercial process, but also has considerable consequences[10] at the political,[11] legal and social level. In other terms, any action

[9] G.A.L. Droz, "L'harmonisation des règles de conflits de lois et de juridictions dans les groupes régionaux d'États", *Études de droit contemporain* (VI[ème] Congrès international de droit comparé, Hambourg, 1962), Paris, Cujas, 1962, pp. 275-292.

[10] L. Limpens, "Relations entre l'unification au niveau régional et l'unification au niveau universel", *Rev. int. dr. comp*., 1964, pp. 13-31.

[11] At the political level, besides the institutions specific to each sub-region, the Rio Group exerts some influence in the Caribbean. Originally composed of ten South American countries, Panama and Mexico, a South American representative and a Caribbean one, it now comprises: Argentina,

aiming at integration, but also at the formation of a more or less complete common market, underlies a multitude of extra-economic considerations. One of them consists in requiring that the member States and their governments embrace a political regime that respects freedoms – political, economic and social – and is endowed with sound and totally independent public institutions. Another consideration consists in proceeding to unify or at least to harmonise private law, or even private international law, as was done in the European Union.[12] The difficult establishment of gradual regional integration, with all the legal precision required, reflects a complex reality. This must be studied on a case-by-case basis, in a multidisciplinary perspective.[13] It may be observed that such processes do not always take place, especially in the OHADAC territory, within a community-type integrationist framework, but that they consist rather in setting up cooperation of an intergovernmental nature. The general theory of international organisations indicates that in a majority of cases we are dealing with institutions having to do with mere cooperation, not integration.

Obviously, each moment and each stage of integration require very different processes of transfer of powers on the part of the member States of the organisation. Whereas in *free trade zones* the liberalisation of trade can take place without requiring an actual transfer of powers pertaining to the sovereignty of the States to common institutions, *customs unions* consist in giving up some powers of the member States for the benefit of the new organisation and, in this case, a common strategy in relation to third parties and a specific institutional structure are set up. Provided that this model takes on the form of a *common market*, this transfer of powers, just like the creation of an institutional structure, becomes substantively more extensive and is supplemented by the adoption of a common trade policy.

From a legal viewpoint, integration triggers a series of public law mechanisms (agreements, treaties, codes and regulations…) whose end is to facilitate the proper functioning of the institutions in charge of overseeing the process. But starting from those basic mechanisms, a body of norms develops; it is aimed directly at the States concerned, and primarily at their economic and later at their social operators, depending on the stage to which integration has progressed. Ultimately, the final targets of the integration process are individuals and entities that are affected at the economic or financial level as well as at the personal and family level. Integration consists in multiple intercommunication and is positively complex. It requires changes in the domestic legal framework, as well as an awareness of the disparity

Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay and Venezuela. It is a consultation and cooperation mechanism which ensures the maintenance of democracy and coordinates positions on Latin American foreign relations through heads of State and government of the region. The Rio Group, which was conceived as a Permanent Mechanism of Political Consultation and Coordination (MPCCP in Spanish), is currently the most important Latin American and Caribbean forum for discussion.

[12] J.C. Fernández Rozas, "Los modelos de integración en América latina y el Caribe y el Derecho internacional privado", *Iberoamérica ante los procesos de integración. Actas de las XVIII Jornadas de Profesores de Derecho Internacional y Relaciones Internacionales*, Madrid, BOE, 2000, pp. 151-192.

[13] E. Pérez Vera, "Reflexiones sobre los procesos de integración regional", *RIE*, 1977, pp. 669-700, esp. p. 699.

existing between national bodies of law. While the latter continue to be necessary at the domestic level, as well as at the level of identity, they may fail in the face of the increase in international situations implied by any integration process.

6. This analysis is usually found under the heading of "Integration law" and requires setting up a complex institutional system which varies according to the objectives pursued and the stage of their achievement. This gives rise to notions such as "supranationality", "community *acquis*" and "regional institutionalism", the use of which is inevitable when dealing with such matters.

But such a legal system does not always prove necessary in order to intensify certain very basic forms of integration. Legislative harmonisation and unification can play an important role in that regard. Provided that they ensure a high level of legal security for legal operators and allow predictability in the field of law, harmonisation and unification prove to be the best guarantees for the safeguarding of legal relationships in supranational areas. The uniformity of cross-border private law relationships offers contract parties greater legal security. In order to achieve this, the applicable rules must have been developed according to fair and objective criteria. The unification and creation of law at the transnational level is no more than the expression of a reality at a given moment within the framework of international exchanges of a private nature.[14]

Indeed, the opening and integration of global and/or regional markets are formatted so as to provide the obvious answers to current economic reality, as well as mechanisms or instruments that are suitable, either structurally or considering economic circumstances, with a view to adjusting demand to an increasing and diversified supply of goods and services. In an economy open to the laws and rules of a market based on free competition between products and services, whether domestic or foreign, demand, just like supply, adjusts to the extended market. Moreover, it offers better conditions of competitiveness to production, both industrial and commercial, and to services. Such openness implies the elimination or reduction of obstacles, whether or not customs-related, to the free circulation of goods and services on the extended market. It likewise implies openness to the free movement of persons and capital inside a geopolitical and socio-economic area. Freedom of movement, whose variability depends on the extent and depth of openness and integration, affects subjects, that is, individuals or entities, who supply (companies) and demand (consumers) those goods and services, which are potentially located in different countries. Integration is inconceivable without such freedom, but the latter results in multiple advantages while generating possible conflicts. Such conflicts are identical to those confronting persons in a strictly domestic context, but they present additional complexity because they arise within an international framework. We are dealing, for instance, with contracts made between parties domiciled in different countries, with companies incorporated in one State and wishing to transfer their registered offices to another country, with workers who enjoy better work opportunities outside their own country and who migrate with their entire

[14] *Cf.* K.P. Berger, *The Creeping Codification of the* Lex Mercatoria, The Hague, Kluwer, 1999, p. 230.

families in order to settle in a foreign country, etc. All of those situations may lead to legal problems, and their solution involves the rules of private international law; one must determine who has jurisdiction, or what is the applicable law, or in what situation a decision handed down in one State can produce its effects in another. At the present time, the answers to those questions are still to be found in each State's legal organisation; consequently, they depend on the specificities and differences of each of them, which adds additional hindrances to integration. At present, private international law, rather than looking for the rules required in order to cause national courts to comply with foreign law, rather attempts to unify the legal criteria and legislations applicable in some parts of the world, such as inside the Caribbean area. During the last decades, in the absence of a system liable to be generally accepted, a strong movement has arisen in favour of harmonisation of the norms of private international law between States. Such unification aims at facilitating international transactions, ensuring that the acquired rights of persons are respected and doing away with forum shopping.

7. In order to allow companies pertaining to States with similar political systems – which, in turn, recognise similar systems of economic organisation – to engage in trade, they must be able to rely on homogeneous rules in a good number of cases. The legal relationships that emerge from this sort of trade require a legal organisation that oversteps the national framework. In order to deal with specific legal relationships set up in an international context, whose interests and requirements differ, a compatible legal mechanism is required, one that will be as homogeneous as possible between all the member States of the integration. There is no doubt that a substantive unification process could solve such problems. However, on the one hand, history demonstrates that the themes concerned by such unification are few in number (the example of the international sale of goods is unparalleled), which would lead to major legal zones being left on the sidelines of the unification in question. On the other hand, the substantive unification achieved by means of *ad hoc* international agreements remains partial, since all States do not adhere to such instruments of international codification, nor do they accept them simultaneously, nor do they even enforce them in the same way.

A legal system, and *a fortiori* a system sensitive to the regulation of private international transactions, cannot allow itself to be limited by normative provisions issued solely by domestic lawmakers. Indeed, the latter are inadequate and cut off from legal reality, even in the context of very basic economic integration. It is necessary, on the contrary, to adjust to the reality of the international community, for in order to ensure international trade, doing away with legal barriers of governmental origin is not enough. If the lawmaker wishes to guarantee the fluidity of international trade, he must eliminate legal obstacles of both private and public origin, that is, those resulting from the legal fractioning of the various States' legislations.[15]

[15] J.J. Garcimartín Alférez, "La racionalidad económica del Derecho internacional privado", *Cursos de Derecho internacional de Vitoria-Gasteiz 2001*, Servicio Publicaciones Universidad del País Vasco, 2002, pp. 87-154, esp. pp. 100-101.

In other words, national normative development or internal codification must take place simultaneously with international codification and in coordination with it. Likewise, international codification must admit that it cannot develop on the fringes of legal unification. All of this doubtless suffers from a certain rigidity, of which internal codification is devoid. [16] Precisely in order to avoid such rigidity, this OHADAC Model Law of private international law has been developed with particular regard for the specific characteristics of Caribbean economic integration.

8. This initiative in the area of unification of private international law is in full harmony with regional integration taking place in that geographical zone. It can constitute a useful tool to mitigate drawbacks due to an inadequate domestic legal framework, which act as a check on international commercial transactions. But it also caters to those who refuse a codification imposed "from on high", leading to a loss of the cultural identity of peoples, to the elimination of competition between legal orders, and in addition to the generation of costs greater than any possible benefits. [17] States are not forced to adhere to all of the Model Law, but can adapt its specific provisions partially and gradually in order to avoid any traumatic change. At this time, such conduct would be thoughtless. Thus, with more realism and prudence, the Model Law does not rule out the maintenance of a certain normative diversity in order to safeguard, for as long as may be necessary, the identity of the national legal orders concerned.

In addition, as a "Model Law", this initiative is no more than a legislative "proposal" which may, in turn, be received by a State in fragmentary fashion or, if necessary, in the same way as other legal instruments in force in that State. However, while such an option cannot be ruled out, such fragmentation is not recommended, for it would give rise to the risk of placing private international law under the tutelage of domestic law (substantive private law) and of giving rise to diverging interpretations liable to jeopardise the very consistency of the normative whole involved. [18] The soft law technique could also lead to a partial reception of the model, but this would simply mean stopping halfway through the process, which nevertheless proves necessary and decisive. This unifying initiative thus aims at offering a complete system of rules of private international law which will adapt specifically to the requirements of the practice generated by private international transactions. Such a system aspires to be received in full by the OHADAC member States. This Model Law, considered as such, may serve as a reference for judges and arbitrators, be interpreted or supplemented by other instruments governing private international law relationships, or also serve as a model for national lawmakers, which is, however, its main objective.

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[16] F. Rigaux, "Codification of Private International Law: Pros and Cons", *Lousiana L. Rev*., vol. 60, nº 4, 2000, pp. 1321-1330.

[17] As an example, reference can be made to the unification process which once took place within the Benelux regarding the "conflict of laws". *Vid*. L.I. de Winter, "La nouvelle version du Projet Benelux de loi uniforme de droit international privé", *Rev. crit. dr. int. pr.*, 1968, pp. 577-606; K.H. Nadelmann, "The Benelux Uniform Law on Private International Law", *Am. J.Comp. L.*, vol. 18, 1970, pp. 406-419.

[18] *Vid*. *infra* commentaries on **arts. 1 and 3.2** of the present Law.

B) Integration in Latin America

9. The integration of the economies of Latin America and the Caribbean is an aspiration that became apparent during the fifties of the past century and was implemented during the sixties. The basic postulate is as follows: integration is a way of settling economic problems which serves to reinforce a sole bargaining power within the framework of international trade, characterised by the existence of countries that are more developed than others. [19] However, the integration mechanisms created at the time (the Latin American Economic System, the first Latin American Free Trade Association, the Central American Common Market, the Andean Community and the Caribbean Common Market…) did not actually lead to significant advances and actions in the field involved. This can be explained by the fact that, from the start, integration was never conceived as a political process, that is, as a reality fully included in each country's national development policies.

In the south of the American hemisphere, the integration process had three different results for regionalism. First of all, the diversity of the forms of institutionalisation, structured into different bodies; secondly, cooperation between countries on bilateral or partly multilateral experiments, which was expressed by a considerable number of multilateral and bilateral free trade treaties; and finally the compatibility of the experiments in multilateralism conducted in the form of "open regionalism". [20] This description contrasts with an equally undeniable fact: in Latin America, confusion and ambiguities regarding the question of regional integration and cross-border trade are frequent. There is still a great distance between what is said and what is actually done. Governments express strong interest in reinforcing relations between States, but their trade practices go in the opposite direction. [21]

Until the mid-eighties of the past century, there was a very distinct difference between the economic area formed, on the one hand, by the countries of Latin America and the Caribbean and, on the other hand, by the developed countries of the continent (USA and Canada). The principle was that integration was a process intended to support the developing economies of the region in order to reinforce the progress and their presence on international markets. Thus, the region's developed countries intervened on those markets through multilateral mechanisms and not via preferential agreements. The creation of the North American Free Trade Agreement (NAFTA), which dates back to the same period as the WTO, changed that picture by meeting the challenges of increasing globalisation and responding to the

[19] In 1950, the ECLAC provided recommendations to Latin American countries to ensure that the possibility of a growing demand through mutual exchange was taken into account when developing economic programmes and incentives in order to achieve a better integration of their economies.

[20] F. Rueda Junquera, "Integración económica en América Latina y el Caribe. Del regionalismo cerrado al regionalismo abierto", *El Estado de Derecho Latinoamericano. Integración económica y seguridad jurídica en Iberoamérica* (I. Berdugo Gómez de la Torre and R. Rivero Ortega, eds.), Salamanca, Ediciones Universidad de Salamanca, 2003, pp. 123–161.

[21] J.C. Fernández Rozas, "El marco general de la integración latinoamericana", *El Tratado de Libre Comercio, la integración comercial y el Derecho de los mercados* (R. Rincón Cárdenas, E. Santamaría Ariza and J.J. Calderón Villegas", eds.) Bogota, Editorial de la Universidad del Rosario, 2006, pp. 152–179, esp. pp. 161–162.

difficulties encountered by developing national economies in finding their place in the international economic scene. The upsurge of regional integration in Latin America and the Caribbean then took place as a movement arising on a global scale.

Those processes come under the heading of "new regionalism". They take on various forms, alternating between projects in the field of classical macro-regions, with novel experiments at the sub-regional level, including between specific zones consisting of two or more countries. In a majority of cases, these are inter-governmental projects whose objectives are mainly economic. They have given rise to intense debate as to the various models of integration involved, and as such they have contributed to a better understanding of the versatility of the integration phenomenon.[22]

10. In the light of the expectations of the eighties, present developments clearly illustrate the fact that the attempts at integration led to persistent crises and were marked by deadlocks. It was then necessary to find new ways out, which, without putting aside all of the traditional processes, would be able to contribute more immediate and realistic solutions, aiming at a more intense integration in a globalised world. A synthetic diagnosis shows, on the one hand, a real political will, rather contained on the part of many governments, who do not hesitate to make grandiloquent positive statements in international fora on programmes which they will not implement. On the other hand, it appears that there is an obvious lack of continuity as regards integrationist proposals. In a majority of cases, this is due to political instability and to the fact that successive governments put forth programmes whose choices differ from those of their predecessors.

As a result, many of the processes initiated were unable to achieve the minimum objectives set in the original texts. This has led to experiments with new models, which in a majority of cases has reduced all those efforts to the sole creation of a "trade zone". The sole establishment of free trade zones or very basic customs union structures is not an appropriate tool for true integration. It must go hand in hand with coordinated common foreign policy actions and with the implementation of productive processes within the region involved. In those cases, we are dealing more with mere formal processes than with actual tools oriented towards true integration. It is not enough to share common objectives as regards integration to allow the project to achieve its purpose. A minimum amount of political coordination is needed in order to have an impact on industry, on foreign policy, on immigration policy, on the handling of the foreign debt, or even, in the case of advanced integration, on a common defence framework. As a result, integration models based primarily on an unsuitable customs protection policy did not at all succeed in solving specific common issues, such as, for instance, the problems posed by drops in the price of commodities, poverty and unemployment. The creation and implementation of transparent mechanisms of participation by citizens in integration processes, together with initiatives aiming at legislative unification, both substantive and

[22] O. Dabène, *The Politics of Regional Integration in Latin America. Theoretical and Comparative Explorations*, New York, Palgrave, Macmillan, 2009.

relating to private international law, are the only means of achieving true results as regards Caribbean integration and of causing the local populations to benefit from them. Let us examine this question more attentively.

C) The specific features of Caribbean integration

11. Besides the basic alternative between regional or continental integration, with tendencies clearly in favour of the former,[23] the Caribbean zone faces major challenges of economic and social development in the face of globalisation. In this new global economic order, a significant part of the competitive potential of each Caribbean State depends on its integration with the other countries in the zone. That zone is presently engaged in several free trade negotiations, which take on various forms but are simultaneous. The major problem confronting the region in the face of those initiatives is perhaps the lack of the human and financial resources which would allow it to conduct effective negotiations and to defend its economic and commercial interests. The main interest of the Caribbean is to arrive at the recognition of a differentiated treatment in its trade policies, taking into account its weakness in the area of production and its dependency on preferential commercial treatment on the markets of the European Union, the United States and Canada.

Caribbean integration thus appears to be an independent development alternative which transcends the strictly economic and commercial framework. Its ultimate objective is the implementation of policies aiming at improving economic development and social welfare. Through the harmonisation project initiated, OHADAC offers an excellent opportunity of developing the Caribbean economies in the context of the globalisation of the economy. One only need take into account the objectives to which it grants priority: dealing with legal and judiciary insecurity in the States of the zone in order to guarantee security for investors and facilitate trade between the member States.

The project contributes tools useful for the countries of that geographical zone for the intensification of intra-Caribbean trade, which fluctuates between 12 and 20 % of total trade. This project is designed to serve as a transmission belt between the development of major economies of scale and processes of legal reform within the Caribbean integration zone. In order to establish trade relations with other countries, it is necessary to finance actions and strategies that will stimulate the economic development of the countries in the region, starting from the chances and strengths offered by those economies. These are the mechanisms which must be used so as to peremptorily overcome the unfavourable approaches to international cooperation characteristic of that geographic zone. In that context, taking into account the rules of private international law is of special interest for the countries and territories integrating that institution and has led to the presentation of this Draft Model Law.

[23] M. Burac, H. Godard and F. Taglioni, “Le bassin caraïbe dans les Amériques: intégration régionale ou continentale?”, *Mappemonde*, nº 72, 2003-4, pp. 12-15. http://www.mgm.fr/PUB/Mappemonde/M403/Integration.pdf.

Indeed, the complementary phenomena constituted by globalisation and integration have seriously disrupted the traditional image of private international law, based on notions of sharing, position, territory and State sovereignty. In the globalised market economy which the States of the Caribbean zone wish to integrate, relations with the rest of the world are much more than a mere diplomatic fact. That economy is characterised by the suppression of national barriers to the free movement of goods, services and capital. Such actions are proving increasingly urgent at all economic and social levels for the movement of wealth between States. This is why the countries of the Caribbean must seek for ways of dealing with all, or at least with a majority of situations involving several States. This task must be carried out through a complete and efficient set of rules making it possible to find the proper substantive norm governing a definite private law situation, as well as the judicial organ responsible for settling any disputes liable to result from it.

12. The instruments of integration are not solely economic (*v.gr.*, common customs tariff, rules of origin, measures for the protection of trade…). The organisms taking part in such a process are predestined to undergo internationalisation on the basis of specific parameters, while safeguarding their sovereignty or their link with their national territory and nationality.[24] Concretely, in the context of legal and judicial cooperation, this tendency is materialised by negotiation, the development of legal tools and a gradual increase in the number of those tools and of the agents intervening in cooperation strategies. The final objective of civil and commercial judicial cooperation is to set up very close collaboration between the authorities of the various States in order to eliminate any and all obstacles resulting from the incompatibility of the various judicial and administrative systems (mutual recognition and enforcement of decisions, access to justice and harmonisation of national legislations). In order to rise to the various challenges existing in legal and judicial matters, one of the tools liable to be successfully developed in the OHADAC zone concerns the assistance that governments can mutually lend one another. It could take the form of new legal mechanisms suited to the objective of cooperation pursued. The purpose is to build a true Caribbean judicial area inside which both individuals and companies will be able to exercise their rights freely and fully. As already indicated previously, the starting point, that is, the diversity between States and the possible and necessary respect for certain national specificities results in the fact that the strategy of private international law is among the most effective, since it renders diversity compatible and provides predictable and uniform solutions. In a certain way, next to the rules settling questions of applicable law, the rules governing international judicial cooperation (international jurisdiction, international judicial assistance, recognition and enforcement of judicial decisions) are called upon to be part of this special procedural law inside a broad field of international situations.

[24] *Vid.* for Latin America, J. Luch English, *La théorie politique de l'intégration et son application à l'Amérique latine*, Louvain, Institut de Science Politique de l'Université Catholique, 1970.

Any initiative aiming at integration requires a combination of normative and institutional efforts in order to simplify the cooperation procedures and specify them clearly. Hence the value of unifying legislations and reducing the number of operators acting within the framework of cooperation, so as to set up simpler and more efficient procedures. Depending on the experiences and needs expressed by the States, such actions may be reinforced and broadened to include other legal and judiciary fields. One of the activities related to legal and judicial cooperation which it would be beneficial to develop concerns the means to be implemented for a more fluid dialogue between legal and judicial authorities, for the sharing of experiences and for horizontal cooperation activities making it possible to perfect the organisation and functioning of democratic institutions. The countries of the OHADAC zone may set up cooperation mechanisms for the legislative development of domestic legal tools.

As the negotiations aimed at consolidating free trade in the zone progress, it will appear increasingly necessary for the countries to harmonise and integrate their domestic law in areas where dialogue and negotiations allow a consensus to emerge. The revision of national legislations and their harmonisation with the international treaties entered into, or their mere coming into effect, is a difficult task in itself. It proves especially complex in countries with a lesser degree of economic and democratic development. This renders assistance particularly necessary. It may take the form of comparative law tools and studies of the most successful laws, regulations and administrative practices. Such work may be planned according to a schedule set for the countries of the zone concerned and be devoted to the various themes relating to the administration of justice. In this area, private international law plays an essential role.

D) Manifestation of Caribbean integration

13. The commercial opening of the Caribbean has considerably strengthened the numerous links at all levels, whether multilateral, regional or bilateral, and has been reinforced by the signing of trade agreements between the countries of the area. [25] Similarly, integration organisations have emerged. The strengthening of relationships has highlighted the serious impediments to the integration process (*v.gr*., conditions in the country of origin and facility for the movement of goods and the circulation of transport in others) and overhauling them would provide additional growth opportunities to regional companies.

In any case, the multiplication of international organisations around the Caribbean may be both an advantage and an inconvenience. Certain countries form part of the Caribbean Community (CARICOM) or the Caribbean Forum (CARIFORUM),

[25] *V.gr*., the revised Treaty of Chaguaramas establishing the Caribbean Community as well as the CARICOM Single Market and Economy, the Treaty of Basseterre establishing the Organization of Eastern Caribbean States or the Agreement setting up a free-trade area between the Caribbean Community and the Dominican Republic.

[26] the Association of *Caribbean* States (ACS), the Organization of Eastern Caribbean States (OECS), [27] the Rio Group or the Latin American and Caribbean Summit (LAC-Summit); [28] and these bodies aim to achieve economic integration, even if only partially. Several countries belong to regional organisations which transcend the frontiers of the Caribbean, but which can work towards similar goals in the area of legal harmonisation or economic integration such as: LAIA, ALBA, OAS, *Commonwealth*... This plurality of international organisations is similar to the situation affecting the OHADA States on the African continent, [29] and this has not prevented this specific organisation from successfully implementing harmonised commercial law[30]. It is certain that OHADAC will not be able to play a role as important as OHADA in Africa[31], at least initially. In any event, it is necessary to

[26] It is a space for political dialogue created in October 1992 for the purpose of managing and coordinating the financial assistance provided by the European Union to the Caribbean signatory countries of the Lome Conventions and promoting integration and cooperation in the Caribbean. Its members are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Cuba, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Suriname, Saint Lucia, Saint Christopher and Nevis, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago. The following British and Dutch territories have observer status: Anguilla, Aruba, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands and Netherlands Antilles. The following French Overseas Departments in the Caribbean also have this status: French Guiana, Guadeloupe and Martinique. *Vid*. D.A. Mohammed, "The Cariforum-EU Economic Partnership Agreement: Impediment or Development Opportunity for Caricom SIDS?", *The Diplomacies of Small states: Between Vulnerability and Resilience*, Basingstoke, Palgrave MacMillan, 2009, pp. 160-177.

[27] The islands of Antigua and Barbuda, Dominica, Grenada, Montserrat, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines are associate members of the Organization. Its objectives include promoting economic integration between member States and cooperation both on a regional and international level.

[28] It is a regional-level intergovernmental body, consisting of the heads of State and government of Latin America and the Caribbean, who gathered at the Latin American and Caribbean Unity Summit, constituted by the 21st Summit of the Rio Group and the 2nd CALC (Latin American and Caribbean Summit on Integration and Development), in the Mayan Riviera, Mexico, on 22 and 23 of February 2010. Its objective is to "decidedly advance toward an organisation gathering all Latin American and Caribbean States".

[29] P. Francescakis, "Problèmes du droit international privé de l'Afrique noire indépendante", *Recueil des Cours*, t. 112 (1964-II), pp. 269-361; V. Babini, "Il diritto internazionale privato quale elemento di armonizzazione dei diritti dei nuovi Stati africani", *Riv. dir. int. pr. proc*., vol. III, 1967, pp. 302-314; U.U. Uche, "Conflict of Laws in a Multi-Ethnic Setting Lessons from Anglophone Africa", *Recueil des Cours*, t. 228, (1991-III), pp. 273-438.

[30] G. Ngoumtsa Anou, "La régionalisation pour le droit: l'exemple de l'OHADA", *La régionalisation du droit international* (S. Doumbé-Billé, coord.), Brussels, Bruylant, 2012, pp. 189-207.

[31] The Organization for the Harmonization of Business Law in Africa has adopted acts of substantive law designed to achieve uniformity, called Uniform Acts. These texts, applicable to internal and international matters, replace the substantive law of member States in the area of uniform law. They thus avoid conflicts of laws and do not have to come up with problem solving methods, but to a limited extent. Unified law is incomplete insofar as it does not solve all the issues it deals with, either because of its deficiencies or because the Community order prefers to submit said issue to an external legal order. Some conflicts of law persist and can only be solved through national or Community conflict rules. Furthermore, unified law applies to extra-Community situations through conflict rules and borrows the mechanisms of private international law to ensure the respect of its values. That is the reason why a public international order of the OHADA and overriding mandatory provisions exist, as is the case in the European Union law. Therefore, the emergence of private international law from the OHADA is bound to develop with regard to conflicts of laws and jurisdictions. By comparing the OHADA to the European experience, the book aims to determine the

rely on this plurality of international organisations and rely on them to give OHADAC special responsibility geared towards the legal harmonisation in commercial matters, with maybe with a more technical than political profile, where a greater role is given to private institutions (Chambers of Commerce and Arbitration) that than to the States, at least initially. This also determines the strategy for harmonisation, which is not the sole preserve of Sub-Saharan Africa.[32]

14. Disregarding a long tradition of integration in Central America, for obvious historical reasons, it should be remembered that during the nineteenth century and the first half of the twentieth century Central American trade and production was dominated by traditional agricultural activities, some of which have led to a great integration in the external market, as is the case of coffee, bananas and cocoa. This process has been much more intense for Guatemala, El Salvador and Costa Rica, and has existed to a lesser extent in Nicaragua and Honduras. Among other aspects, the aim was to promote the growth of industrial activities that permit the substitution of imports and at the same time diversify the production offered by Central America. As for Panama, from the beginning, it has opted for the service economy (related to the canal and the financial sector), in a different dynamic to the process of industrialisation through substitution.

Founded in the early sixties of the last century, the Central American Common Market is the oldest of the region's integration groups. It includes Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. In the late seventies and during the eighties, this market was affected by political instability in several member States, which has influenced its subsequent development and its own crisis. However, the companies of the isthmus have played an important role in the growth of exports, and their initiatives are significant in terms of competitive products and services capable of meeting the challenges of international competition. In 1993, the countries of the sub-region committed themselves to the goal of setting a common external tariff, which was to be adopted at a different pace and was to fluctuate between one and fifteen per cent. In 1995, the agreement on common external tariffs for the first time included the agricultural products sector.

Along with these experiences of regional economic integration, six Central American States (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) established the Central American Integration System (SICA from its Spanish acronym) under the Tegucigalpa Protocol, of 13 December 1991, whose operation began in 1993. This system, for its part, has four integration subsystems in the economic, social, cultural and political fields. Inevitably, the first of these is the most important and establishes the basic principle of the Protocol to the General Treaty of Central American Economic Integration, signed in Guatemala, of 29 October 1993. The economic and trade objectives are expressed in relatively generic terms. Specifically, the SICA aims to achieve well-being and economic and social

influence of legal integration in private international law. *Vid*. G. Ngoumtsa Anou, *Droit OHADA et conflits de lois*, Paris, LGDJ, 2013.

[32] P. Gannagé, "Observations sur la codification du droit international privé dans les États de la Ligue arabe", *Études en l'honneur de Roberto Ago*, vol. IV, Milan, Giuffrè, 1987, pp. 105-123.

justice for all Central American peoples, to allow an economic union and enliven the Central American financial system. It also aims to strengthen the region in order to turn it into an economic bloc capable of successful integration into the global economy.

Following a sluggish period, integration in the Central American region has permitted significant progress in the six presidential summits of the region. The most significant success was the Framework Agreement for the Establishment of the Central American Customs Union signed on 12 December 2007 by the Ministers of Economy, Foreign Trade and Industry. The Framework Agreement establishes and confirms the desire to create a customs union on its territory, in accordance with the General Agreement on Tariff and Trade (GATT) and its successor organisation, the World Trade Organization. The agreement comprises seven Titles and thirty articles. Its application will occur gradually and progressively. It does not have a term of validity, is thus for an indefinite period and open for signature by any member country of the SICA; the acceding country must deposit the instrument of accession with the SICA General Secretariat.

15. The Caribbean Community (CARICOM) includes the following States: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Kitts & Nevis, Saint Vincent & the Grenadines, Trinidad and Tobago and Suriname. The Caribbean Common Market was created by the "Treaty of Chaguaramas" signed by Barbados, Jamaica, Guyana and Trinidad and Tobago. It entered into force on 1 August 1973.[33] Afterwards, the other eight Caribbean territories entered into CARICOM. The Bahamas became the 13th member State of the Community on 4 July 1983. In July 1991, the British Virgin Islands and Turks & Caicos entered as associate members of CARICOM. Twelve other States of Latin America and the Caribbean are observers in various institutions of the Community and the Ministerial Councils of CARICOM. On 4 July 1995, Suriname became the 14th member State of the Community. These countries have a total of 6 million inhabitants. The Community is currently implementing the second phase of its Common External Tariff, which aims to set tariffs between five and twenty per cent for 1998. CARICOM has signed trade agreements with Colombia, Mexico, the Dominican Republic and Venezuela and its countries receive preferential treatment in trade exchanges with the United States of America and the European Union.

In 1995, the Association of Caribbean States (ACS) was created and closely links together Caribbean countries with those of other regions such as the countries of the North of South America, Central America and Mexico. It brings together twenty-five countries and twelve territories in the Caribbean basin. The ACS' priority areas for action concern tourism and both intraregional as well as interregional transport. In a way, the ACS is a reaction against integration processes and glob-

[33] A. Payne, "The Rise and Fall of Caribbean Regionalisation", *Journ. of Common Market Studies*, vol. XIX, 1981, pp. 225-280; H.S. Gill, "Caricom: origen, objetivos y perspectivas de integración en el Caribe", *Integración Latinoamericana*, nº 191, 1993, pp. 37-44.

alisation processes. Its creation stems from the initiative of the CARICOM countries, supported mainly by the countries of the Group of Three.[34]

The creation of the Caribbean Single Market and Economy was the result of a 15-year effort to fulfil the hope of regional integration, which was established by the creation of the British West Indies Federation in 1958. In the economic sphere, the Region has maintained the same status for years and, during this period, free trade had not yet been established between the member States. The Lesser Antilles Federation was completed in 1962, which in many aspects should be considered as the true beginning of what is now the Caribbean Community. The conclusion of the Federation signalled the start of more serious efforts by the political leaders of the Caribbean to strengthen ties between the islands and the mainland, in arranging for the continuation and strengthening of the areas of cooperation that existed during the Federation.

16. Reference should be made to the Caribbean Basin Initiative (CBI), which was adopted in 1984, establishing a unilateral advantage granted by the United States regarding preferential access for exports (either free from any customs charges or taxed less than the exports of other countries) from the countries of Central America and the Caribbean to the United States. Originally, textiles were excluded from preferential access to the CBI. Also, when NAFTA came into effect, exports of textiles from all of Central America suffered a disadvantage compared to Mexican exports. In 2000, Central American and Caribbean countries obtained from the US the inclusion of textiles and tuna exports in the CBI preferences through the Caribbean Basin Trade Partnership Act (CBTPA). Central America's aim was to sign a free trade treaty with the United States, due to the precariousness of the CBI and the disadvantages that it would face in comparison with other countries such as Mexico and Canada.[35]

In September 2001, the governments of the Central American countries and the United States agreed to initiate an exploratory phase for the official launch of negotiations to reach a free trade agreement. From 2002, a series of technical workshops were held in different cities of Central America and United States and resulted in the exchange of information on various business topics, which facilitated the subsequent definition of a framework for future negotiations. On the basis of this process, the countries agreed to commence negotiations on a free trade treaty, which was launched on 8 January 2003. The negotiations were complex and took place through several successive round-table meetings. Due to the integration system that existed in Central America at the time, the Central American States had to conduct coordination meetings in order to adopt a common position around the negotiating table. The Central American countries succeeded in their negotiations in December 2003. During the negotiation process, the Dominican Republic expressed its interest in joining the free trade treaty between Central America and the United States,

[34] E.E. Espinosa Martínez, "La Asociación de Estados de Caribe: una nueva realidad institucional", *Economía y Desarrollo*, vol. 126, nº 1, 2000, pp. 71–96.

[35] A.P. Gonzales, "Caricom and Strategic Adjustment Options in the Post-Lomé World", *Les relations ACP/UE après le modèle de Lomé: quel partenariat?*, Brussels, Bruylant, 2007, pp. 3-27.

and this was received positively by the six other countries. Thus, following negotiations between Central America and the United States, the Dominican Republic accepted the areas previously negotiated by these six countries and signed agreements with the United States and Central America on access for their products to these markets and vice versa.[36]

17. The Free Trade Agreement between the Dominican Republic, Central America and the USA was signed by seven States parties on 5 August 2004. The free trade agreement between the United States, Central America and the Dominican Republic (DR-CAFTA), along with other agreements, presents rules which are reiterated by the World Trade Organization (WTO). It has created a trade liberalisation based on the assumptions and inserts provisions laid down in the Central American integration, and the majority of which apply on a multilateral basis. The DR-CAFTA thus improves Central American regulations, which at the same time are beneficial for trade relations in the region. In this instrument, the legislative changes that the Central American countries must effect for the treaty's entry into force are identified. These changes focus mainly on services, telecommunications and intellectual property. It is hoped that the increased opening of the region and improvement of the regulations induced by the signing of the DR-CAFTA will provide greater opportunities for investment, trade and employment between the signatory countries.

As a condition for entry into force, the negotiating countries had to establish a complex legislative reform process in order to adapt their respective regulations to the latest international commercial standards. The provisions of the Agreement were the consequence of the evolution of international trade legislation. Also, from the start, the reform work was done in a coordinated manner, and in a second phase, the work was done on a bilateral basis between each country and the United States.

E) Contribution of private international law

18. The emergence of regional economic and political integration projects has been one of the realities that have rapidly highlighted the need to go beyond the national reference for formulating the subject of private international law.[37] In this sense, the integration phenomena need to move more towards the following syllogism: since private international law helps compensate for the legal distortions in the space provoked by a variety of causes, it should be taken into account that its subject does not concern a uniform heterogeneous private situation but rather various "heterogeneous private situations" to which private international law is required to provide a particular response. And this need appears all the more evident, but not exclusively, in the case of European integration, which not only pursues a

[36] In August 1998, the Dominican Republic and the countries of the Caribbean Community (CARICOM) signed the Agreement establishing a free-trade area between both parties. The National Congress ratified this Agreement in February 2001 by Resolution 38-01. *Vid.* J.C. Fernández Rozas and L. Contreras, *Derecho del comercio internacional y política comercial de la República Dominicana*, Santo Domingo, Funglode, 2013, pp. 197 ss.

[37] J.C. Fernández Rozas, "Orientaciones del Derecho internacional privado en el umbral del siglo XXI", *Revista Mexicana de DIPr*, nº 9, 2000, pp. 7-32.

specific legal objective, that of integration, but also relies on an autonomous and complete legal order with its own sources and whose vocation is to be applied in the space functionally defined by the fact that it covers private "integration" or "intra-Community" situations.[38] Taking into account the classification proposed by S. Alvarez González, once the "function of defining" the subject of private international law is recognised, the diversity of the heterogeneity that characterises it makes it possible to profile its "normative function".[39]

The implementation of an integration process means that the role of the law and, in particular, of private international law, is one of great significance[40]: integration, as a functional objective, uses this order to be effective in promoting the cultural identity of individuals through respect for legal diversity, even as it harmonises solutions by making them more predictable. In other words, private international law is a "functional unit" which is closely related to the principles and freedoms generated by the operation of a supranational body[41] or free trade area.

At the same time, any regional integration phenomenon has substantial repercussions on the regulation of the legal situations concerning more than one national legal order and situations of so-called private international relations but the intensity of the impact bears a direct relationship with the level of the objectives achieved. Starting from a very basic, but valid functional classification in the context of our demonstration, a distinction can be made between the free trade area, customs union, common market, economic union and global integration. Of course, each of these categories is the result of the qualitative sum of the following elements: removal of customs duties, common external tariff, common trade policies, common economic policies and the common global policies (defence, foreign relations, industry, currency). Needless to say, the role of private international law is very different at each of these levels and it appears particularly important from the stage of the common market – on the fringes of a kind of harmonisation of legislations produced by the process – and that it becomes an indispensable element in the final phase of the process[42]. Thus, in some basic models of integration, the assignment will have repercussions directly in the economic administrative law of the member States, but as and when the phenomenon of integration increases, these rules will have decisive repercussions on private law and in particular on the law of

[38] C. Kessedjian, "Le droit international privé et l'intégration juridique européenne", *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (T. Einhorn & K Siehr, eds), The Hague, TMC Asser Press, 2004, pp. 192 *et seq*.

[39] S. Alvarez González, "Objeto del DIPr y especialización normativa", *Anuario de Derecho Civil,* t. XLVI, 1993, pp. 1109-1151.

[40] C. Mouly, "Le droit, peut-il favoriser l'intégration européenne?", *Rev. int. dr. comp.*, 1985, pp. 895-945; V. Heutger, "Worldwide Harmonisation of Private Law and Regional Economic Integration", *European Review of Private Law*, vol. 10, 2002, pp. 857-864.

[41] E. Jayme and C. Kohler, "L'interaction des règles de conflit contenues dans le droit dérivé de la Communauté européenne et des conventions de Bruxelles et de Rome", *Rev. crit. dr. int. pr.*, 1985, pp. 15-16.

[42] *Vid*. J.Mª Gondra Romero, "Integración económica e integración jurídica en el marco de la Comunidad Económica Europea (Una aproximación al proceso de integración del Derecho en el ámbito de la Comunidad Europea, desde una perspectiva sistemático-funcional)", *Tratado de Derecho comunitario europeo*, vol. I, Madrid, Civitas, 1986, pp. 275-312.

property. Finally, the transition from economic integration to political integration leads to effects in all sectors of the legal order, including the rights of persons.

If private international law is understood as a legal order regulating private international situations, in connection with a recognised and concrete national system, it appears undeniable that any integration process can presume a substantial transformation of its traditional goal. Integration in this context tends to produce three basic alterations. [43] First of all, it leads to a real transformation of some basic principles of private international law, which is essentially the phenomenon of the "frontier". Secondly, the pluralism of the systems is also altered because the integration process marks a trend towards the unification of legislations in the production sector. Finally, given that all "Community law" projects generally have many shortcomings, the new organisation tends to codify directly certain areas of private international law.

19. A paradigmatic example of the need for integration to be accompanied by essential provisions of private international law is provided by the international contract, which quintessentially is the means by which cross-border economic transactions are developed. The internal contractual solutions are inadequate to deal reliably with international contracts. It is necessary to be able to rely on an appropriate regulation based on the international dimension covered. Specifically concerning OHADAC, a legal vacuum exists, which, until now, has been characterised by substantive law, not compensated for by case-law solutions likely to provide sufficient security to commercial operators. It is certain that a majority of States parties have acceded to the Vienna Convention on Contracts for the International Sale of Goods of 1980 and other international instruments. However, this legislation is insufficient to confront the complexity of international contracts, which requires private international law rules that are non-existent in these countries, except for Venezuela, which is a notable exception.

Solutions are necessary in order to establish a climate of confidence conducive to the award of contracts by foreigners in accordance with the principles of *lex mercatoria*, while respecting the interests of Caribbean contractors as well as the rules of economic public order. These solutions also guarantee a fair treatment of nationals by the Caribbean courts. This climate could have been fostered by the entry of the convention area countries of the 1984 Mexico City Convention on the Law Applicable to Contractual Obligations, which was developed within the CIDIP (to which only Mexico and Venezuela are party). However, given that this is not the case, we should not balk at the solutions implemented by this legal instrument, a comparative law model, and need to examine the possibility of introducing these solutions in the private international law of the OHADAC countries, maybe through a Model Law.[44]

[43] J.C. Fernández Rozas, "Derecho internacional privado y Derecho comunitario", *loc. cit.*, pp. 785-786.

[44] *Vid. infra*, **arts. 45 *et seq.*** of the present Law.

2. Burgeoning regional private international law relationships

A) Conditioning factors

20. Any integration process ends up inexorably requiring judicial cooperation among States in civil and commercial matters, which gradually increases as the process continues. Apart from the strictly commercial matters, in recent years the Caribbean has seen an unprecedented growth of problems due to international relations and to which particular attention should be paid by national legislators. To do this, it is necessary to establish clear private international law rules which address specific problems in the following areas: migratory movements with any burden placed on individuals and their families, development of tourism and increase in foreign trade and investment activity.

21. Faced with *migratory movements* and regional economic integrations, the need to create legal and even physical borders continues to be debated in cross-border relations. The immigration phenomenon creates a great challenge to the economic and social impact produced by this human movement. Indeed, the host country, while protecting the elements of its own identity and national cohesion, needs to be able to reconcile its own progress with full respect for human rights as well as to meet the expectations of immigrants and their families as regards their right to a dignified life. Besides rules that govern the entry and establishment of foreigners in the various States, and which is an issue to be placed in a public law framework, there must be private law rules aimed at foreigners already living in a country and making a fundamental choice, following the scheme laid down by comparative law. It is a choice between the application of the national law of foreigners and the application of the law of the host country or of a third country for all legal matters affecting people's personal and family circles, including situations also essential for their property, as is the case for the legal capacity to undertake acts having legal effects. Without going into other considerations in technical terms, which will be discussed later, it is necessary to see once and for all if the traditional fundamental solutions proposed by the domestic law of persons respond correctly to the normative model developed in the twenty-first century.

Answering this question in a context of increasing immigration could be based on the classical dichotomy which requires a simplistic application of the law of the place of the domicile with the goal of integration regarding the application of the law of the nationality rooted in the State of origin. If the diagnosis is accurate, increasing immigration would mean opting for the application of the law of the domicile of persons (immigrants and own nationals resident in the Caribbean area). However, none of this is easy. After decades of theoretical controversies and legislative choices, finding the right balance has led to the current systems opting for "predominant" solutions based on domicile or "predominant" solutions based on nationality, but not for systems as such. This is in addition to the introduction in recent years of a trademark principle: the autonomy of the will, which under certain conditions allows the individual to choose either to be integrated into the law of

their domicile, or to remain dependent on the law of their domicile. We will see below how this idea takes shape in the Model Law.

22. The OHADAC territory, thanks to its privileged location in the Caribbean, has many particularly attractive and interesting locations for the *tourist industry* due to its beautiful beaches and beautiful scenery. The implementation of rules on foreigners in order to facilitate tourism reflects the national interest in the development of a mainly private commercial activity, which is an important source of revenue-driving national economies. This would establish a special status of tourist as a fundamental principle of the development of a private entrepreneurial industry.[45]

Nowadays, foreign tourism is a phenomenon that is part of the daily life of Caribbean people, because it greatly affects their economic income as well as their lifestyle. Foreign tourists generally consume in euros or dollars or exchange their currency, which leads to the introduction of foreign currency into the national economy and allows countries in the region to gain access to services and products they do not produce. However, the presence of millions of tourists, even if of limited duration, poses serious problems that have to be solved on the macroeconomic level, such as the increase in international flights or the introduction of foreign exchange. In ecological terms, it is no coincidence that the majority of hotels in the area are in the hands of foreigners; tourism accentuates the destruction of the flora and fauna of tourist areas and generates pollution and traffic flow problems; and finally, there are legal consequences in the strict ambit of private law.[46]

The situation as it stands requires the establishment of a legal framework in order to provide legal protection to foreigners who engage in contractual transactions. Particular attention must be paid to the international tourism contract, which tends to have a high degree of complexity because it involves hotel franchises, the sale of goods, transfer of technology and labour relations, considering that the vast majority of workers who provide their services to foreign tourism businesses are Caribbean. Given the scale of tourism-related contracts, it should be added that it can increasingly not be ignored that tourists are consumers and that as such they benefit from a specific law and from a certain legal privilege with regard to the professionals they have dealings with.

However, tourism not only calls for contractual solutions either between industry professionals or between professionals and tourist consumers. The potential destruction of the environment by the hotel industry, the increase in traffic accidents caused by foreign tourists and the breaching of immigration conditions by tourists,

[45] Regarding the Spanish experience, *vid*. N. Downes Peirú, "Reflexiones en torno al turismo en el Derecho internacional privado español", *Anales de la Facultad de Derecho de la Universidad de La Laguna*, nº 18, 2001, pp. 117-136.

[46] M.C. Belderrain Boer, "Globalização e Turismo: efeitose tendências", *Relações internacionais & globalização: grandes desafios* (O. de Oliveira, coord.), 2nd ed. Ijuí: Ed.Unijuí, 1999, pp. 285-318.

especially on so-called combined journeys, require specific regulation in which the non-contractual dimension plays an important role.

23. With the opening to international trade, the economy of many Caribbean countries is channelled from the phenomenon of privatisation of enterprises towards a clearly liberal policy except for the sectors exclusively attributable to the State. Meanwhile, in recent years, legislative reforms and administrative deregulation have been operated in order to attract productive foreign capital, so as to increase the supply and quality of jobs, increase exports and improve the conditions for effective technology transfer. In legal terms, the adaptation of private transactions to globalisation and international trade has led to the modification and simplification of hundreds of laws, while at the same time trying to eliminate barriers to trade development. Basically, they refer to the transfer of technologies, trademarks and patents, as well as foreign investment.

The growth of foreign trade warrants special consideration because it is an index of economic growth in the OHADAC area and of the level of integration in the global economy. In addition, it leads to an entry into the market economy and liberalisation of the economy of gradual processes introduced in the late nineties and 2000 and which have been accentuated and reinforced in the past decade, when the States of the area signed important free trade agreements with the United States and the European Union. This opening to international trade and the policy of attracting foreign investment pursued by the States of the region not only require them to proceed with legislative reforms and administrative deregulation in terms of public law, but equally to adapt the rules of conflict governing private transactions and which are contained in large corpora like the Civil Code or the Commercial Code. It is, above all, a question of meeting the new intellectual property or protection requirements of competition in markets, which have gradually been internationalised. It is also a matter of determining the law which will recognise and protect a right or the law that will set the rules of the game applicable to new economic operators and based on which they will take their decisions without hampering free competition or unfairly undermining their actual or potential competitors.

24. The investment activity is likely to extend beyond the national legal framework established by States as a result of the offshoring of their investments in another country. An appreciation of the scale of this activity reveals a characteristic of international production, since this is the means by which they try to increase profits of investors. Investors are targeting locations where regulations on waste emissions, employment law, taxes and salaries are most favourable in order to obtain greater profit margins. All of this involves placing in the hands of States that receive the investment an analysis presenting the difficulties of combining both political and economic criteria as well as strict legal criteria such as, among other things, the impact of the investment on the environment, the scope of intellectual property protection, the effects of employment legislation. The existence of a favourable investment environment also requires specification of the scope of the public economic order, the irrefutable principles for the States of the area, prevention and control of corruption, reform of the tax regime and, in any event, the re-

duction of bureaucratic and commercial barriers.[47] Caribbean legislators must be very aware of the need to create the right conditions in order to enable the private sector to assume the leading role in the investment and capture of foreign capital is a key element of this strategy. To do this, it is necessary to have a legal framework, providing incentives and guarantees to foreign investors and supporting the possible repatriation of investment and its products. In addition, legal protection is not only required for the specific cases of investors but also for the already mentioned indicators, which are directly related to production, the destination of investments and especially to conflict resolution in the hands of all parties concerned (decision in courts, but also before highly specialised arbitrators in these matters).

Such an approach is not incompatible with the fact that the State reserves the right to adopt a series of actions aimed at avoiding the possible destabilising effects caused by the massive and simultaneous withdrawal of speculative capital. This will require portfolio investments on the capital market to remain deposited for a minimum period. In this context important steps have been taken both in the field of regulation of foreign investment and in the parallel policy of signing reciprocal investment protection and promotion agreements as well as in the field of reforms of the regulatory legal framework for the infrastructure sectors.[48]

In any case, a certain modernisation of legislation relating to international trade especially with regard to commercial arbitration should be recognised.[49] Specifically, the existence of many rules in this area, fundamentally based on the line drawn by the UNCITRAL Model Law of 1985, amended in 2006, fully justifies the exclusion of international commercial arbitration from the scope of this Model Law, even if from a purely substantive point of view it would enter perfectly into the framework of this regulatory initiative. Generally, private international law legisla-

[47] A. Calderón Hoffmann, "Foreign Direct Investment in Latin American and the Caribbean; an Assessment at the Start of the New Millenium", *Foreign Direct Investment in Latin American: The Role of European Investors*, Washington D.C., Inter-American Development Bank, 2001, pp. 17-41; J.P. Tuman&C.F. Emmert, "The Political Economy of U.S. Foreign Direct Investmentin Latin America: A Reappraisal", *Latin American Research Rev.*, vol. 39, nº 3, 2004, pp. 9-28; J.D. Daniels, J.A. Krug and L. Trevino, "Foreign Direct Investment from LatinAmerica and the Caribbean", *Transnational Corporations*, vol. 16, nº 1, 2007, pp. 27-54.

[48] R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, London, M. Nihjoff Publishers, 1995; G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours*, t. 269, 1997, pp. 251-460; J.C. Fernández Rozas, "*América Latina y el arbitraje de inversiones: ¿matrimonio de amor o matrimonio de conveniencia?", Revista de la Corte Española de Arbitraje*, vol. XXIV, 2009, pp. 13-37.

[49] J.C. Fernández Rozas, *Tratado de arbitraje comercial internacional en América Latina*, Madrid, Iustel, 2008; A.M. Garro, "Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America", *J. Int'l Arb.*, vol. 1, nº 4, 1984, pp. 293-321; H.A. Grigera Naón, "Arbitration in Latin America: Overcoming Traditional Hostility", *Arb. Int'l*, vol. 5, n 2, 1989, pp. 146-148; R. Layton, "Changing Attitudes Toward Dispute Resolution in Latin America, *J. Int'l Arb.*, vol. 10, 1993, pp. 123 *et seq.*; D.E. González, G.F. Hritz, M. Rios and R.C. Lorenzo, "International Arbitration: Practical Considerations with a Latin American Focus", *The Journal of Structured and Project Finance*, Spring, 2003, pp. 33-43; R. Santos Belandro, "Brisas favorables de orientación estatal impulsan, a vela desplegada, el arbitraje comercial internacional en la región", *Estudios de arbitraje. Libro homenaje al profesor Patricio Aylwin Azócar*, Santiago, Editora Jurídica Chile, 2006, pp. 553-565.

tion is not interested in arbitration, apart from the case of Switzerland, whose federal structural complexity has forced it to consider explicitly the issue through the private international law Act of 1987, and this well before domestic arbitration was governed by the Code of Civil Procedure. Even Venezuelan private international law legislation, with a propensity for expansion, excludes arbitration from its scope of application and follows the practically unchallenged model, especially in Latin America, with a special arbitration law. The new Panamanian Code of private international law of 2014, referred to below, is another example of the disadvantages of the inclusion of this matter.

This is not so with the rules governing the situations in which the courts of member States of OHADAC will have international jurisdiction for legitimately exercising their jurisdiction. The Model Law, in this case, deals in detail with such regulation.

B) Contribution of private international law

25. As has already been suggested in the analysis of each factor studied, a comprehensive response makes it necessary to provide each State, its legal operators and any specifically targeted individual or company with a regulatory instrument composed of modern and simple rules adapted to the requirements of the new era and to the models created by globalisation in general and the regional integration movements in particular. In this regulatory instrument, accompanied by mainly public or vertical relationship measures between the State and the private legal operator, we need concrete rules that provide clear and predictable responses to the specific features of internationality of relations between individuals. There also need to be rules of private international law which address aspects of the international jurisdiction of the Caribbean courts regarding litigation between foreign businesses, or just between individuals, regardless of their nationality, while applying a sufficient dose of internationality. There also need to be specific private international law rules for determining the law applicable to international transactions, but also to matters raised simply by the extraneous nature of the situation and which are not necessarily subject to local law, as is the case in family relations. And finally, we need rules that deal with the enforcement of foreign judgments in the countries and territories. In this way, each country in the region will be able to advance in the position assigned by the International Finance Corporation in the report *Doing Business* 2014.

To approach this task, and as a general principle, national legislators have a wide margin of discretion. In these areas, the limits imposed by the rules of general international law are very weak, given the regulations in nationality law and in the law on the legal status of foreigners. These limits logically result from the international norm on the rights and freedoms of human beings which materialise, on the one hand, in accordance with the principles of legality, legal protection and, in particular, equality, prohibiting any legal discrimination for reasons of birth, race, sex,

religion, among others things;[50] and on the other hand, with respect for everybody's right to have their legal personality recognised, which ensures the protection of their rights by the courts and is reflected in procedural equality (access to justice) abroad when they appear before a national court. For its part, public international law also imposes some limitations on the national legislature regarding the establishment of rules of jurisdiction of its national courts relating to referral to them where foreign elements are present. These limits are the most glaring manifestation of the principle of immunity of jurisdiction and immunity of enforcement of the foreign State, its institutions and its agents.

Beyond these limits, the power of discretion is the rule and this rule can only be tempered for humanitarian reasons, reciprocity and, above all, for reasons of international comity arising from the obligation of effective cooperation of States with regard to the international exercise of justice.

26. Private international law has long been an essential instrument for governing relations between people and international assets. It facilitates the mobility of people and the exchange of goods and services. It promotes integration and also combats illegal border activities. In the broadest sense, it defines the set of legal rules governing relations between persons governed by private law. However, it should be clarified in order to understand the content of the Model Law presented that the term "private international law" does not mean the same thing in all States. In some States, it includes the conflict of laws rules (determining the law applicable to private international law situations). In other States, it additionally comprises the rules on the jurisdiction of courts and the recognition and enforcement of foreign court judgments. These rules relating to the applicable law, international jurisdiction, and to the recognition and enforcement of foreign judgments provide solutions to challenges posed by the same situation which can be related to various legal and judicial systems. These rules show precise correlations that advocate a private international law at the crossroads of all of them.

The private international law rules have their origin in the law, court rulings and legal literature of each State. Despite its name, private international law is, in principle, purely national law. Some of these national rules can be standardised by international agreements or instruments developed within international organisations, on a global scale, *v.gr.*, the Hague Conference on Private International Law or, in the Pan-American context, the Specialized Conference on Private International Law (CIDIP).

The existence of private international law is justified by the plurality of legal systems and jurisdictional organisations coexisting in a context of international relations and, specifically, one of the main features is the establishment of a set of legal

[50] R. Badinter, "L'universalité des droits de l'homme dans un monde pluraliste", *Revue universelle des droits de l'homme*, 1989, pp. 1 *et seq.*; M. Bedjaoui, "La difficile avancée des droits de l'homme vers l'universalité", *ibid*., pp. p. 5 *et seq.*; J.A. Carrillo Salcedo, "El problema de la universalidad de los derechos humanos en un mundo único y diverso", *Derechos culturales y derechos humanos de los inmigrantes*, Madrid, Universidad Pontificia de Comillas, 2000, pp. 39–53.

responses to this pluralism[51]. If such pluralism does not exist, due to the unification of the law of the various States, it would serve no purpose for the legislature to be responsible for resolving these issues by developing a regulatory system in private international law. And this regulatory system would not be of any use, either, if the legal relationship remained confined to a particular legal system, without any connection with foreign countries. A country that does not experience any foreign trade, which does not welcome immigrants and other foreigners for short stays, which does not have emigrant nationals living abroad, does not receive a significant foreign investment flow, does not have any specific problems relating to private international law relations and, therefore, does not need a set of rules that provide a response to these problems. This situation has occurred in many States, not only in Latin America and the Caribbean but also at other latitudes. However, isolation and autarky have been firmly surpassed by the current widespread internationalisation of legal relations of private law. Today, it is almost impossible to find a State in which internationalisation has not gained a foothold in private relationships. This fact, however, has not led to an identical response on the part of legislators, quite the contrary. Comparative law cautions against the diversity of regulatory modes: starting with the absolute silence of some legislators and going to the existence of a detailed and comprehensive national law assuming responsibility in an international context, and on to providing specific responses to social and economic needs.

27. From the above, it follows that on the Latin American stage there is a strong tendency to create integrated economic areas, which leads to important consequences not only for economic development and for the increase of the level of resources in the areas concerned, but also for private international law relations.[52] If we take the two most notable experiences, this phenomenon is noticeable in NAFTA, particularly in the area of "intra-Community" trade operations and in the Mercosur area, and particularly in the areas of international judicial cooperation, protection measures, and the recognition and enforcement of foreign judgments (through the Firewood Protocol, of Ouro Preto and Buenos Aires)[53]. However, with all of the significance that the phenomenon already knows about and which is likely to increase in the future, the relationships between economic integration and private international law are much more distant than in other locations of advanced integration as is the case of the European Union.

The causes of this situation are not readily comprehensible and can be explained synthetically by three main reasons. Firstly, the institutional mechanisms that exist in America are reduced in the face of the complex and consolidated apparatus that governs the EU in a long regulatory tradition with specific techniques, which in

[51] E. Ralser, "Pluralisme juridique et droit international privé", *Revue de la recherche juridique. Droit prospectif*, 2003 pp. 2547 *et seq*.

[52] J.C. Fernández Rozas, "Los modelos de integración en América latina…", *loc. cit.*, pp. 151-192.

[53] A. Dreyzin de Klor: *El Mercosur (Generador de una nueva fuente de Derecho internacional privado)*, Buenos Aires, Zavalia, 1997; D.P. Fernández-Arroyo, "La nueva configuración del DIPr del Mercosur: ocho respuestas contra la incertidumbre", *Revista de Derecho del Mercosur*, vol. 3, 1999, pp. 38-53.

recent years have moved towards an ultra-efficient legal unification through regulations. Secondly, this is explained by the fact that in Europe, unlike what happens in the process of integration in America, since the entry into force of the Single European Act, an "internal market" has been created based on fundamentally different assumptions. By moving beyond the principle of free trade, the "internal market" was designed as an integrated market and was accompanied by a highly developed approximation of national laws.[54] Finally, this political will has led to a rapid development of the private international law of the European Union through the "Third Pillar"[55] and communitisation, which has followed the constituent fields of a genuine area of freedom, security and justice. This dichotomy between the two sides of the Atlantic does not just focus on theoretical and descriptive aspects but clearly reveals the confrontation of the "blocks" (especially the EU and NAFTA) that was seen in the Hague Conference on Private International Law during the drafting of the Universal Convention on the Recognition and Enforcement of Foreign Judgments.

Besides these differences, which can be explained by historical reasons and by the level of integration of each block, there are common problems. For example, the harmonisation of private international law systems requires reconciliation between the system of statute law and *common law* for NAFTA or for the Caribbean integration organisations. This is the case in the European Union, which has been in a period of significant technical problems. But today some member States (such as the UK or Ireland) have a special status in the creation of the area of freedom, security and justice, in which their culture and their legal tradition – in addition to other factors – constitute an essential element.

[54] The originality of the Community experience and its influence within private international law is accurately described in the course of M. Fallon, "Les conflits de lois et de juridictions dans un espace économique intégré: l'expérience de la Communauté européenne", *Recueil des Cours*, t. 253, 1995, pp. 25 *et seq.*, and of A. Struycken, "Les conséquences de l'intégration européenne sur le développement du droit international privé", *Recueil des Cours*, t. 232, 1992, pp. 257 *et seq.*

[55] *Vid.* J.C. Fernández Rozas, "Nuevas perspectivas de la cooperación en el ámbito de la justicia en la Unión Europea", "*Los dos pilares de la Unión Europea*, Madrid, Colección Veintiuno, 1997, pp. 239-267.

II. Diversity and legal heterogeneity in the OHADAC area

1. States and territories involved[56]

28. In contrast to the essentially common tradition of the constituent States of the OHADA zone, the OHADAC project has been confronted from the outset by the diversity and heterogeneity of the countries of the Caribbean. If we look at the island or archipelagic countries, we find territories still subject to or dependent on the sovereignty of European States. This is the case with the French overseas departments (Guadeloupe, Martinique, the collectivities of Saint Martin and Saint Barthélemy). It is also observed on the islands belonging to the Netherlands Antilles – with a new political status since 10 October 2010 – namely Bonaire, Sint Eustatius and Saba (constituent countries of the Kingdom of the Netherlands), and also, but as autonomous territories of the Netherlands, in Curaçao, Aruba and Sint Maarten. British overseas territories are Anguilla, Caiman Islands, Turks & Caicos Islands, British Virgin Islands and Montserrat, to which one might add Bermuda, despite its geographic location. Puerto Rico is a commonwealth, an unincorporated territory of the United States of America, just like the U.S. Virgin Islands. Independent countries or territories include important States with a Spanish tradition, such as Cuba, or with a French tradition, like Haiti, and others such as the Dominican Republic, whose legal tradition owes much to French law, despite the predominance of the Spanish language. Within the common law sphere there are other independent island territories, for the most part associated with the Organisation of Eastern Caribbean States (OECS) or dependent on the Anglo-Saxon tradition even though they do not form part of that organisation, but are members of the Commonwealth (Bahamas, Barbados, Jamaica and Trinidad and Tobago). In short, the OHADAC area comprises at least 18 sovereign island States, which include 31 different territories with languages and legal traditions linked to four mother countries: Spain, France, the United Kingdom and the Netherlands. Their population exceeds forty million inhabitants, half of whom speak Spanish, one quarter French, almost the same number English and a minority (around 1%) Dutch.

The model is replicated in the case of the coastal continental territories of the Caribbean, although in this case we are mostly speaking about independent States, both in terms of geographical area as well as population, with a Spanish-speaking and Hispanic tradition: Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela. Some of them, such as Panama, have been permeable to the Anglo-American legal influence, especially in the commercial sphere. The French tradition is represented by a French overseas department, French Guiana. Suriname, an independent State, bears witness to the Dutch legacy. Finally, the English influence is present in Guyana and Belize, both independent States that are part of the Commonwealth. In total, there are 11 new independent States (12 territories). It is difficult to calculate the coastal population of the continental States of

[56] This paragraph uses the arguments of S. Sánchez Lorenzo, *Introducción al Derecho de los contratos internacionales*, Santo Domingo, Funglode, 2013, pp. 36 *et seq*.

the Caribbean, whose total population reaches very high levels, in excess of two hundred million people, who are overwhelmingly Spanish-speaking.

29. This brief and superficial geographical overview confirms the political and cultural plurality of the OHADAC territory, composed of 29 independent States covering 43 different territories. In political terms, OHADAC covers one sixth of the States that form the international community, and around 260 million inhabitants. The cultural and linguistic legacy of these countries is different, as is the degree of proximity to their former mother counties. While the Spanish-speaking States have a long tradition of independence, dating back to the nineteenth century in all cases, many territories of the French, English or Dutch tradition are still part of metropolitan States or have achieved independence in the second half of the twentieth century. Such diversity of political structures has a bearing on a strategy for the harmonisation of laws. Unlike in the case of the OHADA zone, we are not talking about independent countries with a more or less autonomous tradition within the French sphere of influence. It is sufficient to think of the problems that would be created by the possibility of redrafting an international treaty with the same scope as the OHADA Treaty. The OHADA zone could have been constituted merely with the technical and financial support of France. The OHADAC project, however, will require the significant contribution of other countries such as the Netherlands, the United States and, especially, Spain and the United Kingdom.

30. The challenge likewise needs to be based on recognition of the cultural diversity in the Caribbean region, which has often meant that people in its territories are geographically very close while disregarding one another, adversely affecting their common strategic interests. As it has been pointed out, the island and archipelagic States exhibit great linguistic variety: Spanish, French, English and Dutch, not counting the indigenous languages that are especially relevant on the continental territory, or hybrid languages (in particular Creole). Spanish clearly dominates on the continental territory, and even in countries such as Belize, where the only official language is English, Spanish is commonly used. But Dutch (Suriname) and French (French Guiana) are also used. Such linguistic diversity, which is not necessarily cultural, however, heralds significant variations in the legal sphere that are not always apparent.

2. Overview of private international law and its projection into the OHADAC zone

Review of the unification and implementation of national solutions

31. Combined with fact of their effective application in many OHADAC territories, any modern comparative study on private international law rules and the systems of integration must be preceded by an analysis of the results achieved in the process of unification instituted in the framework of the European Union. The current development of European Community private international law was facilitated by the introduction of Title IV in the EC Treaty arising out of the Treaty of Amsterdam. The European Community's competence in the area of judicial coopera-

tion in civil matters entailed the integration of the former third pillar into this new Title. As a consequence of the provisions of article 65 TEC (now Article 81 TFEU), some of the existing agreements or drafts of agreements on private international law matters were "communitised" and European Community acts were adopted in other matters[57]: Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which, from 10 January 2015, has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012; Regulation (EC) No 1346/2000 of the Council of 29 May 2000 on insolvency proceedings; Regulation (EC) No 1348/2000 of the Council of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, amended by Regulation (EC) No 1393/2007 of the European Parliament and of the Council; Regulation (EC) No 1347/2000 of the Council of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, amended by Regulation (EC) No 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; Regulation (EC) No 1206/2001 of the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; Directive 2002/8/EC of the Council of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; Regulation (EC) No 805/2004 of the Parliament European and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; 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; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; 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); Regulation (EC) No 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obli-

[57] A. Borrás, "La comunitarización del Derecho internacional privado: pasado, presente y futuro", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gastez 2001*, pp. 285-318; M. Desantes and J. L. Iglesias Buhigues, "Hacia un sistema de Derecho Internacional privado de la Unión Europea", *AEDIPr*, t. IX, 2009, pp. 115-128; P.A. de Miguel Asensio, "Integración europea y Derecho internacional privado", *Revista de Derecho comunitario europeo,* vol. 1997-1, pp. 413-445; *id.*, "El Tratado de Amsterdam y el Derecho internacional privado", *La Ley (Unión Europea),* nº 4510, of 30 March 1998, pp. 1-3; S. Leible and A. Staudinger, "El artículo 65 TCE: ¿Carta blanca de la Comunidad Europea para la unificación del Derecho internacional privado y procesal?", *AEDIPr*, t. I, 2001, pp. 89-115; SA. Sánchez Lorenzo, "La política legislativa de la Unión Europea en materia de Derecho internacional privado: de la técnica del carro ante los bueyes a la estrategia del avestruz", *Nuevas fronteras del Derecho de la Unión Europea (Liber amicorum José Luis Iglesias Buhigues)*, Valencia, Tirant lo Blanch, 2012, pp. 133-145.

gations; Regulation (EU) No 1259/2010 of the European Parliament and of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. This competence does not only relate to the specific areas of international civil procedure law but also extends to the scope of applicable law, as evidenced by article 81.2º.*c)* of the Treaty on the Functioning of the European Union. These comprehensive measures aim to ensure greater legal certainty, as well as equality of access to justice, which involves the easy identification of jurisdiction and applicable law, as well as the more expeditious trials and procedures.

32. On the basis of this normative block, and its relevance for the drafting of domestic private international law rules, it should be noted that:

i) Despite having a clearly patrimonial origin, as a result of having been started as an instrument intended to give impetus to the establishment of a Common Market, the unification has gone far beyond this matter, after the consolidation of the European Union and, in this, of the so-called area of freedom, security and justice. This unification spreads to non-patrimonial areas, such as the protection of minors, marriage, divorce or succession, and this expansive tendency has not been halted. All of these matters are regulated from the perspective of international jurisdiction, applicable law and the recognition and enforcement of judgments and, in some of them, the component of collaboration and cooperation between authorities is crucial to the achievement of the defined goals.

ii) As the unification process has not been completed, two systems of private international law coexist in the member States: the system formulated in the Union, which covers the great bulk of the regulation, and each State's own system, which affects matters that are not unified. It is in this residual area, in which the member States retain their jurisdition, that, in recent times, a genuinely national system of private international law can be fully justified.

B) National models of private international law codification

33. Either because a full measure of unification of private international law has not been achieved, or for reasons of tradition or necessity of each State, the truth is that, in recent years, State legislators have continued to implement their own private international law. The last fifty years have been one of the most productive periods in the history of private international law, for having resulted in 61 State codifications and more than one hundred international conventions, regulations and

other similar instruments, which give a greater role to judges compared to the previous instruments.[58]

A review of the national codification models of private international law must, in the first instance, refer to the systems based on a special law, which have been developed mainly in Europe, although, as will become apparent,[59] have been favourably received in Venezuela and most recently in Panama. This codification alternative records the fact that "conflict of laws" rules are gradually disappearing from Civil Codes in order to be integrated into special laws; this tendency, which began in the group of former socialist countries,[60] is to be extended and generalised in other legal circles and appears in ongoing codification projects. Beside the experiences in Louisiana[61] and Quebec,[62] in Western Europe there is, indeed, a marked tendency towards specialisation with regard to the regulation of international legal transactions regardless of the venue chosen for implementing it, as was demonstrated by the Austrian Act of 15 June 1978,[63] the Turkish Private International Law Act and the international procedure of 20 May 1982[64] and, above all, the modern codification paradigms, from Switzerland, Belgium, Italy and Poland.

i) The Swiss Federal private international law Act of 18 December 1987 is a genuine code of private international law featuring 200 articles and which, after a long and laborious process of development, without doubt can be considered as a technically perfect text adapted to a particular country's needs in relations of international legal transactions. It offers many innovations, from its inherent structure,

[58] S.C. Symeonides, "Codification and Flexibility in Private International Law", *Reports of the XVIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIeme Congrès de l'Académie Internationale de Droit Comparé* (K.B. Brown and D.V. Snyder, eds.), Springer Science+Business Media, 2011, pp. 167-190.

[59] E. Vassilakakis, *Orientations méthodologiques dans les codifications récentes du droit international privé en Europe*, Paris, LGDJ, 1987.

[60] L.A. Lunz, "L'objet et les principes fondamentaux du droit international privé en URSS et dans les autres pays socialistes européens", *Journ dr. int*., t. 100, 1973, pp. 97–115; F. Korkisch, "Neues internationales privatrecht in ostmitteleuropa", *Rabels Z.*, 1968, pp. 601–650; T. Ballarino, "Osservazioni sulla codificazione del diritto internazionale privato nell'Europa centro-orientale", *Études en l'honneur de Roberto Ago*, vol. IV, Milan, Giuffrè, 1987, pp. 3-24; P. Kalensky, "Le droit international privé comparé des États socialistes dans leur coopération économique", *Recueil des Cours*, t. 208 (1988-I), pp. 169-281.

[61] *Rev. crit. dr. int. pr*., 1992, pp. 394–400. *Vid*. S.C. Symeonides, "Les grands problèmes de droit international privé et la nouvelle codification de Louisiane", *ibid*., pp. 223–281; D.P. Fernández Arroyo, "Nuevas normas de Derecho internacional privado en el Código civil de Louisiana", *REDI*, vol. XLV, 1993, pp. 615–620.

[62] The Civil Code of Québec in force since 1st January 1994 includes in its Book Ten a complete system of private international law which comprises, in addition to the matters of applicable law, those regarding international jurisdiction, recognition and enforcement of judgments. In the Code, which encompasses commercial matters, the law of the domicile is the closest connecting factor. *Rev. crit. dr. int. pr*., 1992, pp. 574–584 and the note of E. Groffier.

[63] The basic rule in this context is the Law of 15 June 1978 on private international law (IPRG, published in the Austrian Official Journal, BGBI. nº 304/1978). It comprises 54 articles relating to applicable law but does not address procedural matters. *Vid*. E. Palmer. "The Austrian Codification on Conflicts of Law", *Am. J. Comp. L.*, vol. 28, 1080, pp. 197 *et seq.*

[64] It includes 48 articles, grouped in three chapters relating to: general issues, applicable law and law of international civil procedure.

broad content not only focussed on the area of applicable law, and the solutions that it incorporates, including the institutions that it introduces, whose confluence between the North American and European[65] doctrines will inspire the subsequent codification of private international law in many other national systems.

ii) Meanwhile, the Belgian Act of 16 July 2004 introduced another complete Code of Private International Law, regulating 140 articles. It entails a radical reform of the rules of legal or doctrinal origin or resulting from established court rulings, in cases of an "international situation", the jurisdiction of the Belgian courts, applicable law and the enforcement of acts and foreign judgments in civil and commercial matters.[66] This Code is characterised by its practical response to the above matters, fleeing needless academic considerations through pragmatic and flexible rules. In an effort to ensure modernisation, the Code has assumed a significant change in the traditional regulation of private international law, recognizing the significance gradually being gained by the principle of proximity[67] and that in the matters related to personal status the main connecting factor must be the habitual residence at the expense of the nationality[68]. Finally, it takes into account the situations produced by the evolution of society (marriage between persons of the same sex and non-marital unions) and shows of a spirit of internationalism by allowing the automatic recognition of foreign judgments.[69]

iii) The private international law relationships in Italy are governed by Law No. 218 of 31 May 1995, which replaced articles 16 to 31 of the provisions of the law generally laid down in the Civil Code. The Italian private international law Act (Law No. 218, of 31 May 1995) includes five Titles and comprises 74 articles. Title I ("General provisions") determines, on the one hand, matters governed by the

[65] Art. 15, which covers the exception clause, provides a concrete example of this. In accordance with the 1st paragraph: "As an exception, any law referred to by this Act is not applicable if, considering all the circumstances, it is apparent that the case has only a very loose connection with such law and that the case has a much closer connection with another law". *Vid*. A. Bucher, "La clause d'exception dans le contexte de la partie générale de la LDIP", *La loi fédérale de droit international privé: vingt ans après, Actes de la 21e Journée de droit international privé du 20 mars 2009 à Lausanne*, Geneva, 2009, pp. 59-74.

[66] Regarding the preparatory work of the Code *vid*. M. Verwilghen, "Vers un Code belge de droit international privé", *Travaux. Com. fr. dr. int. pr.*, Paris, 2001, pp. 123 *et seq.*; J. Erauw, "De codificatie van het Belgisch internationaal privaatrecht met het onderwerp van Wetboek I.P.R.", *Rechtskundig weekblad*, vol. 65., 2001-2002, pp. 1557-1566; G. Stuer and C. Tubeuf, "La codification en droit international privé", *Rev. dr. U.L.B.*, 2003-2, pp. 143 *et seq*. Regarding the meaning of this important legislative initiative *vid*., for all, M. Fallon, "La loi belge de droit international privé belge pour un centenaire", *Travaux Com. fr. dr. int. pr*. (2004-2006), pp. 98-118; *vid*., as well, J.Y. Carlier, "Le Code belge de droit international privé", *Rev. crit. dr. int. pr*., 2005, pp. 11-45; N. Watté and C. Barbé, "Le nouveau droit international privé belge: étude critique des fondements des règles de conflits de lois", *Journ. dr. int*., vol. 133, 2006, pp. 851-927.

[67] *V.gr*. Art. 19 of the Belgian Code of private international law; L. Barnich, "La clause d'exception dans la proposition de loi portant le Code de droit international privé", *Mélanges John Kirkpatrick*, Brussels, Bruylant, 2004, 59-72.

[68] M. Verwilghen, "La place de la nationalité dans le Code de droit international belge", *Hommage à Francis Delpérée: itinéraires d'un constitutionnaliste*, Brussels, Bruylant, 2007, pp. 1687-1701.

[69] H. Fulchiron, "Le mariage entre personnes de même sexe en droit international privé au lendemain de la reconnaissance du 'mariage pour tous'", *Journ. dr. int*., 2013, pp. 1055-1113.

Law, following the tripartite scheme currently admitted: determination of the scope of jurisdiction, determination of applicable law and the regulation of the enforcement of judgments and foreign acts, and, on the other hand, the preference for international treaties. Title II ("Italian jurisdiction"), after establishing the scope of the jurisdiction and its limits, focuses on important issues such as prorogation and derogation of jurisdiction, actions *in rem* concerning immovable property located abroad, the application of the *lis pendens* principle to foreign proceedings and non-contentious jurisdiction, protective measures, the pleas as to lack of jurisdiction, concluding with the confirmation of the rule of *lex fori regit processum.* Title III ("Applicable law") begins with a chapter dedicated to the general problems of application of the conflict rule expressly considering *renvoi*, the application of foreign law, the interpretation and application of foreign law, public policy, the rules of necessary implementation, the legal systems with more than one system of law, concluding with the answers to the questions of the law applicable to stateless persons, refugees and positive conflicts of nationality. Then are some solutions for the capacity and rights of natural persons, simultaneous death, disappearance, absence and presumed death, the capacity of natural persons to exercise rights, rights of personality, companies and other legal persons; subsequently, attention is given to family relationships following the classic pattern of the principles concerned by combining the solutions in relation to applicable law with those in relation with jurisdiction, and ending with the rules under the succession regime. The chapter on property ownership begins with the consideration of the rights *in rem*, with a thorough treatment of issues such as goods in transit, rights in respect of intangible property or disclosure of acts relating to rights *in rem*. After a study of donations, the chapter on contractual obligations is directly inspired by the Rome Convention with regard to which "incorporation by reference" is established; then are some answers to the questions pertinent to non-contractual obligations. Title IV ("Enforcement of foreign judgments and public documents") begins with the consideration that foreign judgments are recognised in Italy without the need to have recourse to a specific procedure if a certain number of conditions are met and, after setting out the rules on the matter, focuses on the implementation of the public documents issued abroad and on the admission of means of proof requested by the foreign judge. The Law concludes as usual with the transitional and final provisions.

iv) Among the most modern texts is the Polish private international law Act of 4 February 2011,[70] which replaces the Law of 12 November 1965, which, in turn, had replaced the Law of 2 August 1926 as Poland has been a pioneer of private international law systems, with a commitment towards a special law. Its most important features are: its strongly civil law nature, although there is an inevitable treatment of issues of commercial law; its limitation to the regulation of the problems related to the determination of applicable law and, within this, the establishment of the national law as the dominant connection (article 2), although article 4 admits a wide margin to autonomy of the parties in the choice of the law, provided

[70] http://pil.mateuszpilich.edh.pl/New_Polish_PIL.pdf. T. Pajor, "Introducción a la nueva Ley polaca de Derecho Internacional Privado, de 4 de febrero de 2011 (seguida del texto de la ley traducido al inglés)", *REDI*, vol. LXIV, 2012, pp. 263 *et seq*.

that it does not harm the interests of third parties (article 4); finally, it is important to emphasise the use of the technique of "incorporation by reference" of texts from the European Union, notably in the area of contractual and non-contractual obligations. As a new development, article 67 includes the application of the law of the country to which the legal relationship has the closest connection, in the absence of references established by the Law under discussion or by the provisions of the European Union to which reference is made.

34. Starting from the special law, private international law not only gains material autonomy, but provides the possibility of a thorough regulation of matters, which, thus far, had remained in the orbit of the development of court rulings. This technique, however, is not exclusive but is combined with another technique, which can be classified as "partial codification" and offers three primary manifestations. The first one, which is widely criticised, is to take advantage of the successive reforms of substantive law to introduce private international law rules;[71] the second one, a questionable system, consists of using any source of reform, whether substantive or concerning conflicts of laws, to introduce private international law rules;[72] finally, a third way can result of the reform all of the rules of private international law scattered in various legal corpora which, while remaining at their original seat, are modified harmoniously; this is the route followed by the legislator of the Federal Republic of Germany in 1986.

Besides the "special law" model, there are still systems that use Civil Codes as a basic text for including a broad area of the precepts of private international law, mainly relating to applicable law. This has been the original codification system of the private international law rules, with the three aforementioned models: the sys-

[71] *V.gr.*, the technique used by the French legislator through reforms of the Civil Code operated by the Law nº72-3 on filiation or the Law 75-617 of 11 July 1975 on the divorce reform. Regarding the first law *vid. Rev. crit. dr. int. pr*., 1972, pp. 154-155; R. Sabatier, "Le projet de loi sur la filiation, mystique ou réalisme?", *Semaine Juridique*, 1971, I, p. 2400; J. Foyer, "La réforme du droit de la filiation et le droit international privé", *Travaux Com. fr. dr. int. pr. (1969-71)*, Paris, Dalloz, 1972, pp. 107-125; H. Batiffol and P. Lagarde, "L'improvisation de nouvelles règles de conflit de lois en matière de filiation", *Journ. dr. int*., t. 99, 1972, pp. 765-796; M. Simon-Depitre and J. Foyer, *Le nouveau droit international de la filiation*, Paris, L. Techniques, 1973; A. Huet, "Les conflits de lois en matière d'établissement de la filiation depuis de la loi du 3 janvier 1972", *Les conflits de lois en matière de filiation*, Paris, LGDJ, 1973, pp. 19-63; D. Alexandre, "Les conflits de lois en matière d'effets de la filiation", *ibid*., pp. 65-94. Regarding the second law *vid.* Ph. Francescakis, "Le surprenant article 310 nouveau du Code civil sur le divorce international", *Rev. crit. dr. int. pr.*, 1975, pp. 553-594; A. Cornec, "Le nouveau divorce international (article 310 du Code civil)", *Gazette du Palais*, 1976, 2, pp. 612-614; J. Foyer, "Tournant et retour aux sources en droit international privé (l'article 310 nouveau du Code civil)", *Semaine Juridique*, 1976, I, pp. 2762 *et seq.*; M. Simon-Depitre, "Le nouvel article 310 du Code civil", *Journ. dr. int.*, t. 103, 1976, pp. 823-830; T.E. Carbonneau, "The New Article 310 of the French Civil Code for International Divorce Actions", *Am. J. Comp. L.*, vol. 26, 1978, pp. 446-460.

[72] *V.gr.*, the technique used by the Spanish legislator through reforms of the Civil Code. In some cases, it has introduced new rules governing international relations in a context of substantive law reform. Concretely, the reform of the Civil Code carried out by the Law 30/1981 preferred to add, in Title IV of Book I of the Civil Code, the conflict of laws rules in matters of divorce and legal separation in addition to the substantive regulations of this institution. On the contrary, the Law 21/1987 benefited from the course of the reform of the substantive regulation on adoption to modify the conflict of laws rules of the Preliminary Title of the Civil Code on filiation.

tem of the French Civil Code of 1804, the Civil Code of Piedmont of 1865 and the Introductory Act to the German Civil Code (EGBGB) of 1896 and with an important projection in the Spanish system of the Preliminary Title of the Civil Code of 1974. Meanwhile, the "model" of a technique of this kind is, without doubt, as has been pointed out, the Portuguese Civil Code of 1966, which dedicates Chapter III of Title I of its Book I (articles. 14 to 65) to regulating the "rights of foreigners and conflicts of laws" ("*Dereitos dos estrangeiros e conflictos de leis*"), with a proper and comprehensive system and detailed treatment of the specific problems for the time in which it was drafted.[73] The scope in which the "model of the Civil Code" has been developed is not, however, exclusively of the European continent. If we move to the American continent and, specifically, to the group of Latin American countries, we can still note the past inertia with the Civil Code as a principal seat of private international law rules, above all concerning the area of applicable law. The said tendency, however, undergoes various deviations, since in some Civil Codes substantial reforms are occurring given the modern trends of private international law, as shown by the reform of the Peruvian Civil Code carried out in 1984 (articles 2046 *et seq.*), which replaced the so-called "Benavides Code" of 1936 and which dedicated its Book X, which is the last one, to private international law, thus eliminating the narrow margin offered by the Preliminary Title.[74] As seen before, this tendency would be followed in Quebec and is currently being implemented in Argentina.

35. In the review of the "models" of the national codification of private international law, it is necessary to exclude the problem-solving techniques used in Anglo-Saxon countries, since these are based on very different hypotheses, in particular, the adoption of common law. Nonetheless, despite the mentioned impact of common law particular mention should be made of the work carried out in the United States by the *American Law Institute* which, through two *Restatements* of 1934 and 1969, has systemised and organised the principal judgments on private international law. Despite their eminently doctrinal nature, the *Restatements* in practice constitute authentic codes of private international law, which have exerted a notable influence in recent times, not only in the national codification in Europe, but in the international codification of private international law. The texts set out offer a substantially diverse content. With a very classical content, *Restatement (First)* (very much influenced by the work of J.H. Beale) was characterised by the use of very rigid solutions which were called into question by North American court rulings (cases *Auten v. Auten*, *Babcock v. Jackson*); it was a driving force for the development of *Restatement (Second)*, whose solutions, use of flexibility and realism, are one of the masterpieces of our times for the solution of the problems of international transactions. The fact that these solutions have been accommodated in such di-

[73] L. de Lima Pinheiro, "The Metholology and the General part of the Portuguese Private International Law. Codification: A Possible Source of Inspiration for the European Legislator?", *Yearb. Priv. Int'l L.*, vol. 14, 2012-2013, pp. 153-172.

[74] *ILM*, vol. XXIV, 1985, pp. 1002–1014, and the note of A. Garro, *ibid.*, pp. 997–1001; *Rev. crit. dr. int. pr.*, 1986, pp. 192 *et seq.* and the note of J. Lisbonne; J. Samtleben, "Neues Internationales Privatrecht in Perú", *Rabels Z.*, 1985, pp. 486–521.

verse systems as those of the European continent shows that they correspond to the societal reality of our times.[75]

These remarks help us to evaluate the special situation of Puerto Rico. The private international law of this territory is mainly found in the Civil Code, and, in a complementary manner, in other provisions. The principles of the Civil Code correspond to the original version of the Spanish Civil Code of 1889, which are, in turn, a juxtaposition of the statutory orientation of the French Civil Code of 1804 and the concerning conflicts of laws outlook of the Civil Code of Piedmont of 1865, specifically article 9, 10 and 11, which are included in its preliminary provisions,[76] provide a response to the so-called "personal status", "*in rem* status" and "formal status". The current Civil Code, moreover, contains other private international law provisions interspersed between substantive provisions, for example, the last sentence of article 68 (non-recognition of same sex marriage celebrated abroad), article 127 (law applicable to the economic regime of the marriage celebrated abroad), article 97 (jurisdiction for divorce), article 666 (law applicable to the form of a will drawn up outside of Puerto Rico), article 667 (prohibition of a joint will drawn up outside of Puerto Rico) and article 638 (place of drawing up a will and language of the holographic will). The virtues and the defects of articles 9, 10 and 11 of the current Civil Code have been the proponents of Puerto Rican private international law and have marked the development of this matter. These brief articles originate from the Spanish Civil Code of 1889, which, in turn, is based on the French Civil Code of 1804, and its background can be identified in the Italian Civil Code.[77] However, in the revision made in the Civil Code in 1902, the commissioners who had been trained in Anglo-Saxon law decided to "americanise" these articles. In this way, they suspended the former civil-law principle of the unity of the estate and replaced it with the American rule of *lex rei sitae*. Furthermore, they eliminated an article that could have provided a basis for the solution of conflicts in relation to non-contractual civil liability. Despite these incursions of Anglo-Saxon law, the remaining three articles of the Civil Code of Puerto Rico were not more deficient than other similar provisions of some civil codes of the French or Latin legal family. These articles have for some time performed the role that was expected of them, especially due to the corrective and supplementary function of Puerto Rican court rulings, which is discussed further below.

Currently, however, more than one hundred years after the revision of 1902, it is evident that articles 9, 10 and 11 of the Civil Code have exhausted their social utili-

[75] *Vid*., *inter alia*, P. Wigny, "Le 'Restatement' américain du droit international privé", *Rev. crit. dr. int. pr*., 1936, pp. 67–85; M. Giuliano, "II diritto intenazionale privato e processuale nel Restatement of the Laws 2d.", *Riv. dir. int. pr. proc*, 1974, pp. 226–229; B. Hanotiau, *Le droit international privé américain: du premier au second Restatement of the Law, Conflicts of Laws*, Paris, LGDJ, 1979; R.J. Weintraub, "The Restatement Third of Conflict of Laws: an Idea whose Time has not Come", *Indiana L. J.*, vol.75, nº 2, 2000, pp. 679-686.

[76] *Vid*. G. Velázquez, *Directivas fundamentales del Derecho internacional privado puertorriqueño*, Rio Piedras, Editorial de la Universidad de Puerto Rico, 1945.

[77] L. Muñoz Morales, *Reseña histórica y anotaciones al Código Civil de Puerto Rico*, Río Piedras, Junta Editora UPR, 1947; G. Velázquez, *Directives Fundamentales del Derecho Internacional Privado*, Río Piedras, Junta Editora UPR, 1945); S. Symeonides, "Revising Puerto Rico's Conflicts Law: A Preview", *Colum. J. Trans'l L*., vol. 28, 1990, p. 13 *et seq*.

ty and have become an impediment to progress. The need to overcome this impediment is essential and therefore it is not by chance that all of these jurisdictions of Romano-Germanic orientation which have similar provisions have replaced them with modern codifications of private international law, an important task which ought to have been done in Puerto Rico a long time ago. As can be seen, the articles on private international law of the current Civil Code are scarce, brief, elliptical and outdated, and consequently the Supreme Court has been forced to complete, partially, the task of modernising and supplementing them. Puerto Rican court rulings on private international law have been characterised by the presence of two principal dichotomies: between "the Spanish" and "the United States" and between "the codified" and "the non-codified".[78] On the other hand, in areas not considered by the provisions on private international law of the Civil Code, the court rulings were free to move, gradually, from the traditional focus to the modern focus of this matter, without the limitations of outdated legislative rules. Like in the United States of America, the transition from one focus to the other, which commenced in the 1960s, was completed in the 1970s and has been limited, mainly, to conflicts of laws in relation to contracts and non-contractual civil liability. The other dichotomy present in the Puerto Rican court rulings on private international law stems from fact that the rules legislated in this matter do not cover the complete spectrum of possible problems. Thus, for example, these rules do not deal with the conflicts of laws in relation to non-contractual civil liability or, for the most part, with the conflicts in relation to contracts. Due to this dichotomy, the Puerto Rican court rulings have had to proceed in two directions. In the area covered by the rules of the Civil Code on private international law, the court rulings have followed these guidelines sufficiently accurately, as was to be expected in an originally civil-law system, and at the same time, they have conscientiously attempted to temper their rigidity.

36. Still with regard to this part of the Atlantic, an evaluative assessment of the process of international unification of private international law in Latin America, in turn, records a series of relevant data that do not have a static nature, but are elements arising from a very specific time in history and, as such, are liable to variation according to the characteristic globalisation and regionalisation processes of the international society of our times. Generally speaking, it should be appreciated that it is an expansive phenomenon: the experience of unification in this area,[79] above all in the wake of the enormous work of institutions like the Inter-American Specialized Conference on Private International Law, is clear proof of this phe-

[78] A. Fernos López-Capero, "Perspectiva actual del Derecho internacional privado puertorriqueño", *Revista Jurídica de la Universidad Interamericana de Puerto Rico*, vol. XXI-3, p. 589 *et seq.*

[79] J.E. Briceño Berrú, "Reflexiones sobre la codificación del DIPr en América latina", *Studi in memoria di M. Giuliano*, Padua, Cedam, 1989, pp. 157-192; D.P. Fernández Arroyo, *La codificación del DIPr en América latina*, Madrid, Eurolex, 1993; T. de Maekelt, "General Rules of Private International Law in the Americas. New Approach", *Recueil des Cours*, t. 177 (1982-IV), pp. 193-379; L. Pérezneto Castro, "La tradition territorialiste en droit international privé dans les pays d'Amérique Latine", *Recueil des Cours*, t. 190 (1985-I), pp. 271-400; H. Valladão, "Actualisation et spécialisation des normes du droit international privé des États Américains", *German Yearb. Int'l. L.*, 1978, pp. 335-36.

nomenon.[80] It precisely defines a revitalisation of the use of the compared method that is a much more developed phase of the knowledge of foreign law with which it tends to be confused.[81] The reinforcement of the so-called "units of comparison" and the selection of matters for unification are indispensable elements for ensuring that the unification work will bear fruit without sacrificing the idea of justice for the sake of the uniformity.[82] Many large unification projects are condemned to failure due to their ambitious objectives and the interests in question before the attempts at a dominant implementation of a particular arrogant option. And it should not be overlooked that the fact that there is a substantial incompatibility between the particularist legal approach and the idea of codification.[83] The right point of balance or compromise must be reached.

37. In this comparative context, different models of regulation of private international law exist in Latin America. A first group is characterised by the spread of the system of private international law in different legal corpora.

i) Colombia does not have a complete and integrated system of private international law. The regulation of the different areas (international legal jurisdiction, applicable law, recognition and enforcement of foreign judgments) is found in various rules that are not very adequate for the resolution of various problems of private international relations. In addition to this fragmentary and anachronistic nature of private international law deriving from a national source, bilateral and multinational agreements exist, whose criteria of application in most cases do not appear to

[80] J.E. Briceño Berrú, "Las convenciones interamericanas sobre DIPr de 1984", *Riv. dir. int. pr. proc*., 1987, pp. 429-452; C. Delgado Barreto, "Las relaciones de los sistemas conflictuales en las normas generales de Derecho internacional privado aprobadas por la CIDIP II de Montevideo de 1979", *Estudios de Derecho internacional. Libro homenaje al profesor Santiago Benadava*, vol. 2, Santiago de Chile, Librorecnia, 2008, pp. 377-405; D.P. Fernández Arroyo, "La CIDIP VI: ¿Cambio de paradigma en la codificación interamericana de Derecho internacional privado", *Rev. mexicana DIPr*, nº 13, 2003, pp. 214-172; W. Goldschmidt, "Normas generales de la CIDIP II: Hacia una teoría general del Derecho internacional interamericano", *Anuario Jurídico Interamericano*, 1979, pp. 141-155; T.B. de Maekelt, *Conferencia especializada de DIPr (CIDIP I): análisis y significado de las Convenciones aprobadas en Panamá, 1975*, Caracas, Univ. Central de Venezuela, 1979; *id*., *Normas generales de DIPr en América*, Caracas, Univ. Central de Venezuela, 1984; D. Opertti Badán, "La codificación del DIPr: análisis comparativo e la labor realizada por la Conferencia de DIPr de La Haya y por la CIDIP", *España y la codificación internacional del Derecho internacional privado*, Madrid, Eurolex, 1993, pp. 259-283; G. Parra-Aranguren, "La primera conferencia especializada interamericana sobre DIPr, Panama, 1975", *Libro homenaje a la memoria de Joaquín Sánchez Covisa*, Caracas, Univ. Central de Venezuela, 1975, pp. 253-277; *id.*, "Recent Developments of Conflict of Laws Conventions in Latin-America", *Recueil des Cours*, t. 164 (1979-III), pp. 57-170; *id.*, "La tercera conferencia interamericana sobre DIPr (CIDIP III, La Paz 1984)", *Revista de la Facultad de Derecho (Univ. Católica "Andrés Bello")*, nº 33 and 34, 1984-1985 (reissue); J. Samtleben, "Die interamerikanische Spezialkonferenz für internationales Privatrecht", *Rabels Z.*, 1980, pp. 257-320; *id.*, "Los resultados de la labor codificadora de la CIDIP desde la perspectiva europea", *España y la codificación..., op. cit.*, pp. 293-302; A.M. Villela, "L'unification du droit international privé en Amérique latine", *Rev. crit. dr. int. pr*., 1984, pp. 235-262.

[81] O. Pfersmann, "Le droit comparé comme interprétation et comme théorie du droit", *Rev. int. dr. comp.*, vol. 53, 2001, pp. 280-281.

[82] H. Batiffol, "Codificación y unificación en Derecho internacional privado", *Choix d'articles*, Paris, 1976, pp. 125-136.

[83] *Cf*. R. Sacco, "Codificare: Modo superato de ligeferare?", *Riv. dir. civ.*, 1983, p. 119.

be clearly established in their own instrument. In fact, the presence, in these instruments, of provisions on their territorial scope appears almost exceptional, and consequently their applicability is uncertain, at least with respect to those that regulate international legal jurisdiction[84]and applicable law.[85] The national rules are found dispersed throughout the Colombian legal system especially in the Civil Code (Law 57 and 153 of 1887), the General Code of Procedure – CGP (Law 1564 of 2012), the Substantive Labour Code (Decree Law 3743 of 1950) the Code of Commerce (Decree No. 410 of 1971) and some ratifying laws of international treaties on the matter.

ii) Since the action of the treaties on the subject is limited, the Cuban System of private international law is essentially based on a series of provisions dispersed in the Civil, Administrative, Labour and Economic Procedure Act of 19 August 1977, to which the term "Economic" was added in 2006[86] (LPCALE), and in the Civil Code of 1987 (Law No. 59), which are structured in the following manner: a) international legal jurisdiction: articles 2, 3, 4 and 372 and 739 LPCALE;[87] b) applicable law: articles. 11 to 21 and special provisions of the Civil Code and article 244 LPCALE; and c) recognition and enforcement of judgments: articles 483 to 485 LPCALE. And in addition to these we must mention a series of procedural provisions on foreigners included in the LPCALE: articles 174, 230, 250, 290, 339 and 530.[88] It is thus a model of regulation of a variable nature similar to that maintained in Spain up until the end of the 1980s.

iii) The system currently in force in Mexico is based on the interaction between the rules contained in the Civil Code and those arising from a convention after a massive incorporation of international treaties that began in the decade of the 1990s. The reforms carried out in the civil legislation,[89] from 1988, laid the founda-

[84] For instance, the Inter-American Convention on Support Obligations adopted on 15 July 1989 does establish a spatial scope of application, but nothing was specified on that point regarding instruments such as the Montevideo Treaties of 1889. From the publication in that regard of *Los Tratados de Montevideo de 1889 y su interpretación judicial*, vol. I, part 1, Universidad Nacional de La Plata, Argentina, 1940, an *inter-parte* application can be inferred, i.e., any legal dispute, act or relation would require to have a connection with at least two contracting States (all the matters treated in the aforementioned book have a connection with Argentina and Uruguay).

[85] Instruments such as the Inter-American Convention on General Rules of Private International Law, adopted in Montevideo in 1979, do not include an express provision on their spatial scope of application either. It can be assumed that they are *inter-partes* instruments, i.e., they can only be applied in so far as the applicable law is the law of a contracting State. Other conventions which include provisions regarding applicable law, such as the Inter-American Convention on adoption of La Paz of 1984 or the aforementioned Inter-American Convention on Support Obligations, do expressly provide a spatial scope of application.

[86] It was subsequently called Civil, Administrative, Labour and Economic Procedure Act after the part on economic procedure was added, in accordance with the Decree-Law 241/2006.

[87] It was introduced by the Decree-Law 241/2006.

[88] Other relevant rules regarding private international law are scattered in: the Law No. 1289/75, which introduced the Family Code, the Law No. 1313/1976 on foreign nationals, the Law No. 50/1984 on State notary's offices and the Law No. 51/1985 on civil status registry.

[89] On 7 January 1988 two decrees were published in the Official Journal: the first one, which reformed and completed the Civil Code governing the Federal District on Common Matters; and the second one, which reformed and completed the Code of Civil Procedure for the Federal District.

tions for eliminating the prevailing legislative backlog in the area of private international law in Mexico, thus uniting it with the prevailing codification movement in the global economic powers, and managing to implement the applicable international legal corpora on the matter.[90] However, this system continues to be characterised by a normative "morass", which is difficult to follow and can even less be coherent from the very moment in which there are contradictions between the statements in one rule and another, either autonomously or based on a convention.[91]

iv) The Dominican Republic also does not have a special law which regulates, at least, a substantial part of the problems of private international relations.[92] No regulation of the matter of international legal jurisdiction exists, apart from the provision in articles 14 and 15 of the Civil Code[93] (article 16, related to the *cautio iudicatum solvi*, was modified by the Law 845, of 1978[94]). In light of the lack of express rules in the Code of Civil Procedure, the legal practitioners must refer to the review of the entire body of court rulings of the Dominican courts, which reflects a

Shortly after, on 12 January 1988, a decree reforming and completing the Code of Civil Procedure for the Federal District was also published in the Official Journal. Further on, on 2 January 1989, reforms, additions and derogations of several dispositions of the Commercial Code – some of which relate to conflict of laws and international procedural cooperation – were published in the Official Journal. All the reforms above mentioned focus on private international law matters. In the Explanatory Note of both the Civil Code and the Code of Civil Procedure for the Federal District, it was established that "The law, understood as a promoter of social change, cannot remain static before transformations induced by social dynamics. The growing economic, politic, social and cultural relations, that are formed daily between the people that make up our society and those who belong to other States composing the international scene, have shown the need to find solutions more consistent with our time." After referring to the CIDIP–I, –II and –III conventions, national legislation was reformed to conform to "the principles established by the [aforementioned] conventions". Therefore, the main purpose of these reforms was to conform Mexican laws to the above conventions.

[90] L. Pereznieto Castro, *Derecho internacional Privado, Parte General*, 8th ed., Mexico, Oxford, 2003.

[91] N. González Martín, "La Conferencia Especializada Interamericana de Derecho Internacional Privado y la modernización del Derecho internacional privado latinoamericano ¿un cambio en el iter convencional hacia la Ley Modelo?", *Boletín Mexicano de Derecho comparado*, 2008, pp. 511-544.

[92] *Vid*., generally, J.C. Fernández Rozas, "*¿Por qué la República Dominicana necesita una ley de Derecho internacional privado?*", *Gaceta Judicial, la Revista Jurídica de Interés General* (Dominican Republic), Año 18, nº 329, 2014, pp. 20-31.

[93] These articles are a literal translation of their counterparts of the French Civil Code of 1804. Art. 14: "A foreigner, even if not residing in the Dominican Republic, may be cited before Dominican courts for the performance of obligations contracted by him in the Dominican Republic with a Dominican person; he may be called before the courts of the Dominican Republic for obligations contracted by him in a foreign country towards Dominican persons." Art. 15: "Dominican persons may be called before a court of the Dominican Republic for obligations contracted by them in a foreign country, even with a foreigner".

[94] Law No. 834 repealing and amending some dispositions relating to Civil Procedure and integrating the most recent and advanced reforms of the French Code of Civil Procedure of 15 June 1978 (Official Journal No. 9478).

rather confused and misleading picture.[95]This construction points to the existence of two general criteria: on the one hand, the independence of the treatment of conflicts of laws and jurisdictional conflicts and, on the other hand, the dominant character of the Dominican jurisdiction, which is regarded as being completely unwavering. For the Dominican courts, the solutions in this area respond to a broad concept of the idea of jurisdiction, in which this appears intimately connected to national sovereignty. This is seen clearly in: i) the pure and simple transposition at the international level of the *vis atractiva*, namely of the ordinary jurisdiction established at the domestic level (article 59 of the Code of Civil Procedure) to affirm, in this way, the exclusive and exclusionary nature of the national jurisdiction over foreign jurisdictions to decide the civil matters arising in the Dominican Republic;[96] ii) The attribution of jurisdiction of the Dominican courts may have a derogatory effect on the private will when the parties submit to a foreign court.[97]From the perspective of applicable law, the system resolves around article 3º of the Civil Code, whose inadequacy has not been remedied by other subsequent provisions. The obsolete nature of the regulation of the questions of applicable law is due to the fact that the solution introduced in article 3 of the Napoleonic Code of 1804 still remains faithful heir to the so-called theory of the statutes. Even without the necessary impact, the unilateral nature of the precept has been bilateralised by Dominican court rulings, by admitting, for obvious reasons of reciprocity, the application of foreign law when the claim comes from foreign jurisdictions. Among the subsequent provisions, it is worth mentioning the so-called "Quick Divorce Law" ("*Ley de divorcio al vapor*", Law 1306–bis, of 21 May 1937,[98] modified by Law 142 of 4 June 1971) governing a procedure of divorce by mutual consent especially instituted for foreigners or Dominicans not resident in the country. It was the fruition of a period in decline that must be overcome, besides its problems of a confessional nature, as evidenced by Resolution No. 3874 of the National Congress, which approved the Concordat and the Final Protocol signed between the Dominican Republic and the Holy See of 16 of June 1954. It should also be mentioned that Law No. 136–03 created the Code for the Protection of the Fundamental Rights of Children and Adolescents, of 7 August 2003, together with some other isolated provisions and, subsequently, with the entry into force of Law No. 489–08 on Commercial Arbitration. This last provision, directly inspired by the UNCITRAL Model Law of Commercial Arbitration of 1985, is completely adapted to the provisions that exist in other legal systems favourable to arbitration. Finally, great inaccuracy exists with regard to the recognition and enforcement of foreign judgments.

[95] J.M. Castillo Roldán, "Competencia judicial internacional en la República Dominicana", http://juanmicastilloroldan.blogspot.com.es/2013/06/competencia–judicial–internacional–en.html, 13 June 2013.

[96] Art. 24: "When the judge considers that the matter falls within the jurisdiction of a criminal, administrative, arbitral or foreign court, he will only refer the parties thereto to the competent court. In all the other cases, the judge who considers that he lacks jurisdiction must designate the court he deems competent. Such designation will be imposed to the parties and the referring judge".

[97] This principle was endorsed by the judgments of the Supreme Court of Justice (SCJ) on 13 December 2006 and 30 January 2008. *Vid*. E. Alarcón, *Comentarios a la Ley de arbitraje comercial de la República Dominicana*, Santo Domingo, Librería Jurídica Internacional, 2012; J.C. Fernández Rozas and N. Concepción. *Sistema de arbitraje comercial en la República Dominicana*, Santo Domingo, Editorial Funglode, 2013.

[98] G. Ireland and J. de Galíndez, *Divorce in the Americas*, Buffalo NY: Dennis, 1947.

Traditionally, the rules on *exequatur* contained in the old Code of Civil Procedure[99] have been applied, until the amendment made by Law No. 834/1978, whose article 122 provides that "The judgments handed down by foreign courts and the acts received by foreign officials are executory in the territory of the Republic in the manner and in the cases provided by the law". The maintaining of the abovementioned regulation is questionable since that law does not include express derogations, its article 142 merely declaring "all of the laws and provisions of the Code of Civil Procedure relating to matters dealt with in the present law shall be repealed and replaced". And it is unlikely that the matter will have an immediate solution due to the paralysis of the reform initiative of the Code of Civil Procedure of 2010, which included an express regulation of the matter.[100] It should be noted that the said article 122 merely establishes a referential framework, without specifying whether the request of the interested party will have to be regulated by contentious protocol, by citation to the other party, or by the non-contentious procedure, *inauditan partem*.

38. Besides the group described, there is another group, currently in the minority, and which includes Venezuela and Panama, that has preferred to abandon the regulation contained in the Civil Code, as is the case in other legal circles, and to regulate the matter by a special law. Specifically, Venezuelan law determines the scope of the jurisdiction; it sets out the criteria for the determination of applicable law and regulates the enforcement of foreign judgments.

i) In the decade of the 1990s, on the initiative of Gonzalo Parra Aranguren and Tatiana Maekelt, the Private International Law Act was approved on 6 August 1998 and entered into force on 6 February 1999.[101] The Law maintained the basic provisions of the draft law of 1965 and was adapted to new laws currently in force in Venezuela and to the updates of its original rules that were made in the framework of the Inter-American Specialized Conference on Private International Law (CIDIP). Furthermore, in its articles, it reflected the evolution of Venezuelan doctrine and court rulings. Its main objectives were to eliminate the problems caused in the Venezuelan system by the statutory method, the scarcity and the dispersion of rules, the adoption of nationality as the connecting factor for regulating personal status and the antagonistic hybridism established by article 8 of the Venezuelan Civil Code. Prior to the Panamanian Code of 2014, the Law was the only special

[99] The Dominican Code of Civil Procedure, amended by the commission named by the executive power and which complies with the decree of the National Congress of 4 July 1882, kept the order of the articles of the French Code in effect *(sic)* in the Republic since 1845.

[100] In September 2010 took place the legislative proposal preliminary draft of the Code of Civil Procedure which, in accordance with the adopted plan, comprises twelve volumes. The first one deals with the fundamental principles of the process, the application of national and supranational rules, judicial cooperation and recognition and execution of foreign and international judgments. For our purposes, special attention should be paid to Chapter II of Title II on the application of international rules of procedure, which begins by asserting the primacy of international law (art. 29), and to Title IV (arts. 48 to 63), which pays particular attention to recognition and execution of foreign and international judgments.

[101] G. Parra Aranguren, "La Ley venezolana de 1998 sobre Derecho Internacional Privado", *REDI*, vol. LI 1999, 1, pp. 277-287.

law in America, reconciling the lessons of the contemporary doctrine and the comparative law to the historic, social and human data from the Venezuelan reality. This instrument has a general nature and, in only 64 articles, establishes rules on its general principles (articles 1 to 15); applicable law in relation to natural persons (articles 16 to 19) and legal persons (article 20); family relationships (articles 21 to 26); assets and rights *in rem* (articles 27 and 28); contractual obligations (articles 29 to 31) and non-contractual obligations (articles 32 and 33); succession (articles 34 to 36); form and proof of acts (articles 37 and 38); courts and territorial jurisdiction (articles 39 to 52 and 56 to 58); international judicial cooperation (article 59); recognition and enforcement of foreign judgments (articles 53 a 55); and, finally, rules on the procedural treatment of foreign law (articles 60 and 61). The adoption of the domicile as the connecting factor for regulating the capacity of natural persons (article 16) signifies a profound and fundamental reform of the Venezuelan system of private international law, as it leads to abandon the link to nationality, an inherent factor of countries of emigration, mainly European, to bring us closer to the American legal systems, which are characterised by immigration.[102]

ii) On 27 August 2009, Professor Hernán Delgado presented the preliminary draft private international law Act to the Commission on Government, Justice and Constitutional Affairs of the National Assembly of Panama. This draft law contained 190 articles and its inspiring philosophy was the protection of the interests of Panamanian nationals, tolerance and the coexistence of foreign laws and national jurisdiction when this is competent in the transactions of international legal relations. It also aimed to fill the legal vacuum existing until then regarding the systemisation of this area of the legal system, which was dispersed in various legal texts, hindering knowledge not only for the legal practitioners but also for the Panamanian judge himself. The content of this codification work derives from the ideas of the Panamanian lawyer Gilberto Boutin, so that there is in Panama rather than a "Bustamantine" current (reference to the Bustamante Code), a "Boutinian" current, based on the influence that this lawyer has exerted on the construction of Panamanian private international law, who remained faithful to the Cuban jurist, as was reflected in the draft text. This initiative followed all of the relevant legislative procedures in the year 2012 resulting in a draft law, which led to the adoption of the Code of Private International Law of the Republic of Panama, where the above-mentioned provisions were replaced by articles 149 to 151 within the 189 articles that constituted the final version of the complex legislative process, the last of its provisions having a *vacatio legis* period of six months. The road to reform thus remained open. However, the Panamanian Constitution establishes a particular feature regarding the process of adoption of a law and which conferred to the President of the Republic the right to object to draft laws under paragraph 6 of article 183. And this particular feature was used on this occasion.[103]

[102] H. Barrios, "Del Domicilio", *Revista de la Facultad de Ciencias Jurídicas y Políticas*, vol. 46, nº 117, Universidad Central de Venezuela, Caracas, 2000, pp. 41 *et seq*.

[103] Presidential opposition was essentially directed towards the principles of the draft law on international commercial arbitration. For these reasons among others, the president partially vetoed the draft law of private international law and in view of this situation the Commission of Government, Justice and Constitutional Affairs, in compliance with the art. 205 of the Organic Rule of

Such an intervention was not by chance. In parallel to the process described, on 26 February 2013 the draft law relating to national and international arbitration in Panama,[104] whose proponent was Professor Raúl Hernández,[105] was entered in the Commission on Government, Justice and Constitutional Affairs of the National Assembly of Panama. The result was Law 131, of 31 December 2013, which regulates national and international commercial arbitration in Panama.[106] The fate of the Private International Law Act thus appeared to be sealed, however, in the last few years of the mandate of President Martinelli, and to everybody's surprise, the rules on international arbitration have been maintained and the green light has been given to this initiative to adopt the Code of Private International Law of the Republic of Panama.[107] The Code comprises 184 articles and maintains a broad concept of private international law, which is evidenced by the matters regulated (legal jurisdiction, applicable law, recognition and enforcement of judgments and international judicial cooperation in civil matters) going beyond the framework of the modern legislations, extending to matters such as international arbitration (conflicting as is indicated with the Law of Arbitration of 2013), criminal law, in the most "Bustamantine" sense of the term, and to other matters of a commercial nature, such as international bankruptcy. The national law has a protagonist nature in the area of applicable law, although the Code gives a certain entry to the law of the domicile and the law of the habitual residence. As a curiosity, the Code introduces a general provision which goes beyond the issues addressed in a provision focused on the regulation of the matters of international transactions by categorically establishing that "marriage between individuals of the same sex is prohibited"; the polemic nature provoked by this kind of provision has obscured the overall assessment of this provision in the early stages of its period of validity.

C) Government bills and academic projects

Domestic Regime, issued its report on 6 February 2013, considering that the objections made by the president of the Republic were founded. For this reason, the Commission concluded that Arts. 150, 151–158 and 159 of the draft law on private international law should be amended, recommending the plenary chamber of the National Assembly to adopt such objections in all their integrity. They did so, leading to a new draft law in 2013.

[104] http://www.asamblea.gob.pa/apps/seg_legis/PDF_SEG/ PDF_SEG _2010/ PDF_SEG_2013/ PROYECTO/2013_P_578.pdf.

[105] The parliamentary offices of this last draft law were not exempt from problems either. It is obvious that being related to the proceeding of the draft law on private international law, containing provisions which clash with the spirit of said draft, created tensions between supporters and opponents of both projects. The fact that the president of the Republic was directly involved in the abandonment the draft of private international law is proof that this legislative procedure was not peaceful. But this last text was not the only one targeted. The one that was retained in a first time generated a strong opposition as well, to the extent that it almost never saw the light. It was adopted at the last minute, after enduring many complaints asking the president to veto for having apparently induced serious irregularities as well as for never having been approved in first debate. F. Gómez Arbeláez, "Nueva ley de arbitraje, irregularidad legislativa", *La Prensa*, 19 December 2013.

[106] J.C. Araúz Ramos, "La porfiada reforma del arbitraje en Panamá", *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, vol. VII, nº 1, 2014, pp. 143-149.

[107] It was published in the Official Journal of 8 May 2014. According to Art. 184, the Code "shall come into force six months after its promulgation". http://www.gacetaoficial.gob.pa/pdfTemp/27530/46493.pdf.

39. Continuing in the Latin American legal group, it is especially interesting to refer to the already completed projects and those currently being developed in private international law in Latin America, which include the present draft Model Law.

i) Through its 226 articles, the Draft Mexican Model Code of Private International Law of October 2006, with some highly ambitious codification objectives and with a formidable effort to achieve coordination of the preparatory studies, has a vocation to be applied to any matter, transaction or situation that is linked to any foreign legal system. It establishes the jurisdictional framework of the Mexican authorities, indicates criteria for the determination of applicable law and governs the recognition of judgments and foreign instruments. This instrument has many coincidences with the Model Law, not only in its tripartite structure (applicable law, competent jurisdiction and recognition and enforcement of judgments), although it is presented in different order, but also regarding the matters dealt with, in the use of the domicile as the dominant connection as well as, finally, in the abandonment of the inspiration of the Bustamante Code. The known differentials lie in the greater influence of the work of the CIDIP in the Mexican text[108] and above all in the federal structure of the system, which has almost three hundred laws currently in force, a quarter of which bear any relation to private international law.[109] The Mexican State will only be able to ensure a regulation in conformity with article 17 of the Constitution if the latter matter is resolved – hence the option for a "Model Code".

ii) In Puerto Rico the draft text of the Book of Private International Law stems from a proposal developed between 1987 and 1991 under the auspices of the Puerto Rican Academy of Jurisprudence and Legislation ("the Academy"), at the time presided over by the former judge President of the Supreme Court of Puerto Rico, José Trías Monge. The proposal, titled *A Project for the Codification of Puerto Rican Private International Law*, was debated extensively, amended and adopted by a Special Committee of the Academy[110] which included Symeon Symeonides, as a consultant of this Joint Committee and who produced a draft of an updated proposal that he presented under the title of *A Bill for the Codification of Puerto Rican Private International Law*.[111] Despite certain terminological similarities with

[108] It is a draft model Code of private international law dated 3 December 2005. *AEDIPr*, t. VI, 2006, pp. 1242-1276; J.A. Silva, "Una codificación iusprivatista para México: los trabajos para conformarla", *AEDIPr*, t. VI, 2006, pp. 1221-1240.

[109] http://www.diputados.gob.mx/LeyesBiblio/index.htm.

[110] The committee was chaired by Lino Saldaña, a former associate judge of the Supreme Court of Puerto Rico. Arthur T. von Mehren, a professor at the Harvard Law School, was a consultant for the committee and Symeon C. Symeonides, professor and dean at the Willamette University College of Law, served as rapporteur for this contribution.

[111] Based on that document and using an initial draft of the translation into Spanish of the proposal of the Academy made by Julio Romanach of the *Center of Civil Law Studies de Louisiana State University*, the Joint Commission prepared this draft of private international law book. The wording of the articles and their commentaries suffered significant modifications, making a standardisation of language and of the structure of the articles necessary to adjust to the guidelines used in the rest of the revised draft of the Civil Code. Furthermore, in some cases, some substantive modifications were required to adjust the said proposal to the new content of the rest of the books of the project. This obviously meant modifying the commentaries whose purpose is to justify the rules. Even after consulting all these documents, this book is far from being consistent with some of them.

other codifications, this is a truly different and independent Book. An example of its universality and its particularity is found in the general and supplementary article, which reflects that the objective of the process of determination of applicable law is to identify and apply the law of the State that "has *the most significant connection* to the parties and the dispute in relation to the problems concerned…".[112] This Book of Private International Law incorporates the doctrine derived from the court ruling in *Viuda de Fornaris* and other cases of the Puerto Rico Supreme Court, develops it and adopts a less territorial and less quantitative focus. It is a perspective based on the Puerto Rican experience which, in turn, includes the best elements of both sides of the Atlantic, without blindly and automatically submitting to the United States or Spanish legal authorities. In accordance with the civil-law tradition of the Puerto Rico Civil Code, the scope and the structure of this Book only deals with the aspect of applicable law in the cases with foreign elements and not the matter of the interstate or international adjudicative jurisdiction, or the recognition of foreign judgments. This Book consists of forty eight articles organised in six Titles: Title I ("General Provisions"), Title II ("Family Institutions"), Title III ("Rights *in Rem*"), Title IV ("Law of Obligations and Contracts"), Title V ("On the Obligations Resulting from Fault or Negligence") and Title VI ("Law of Succession").

iii) The legislative initiative of 2014[113] proposes to correct this situation, as far as possible, to reach into the sphere of the private international relations the two su-

[112] The sentence in italics is similar to the sentence "*most significant relation*" of the *Segundo Restatement* (sections 5, 188, 222, 28 & 291). However, it is also similar to the following expressions used in other codifications: "*closest ties*" (Art. 9 of the Inter-American Convention on the Law Applicable to Contractual Obligations), "*most directly linked*" (Art. 30 of the Venezuelan Act of Private International Law of 1999), "closest ties" (Arts. 200 and 206 of the Argentinian Projects of Private International Law of 1998), "*closest relationship*" or "*closest connection*" (Swiss Private International Law Act of 1987), "*close connection*" (Civil Code of Québec of 1994), "*closest connection*" (Art. 28 of the German Private International Law Act and Rome Convention) and "*stronger connection*" (Austrian Private International Law Act of 1978). At the same time, the expression "*most significant connection*" used in the article is sufficiently different from all the abovementioned formulations. For instance, the expression "*most significant*" prompts us to make a more qualitative analysis and have less of a territorial and physical connotation than the expressions "*strongest*" and "*closest*", which are used in the European formulations. To some extent, these differences and similarities may reflect the European and American influence on this matter. However, it is more important to note that the terms "*most significant connection*" and their objective is supported in the Puerto Rican jurisprudence of private international law, particularly with the expression "dominant contacts" used in *Maryland Casualty, Viuda de Fornaris y Green Giant.* But even so, the expression used in the article is sufficiently different from it, making it less prone to an incorrect interpretation which encourages a mechanical or quantitative counting of contacts or a mere geographic localisation of the dispute.

[113] The drafting commission was composed of: Edynson Alarcón, Julio Cesar Valentín, Marco Herrera, Marcos Peña, Cruz, Peña, Fabiola Medina, Mario Pujols, Leidylin Contreras, M.A Víctor Villanueva, M.A. Nathanael Concepción, M.A. Marjorie Félix, Ana Carolina Blanco Hache, and Prof. José Carlos Fernández Rozas as rapporteur. The Global Foundation for Democracy and Development (GFDD), the Global Institute of Higher Studies in Social Sciences (IGLOBAL) and the Foundation for Institutionality and Justice (FINJUS) delivered the proposal of the draft private international law Act on 19 March 2014 to the president of the Senate of the Republic, Reinaldo Pared Pérez. The chancellor of IGLOBAL, Marcos Villamán, was in charge of submitting the said draft.

preme objectives of justice and legal certainty, the *raison d'être* of any rule of law, and adjust the provisions to the characteristics and needs of the social, economic and human reality of the Dominican Republic. More specifically, it is primarily a matter of resolving the problems of the system of private international law, characterised by its contradictions between article 3, with a strong statutory basis, and article 15 of the Civil Code with other provisions dispersed in other codes and special Laws.[114] It is, secondly, a matter of adjusting the private international law legislation to the social reality of the Dominican Republic and thirdly, of adapting the domestic solutions to the accomplishments achieved in the international codification, especially based on the experiences obtained in the Hague Conference on Private International Law at the global level and in the Specialized Inter-American Conference on Private International Law at the Latin American level. This must be done without losing sight of the solutions reached by the unification of the private international law of the European Union based on the genuinely European origin of the Dominican system. Finally, the Dominican solutions should be adapted in the universal development of the matter and to the most recent legislations, which have been converted into valid instruments for the harmonious development of the cross-border legal relations. The remarks made until now make it possible to establish the guidelines of the draft law, to justify the choice of a Special Law as an adequate legislative technique and the tripartite design of the matter regulated. It also makes it possible to glimpse the influences in the solutions adopted. It contains four Titles: Title I ("Common Provisions"); Title II ("Scope and Limits of Dominican Jurisdiction in Civil and Commercial Matters"); Title III ("Determination of Applicable Law"); and Title IV ("Recognition and Enforcement of Judgments and Foreign Instruments").

40. The comparative review of these initiatives that are being developed in the Caribbean area identifies some discrepancies, but also points to the existence of many points of coincidence with which the Model Law is in conformity. And this coincidence is extended to other legislative aspirations developed with varying degrees of success in the American hemisphere.

i) Among these a standout role is played by the laborious process followed in Argentina, with a proposed insertion in the Civil Code of a Book VIII including the private international law rules relating to international legal jurisdiction and to applicable law;[115] the Draft Bill does not deal with the problems of recognition and

http://www.funglode.org/wp-content/uploads/2013/11/proyecto-ley-derecho-internacional-privado.pdf.

[114] S.T. Castaños, "Algunas reflexiones sobre la necesidad e importancia de regular el derecho internacional privado de la República Dominicana mediante una ley especial?", *Gaceta Judicial, la Revista Jurídica de Interés General* (Dominican Republic), Año 18, nº 329, 2014; R. Campillo Celado, "Necesidad de la adopción de una ley nacional sobre Derecho internacional privado en la República Dominicana", *ibid*.

[115] The Argentinian draft code of private international law was established by a Group of Argentinian international privatists grouped under the "Commission of Studies and Establishment of the Draft Private International Law Act", appointed by the Executive (Res. M.J y DH 191/02 and Res. M.J.S y D.H. 134/02), and composed of Drs. Miguel Angel Ciuro Caldani, Eduardo L Fermé, Berta Kaller de Orchansky, Rafael Manovil, Maria Blanca Noodt Taquela, Beatriz Pallarés, Alicia Maria

enforcement of judgments and extrajudicial decisions issued abroad. As its advocates recognise, it responds: a) to a conception of legislative policy strongly geared towards the process of integration in which Argentina is engaged; b) to the legal and ethical commitment "to guarantee the defence and the adequate protection of the weak sections of society"; and c) to the coordination with the requirements of conventional law that cannot be ignored.[116] The Draft Bill is composed of 130 articles which are accompanied by two precepts which include transitional provisions. The said articles are spread over four Titles. The first of them (articles 1 to 16) provides a response to the general problems of private international law through "general provisions" referring to the object, the scope of application of the Draft Bill and to the traditional questions of the topic. Title II provides the rules on legal jurisdiction through four chapters referred to in "General Provisions", "Special Jurisdictions", "Exclusive Jurisdiction" and "International *Lis Pendens*", respectively. Title III deals with the rules on applicable law and is divided into fifteen chapters referring to the different matters systemised in: "Human Person", "Legal Persons under Public law", "Legal Persons under Private Law and Companies", "Legal Acts", "Contracts", "Securities", "Support Obligations", "Non-Contractual Liability", "Rights *in Rem*", "Copyrights", "Family Relationships", "Protection of Adults without Legal Capacity not Subject to Parental Authority", "Succession", "Insolvency and Prescription". Finally, Title Four comprises the "Transitional Provisions".[117]

ii) A further benchmark in any process of domestic codification in Latin American is the General Private International Law Act drafted in Uruguay.[118] It is an ini-

Perugini Zanetti, Horacio Daniel Biombo, Julio Cesar Rivera, Amaia Uriondo de Martinolli and Inés M. Weinberg de Roca. Later on, it was presented to the national Congress along with the "Draft of Unification of the Civil Code and the Code of Commerce" in view of their legislative treatment. http://www1.hcdn.gov.ar/ dependencias/ dsecretaria/ Periodo2004/ PDF2004/ TP2004/02abril 2004/ tp037/2016-D-04.pdf-

[116] Reference should be made in particular to the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, the Inter-American Convention of La Paz of 1984 on Conflict of Law Concerning the Adoption of Minors or the Inter-American Convention of Montevideo of 1989 on Support Obligations.

[117] *Vid*. S.L. Feldstein de Cárdenas, "La reforma del Derecho Internacional privado en la República Argentina, ¿la cenicienta se convertirá en princesa?", www.elDial.com; *id*., "La Ley de Derecho Internacional privado en la República Argentina: mito o realidad?", *Revista Jurídica del Centro de Estudiantes de la Facultad de Derecho de Buenos Aires*, n° 4, 1999, "El Proyecto argentino en materia de Derecho Internacional privado: Reforma a la italiana?", www.diritoitalia.com, December 2000; N. Magallón Elósegui, "La reforma del Derecho internacional privado en la República Argentina", *Revista Estudios Internacionales*, 14, 2007.

[118] This text comprising 63 articles incorporates the Uruguayan Draft Private International Law Act of 2008. The idea began to take shape in 1994, with the initiative brought forth by Prof. Dr. Didier Opertti Badán at the private international law institute of the law school of the *Universidad de la República*. A group made up of several members of the institute was appointed and was assigned the task of developing a first preliminary draft of the national Private International Law Act, beginning with general theory. Once it was done, they reached a dead end, especially when Prof. Opertti, as the Minister of Foreign Affairs, formally appointed a Working Group in charge of developing the preliminary draft of general private international law act, replacing the Appendix of the Civil Code created by Resolution 652/998 of the executive power, on 17/8/1998. The members of the Group, chaired by Dr. Opertti, were Drs Ronald Herbert, Eduardo Tellechea, Marcelo Solari,

tiative which, as its own explanatory note declares, has moderate claims regarding the content of the matter: it claims to update the regulations from national sources by harmonising them with the regulations from international sources already ratified by Uruguay or in whose generation this country has actively participated through its delegations, notwithstanding the need to take into account the latest solutions of the regulations from national sources in the comparative law in order to guard against an irrelevant isolation. The influence of the codification work of the CIDIP is even greater than its Mexican namesake, but the influx of the Hague conventions on private international law is also very relevant. The draft bill, which claims to replace the current Appendix to the Civil Code, has three basic sections. Section one, referring to the general principles, comprises three topics: the benchmarks which must regulate the mechanics of application of the conflict rule, the impact had by the speciality of international commercial law regarding this topic, and the definition of the domicile as the basic connecting factor of the person always adopted by our system. This section one is an innovation compared to the rules of conflict from national sources, although not compared to international sources; the section two aims to establish the law applicable to the legal categories that have been adopted as references of the system and section three aims to establish the jurisdiction of the national courts in the international sphere. It is constituted by unilateral rules, characteristic of their jurisdiction conferring nature.

41. The picture would not be complete if it did not provide some examples of private codification of private international law implemented in Latin America.

i) In the Colombian case, the proposal to develop a homogeneous body of legislation or law which groups together and completes the rules in relation to private international law found dispersed in the Colombian legal system stems[119] not simply from the necessity to promote its unification, but to organise systematically the large number of rules of this nature that appear in it. Therefore, it became imperative to develop a draft bill structuring this normative unity, whose primary objective is to carry out the adjustments that are considered relevant for adapting the national legislation to the international practices currently being developed in the global context, and in this way to integrate the multilateral conventional rules currently in force in this legal system. This task has been undertaken by Professor José Luis Marín Fuentes of the University of Medellín, who has drafted a General Private International Law Act for Colombia.[120] It aims, among other objectives: a) to unify within a single body of legislation the various rules or regulations of public international law, which are not only found in the different codes but also in the texts of conventions ratified by Colombia; b) to have a clearer, more precise, coherent, ordered, easily consultable and easily applicable regulation in relation to the

Berta Feder, Carmen González and Cecilia Fresnedo. Later on, Drs Jorge Tálice, Paul Arrighi and Gonzalo Lorenzo joined them.

[119] J.L. Marín Fuentes, *Derecho Internacional Privado*, Medellin, Editorial Universidad de Medellín, 2013, p. 17.

[120] http://www.udea.edu.co/portal/page/portal/bibliotecaSedesDependencias/unidades Academicas/ FacultadDerechoCienciasPoliticas/BilbiotecaDiseno/Archivos/01_Documentos/ proyecto_de_ley_gral_der_intrna_priv2.pdf.

said matter; c) to facilitate legal openness in the international field, seeking to adapt Colombian private international law to the current changes that are taking place in the international legal, social and commercial sphere, d) to support a harmonious development of private international relations, as well as the migratory and commercial movements of the international arena; e) to clarify the current legal provisions, and at the same time to formulate simpler and more precise rules that regulate the more complex matters of this topic; f) to make all of this information more accessible to the persons who have a direct or indirect interest in the matter, no matter what speciality they belong to; g) to spread and develop the science of private international law in the Colombian legal sphere, thereby seeking a harmonious development of its rules, most of which form part of the national legal system. The outline of the project that it develops is as follows: after a chapter dedicated to "General Provisions", it pays attention firstly to the problems of application of the rule of conflict, international legal jurisdiction and the validity of foreign judgments, and ends with the specification of the connecting factors with special emphasis on the habitual residence. In a second stage, the project grinds to a halt in the regulation of the specific institutions: natural persons, marriage, gifts, filiation, adoption, support, protection of minors, disappearance, absence and presumed death, succession, legal persons, commercial companies, assets, contractual and non-contractual obligations, non-contractual civil liability, intellectual property, insolvency, securities and prescription. The draft bill ends with a set of final provisions. It is currently being debated by the Colombian scientific community.

ii) Outside of the Caribbean area, Bolivia has published the first version its Draft Bill undertaken by Fernando Salazar-Paredes, which follows very closely the general lines of the Venezuelan Private International Law Act of 1998. In the year 2005, the Faculty of Law of the Private University of Santa Cruz de la Sierra received a request of the author to discuss the Draft Bill in various panels as was the case on 11 May 2005, entitled "Draft Bill of a Bolivian Private International Law Act". In Chapter I ("General Provisions"), after establishing the scope of application of the Law, the proposal is dedicated to the technical problems of application that result from the solution of the conflicts of laws which includes most of the principles of the Inter-American Convention on General Rules of Private International Law, which Bolivia signed in 1984. Chapter II ("On the Domicile") refers to the rules of the domicile of natural and legal persons as a medium for determining applicable law or the jurisdiction of the judges or courts, establishing the place of the domicile of persons in general and then focusing on the special cases of conjugal domicile, that of minors and adults without legal capacity subject to parental authority or guardianship and, finally, the cases when a person is not considered to be domiciled. When regulating the general concept of the domicile, it was described through the term of habitual residence, which is easy to verify, as well as the special domiciles, which include that of the married woman, granting her full autonomy with regard to the domicile of the husband. Chapter III ("On Persons") defines the law applicable to the existence, status and capacity of natural and legal persons, while Chapter IV ("On Legal Persons") deals with the extraterritorial actions of legal persons both under public law as well as private law. For its part, Chapter V ("On the Family") establishes law applicable to the validity and proof of

marriage, including the conditions of long-distance marriage and consular marriage and establishes a list of the impediments to international public policy which do not recognise marriages celebrated abroad when they violate the fundamental principles of the Bolivian system. Likewise, the text regulates the law applicable to non-matrimonial unions, and to the personal and patrimonial effects of marriage, including the requirements of validity in the marriage contracts celebrated abroad. In the same manner, it regulates the legal regime applicable to divorce and separation, the establishment of filiation, the rules applicable to international or foreign adoption and questions relating to the guardianship and other protections of persons without legal capacity, making express reference to the problem of abduction and the international transactions of minors. Regarding property law, Chapter VI ("On Assets"), in its Section One refers to the rights *in rem* and in its Section Two to copyright; and, regarding "On the Obligations", Chapter VI (and, particularly in the case of contractual obligations), the text seeks to summarise, in a set of precepts, the most relevant orientations of the Inter-American Convention on the Law Applicable to International Contracts signed by Bolivia in Mexico in 1994. Chapter VIII ("On Succession") identifies the law of the domicile of the deceased as the law applicable to succession; likewise, the capacity to make or revoke a will is entrusted to the law most favourable between the domicile and the nationality of the testator. Chapter IX ("On the Form of the Acts and the Power of Representation") proposes a necessary reform regarding the form of the acts, differentiating the law imposing a particular form, the law governing the same and the law that adjudges the equivalence for the purposes of section one. The Draft Bill also pays attention to certain characteristic matters of the law of international transactions. Thus, Chapter X ("On Foreign Currency Titles") establishes an integral set of rules of law applicable to international foreign currency titles by paying attention to the legal vacuum existing in current Bolivian legislation. Chapter XI ("On Insolvency") determines that the insolvency processes shall be governed by the law of the State of the court to which the matter is referred, and, in relation to "prescription", Chapter XII considers that it is the cause of extinction and acquisition of rights, and proposes to link the law applicable to prescription to the law applicable to the obligations or rights referred to. International legal jurisdiction matters are considered in Chapter XIII ("On Jurisdiction and Competence"). Its Section One begins by accepting the extension of express or tacit jurisdiction in patrimonial matters, unless the courts of the Republic had exclusive jurisdiction; likewise, it includes the so-called "forum of necessity". Below, in Section Two, international jurisdiction for various scenarios is specifically provided. On the "Validity of Foreign Judgments", Chapter XIV determines that the judgments and other legal resolutions issued in a foreign country will have, in Bolivia, the force established by the respective treaties. Finally, in Chapter XV ("On Procedure") the draft bill determines that the jurisdiction and the form of the procedure shall be regulated by the law of the authority before which it takes place. The plea as to jurisdiction of the Bolivian judge or court regarding the foreign judge or court will declare on its own motion, or by a separate request, in any stage or level of the proceedings.[121]

[121] http://asadip.files.wordpress.com/2009/12/ley-dipr-2.pdf.

D) Limited participation in international codification

42. From the very inception of the OAS, the American States have reaffirmed that the greatest contribution to peace is the respect for public international law. For this, the Charter of the Organisation provides that "International law is the standard of conduct of states in their reciprocal relations" and that international order among other things consists of respect for "the faithful fulfilment of obligations derived from treaties and other sources of international law". Among the matters selected for codification, in the Inter-American sphere in particular one may note those related to treaties contained in the Havana Convention on Treaties of 1928 and the Convention's rules on reservations, which at the time were set out both by the case law of the International Court of Justice as well as the Vienna Convention on the Law of Treaties. From here, the commitment to the priority application of the international treaties on private international law is present in the majority of the Latin American systems,[122] particularly in the States that are members of the Hague Conference on Private International Law, which are inspired in a "monist" conception geared towards the incorporation of the treaties into the domestic legal system.[123] Likewise, with the exception of Venezuela, the said States are parties to the Vienna Convention on the Law of Treaties of 1969, which results in a certain degree uniqueness in this area,[124] despite its inherent limitation. The CIDIP includes an express reference to the application of the rules of conflict, which has a didactic effect which is directed rather at the judge.[125] It is no accident that article 1 of the Inter-American Convention on General Rules of Private International Law of 1979 establishes that "Choice of the applicable rule of law governing facts connected with foreign law shall be subject to the provisions of this Convention and other bilateral or multilateral conventions that have been signed or may be signed in the future by the States Parties"; adding that in the absence of an international rule "the States Parties shall apply the conflict rules of their domestic law".[126] It thus grants a supplementary nature to private international law from a State source which, while evident in certain rules developed by the domestic legislator, such as article 20 of the Cuban Civil Code of 1987 or in article 12 of the Mexican Civil Code of 1987, this is not as apparent in others. Unique in this sense is article 2047.1º of the Peruvian Civil Code of 1984, which requires the "rele-

[122] G. Parra-Aranguren, "Las recientes modificaciones del DIPr en el Continente Americano", *Revista de la Facultad de Derecho (Univ. Andrés Bello)*, nº 43, 1991, pp. 357-443, esp. pp. 399-406.

[123] J.H.A. van Loon, in *The Effect of Treaties in Domestic Law* (F.J. Jacobs y S. Roberts, eds.), vol. 7, London, Sweet & Maxwell, 1987, pp. 229 *et seq.*

[124] From the point of view of the law of treaties *vid.* I. Sinclair, "The Vienna Convention on the Laws of Treaties: The Consequences of Participation and Non-participation", *Am. J. Int'l L.*, Proceeding of 78th Annual Meeting, 1984, pp. 271 *et seq.*

[125] *Vid*. H.U. Jessurun D'Oliveira, "Codification et unification du droit international privé. Problèmes de coexistence", *Unification et le droit comparé dans la théorie et la pratique. Contributions en l'honneur de Jean Georges Sauveplanne*, Deventer, Kluwer Law and Taxation Publishers, 1984, pp. 117 *et seq*.

[126] The adoption of this provision was warmly welcomed by W. Goldschmidt, "Un logro americano en el campo del DIPr", *El Derecho* (Buenos Aires), nº 4.763, 24 July 1979.

vance" of the international treaties to be "ratified" by Peru, "and if these were not" Book X of the said Code will be applied.

However, the solution to the matters of incorporation of the rules of private international law of contractual origin is generally determined in the constitutional texts or in the preliminary provisions of the Civil Codes, which at times preclude such incorporation and raise problems of domestic hierarchy of the international rules,[127] particularly if we are not dealing with agreements that are unknown by the judges due to their infrequent use, their age, or their recent nature.[128]

43. Today, the integration process of Latin America as regards private international law lies in the international treaties and in relation to these there are notable discrepancies in the area. The Inter-American system has a sufficient legal framework of conventions on legal and mutual judicial cooperation, which ranges from procedural law to family law, but the said system does not adequately cover the OHADAC zone. The effective fulfilment of judicial cooperation in this framework involves the creation of a network of central authorities and government officials as required by the existing conventions. It would be a good idea to provide the central authorities with the necessary tools to allow them to carry out their functions adequately and communicate with one another more efficiently and reliably. This shortage highlights the need to promote investigations into judicial cooperation in Latin America, because developing a stable legal framework of judicial cooperation requires prior in-depth knowledge of the reality of the actual situation of the regulations involved.

In the Latin American community there are models in which the problems of interaction of normative production procedures are very similar, resulting from the coexistence between the Civil Code, in its various versions on private international law (Napoleonic, German, Chilean and Argentinian), and the regulations of convention-based origin.[129]The most significant case is that of Mexico which, after an extended period of opposition to the convention-based rules in the regulation of issues of international legal transactions, started in 1975 a policy of incorporation of international treaties, predominantly multilateral in nature, which has resulted in a number of problems of interaction with the domestic legal system[130] in this country, which have been, in a way, rather similar to those which occurred in Spain after the process of political reform. In other models, however, the leading

[127] K. Siehr, "Codificazioni del diritto internazionale privato e convenzioni internazionali", *Problemi di riforma del diritto internazionale privato italiano*, Milan, Giuffrè, 1986, pp. 497-507.

[128] E. Jayme, "Identité culturelle et integration: le droit international privé postmoderne", *Recueil des Cours*, t. 251, 1995, pp. 68-69.

[129] It is only fair to point out the particular sensitivity to interaction problems between the Civil Code and the international treaties signed by Uruguay detailed in the work of Q. Alfonsín, *Curso de Derecho privado internacional con especial referencia al Derecho uruguayo y a los Tratados de Montevideo de 1889. Teoría del Derecho privado internacional*, Montevideo, Facultad de Derecho y Ciencias Sociales, 1955, esp. pp. 227 *et seq.*

[130] More than fifty international treaties related to private international law *lato sensu* gave a new face to the existing process of regulation in Mexico. *vid*. L. Pereznieto Castro, "El art. 133 Constitucional: una relectura", *Jurídica*, nº 25, 1994 and L. Ortíz Ahlf, "Comentarios sobre algunos problemas de Derecho internacional público que plantean las Convenciones de DIPr", *Memoria del XIII Seminario Nacional de DIPr*, Mexico, UAM, 1992, pp. 176 *et seq.*

role is played by the so-called "Treaties of Montevideo",[131] a consequence of the supranational codification euphoria that characterised the Latin American republics from the first stage of their independence and which had a fundamental impact in private international law. The polemic between the law of the nationality and the law of the domicile as a backdrop[132] as well as that of the "Bustamante Code" confer a singularity upon the international codification system of private international law in Latin America.

E) Impact of the work of the Hague Private International Law Conference

44. The Hague Conventions on Private International Law have been developed with a twofold objective: on the one hand, to provide a legal framework to private international transactions involving persons, families or companies, which provides a certain degree of certainty in the solutions; and, on the other hand, to facilitate the orderly and efficient solution of cross-border disputes, good governance and State governed by the rule of law, with respect for the diversity of legal traditions.[133] Mention should also be made of an important function such as constituting an essential instrument of support in the regional integration.[134]

In recent years, the number of States members of the Hague Conference has almost doubled. Today, almost one hundred and fifty States of the international community participate as States parties in some of the conventions emanating from this entity, which shows that there is a growing demand for specialised training and counselling services on the part of governments. Such support is very often essential for ensuring the objectives of the different conventions, such as the protection

[131] They are the result of a series of "Hispano-American Congresses" which took place from 1826 onwards. They were named "Montevideo Treaties" of 1889, revised in 1939-1940. *Vid*. M. Argúas, "The Montevideo Treaties of 1889 and 1940 and their Influence on the Unification of Private International Law in South America", in the centenary book of ILA, *The Present State of International Law and Other Essay*s, Kluwer, 1973, pp. 345-360.

[132] In the first Latin American Legal Congress, which took place in Lisbon in 1889, the polemic between the law of the nationality and of the domicile regarding personal status regulation was the main focus as well. *Vid.* M. Torres Campos, *Elementos de DIPr*, 4th ed, Madrid, Librería de F. Fé, 1913, pp. 145-146.

[133] *Vid*. G. Droz, M. Pellichet and A. Dyer, "La Conférence de La Haye de droit international privé vingt-cinq ans après la création de son bureau permanent", *Recueil des Cours*, t. 168 (1980-III), pp. 213-268; R. Graveson, "Problems of the Hague Conference of Private International Law", *Essays in honour of R. Ago*, vol. IV, Milan, Giuffrè, 1987, pp. 125 *et seq.*; M. H. van Hoogstraten, "La codification par traités en droit international privé dans le cadre de la Conférence de La Haye", *Recueil des Cours*, t. 122 (1967-III), pp. 337-435; *id*., "L'état présent de la Conférence de la Haye de droit international privé", *The Present State of International Law* (centenary book of I.L.A.), Deventer, 1973, pp. 371 *et seq.*; J.H.A. Van Loon, "Quelques réflexions sur l'unification progressive du droit international privé dans le cadre de la Conférence de La Haye", *Liber Memorialis François Laurent*, Brussels, Story-Scientia, 1989, pp. 1133-1150; A. E. von Overbeck, "La contribution de la Conférence de La Haye au développement du droit international privé", *Recueil des Cours*, t. 233 (1992-II), pp. 9-98; R. Viñas Farré, *Unificación del DIPr. Conferencia de La Haya de DIPr*, Barcelona, Bosch, 1978; W. von Steiger, "Konventionen oder Modellgesetze?", *Ann. suisse dr. int.*, vol. 17, 1970, pp. 39 *et seq*.

[134] *Vid.* G. Vieira da Costa Cerqueira, "La Conférence de La Haye de droit international privé. Une nouvelle voie pour le développement du droit international privé des régionales Organisations d'intégration économique", *Rev. dr. unif. / Unif. Rev. Law*, vol. 12, nº 4, 2007, pp. 761-793.

of children and adults, which require special and continuous implementation and supervision.

Despite its indisputable importance, the impact of the work of the Hague Conference on Private International Law in Latin America[135] and, in particular in the Caribbean area, has been very limited except in the case of Mexico or Venezuela[136] and the territories linked to France, the Netherlands and United Kingdom. In recent years, the Caribbean group increased with the integration of Costa Rica in 2011, as well as the incorporation of other countries in Latin America, such as Paraguay in 2005 and Ecuador in 2007, as a result of a Special Programme for Latin America of 2005.

This expansion had the advantage of admitting the possibility for the representatives of this group debate in Spanish, although it never became an actual working language. The invitation to participate as an observer was repeated in the Eighteenth Session of the Conference on the occasion of the deliberations of the Conference on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children that took place in October 1996, and was attended by representatives of Colombia, Costa Rica, Ecuador, Paraguay and Peru.

45. Since 2004, the Hague Conference has shown a policy of expansion resulting from the experiences of regional integration in Latin America, Eastern Europe, the Asia-Pacific region and in the whole of Africa, with a view to supporting the effective and generalised application of its conventions. For that reason, an extensive programme of activities has been developed at the regional level, which promotes cooperation and coordination between States with cultural, geographical and special linguistic ties. In turn, this aims to facilitate a most effective adaptation to the Hague Conventions to the legal culture in particular of the areas shared by the States in one region. After the conclusions and recommendations agreed in December 2004 during the Latin American Judges' Seminar on the 1980 Hague Conference on Child Abduction, the Permanent Bureau very seriously considered the need to reinforce the operation of the Hague Conventions in Latin America and to promote the participation of the States of the area in the work of the Hague Conference.

This initiative in 2005 resulted in the development of a special programme for the Latin American States with the collaboration of the governments of Argentina, United States and Spain and the contributions of various other States in the additional funding, administered by the Hague Conference International Centre for Ju-

[135] *Vid*. G. Parra-Aranguren, "The Centenary of the Hague Conférence on Private International Law", *Études de droit international en l'honneur de Pierre Lalive*, Basilea, Helbing und Lichtenhahn, 1993, pp. 111-112; D. Opertti Badán, "The Relationships between Latin American and the Hague Conference regarding the Recent Developments of Private International Law,", *A Commitment to Private International Law. Essays in honour of Hans van Loon*, Cambridge, Intersentia, 2013, pp. 421-432.

[136] Regarding the admission and acceptance of Venezuela *Vid*. G. Parra-Aranguren, "La Conferencia de La Haya sobre DIPr", *Facultad de Derecho (Univ. Andrés Bello)*, nº 37, 1986-87, pp. 204-205. Needless to say, Spain voted in favour of its admission.

dicial Studies and Technical Assistance. In essence, the objectives of this programme have to promote: a) participation of regional agents and the States in the work of the Hague Conference; b) the creation of networks between executive bodies, government authorities, the Hague Judges' Network, international organisations and the academic sector; and, c) the access to information in relation to the Hague Conference by the actors in the region, promoting knowledge and best practices under the Hague Conventions. The programme also seeks to collate information and carry out the investigation in the region in accordance with the needs of the Permanent Bureau and assist in the development and promotion of tools and guides of the Hague Conference (*v.gr.*, INCADAT, INCASTAT, iChild, e–APP and good practice guides, among others) for the persons and entities responsible for the application of the Hague Conventions. It also aims to develop and advance the work of the Hague Conference in the Spanish language and coordinate technical assistance to the Latin American States regarding training and seminars for judges, government officials, the central authority, and other officials professionals responsible for the implementation of the Hague conventions.

Officials, judges, professionals and academics of the region are now in permanent contact with the Bureau for Latin America, which either answers them directly or forwards their needs and requests to the Permanent Bureau. In the same way, many requests submitted to the region by the Permanent Bureau are forwarded to the Bureau for Latin America, which serves as a source of information and a regional conduit for many of the global initiatives that are being developed and processed in the Permanent Bureau.

It is very difficult to measure accurately the results of a programme that has been expanding its scope year after year and which is entirely related to the functioning of the Permanent Bureau. In particular, the staff of the Permanent Bureau has been heavily involved and/or have participated directly in many of the activities reported in the present document. However, we will try to highlight a few specific advances in the region during the last seven years that are directly linked to the work carried out by the Bureau for Latin America.

The participation of Latin American States in the activities of the Hague Conference occurs through the Bureau for Latin America and includes distributing questionnaires, translating preliminary documents into Spanish, sending documents and financing journeys in order to facilitate attendance at events. The Bureau facilitates the participation of the delegates of the region in the international meetings, helps the delegates and experts obtain relevant information and encourages regional dialogue through telephone conferences, regional meetings, as well as the preparation of joint proposals and working papers for the global meetings.

46. Nonetheless, the instruments that are currently in force in the OHADAC area, as limited as they may be, tend to refer to questions such as legalisation, civil procedure, child abduction and, depending on the particular circumstances sur-

rounding this matter, international adoption.[137] And this situation has not varied substantially, although in recent years Costa Rica and the Dominican Republic were incorporated into the Convention of 5 October 1961 on the apostille, and the Dominican Republic and Cuba signed the Convention of 29 May 1993 on protection of children and cooperation in respect of intercountry adoption. Likewise, the Dominican Republic is party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

As well as the above-mentioned limitation of the matters regulated there has been a lack of a proper development of the mechanisms of international legal assistance and coordination between extrajudicial authorities that help the legal practitioner implement his own principles in the Conventions. In other words, the implementation of these instruments is expensive, but often they constitute a starting point towards an adaptation of development at the domestic level and are in no way adequate by themselves to resolve the problems of international legal transactions regulated in them. Hence, a State should not be incorporated without anticipating the ensuing problems raised by its implementation in the domestic legal system, which, very often, requires a very significant budget allocation.[138]

A third limitation is focused on the block politics that are observed in the Hague Conference and that are translated into a spatial relativism so as to ensure the enforcement of the Conventions resulting from them, as shown by the action by the so-called "European Group for Private International Law" and by the EU itself. This group not only wields its influence outside of the Conference itself but, inevitably, occupies a subliminal position of power within this. For the time being, this position is focused rather on patrimonial matters, but the extension of the matters conducive to matters of civil justice offered by the "Third Pillar" designed in Maastricht, and the new possibilities experienced by the harmonisation of family law in Europe can undoubtedly be a new factor of special regional particularism and, consequently, of estrangement.

47. Finally, the possible meeting between the codification tasks carried out on both sides of the Atlantic, if both cover the same matter, can be removed by the judge from the incorporation clauses for the conventions focused on the specific area of the "conflict of laws". Starting from 1961, some of these instruments conceived in the Hague Conference contain clauses of universal application which exclude any condition of reciprocity. Although this undoubtedly offers great advantages for the unification of the rules of conflict, it can also hinder the relationships of private international law, in addition to the problems of interaction with the national rules of private international law and their incorrect application by the courts of justice. This situation can preclude the State that has assumed *erga omnes*

[137] Precisely in this matter and depending on the importance of many countries as "States of origin" of minors likely to be adopted, the Hague Conference on Private International Law was exceptionally opened to non-member States.

[138] Generally *Cf.* J.H.A. van Loon, "The Increasing Significance of International Co-operation for the Unification of Private International Law", *Forty Years On: The Evolution of Postwar Private International Law*, Deventer, 1990, p. 102.

obligations under a Convention from being incorporated into another Convention of this kind concerning the same matter[139] or from developing its own strategies for national private international law.

On the other hand, important rapprochement factors exist. One of these, as might be expected, would consist of the adoption of Spanish as a working language. At the beginning, French was the only official language; then, upon the entry of the United States in the Conference, firstly as an observer and subsequently as a member, English was added, although at the beginning the French text of the conventions had to prevail in case of dispute. This situation, which is at odds with the universal nature of this institution, although it is justified for understandable economic reasons, has not been peaceful.[140] Another rapprochement factor, as irrelevant as it may appear, is the translation into Spanish of the agreements from one common language accepted by all Latin American countries. Of course, the sole authentic text of the conventions resulting from the Conference is French and English. This issue was not new in the Conference since Germany, Austria and Switzerland have generally presented a joint text and undoubtedly this is a factor which not only prevents horrendous private translations, but favours the implementation of the Conventions in the Member States, while preventing the circulation of different versions.[141] After a series of informal initiatives in 1989 two meetings of Spanish-speaking delegates took place in the Hague, which commenced the preparatory work of revision of the texts in that language. The following year and thanks to the auspices of the Spanish Ministry of Foreign Affairs a new meeting took place in Madrid, which would lay the definitive foundations for the future unified translation of the Hague Conventions into Spanish.[142]

[139] Regarding the interplay between clauses in the codification process, *Vid.* G.A.L. Droz, "Regards sur le droit international privé comparé (Cours général de droit international privé)", *Recueil des Cours*, t. 229 (1991-IV), p. 391 as well as J.D. González Campos and A. Borrás, *Recopilation de Convenios de la Conference de La Haya de DIPr (1951-1993). Traducción al castellano*, Madrid, M. Pons, 1996, pp. 21-24.

[140] *Vid*. G. Parra-Aranguren, "La Conferencia de La Haya...", *loc cit*.,p. 216.

[141] *Ibid.*, pp. 218-220.

[142] *Cf.* A. Borrás, "Unificación de la traducción al castellano de los Convenciones de La Haya de DIPr", *REDI*, vol. XLII, 1990, pp. 703-705. It is worth recalling that during its VIIth Congress, the IHLADI had recommended to establish an inaternational legal vocabulary of the Spanish, Portuguese, American and Philippine Community (*Anuario IHLADI*, vol. 4, 1973, p. 692-693).

F) Impact of the work of the CIDIP

48. The process of codification of private international law in the Inter-American sphere has been one of the permanent legal efforts of the States of the area from the final decades of the nineteenth century. This work has been carried out by various institutions and for some years now has been taken over by the Inter-American Specialized Conference on Private International Law (CIDIP). After the start of this new codification stage in America, the main concerns have aimed, on the one hand, to coordinate the efforts undertaken to ensure that contradictory instruments are not approved and, on the other hand, to consider the mutual influence between the various processes involved, in particular that created in the Hague Conference on Private International Law.

The beginnings of this Conference were marked by the Charter of Bogotá approved in 1948, which created an Inter-American Council of Legal Experts, whose mission included the promotion as far as possible of the uniformity of American legislations. During the Third Inter-American Conference, which took place in Buenos Aires in 1967, the Council's competence was transferred to another body, the Inter-American Juridical Committee (IAJC),[143] whose mission is to "promote the progressive development and codification of international law and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation" (article 99 OAS Charter). During the 1950s, the efforts of the technical bodies of the OAS were aimed at exploring the possibility of harmonising the selection criteria of applicable law adopted by the Bustamante Code with those incorporated in the South American treaties on private international law and the *Restatement of the Law of Conflicts of Laws* prepared by the *American Law Institute*, however these efforts were not crowned by the success. Suffice to say that a draft Code developed by the IAJC did not have the support of the States members of the Organisation. This led the IAJC to abandon the global focus of the codification of this legal discipline and commence a second stage, marked by the sectoral codification of private international law. To do this, it was necessary to explore other possibilities, specifically to develop an array of instruments on the most important substantive and procedural aspects of relations of private international transactions. Thus, in 1971, the General Assembly of the OAS decided to convene the First Specialised Inter-American Conference on Private International Law (CIDIP–I),[144] which was held in Panama City from 14 to 30 January 1975, marking the beginnings of important codification work on private international law on the American continent.

[143] *Vid.* J. R. Vanossi, "El Comité Jurídico InterAmericano (reseña de su historia y de su obra)", *Revista El Derecho* (Buenos Aires), vol. 118, pp. 771-783.

[144] It should be kept in mind that such Conferences were established by Chapter XVIII of the OAS Charter. They are intergovernmental meetings whose purpose is to deal with special technical matters or to develop specific aspects of inter-American cooperation. Those meetings shall be held either when the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs so decides, on its own initiative or on the request of one of Councils or Specialised Organisations.

The CIDIP conferences have been the mechanism used in recent years for addressing issues of private international law with considerable success. One of the main characteristics of the CIDIP conferences is that the topics proposed for consideration by a particular conference are the recommendations presented by the previous CIDIP conference. The topics proposed went on to be studied in meetings of experts, which examined these highly specialised aspects of private international law.

49. The essential overview of the work of the Conference shows the following. CIDIP–I, held in Panama City in 1975, adopted the following six conventions covering international commerce and procedural law: these are the Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices; the Inter-American Convention on Conflict of Laws concerning Checks; the Inter-American Convention on International Commercial Arbitration; the Inter-American Convention on Letters Rogatory; the Inter-American Convention on the Taking of Evidence Abroad; and the Inter-American Convention on the Legal Regime of Powers of Attorney to be used Abroad.[145] The Second Conference took place in Montevideo in 1979, and also had significant results, since eight codification agreements were developed: the Inter-American Convention on Conflicts of Laws Concerning Checks; the Inter-American Convention on Conflicts of Laws Concerning Commercial Companies; the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; the Inter-American Convention on Execution of Preventive Measures; the Inter-American Convention on Proof of and Information on Foreign Law; the Inter-American Convention on Domicile of Natural Persons in Private International Law; the Inter-American Convention on General Rules of Private International Law; and the Additional Protocol to the Inter-American Convention on Letters Rogatory. The Third Conference was convened in La Paz, in 1984, with more modest results: the Inter-American Convention on Conflict of Laws concerning the Adoption of Minors; the Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law; the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments; and the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad. The CIDIP-IV Conference, which was held in Montevideo in 1989, adopted the Inter-American Convention on the International Return of Children, the Inter-American Convention on Support Obligations, and the Inter-American Convention on Contracts for the International Carriage of Goods. The CIDIP–V Conference, held in Mexico D.F. in 1994, adopted the Inter-American Convention on the Law applicable to International Contracts and the Inter-American Convention on International Traffic in Minors. Registering a certain institutional crisis, the CIDIP–VI, held at the seat of the OAS in Washington DC in 2002, adopted the Model

[145] *Vid*. R. Abarca Landero, "Convenciones interamericanas en materia procesal. Panamá, 1975", *Cooperación interamericana en los procedimientos civiles y mercantiles*, Mexico, U.N.A.M., 1982, pp. 613-678; T. B. de Maekelt, *Conferencia especializada de Derecho internacional privado (CIDIP I),* análisis y significado de las convenciones aprobadas en Panamá, 1975, Caracas, Universidad Central de Venezuela, 1979; G. Parra Aranguren, "La Primera Conferencia especializada interamericana sobre Derecho internacional privado (Panama, 1975*)*", *Libro-homenaje a la memoria de Joaquín Sánchez- Covisa*, Caracas, Ed. Sucre, 1975, pp. 253-277.

Inter-American Law on Secured Transactions; the Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road and the Non-Negotiable Inter-American Uniform Through Bill of Landing for the International Carriage of Good by the Road. Finally, the Seventh Conference on Private International Law (CIDIP–VII) was held in June 2003 and the topics of consumer protection and electronic registries were approved.

With an inspired vision and despite the common American tradition and the existence of extensive previous codification work, the CIDIP has demonstrated an extraordinary realism. It has opted for a clear rejection of the codification of the whole of private international law in order to look more closely at specific aspects of interest for the relations of international legal transactions of the States parties. What we are dealing with might be classified as "decodification" of convention-based private international law.[146] On the other hand, and inevitably, it has experienced a certain mimetism with the Hague Conference on Private International Law in the techniques of codification and in the way of dealing with the specific problems.[147] It is probably the fact that various American countries are members of the said Conference, whose claim of universality is clearly apparent, which has caused this parallel codification work. Such a similarity does not exist, however, regarding the work schedule and the matter codified. While in the Hague the "content" of private international law *strictu sensu* is considered, in the CIDIP this is much greater, since it includes specific issues of the law of international commerce (bills of exchange, promissory notes, invoices, cheques, arbitration, commercial companies and international carriage of goods by road)[148] and shows an expansive tendency in the feelings of certain delegations. In any case, as in the Hague Conference[149] itself, the greatest successes from the point of view of the incorporation of the States into the Conventions are encountered in the sphere of international procedural law and, in particular in the area of international judicial assistance.

It should be noted that the work of the CIDIP reflects a very evident prominence of three countries (Mexico, Venezuela and Uruguay), the remainder being limited to a mainly passive role, which results in a distortion between the codification efforts undertaken and the number of States that incorporate into the Conventions of the Conference.

G) Inadequacy and insufficiency of the Bustamante Code

[146] *Vid.* D. Opertti Badán, "L'œuvre de la CIDIP dans le contexte du droit international privé actuel", *Liber amicorum Georges A.L. Droz*, La Haya, Nijhoff, 1996, pp. 269-286.

[147] *Vid.* D. Opertti Badan, "Unification of Laws in the Western Hemisphere: The Contribution of the Organization of American States", *Rev. dr. unif.*, 1981, pp. 60-67.

[148] *Vid.* R. Eyzaguirre Echeverría, "Los problemas del Derecho comercial en el DIPr interamericano", *XII Curso de Derecho Internacional del Comité Jurídico Interamericano*, 1990, pp. 241-259.

[149] *Cf.* J.C. Fernández Rozas, "La cooperación judicial en los Convenios de La Haya de DIPr", *REDI*, vol. XLV, 1993, pp. 83-84.

50. The Code was adopted by the Sixth Pan-American Conference and conceived at a historical moment but dominated by a certain internationalist euphoria, which was cut short after the economic crisis of 1929. Its intention was to bring together in a single text all of matters that at the time were considered to form part of the content of private international law. For this reason, it was structured in four books related to civil matters, undoubtedly the most extensive, as well as commercial, criminal and procedural matters respectively, which were preceded by a Preliminary Title. It resulted in a text of extraordinary material heterogeneity and excessive length (437 articles) which, in many cases, went beyond the mere unification work of the practice existing until then, incorporating the regulation of a number of matters on which there was no established practice in the court rulings of the States parties. This final aspect conferred the Code a character that extended into a progressive development perspective of the rules with a significant academic component and a propensity to regulate matters falling entirely within the ambit of public international law (*v.gr*., extradition) by entering completely into matters pertaining to national sovereignty.

The presence of Latin American States in the instrument is limited: complete acceptance (Cuba, Guatemala,[150] Honduras, Brazil, Haiti, Dominican Republic, and Venezuela[151]), ratification with countless reservations and subordination to the domestic legislation (Bolivia, Costa Rica,[152] Chile,[153] Ecuador and El Salvador) and complete withdrawal (Argentina, Colombia, Mexico[154], Paraguay and Uruguay). It undoubtedly gives rise to glaring discrepancies, which are linked to the dimension related to public international law in its relations with the national constitutions which, lamentably, is not very developed from a comparative law perspective. As can be observed, within the OHADAC area, complete acceptance of the Code is only effective in Cuba, Guatemala, Honduras, Nicaragua and Panama. It was ratified with a reservation regarding some articles by Haiti, Dominican Republic and Venezuela; and, ratified with countless reservations and subordination to the do-

[150] The Code of Private International Law was adopted by Decree 1575 of the Legislative Assembly and published on 31 August 1929. Upon signature of the Convention, the Guatemalan Delegation announced "its absolute acceptance and without reservations of any kind" of the Bustamante Code.

[151] General application problems of the Bustamante Code in Venezuela and, in particular, its primacy over national law and the scope of the reservations entered by the country are detailed in J. Samtleben, "La aplicación of el Código Bustamante in Venezuela", *Libro homenaje a la memoria de Joaquín Sánchez Covisa*, Caracas, Univ. Central de Venezuela, 1975, pp. 329-333.

[152] The Code was ratified by Costa Rica on 13 December 1928 by Decree No.50 of the "Constitutional Congress" and approved by the Executive Power on 4 February 1930.

[153] The Convention was signed by the National Congress with the following reservation: "Please approve the Code of Private International Law, signed on 20 February 1928 during the VIth International American Conference of Havana, with the reservation that, in Chilean law and with relation to conflicts that may appear between Chilean and any foreign legislation, the provisions of the present or future legislation of Chile prevail over said Code in case of disagreement". It was incorporated in the legal order as Law of the Republic on 10 April 1934.

[154] The position of Mexico on this instrument is peculiar, as it was voted and approved without any reservation but never ratified. *Vid*. the comparison between the Mexican system and the Bustamante Code in order to observe their possible compatibility with a possible process of harmonisation of private international law in Latin America made by E. Helguera, "El DIPr mexicano y el Código Bustamante", *Comunicaciones mexicanas al VI Congreso International de Derecho Comparado* (Hamburg, 1962), Mexico, UNAM, 1962, pp. 29-47.

mestic legislation by Costa Rica. The considerable impact that the Bustamante Code has had in the area of the Caribbean and its broad dissemination have inevitably spawned a number of comments regarding this.

51. It goes without saying that it is very important to highlight the significant value of this Code, which has managed to establish itself as an authentic legal monument. Moreover, it has been one of the most important legal instruments of the twentieth century and at the time was the culmination of an enormous task that must be duly recognised and valued. It has also been one of the most accepted instruments in Central American countries, in Caribbean Latin America and in the north and centre of South America, and it can be said that it instituted large-scale development of sub-regional conventions. At the time, it constituted a substantial agreement between the States, which signed it for the resolution of conflicts of laws in their legal systems. It is a general codification instrument of private international law, whose scientific authority was based on the great attention that has always been given prominence in the works of private international law written in America, where it is considered to be an essential document for understanding the application of private international law[155] in practice. Upon its entry into force, the said States became pioneer States in the utilisation of adequate regulations in cases with foreign elements and also in the development and advancement of private international law.[156]

The Code has been the obligatory reference point for all of the constructions of private international law that have been achieved in Latin American in a period spanning almost a century, and in other legal circles[157], with important implications in certain key institutions such as in relation to the legal implementation of the foreign law. In this way, it has sometimes constituted a source of solutions to the problems of international transactions used by the courts of countries that did not participate in this great project, while it led national courts to interpret and implement its precepts in such a disparate manner it called for a work of unification.

As every human endeavour has its time, the Code has not been able to resist the passage of the years. It is the fruit of an era dominated by the publicist conception

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[155] J. Samtleben, *Derecho International Privado in América latina. Teoría y Práctica del Código Bustamante*, vol. I .*Parte General*, Buenos Aires, Depalma, 1983, pp. 178-189.

[156] T. de Maekelt, "El futuro del nuevo Derecho International Privado venezolano del próximo Siglo", *Revista Mexicana de DIPr*, special issue, 2000, p. 65.

[157] Spain was on the verge of integrating one of them under the Second Republic: *Vid*. I. Beato Sala: "Sobre la accesión o adhesión de España al Código americano de DIPr, denominado 'Código Bustamante'", *Revista General de Legislación y Jurisprudencia*, t. 167, 1935, pp. 603-616; F. de Castro, ¿Debe adherirse España al Código Bustamante?", *Revista de Derecho Privado*, vol. XXII, 1935, pp. 1-6; *id*., "De nuevo sobre la pretendida adhesión de España al Código Bustamante", *Revista General de Legislation y Jurisprudence*, vol. XII, 1935, pp. 306-307; M. de Lasala Llanas, "Posibilidad de la accesión de España al Código americano de DIPr ('Código Bustamante')", *Revista General de Legislación y Jurisprudencia*, vol. XXI, 1934, pp. 221-228; *id*., "¿Puede adherirse España al Código Bustamante?", *Revista General de Legislación y Jurisprudencia*, vol. XXII, 1935, pp. 217-221. G. Parra Aranguren: "El Código Bustamante: su vigencia in América y su posible ratificación por España", *Libro homenaje al Doctor L. Loreto*, Caracas, 1975, pp. 201-282; J. Quero Molares, "La adhesión de España al Código americano de DIPr", *Revista General de Legislación y Jurisprudencia*, t. 165, 1934, pp. 695-721.)

of private international law, which considered it to be part of public international law. It provided a response to a conflict of sovereignty between the States and was imbued with a strongly "Eurocentric" conception, in which the principle of the nationality was an essential tenet, compared to other conflicting conceptions that have been very firmly established in Latin America. Finally, it responds to some special circumstances of international economic transactions that occurred in the final years of the League of Nations, quite different from the situation today. Similar considerations are found in the Explanatory Note of the Venezuelan Private International Law Act, in the sense that "experience has shown us, in effect, that the rules contained in a series of isolated but congruent legislative provisions, and even in such an extensive and comprehensive organic text as the Bustamante Code, have had a latent life and have lacked in real significance".

52. From the perspective of the technique used for the Code, it must not be forgotten that it is an international convention, with all of the disadvantages that an instrument of this kind entails for a regulation of the private international situations, which require legal certainty. As every Convention, the Bustamante Code is subjected to the general rules that govern international treaties, and as such, before proceeding to the application of its precepts, it is necessary to respond to four preliminary questions.

First of all, the question arises as to whether the subject matter of the dispute falls within its substantive scope of application or, on the contrary, the domestic rules must be applied in the event of legal vacuum in the regulations; secondly, the determination of the time when the Code is applied and whether its provisions can be applied retroactively to legal situations which occurred before its entry into force; thirdly, if the State is involved in the disputed legal relationship, since, unlike the modern international normative instruments of private international law, the Bustamante Code does not contain *erga omnes* rules, and is only applied in the framework of the relations between the member States. To put it another way, and it is important to insist on this, it is not an international instrument of unification. Finally, like any applicable legal regulation, the Code is likely to enter into conflict with the successive treaties regarding the same matter signed by the States parties and such a conflict must be solved in the most cases by the law courts. If, in the early years of the twentieth century, the existence of an international agreement on the subject of private international law was the only possible source, currently this technique has been largely surpassed. Many of these questions have been provided with a timely response in the court rulings, which have repeatedly demonstrated the inadequacy of the Code as an instrument of global regulation of the system of private international law.

In addition to this, it is important to mention the antiquated nature of many of the solutions considered in the paragraph concerning international business law. The treatment of autonomy of the will of the rules governing international contracts has been completely overtaken by international events, which renders the regulation of the Code completely obsolete in this important sector of international commercial transactions. And the same can be said of the regulation of arbitration, which, starting with the work of UNCITRAL, has ventured down other roads. If the Code at

the time constituted an advanced position in the consideration of the problems of international transactions, almost one century later, during which the global economy has changed substantially, moving towards a virtually complete acceptance of a globalised market, a good deal of its responses fail to adjust to the present reality.

53. The dissemination of the Code and its unification objectives in the whole of Latin America bore no relation to its declared expectations. Even distinguished Latin American jurists have considered that the code has not gone on to be more than a mere declaration of good intentions and that its practical value and its results were not very significant. And in addition to this, as we will see below, it has had a very limited and singular application in the States that formulated general reservations.

Indeed, it is very important to bear in mind that some of the signatory States were never incorporated into this international convention, as was the case of Argentina, Paraguay, Uruguay, Colombia and Mexico, certainly for very different reasons but, in any case, due to their failure to accept a personal law different to the law of the domicile; the position of Colombia is significant, which showed a special preference for the "genuinely American" doctrine of the domicile. Other States such as Brazil, Haiti, Venezuela, Bolivia, Costa Rica, Chile, Ecuador and El Salvador formulated reservations of greater or lesser importance (the Venezuelan reservation affected no fewer than 44 articles) of the application of this instrument. Consequently, the generalised acceptance of the Code only involved a small number of countries: Cuba, Guatemala, Honduras, Nicaragua, Panama and Peru. On the whole, it can be affirmed that this instrument applies in a very limited number of Latin American States and that its implementation is very frequently brought about by the set of reservations regarding its scope of application.

As can be observed from the doctrine elicited from the Caribbean courts, the Bustamante Code has not had a significant practical application, but is merely a reference used occasionally by the parties as an accessory for justifying a particular cause of action in law (violation of public policy, maintenance of possession by the affected owner, domicile of diplomats abroad, rights of succession…) combined with the constitutional provisions or the provisions of international human rights regulations.

III. Draft of a OHADAC Model Law on Private International Law

1. Legislative technique issues

54. In matters concerning the regulation of private international relations, no national legal system can remain shackled to normative solutions generated exclusively by the domestic legislator, which are often outdated and inadequate for the current legal reality. On the contrary, it is necessary to align with the tangible achievements that are occurring in the international community and more specifically to the countries in their immediate vicinity. On the other hand, globalisation generates the need for new normative blocks to overcome the traditional problems of the sources of private international law through uniform substantive solutions. The need for the harmonisation of private international law is based on the finding that national laws tend to be inadequate for international cases and that there is a significant disparity between them, including in a geographic framework such as that of the OHADAC project.

Unification and harmonisation are terms with varying scopes. Being more flexible, harmonisation does not imply the need to adopt a specific text, but comprises an approximation of legal concepts which can be achieved through different instruments, such as the implementation of a "model law". This flexibility indicates that it constitutes an intermediate stage between the results of the comparison of legal systems and unification strictly speaking.[158] We are facing a process that is aimed at facilitating the amendment of certain rules of domestic law of the States, in order to ensure the predictability of the relations of international legal transactions. On the contrary, unification requires the existence of a joint text, either a "convention" or a "uniform law" which results from direct application for the legal practitioner. It is a process through which the States approve common legal rules or systems for governing certain aspects of the relations of international legal transactions.

This context is characterised by economic interdependence resulting from the so-called North–South dialogue and, from a legal perspective, by a dialectic between countries of common law and Romano-Germanic law. In this universal dimension, regional solidarity is superseded by the universal unification currents.[159] It is fertile soil for insisting on the idea of "legal family", which is projected in some form before international courts of private international law, with all reservations that this entails. And the result is none other than the strong tendency towards the international harmonisation of this area of the legal system. From this special perspective, the harmonisation is presented as a new reality of the cooperation on private

[158] M. Mateucci, "Les méthodes de l'unification du droit", *Annuaire de l'Unidroit*, 1956-II, pp. 40 *et seq.*; M. Ancel, "Utilité et méthodes du droit comparé. Éléments d'introduction générale à l'étude comparative des droits", *Rev. int. dr. comp.*, vol. 23, n°4, pp. 933-935.

[159] *Cf.* A.M. Garro, "Armonización y unificación del Derecho internacional privado in América latina: esfuerzos, tendencias y realidades", *España y la codificación internacional del Derecho internacional privado*, Madrid, Eurolex, 1993, pp. 347-350.

law which tries to overcome deficiencies of the traditional legal solutions through rules of conflict of laws and harmonised jurisdictions, as a means of connection between the various national systems. The decodification processes, the ever-increasing creation of special laws by countries and the increase of peculiarity have resulted in the existence of an extensive set of rules of very different nature, provenance and formulation, aimed at regulating the private law aspects of international commercial relations.

55. The international harmonisation of private international law raises particular questions that need to be addressed, even in passing. First of all, the codification requires an auspicious moment for its implementation.[160] If the codification that took place in the League of Nations was limited and was characterised by the low participation of States in the conventions on private international law, it must not be forgotten that the aftermath of the New York Stock Market crisis had an decisive impact on this fact; and, to cite but one example, if the codification of the international commercial law has experienced a serious setback, the latter must be seen in the context of the energy crisis of 1973 and 1978 and its impact in the context of the so-called "New International Economic Order". Secondly, these economic reasons are joined by others of an institutional nature, which are far from negligible, in particular, the inexistence of an international parliament, which requires linking the international codification to the phenomenon of the international organisations and, more specifically, regional ones where, generally, the particularities are less pronounced, increasing their chances of success.

The international codification of private international law also requires an adequate technique, which, in addition to the traditional use of the international convention, allows for the adoption of various texts, such as uniform laws, model laws, etc.,[161] which we have already mentioned. It is also necessary to ensure that a series of requirements are met in their various phases, in particular regarding the selection of matters to be codified, in the drafting of the preparatory texts, in the selection of the "special rapporteurs" in the plenary session, in the adoption of the final text and, finally, at the critical time of the complete or partial adoption of the resulting text by the States. A crucial aspect in this technical perspective is the selection of the appropriate normative channel: a specific type in the case of the advanced integration schemes (such as in the EU, for example, with the Directive or, especially, the Regulation), an international convention or an instrument of so-called *soft law*, for example a framework law or "model law". In the absence of a specific normative type, the latter channel, the model law, seems preferable to employing the support of a convention for guaranteeing a codification result that will always require the consent on the part of the States to being bound by the convention in question. And it should not be forgotten that if the matter selected is greatly imbued with the particular conceptions of a reduced group of States, the final text might not acquire

[160] R. de Nova, "Current Developments of Private International Law", *Am. J. Int'l.L.*, vol. 13, 1964, pp. 542 *et seq.*

[161] G.A.L. Droz, "La Conférence de La Haye de droit international privé et les méthodes d'unification du droit: Traités internationales ou lois modèles?", *Rev. int. dr. comp.*, 1961, pp. 507-521.

the sufficient number of ratifications, accessions, etc., necessary for its entry into force.

In addition to the conditions described, it is important to note that for international codification to be effective the authorities of the country or countries involved are required to provide their assistance in two different aspects. Firstly, the domestic institutions must be consistent with the international obligations assumed by the State; hence, a close coordination between the matters that have been codified and the national measures for their implementation. Secondly, and this is common to all codification enterprises, real political will is necessary to confront codification resolutely, taking into account its importance, as we have suggested in the previous pages. Thirdly, an authentic harmonisation can only be achieved based on a text which incorporates a generally accepted familiar legal language that is conducive to a similarly uniform application and judicial interpretation. It also needs to be aware that it aims to overcome the peculiarity and not to guarantee it, with all that this entails in terms of sacrifice and, where necessary, of moderation in the use of generally admitted remedies, such as national public policy.

2. Codification methodology

A) Problems of uniformity and diversity of normative techniques

56. The particularism, the need for an in-depth methodology and the hegemonic interests are not the only problems involved. As indicated before, it is important to point out the codification techniques. Apart from the experiences that are only possible in certain legal circles which also have common interpretation procedures, the traditional channels of unification have clearly shown their shortcomings, in particular the instruments based on Uniform Laws that have most often been declared to be powerless against the irresistible tendency of the States towards peculiarity. For that reason, it is important not to sanctify the international unification process and even less its formalisation through a normative production process at the international level: the uniform solution does not necessarily have to be the best and the supposed advantage of being based, quite simply, on an international text must be accepted with many reservations.[162] The phenomenon of unification, heir to the tenet of international harmony of solutions, is not an end in itself nor an abstract value. It can only be described as positive if it offers adequate solutions better adapted than the provisions enshrined in domestic rules. Strictly speaking, it serves to clarify and rationalise the domestic solutions.

No effort to unify the law may be conceived only in aprioristic and idealistic terms; in such a case, the work is doomed to failure and is reduced to mere dogmatic speculation. If, on the other hand, the phenomenon responds to some specific interests, or rather, to an accommodation of reciprocal interests by the States that initiate this particular process, the results are much more effective and the unifica-

[162] What usually follows from this idea is the old statement of M. Mateucci, according to which unification of laws is the end of all international source. *Cf*. "Introduction à l'étude systématique du droit uniforme", *Recueil des Cours*, t. 91, 1957, pp. 388-389.

tion becomes particularly important. For this reason, there are areas of the law, such as private international law, in which unification is a consubstantial element, not only at the normative level, but also at the level of judicial application. This situation is very much focused on the particular times in which we live and concrete achievements are already being felt in areas of the law which until now had remained at the margins of unification movement. The said achievements are expected to change the panorama and, in the process, they will produce a sea change in the codification techniques and, finally, in the outcome of the unification.

57. It is undeniable that the uniform law is a valid regulation technique for the unification of private international law, to the extent that it guarantees complete legal certainty and predictability for the economic operators[163] like no other law. However, it is necessary to make a series of prior observations in order to define their limits. On the one hand, consideration should be given to the intended amount of coordination, which can be different based on the distinction between the simple harmonisation of regulations, in which only the existence of a series of normative principles is apparent, although the diversity of the regulations involved is maintained, and unification strictly speaking.[164] On the other hand, a distinction should be made between unification and unified law. Unification is composed of a set of rules adopted by a group of States that share a common will to be subjected to a same regulation in certain legal relations. As for unified law, it refers to the normative result, which opens up a process of unification of the law, which can materialise through different channels: Model Laws, Uniform Laws, unification treaties and, in certain legal circles with a high degree of integration, certain specific instruments can appear in various formulations as is the case in the sphere of the European Union, especially with Directives and Regulations. The uniform law would thus be nothing other than the law unified through a single procedure: the Uniform Law, always instrumentalised through an international treaty.[165]

The best results achieved by the unification of the law have been obtained when it intervened in the regulation of the international life of individuals; that is to say, when it has operated on the very reality of private international law, albeit with different approaches than the classical tenets based on which it was developed. We are facing a regulation technique which, despite emerging outside of private international law, is a very important instrument for resolving private international situations.[166] Notwithstanding the numerous challenges involved in the unification of substantive law, including the unification of a system of private international law, it implies the best possible guarantee of legal relations across supranational areas, providing them with greater legal certainty and ensuring greater predictability of

[163] *Vid*. M.V. Cuartero Rubio, voz "Derecho uniforme", *Enciclopedia Jurídica Básica*, vol. II, Madrid, Civitas, 1995, pp. 2380-2381.

[164] J.C. Fernández Rozas, "Los procesos de unificación internacional del Derecho privado: técnicas jurídicas y valoración de resultados", *La unificación jurídica en Europa*, Seminario organizado por el Consejo General del Notariado en la UIMP (J.M. García Collantes, ed.), Madrid, Civitas, 1999, pp. 17-44.

[165] P. Chaveau, "Des conventions portant Loi Uniforme", *Journ. dr. int.*, t. 83, 1956, pp. 570-594.

[166] P. Lalive, "Tendances et méthodes en droit international privé (Cours général)", *Recueil des Cours*, t. 155, 1977-II, pp. 47-49.

the law for the legal practitioner. The solution of the problems of the international transactions through the uniform law thus appears to be a substantive response, almost always very special and, in any case, based on wide legal experience. It is not surprising therefore that we are able to affirm rigorously that a uniform law is theoretically the most effective technique of private international law, in particular among those whose preventive function makes them practically infallible.[167] It is the quintessence of the notion of "preventive private international law" or *conflict avoidance*.

58. Even today, it is evident that the legal unification of private international law, at least in the area of applicable law, offers undeniable advantages, regardless of the method used.[168] It is also undeniable that in this particular area the most effective instrument to date has been the international convention. Recourse to the unification of rules of conflict has had great prestige until quite recently through its less controversial nature and by offering better negotiation facilities in order to achieve a Convention, considering the expedience of universal or regional actions in the area.[169] Nor has there been a lack of advocates of this position claiming that the unification of generally applicable substantive rules ignores conceptual and methodological differences existing between the various legislations, which is not the case if conflicts of laws techniques are used.[170] Furthermore, on the whole, the choice between one technique or another depends on the willingness of the States to modify their legal systems and it is obvious that there is greater reticence towards the unification of the substantive law, which is intrinsically more aggressive, than for the unification of a handful of rules of private international law. In any case, the tendency towards the implementation of the rules of private international law on applicable law is not in line with the traditional codification techniques based on international conventions. Of course, this does not apply in other areas of this legal system, such as in international judicial cooperation, where the highlight of the international regulation is indeed technical and ultimately the international convention: the results of the international codification of private international law show that the greatest success has been obtained in this particular matter, both through the massive participation of the States as well as through its habitual application by the national jurisdictions.[171]

On the other hand, one should not lose sight that the international treaties that unify the rules for determining applicable law are obligatory and rigid sources, which leave the contracting States hardly any room for manoeuvre and when, as is

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[167] C.M. Schmitthoff, "International Law and Private International Law", *Select Essays on International Trade Law*, Dordrecht, 1988, pp. 533 *et seq*.

[168] H.U. Jessurun d'Oliveira, "Codification et unification…", *loc. cit*., pp. 117-130.

[169] K.H. Nadelmann, "Conflicts between Regional and International Work on Unification of Rules of Choice of Law", *Harvard Int'l L.J*., vol. 15, 1974, 213-217.

[170] H. Bauer, "Les traités et les règles de droit international privé matériel", *Rev. crit. dr. int. pr.*, 1966, p. 570.

[171] *Vid*. J.C. Fernández Rozas, "La cooperación judicial en los Convenciones de La Haya de Derecho internacional privado", *REDI*, vol. XLV, 1993, pp. 81-100; *id*., "La cooperación jurídica internacional, civil y mercantil, en el espacio hispano-luso-americano-filipino", *Anuario del Instituto Hispano-Luso-Americano*, vol. 15, 2001, pp. 13-73.

increasingly happening, the rules on applicable law provide a high degree of substantification, it presupposes a consensus which is difficult to achieve as the substantification advances inexorably.[172] The States that do not opt for the substantive orientation retained by the solution of applicable law will not appropriate it as their own. But on the other hand, it must also be recognised that the supposed "neutral" nature of the rules of conflict resulting from convention negotiations can also contribute to discouraging the States from incorporating the text since they do not see their own interests reflected in it. The neutrality resulting from the necessary consensus tends to accentuate the conservative nature of the rules of conflict included in an international treaty. This explains why international commercial relations tend to escape from this codification methodology, which is increasingly focused on non-patrimonial matters, and is better suited to substantive unification.

B) Disadvantages of international treaties as a unification method

59. Strictly speaking, the uniform law prefers to use the multilateral international treaty as a channel of incorporation into positive law, which presents advantages and disadvantages: advantages, due to providing certainty regarding the unified matter; disadvantages, due to the rigidity entailed by any codification and through the problems of adaptation offered by a text of this type in any national legal system. It is sufficient to consider that the conventions on uniform law have not generally acquired a significant number of States parties. For example, it is significant that a reduced number of States have adopted the Geneva Convention on Bills of Exchange and, above all, its absence in Anglo-Saxon countries. Apart from the characteristics mentioned in above paragraph, which are not entirely positive, the uniformity through the international treaty identifies the general and typical problems that characterise this particular codification technique regardless of its content.[173]

First of all, there is a possible "democratic deficit", due to the frequent disconnect, firstly between the drafters of the bills (who mostly act independently) and then the negotiators at the international conference, with the actual needs of the legal network that they are supposed to represent. In addition, there is a lack of coordination between the domestic and international codification processes.[174] Secondly, the unification of the convention is an expression of a somewhat antiquated positivism in the sense that it permits the States to preserve their capacity for control in the creation of the law; we are thus witnessing a parallel phenomenon to that occurring in domestic legislation, and both can be reproached for an excess of

[172] J.D. González Campos, "Efforts concertés d'unification et coexistence des règles de droit international privé dans le système étatique", *E pluribus unum. Liber amicorum G.A. Droz*, the Hague, Martinus Nijhoff Publishers, 1996, pp. 109-110.

[173] *Cf.* J.C. Fernández Rozas, "Los procesos de unificación internacional del Derecho privado…", *loc. cit*., pp. 43-44.

[174] *Vid*., regarding the Australian system, P. Brazil, "Reception of Uniform Law into National Law: an Exercice in Good Faith and Progressive Development of the Law", *Rev. dr. unif*., vol. III, 1998, pp. 318-318.

quantity and a lack of quality.[175] Thirdly, the result is very often antagonistic. It is translated by compromises that are embodied in agreements, which sacrifice the necessary simplicity of the unified rules, resulting in ambiguous texts that confront the interpreter with a number of difficulties, if not merely contradictions or incoherencies, which have become difficult to deal with in practice.[176] Fourthly, the rigidity implied by many convention-based solutions can swiftly render obsolete agreements that do not incorporate flexibilisation mechanisms in their articles with any development of international commerce. This rigidity is often the result of the absence of a distinct political power of the States, which promotes the drafting of conventions in adequacy with the social reality.[177] It is also the result of the traditional rigidity in the traditional mechanisms of the law of treaties at the time of modifying, amending or simply updating an existing convention, with the participation of all the States that originally gave their consent. Fifthly, the incorporation of the unification treaties into the domestic legal order of the States that have given their consent to be bound is a problem; this difficulty might be the origin of the appearance of various subsystems based on the effects of the rule in the convention. These subsystems typically are from two sources: one domestic and one originating from a convention.[178] A further point in this connection is the problem of the application of the convention in the different territorial units in case we are dealing with a State with more than one system of law[179]. Sixthly, the incorporation of the uniform law convention is connected to the reception and acceptance of the treaties by national judges in the process of application of the law. Judicial interpretation through legal categories of the forum or the possible action of public policy are elements that hinder the implementation of a healthy assimilation of the unified law on the part of the national authorities. Finally, the existence of the broad network of treaties in this area, which often apply successively, begets the question of their mutual relations[180] and, finally, the set of clauses on compatibility, subordination or complementarity of the international instrument, with respect to the substantive, temporal and territorial scopes of application of the convention, giving rise to the increasingly common occurrence of the "conflicts of conventions" which are sometimes difficult to resolve due to the operation of the clauses incorporated by them[181] or by keeping silent on this matter, and this apart from the set of reservations,

[175] *Cf.* B. Oppetit, "Le droit international privé, droit savant", *Recueil des Cours*, t. 234, 1992-III, vol. 234, pp., p. 422.

[176] This is particularly true when it comes to determining the scope of application of the provisions of the convention. B. Knapp, "Unification international des règles et désignation du droit applicable", *Internationalisation du droit. Mélanges el l'honneur de Yvon Loussouarn*, Paris, Dalloz, 1994, pp. 219-232.

[177] A.L. Diamond, "Conventions and their Revision", *Unification.Liber amicorum Juan Georges Sauveplanne*, *op. cit.*, 1984, pp. 45-60.

[178] S. Bariatti, *L'interpretazione delle Convenzioni internazionali di diritto uniforme*, Padova, Cedam, 1986, pp. 44 *et seq.*

[179] S. Sánchez Lorenzo, "La aplicación de los Convenciones de La Haya de Derecho internacional privado a los conflictos de leyes internos", *REDI*, vol. XLV, 1993, pp. 131 *et seq.*

[180] F. Ferrari, "The Relationship between International Uniform Contract Law Conventions", *Rev. dr. unif.*, vol. V, 2000, pp. 69-84.

[181] S. Álvarez González, "Cláusulas de compatibilidad en los Convenios de la Conferencia de La Haya", *REDI*, vol. XLV, 1993, pp. 41 *et seq.*

which are particularly relevant in the conventions applicable to international commercial transactions.

60. In addition, the uniform law conventions have the advantage of restricting their application to the relations connected to more than one system of law, coexisting with the domestic legislation of the State, which governs relations of domestic transactions. This dimension logically raises an evident problem of delimitation between both systems. It should not be overlooked that there is a close-knit interaction between the unification rules and the domestic system that receives them, so that certain distortions can result in the implementation of these. Sometimes, the mere fact of classifying a specific convention as being a "uniform" rule is a difficulty in itself.

i) Apart from the possibility of the existence of universal application of the Convention, this gives rise to a number of problems of interpretation which can lead to very disparate results and which, in any case, undermine legal certainty, which must be at the core of the regulation of international commercial transactions. It should also be noted that not all of the conventions that regulate the said transactions have this claim of universality. A good example is provided by the scope of application of the Vienna Convention of 1980 on the International Sale of Goods.

ii) The rapid development of the international codification of the uniform law has lately been generating frequent situations of conflict between Conventions,[182] which raises significant and complex problems of normative delimitation and does not favour a healthy regulation of the fundamentally commercial international transactions. This fact is caused by various factors. A revision of previous conventions frequently occurs within the same codification forum or identical matters are the object of simultaneous international codification in different fora (whose most glaring example is the conventions related to international contracts of the UN, European Union, Unidroit, etc.). And while it should not be forgotten that futile conflicts of conventions are often aroused due to a flawed interpretation of their respective scope of implementation, it is certain that the problems of delimitation between conventions are coming to light in increasing numbers every day in the domestic court rulings of any Stat. The intrinsic risks of the delimitation between conventions are manifold and result from the very possibility of ignoring the existence of international texts, and the intrinsic difficulty which, on occasions, involves the work of selection of the correct rule, of the specific convention.

iii) The said difficulties have facilitated the inclusion in the same texts of conventions of the so-called "compatibility clauses of Treaties".[183] It provides a very different scope, from the goal of eliminating any conflict in the future regarding the period of validity of the previous treaties to the application of the principle of the

[182] *Vid*. F. Majoros, *Les conventions internationales en matière de droit privé. Abrégé théorique et traité pratique*, t. I, Paris, Pedone, 1976, pp. 282 *et seq*.

[183] In the Spanish legal theory *Vid*. S. Álvarez González, "Cláusulas de compatibilidad...", *loc. cit.*, pp. 39-62.

most favourable law, passing through more complex situations depending on the interests involved or generating uncertainty and finally a freedom to act for the judge, who ultimately will be the person who decides according to his sound discretion and will chose the text of the convention applicable to the case.[184] In the latter cases, the wording of the clause finds a certain justification in a codification technique of "forging ahead", for preventing the negotiations from becoming paralysed, and not in the definitive solution of any of the problems involved.

iv) The concept according to which the uniform law conventions ultimately have to eliminate any conflict of laws that may occur in the matter subjected to the same must be discarded because the legislative uniformity does not imply the uniformity of interpretation. Commercial practice shows that the legal systems, although originating from the same family, tend to provide different and varied responses to a specific question regulated in an international unification instrument.[185] The problem of the interpretation of this type of conventions is not only one of the most debated matters, but also provides an important theoretical essence.[186] In principle, if one were to formulate a text which pre-emptively eliminated questions of interpretation and used very clearly defined categories, one would avoid problems *a posteriori*. However, on many occasions, this work is not feasible; this dilemma appears at the time of applying the rules. But the problems do not end here, since the multiplication of the international uniform law conventions has recently given rise to considerable divergences in the interpretation that is given to the same concept, not of one concept in the same convention from the perspective of different States parties, but in two or more of these instruments, including from the unilateral perspective of a single state legal practitioner. The inexistence, today, of any "autonomous concepts" such as "sale", "movable property", "business establishment" or "*factoring*", notions of varying scope based on the specific instrument, requires a coordination of the unification efforts so that the questions derived from the so-called "interpretation of conflict of conventions" are pre-emptively bypassed.[187]

C) Advantages of Model Laws

61. Given this situation, attention must be paid to the new normative techniques favourable to the unification of the law that are generated in certain international codification fora. Given the reticence of the States to be incorporated into Uniform Laws, in defence of its legal peculiarities at any cost, we turn to a more flexible

[184] According to the section "Relationship with other conventions", Art. 21 of the Rome Convention of 1980 on applicable law to contractual obligations provides that "this Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party". The art. of the Hague Convention on the law applicable to products liability has a similar approach.

[185] E. Krings, "L'opportunité de juridictions supranationales pour l'interprétation des lois uniformes", *Rev. dr. unif.*, vol. III, 1998, pp. 525-534.

[186] L. Marquis, "L'interprétation du droit commercial international uniforme: un modèle personnifié par Marc-Antoine", *Rev. int. dr. comp*., vol. 54, 2002, pp. 97-125.

[187] F. Ferrari, "I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e the necessità di un'interpretazione interconvenzionale", *Riv. dir. int. pr. proc.*, 2000, pp. 669-688.

channel, which is that of the Model law. It plays an increasingly important role for the approximation of the legislations, by providing the States with a margin of freedom to decide to regulate a specific matter based on internationally accepted standards. It also allows them to modernise their legislation in accordance with their own needs and is a valuable instrument, in the international sphere, for interpreting certain conventions and other existing international instruments, without ignoring that this is an "alternative" codification technique which provides a lower level of international cooperation often being configured more like a one-off solution than as a generic codification mechanism.

The Model Law now being presented is essentially a legislative text:

i) That the States are recommended to incorporate into domestic law. And unlike an international convention, the State which decides to adopt it will not be obliged to comply with a number of complex legal requirements inherent to treaties, such as the notification to the corresponding depository or to the other States parties. One of the reasons for ensuring compliance as much as possible with the uniform text of the Model Law is because this will ensure that the domestic rules will be more transparent and known to the foreign parties, as well as to the foreign advisors and consultants who participate in a conciliation process that takes place in the territory of a State that has adopted it.

ii) That generally tends to be adopted in an international conference after a complete preparatory discussion regarding its mere implementation, in the sense of implementing a similar process to that followed in the European Union applying the so-called "Green Paper" technique. After this adoption, States will be recommended to incorporate some or all of the resulting text into their domestic law. This does not have, however, an immediate mandatory effect – the States are not under any obligation to communicate to the codification body or other States that they have incorporated the text into their legal order – but its function is to inspire the domestic legislator at the time of codifying a specific matter covered by the said Model Law. Bearing in mind that we are dealing with a model of a legal text prepared in order to be incorporated into domestic law, it exhibits the same traits as any legal text intended to be adopted by a parliament and, consequently, it does not contain any list of "signatories" like the ones that tend to be appended to international treaties.

iii) Whose provisions can be modified or suppressed by the State in the procedure of incorporation into domestic law, avoiding the traditional practice of reservations that occurs when the text of a convention is adopted; the said practice does not tend to be well accepted in the sphere of international codification, and it is becoming more frequent in the conventions that scrupulously limit its scope under exceptional circumstances. It is certain that the harmonisation and certainty that is achieved through the model legislation is probably less than a treaty or convention. However, this apparent disadvantage may be compensated by the fact that the number of States that decide to incorporate the Model Law will probably be greater than the number of States that will be able to ratify or adhere to the convention. And, in any case, the flexibility that characterises this technique permits the legisla-

tor to adapt the model text to its domestic idiosyncrasies, for example those of a procedural nature. While it is understood that the codification institutions strongly recommend the States not to resort to this practice very often so as to improve the effectiveness of the codification work, in order to achieve a satisfactory degree of harmonisation and certainty, the States must endeavour to introduce as few changes as possible when incorporating the rules of the new Model Law into their domestic law, and they must endeavour to ensure that any change introduced is compatible with the basic principles of the Model law.

The UNCITRAL, the predominant codification institution in the commercial sector, has recently adopted this technique in an intention to overcome State misgivings and expand a series of basic principles in relation to certain institutions. A significant example has been the UNCITRAL Model Law on International Commercial Arbitration of 1985, although it has not borne the fruit expected of it; it is sufficient to verify the domestic legislator's lack of interest regarding the same in the subsequent national laws on arbitration, in particular, the Spanish Law of 1988. Another example has been the Model Law on Cross-Border Insolvency of 1997, which has been taken into account in the modern codifications and which is an example of how an adaptation of a Model Law can be investigated with procedural rules of the States. However, the technique of the Model Law has not been generalised in all of the international codification fora; for example, the Hague Conference on Private International Law has for many years abandoned the possibility of harmonising the rules of conflict of laws through model laws, techniques proposed by the North American representatives,[188] although this situation has recently been relaxed.

[188] K.H. Nadelmann and W.L.M. Reese, "The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws", Am. J. Comp. L., 1958, pp. 239-247; K. Nadelmann, "Méthodes d'unification du droit international privé. La législation uniforme et les conventions internationales", Rev. crit. dr. int. pr., 1958, pp. 37-51; A. Marín López, "La Conferencia de La Haya de Derecho internacional privado y el método de las leyes modelo", RDEA, nº 24, 1969, pp. 33-48.

62. A law adopted by the national legislator, although technical in appearance, is always the translation of an ideology and of some interests and its content implies a common policy, which requires unity of sovereignty excluded by hypotheses.[189] On the other hand, a model law exemplifies the type of text whose objective is to harmonise domestic law, while a convention is an international instrument to which the States give their official approval in order to unify certain areas of their domestic law in the international sphere.

Apart from the Venezuelan and Panamanian cases, in the OHADAC countries there is an absence of a special law that regulates at least one substantial area of the problems of international legal transactions. In general, the different areas that form the content of private international law are the following: determination of the jurisdiction of the courts of the forum and determination of applicable law in the matters relating to foreign affairs and recognition and enforcement of judgments pronounced abroad. These areas have highly inadequate regulation and are located in different legal corpora which creates serious problems to ensure a joined-up response of the solutions proposed.

This construction points to the existence of a series of general criteria: firstly, independence in dealing with conflicts of laws and jurisdictional conflicts; secondly, the attractive nature of Caribbean jurisdiction, which is considered to be unlimited and unwavering. For the Caribbean courts, the solutions in this respond to a broad concept of the notion of jurisdiction in that it appears intimately connected to national sovereignty. This is clearly seen in:

i) The pure and simple transposition at the international level of the *vis atractiva* which, in the domestic sphere, has ordinary jurisdiction for affirming in this manner the exclusive and exclusionary nature of national jurisdictions over foreign jurisdictions regarding civil transactions that have arisen on the national territory; on many occasions, this has to led to the application of the delimiting criteria of the domestic territorial jurisdiction under the circumstances connected with other countries.

ii) The recognition of the jurisdiction of the Caribbean courts in the event of a dispute arising from a contract, even if the contract includes an express and unequivocal clause to submit the disputes to a foreign jurisdiction; to put it another way, it is not customary to admit that the private will of the parties can have a derogatory effect that clearly goes against the particular requirements of international commerce if the parties submit to a foreign court. And it contrasts with the existing regulation in the arbitration laws of the OHADAC countries, in which the plea as to the arbitrator's jurisdiction is admitted unequivocally if a arbitration clause is included in the contract and the effects of the submission to courts inserted in foreign jurisdictions if a clause of this type included in the contract are not regulated in procedural laws.

[189] P. Malaurie, "Loi uniforme et conflits de lois", *Travaux Com. fr. dr. int. pr. (1964-1966)*, Paris, pp. 83-109.

3. Main thrust of the OHADAC Model Law

A) Preference for civilist regulation

63. The question is related to the consideration of the content of private international law *lato sensu* or *stricto sensu*. It is undeniable that the conception mostly maintained in Latin America has for some years followed the so-called "broad conception", which not only covers the classical sectors embodied by the French doctrine (nationality, foreignness, conflict of laws and conflict of jurisdictions),[190] being ultimately dominated by a "conflict of laws-based" and "normativist" conception, but which also extends its regulations in areas as diverse as private, criminal or employment law.[191] The most significant example of this concept can be found in the Bustamante Code and currently in particular in the Panamanian Code of Private International Law. This double extension has disappeared from modern private international law legislations and, consequently, from the educational systems, although certain laws cannot avoid being inserted in certain commercial institutions.

Since it is not a regulation limited to resolving questions related to applicable law in the area, the Model Law does not lead to a general regulation of all of private international relations, preferring to focus on the resolution of the conflicts of laws and "civil" jurisdictions although the said limitation shows notable exceptions, such as the admission of foreign public law (**article 65**), the regulation of the employment contract (**article 47**), or the consideration of certain essentially commercial institutions.

64. Precisely in relation to the latter, some reflections are called for, which endorse its disregard in the Model Law. Overcoming formalism has led to a progressive separation between private international law and the law of international transactions (which some authors call the law of international commerce or international commercial law), understood as a legal system regulating the exchange of goods and services, whose objective is to provide a response to the relations between the parties to an international, commercial or financial operation or a cross-border provision of services. Although it is certain that from a privatist perspective the study of the system of commercial exchanges is fundamentally interesting, a complete study of the regulating system of the international commercial transactions must analyse the subjects of the said exchanges, entering into the company law and the framework of its operation: the international market. This study of the international market requires not only to address its protection mechanisms, especially in the sphere of free competition and access to the special properties, but also to study the very structure of the organisation of such a market: institutional organisation, structure and operation of the various regional markets and internal organisation of international commerce. Undoubtedly, it implies exceeding a purely privatist or mer-

[190] H. Batiffol, "Les tendances doctrinales actuelles in droit international privé", *Recueil des Cours*, t. 72 (1948-1), pp. 7-8 and 34-35.

[191] J.C. Fernández Rozas, "Sobre el contenido del Derecho internacional privado", *REDI*, vol. XXXVIII, 1986, pp. 69-108.

cantilist framework and makes it necessary to introduce concepts and developments of international administrative law and international economic law; but it would be absurd to analyse the regime of international exchanges without a view of the guidelines, on which such exchanges have to be developed and brought about.

Regardless of whether the law of international transactions can be conceived from a normativist perspective that places the emphasis on the "conflict of laws",[192] the configuration of international commercial law as a special law largely rests, due to its rules, on a perspective related to the process of codification carried out in the UNCITRAL. In the light of the non-existence today of a law of international transactions common to all States, various sources of legal production, originating from institutions, conventions and domestic bodies, have to be combined. On this basis, this system can be defined as "all of the legal rules that govern the commercial operations carried out by private legal practitioners whose interests are located in different States". Based on this definition, the following notes concerning the law of international transactions can be inferred: a) it comprises a normative block that governs the international commercial activity from national provisions as well as international treaties, as well as international professional legislation or international usages; b) it makes reference to all of the operations involving the conduct of trade, where it refers to the structure of the activity (status of the directors of companies), as well as in relation to the acts expressing the business activity (sale, competition...); c) it applies to all of the commercial and financial relations that affect persons who have interests or connections located in different States.

B) Overcoming the strict rule of conflict model and its unpredictable outcome

65. The narrow scope offered to the provisions dedicated to private international law has decisively influenced the distribution of matters regulated in the civil codes for the conservation of the statutory footprint (Cuba, Dominican Republic), although it is not without its detractors.[193] For this, the Venezuelan Private International Law Act expressly dropped this conservatism by refusing in its Explanatory Note "that a time-honoured statutory system, with its own original and plausible characteristics, has been corrupted by the practice and has ultimately evolved into a system shaped by territorialist ideas, or even worse, into a cluster of uncertain and unrelated solutions".

[192] From a normativist point of view, prevailing until recently, typical commercial matters resulting of "conflicts of law" issues were governed by international business law. This conception, very widespread at the beginning of the twentieth century, resulted from the distinction made between the "civil acts" and the "acts of merchant" in the Commercial Code. Pursuant to the resolution of "conflicts of qualifications", "conflictual issues" were comprised in the acts of merchant within "international business law". It was an allusion to the body of rules concerning some legal acts or persons and which constitutes an exception to the rules of civil international law. However, it is important to take into account that, according to this conception, the guiding principle of this legal system rested on two common elements: the matter governed (act of merchant) and the regulatory standards (rule of referral or conflict).

[193] Herrera Mendoza, "La escuela estatutaria en Venezuela y su evolución hacia la territorialidad", *Estudios sobre Derecho Internacional Privado y Temas Conexos*, Caracas, El Cojo, 1960, p. 124.

66. Such a legislative technique also demonstrates that modern codification is inclined to abandon the rules of conflict with a single connecting factor to offer multiple connecting factors better adapted to the various relations and legal institutions that come in contact with international legal transactions.[194]

The rules of single connecting factor reflected the model developed in the middle of the twentieth century by the German jurist F.K. von Savigny, which, in its purest state, was the result of a normative structure composed of three elements. Firstly, of a factual situation that makes reference to the matter regulated and which can be a legal relationship ("effects of the marriage", "succession *mortis causa*", "issue of securities", etc.), an institution ("guardianship and other institutions", "adoption", "possession", "ownership", etc.) or a subjective right ("right to maintenance payment", "intellectual or industrial property rights", etc.). Secondly, of a legal consequence that is not contained in the rule itself but needs to be determined indirectly through the mandate of enforcement established by the legislator with regard to an entire national law. Thirdly, of a connecting point whose mission is to attribute legal relevance to the foreign element, which may be encountered in the factual situation, establishing in it the location of the legal relationship in order to bring about the legal consequence ("law of the common nationality of the maintenance creditor and debtor", "national law of the deceased", "law to which the parties have expressly subjected themselves", "law of the country in which they are granted", etc...).[195] It must be remembered that this author began by asserting that the function of the rule of conflict consisted in determining a substantive law among those theoretically applicable to a specific circumstance, that is to say a single law excluding all of the others, with the exception of the corrective measures imposed by the rule of conflict itself.[196]

The method outlined implied a highly automated and mechanic component which often ignored considerations of justice and which was rigidly and dogmatically focused precisely on the function of the rule, prioritising the objective of certainty and legal security above any other. No wonder it was classified with apparent success as a "blind machine".

This rigid model contrasts starkly with the approach pursued by the rules of conflict contained in modern national legislations and in international conventions after the Second World War. The said rules, while maintaining the traditional structure, incorporate a substantive results orientation that gives a wider margin of discretion to the judge or the authority that applies them. This is the so-called "functionalised multilateral rule of conflict", which continues to apply to the case either the law most closely connected to the same, or the law substantively most appro-

[194] F. Rigaux, "La méthode du conflit de lois dans les codifications et projets de codification de la dernière décennie", *Rev. crit. dr. int. pr.*, 1985, pp. 1 *et seq.*; P.M. Patocchi, *Règles de rattachement localisatrices et règles de rattachement à caractère substantiel (De quelques aspects récents de la diversification de la méthode conflictuelle en Europe)*, Geneva, Georg, 1985; E. Vassilakakis, *Orientations méthodologiques dans les codifications récentes du droit international privé en Europe*, Paris, LGDJ, 1987.

[195] F.K. von Savigny, *System des heutigen römischen Rechts*, t. VIII, Berlin, Veit und Comp., 1849.

[196] J.-L. Elhoueiss, "L'élément d'extranéité préalable en droit international privé", *Journ. dr. int.*, 2003, pp. 39 *et seq.*

priate to the same, or the law that one or several of the parties involved consider to best reflect and be able to protect their interests, provided they are in accordance with a functionalist methodological approach.

C) Abandonment of the constructions based on the law of the nationality

67. Earlier, we referred to the European influence of the Code and to its favourable orientation to considering the nationality as a determining element of the system, while other options existing in Latin American are in favour of the domicile. However, mindful of the wide acceptance of the latter criterion, the Code granted each State party the power to apply, in addition to the laws of the nationality and the domicile, the laws "adopted or henceforth adopted by its domestic legislation" (article 7). It permitted the presence of rules based on territorialist principles. This was the option of most of the Caribbean countries,[197] apart from the case of Cuba and the Dominican Republic which, faithful to the Spanish and French legal tradition, supported the principle of the nationality. It was consistent with the provisions of article 3.3º of the Civil Code. In accordance with this provision, which was also included in article 9 of the first version of the Spanish Civil Code of 1889, not only the State and the capacity of the person but also family relationships and the law of succession were governed by the principle of the nationality, which implied the possibility of a broad concept of extraterritoriality of French, Spanish or Dominican law applicable to the nationals of these countries, in any place.

However, the solution based on national law, which was justified more than one century ago in countries such as France, Italy,[198] Spain, the Netherlands, Portugal or Switzerland, has not managed to establish itself in most of the legal systems, facing a strong challenge[199] over many decades, which has been the result of an considerable polemic between the advocates of the national law and the advocates of the law of the domicile, which results in the acceptance of the habitual resi-

[197] Although it was not signed by the Caribbean States, it should be remembered that the Inter-American Convention on Domicile of Natural Persons in Private International defines the special and general domicile of natural persons through cumulative solutions that facilitate the choice of the connecting point of such individuals, notwithstanding the diversity provided by international legislations in this matter. The domicile of a natural person shall be determined by the following factors: 1) the location of the person's habitual residence or the location of its principal place of business; 2) in the absence of the foregoing by the place of mere residence; and 3) in the absence of mere residence, the place where the person is located. Regarding special domiciles, the Convention establishes that the domicile of persons without legal capacity is that of its legal representatives; that the conjugal domicile is the place where the spouses live together; that the domicile of diplomatic agents is that of their last domicile in the territory of the accrediting State; that the domicile of natural persons temporarily residing abroad in the employment or commission of their Government is that of the State which appointed them; and, finally, that when a person has his domicile in two States party to the Convention, this person shall be considered domiciled in the State in which such person resides and, if he or she resides in both, the place in which the person is located shall be preferred.

[198] E. Vitta, "Il principio di nationalità nel diritto internazionale privato italiano", *Riv. dir. int. pr. proc.*, 1981, pp. 345-363.

[199] R.D. Kollewijn, "Degenerazione del principio di nazionalità nel diritto internazionale privato moderno", *Dir. int.*, vol. XIII, 1959, pp. 508-525; Ph. Francescakis, "Les avatars du concept de domicile dans le droit international privé actuel", *Travaux Com. fr. dr. int. pr.* (1982-1984), pp. 291 *et seq*.

dence.[200] An eloquent example is found in the Belgian Code of Private International Law,[201] in the Venezuelan Private International Law Act, in the Dominican Draft Law, or in the Argentine Draft Law, where the use of the habitual residence is emphasised with the same attributive and indistinct value as the domicile of the natural persons, which was the classic attribution factor. This solution contributes powerfully to the achievement of a normative objective, which is finding increasingly acceptance.

Usually, one tends to set out and analyse the arguments that justify one or other of the solutions, identifying the respective advantages. Thus, for example, in favour of the national law, one invokes the following arguments : a) greater stability compared to the law of the domicile, since the latter can be changed more easily; b) its degree of certainty, because it is easier to determine the nationality of an individual than to locate their domicile; c) its greater adaptation to the particularities of the individual (race, religion, language…); d) its potential in the achievement of unitary solutions, for example, in relation to the members of a family. On the other hand, the advocates of the law of the domicile also produce weighty arguments: the law of the domicile a) largely conforms to the interests of emigrants in a foreign country; b) corresponds to the interests of third parties contracting with overseas contractors; c) reflects the person's better connection with the socio-economic environment where they carry on their activity; d) is the result of this integration of the foreigner in their environment, the achievement of a more cohesive society without legal distinctions between its citizens; e) creates a coincidence between the forum where the dispute is played out and the law applied by the judge; f) determines the connecting factor based on the law of the forum, without any consideration of the provisions of foreign legal systems on the nationality; g) is the best technical solution of specific problems as is the case of stateless persons or persons who hold two or more nationalities; and h) is better suited for legal persons and companies, which permits their mobility and improves their competitiveness, with a connection that can be representative of the market in which they operate.[202]

Although the polemic has reached a certain degree of abstraction, it can be affirmed that the nationality provides a predictable law, but which is frequently inadequate in relation to personal status, while the domicile will provide an adequate law but is sometimes difficult to determine; however, this does not imply that it is actually predictable. On the contrary, it may occur, especially in family relationships, that individuals presume the application of the law with which they are most connected, that is to say the law of the territory in which they are domiciled, maybe for decades; and what they find surprising is that the application of a national law does not show genuine connections with the individual anymore. In the countries in which the number of immigrants is quite high, the extension of the application of

[200] R. van Rooij, "The Concept of Domicile ("woonplaats") in Netherlands Private International Law", *Netherlands Int'l L. Rev*., vol.22, 1975, pp. 165-182.

[201] M. Verwilghen, "La place de la nationalité dans le Code de droit international belge", *loc. cit.*, pp. 1687-1701.

[202] J.V. Long, "Domicil v. Nationality", *RabelsZ*, 1953, pp. 247-262; L.I. De Winter, "Nationality or Domicile? The Present State of Affairs", *Recueil des Cours*, t. 128, 1969-III, pp. 347-504; Y. Loussouarn, "La dualité des principes de nationalité et domicile en droit international privé", *Annuaire IDI*, vol. 62-II, 1987, pp. 127-178.

the national law is not only the cause of the practical difficulties resulting from the procedural application of the foreign law, but sometimes implies social discontent resulting from the application of regulations that do not have a relevant connection to the case, which leads to solutions which, although assumed by specialists, are frequently not expected by citizens.

In any case, the domicile is a conciliatory element in the dispute between absolute territorialism and personalism, a characteristic of nationality, used as a personal factor, in that it often permits the application of the law of the forum, without abandoning the possibility of applying the foreign law.[203] At the same time, the classification of the domicile as the habitual residence responds to the universal trend to relax this concept, for the purposes of its easy approval and at the same time in order to facilitate the localisation of applicable law. This new factor makes it necessary to look into two specific matters: the interpretation of the habitual residence that one identifies with and the scope of its application, on the one hand, for natural persons and, on the other hand, as a connecting factor for determining applicable law or the jurisdiction of the courts.[204]

68. Evidently, we are not facing a merely theoretical problem since the insertion of the connection to the nationality or the connection to the domicile into a certain system of private international law is not a neutral act but reflects the interests of the State at a certain time in history. The first national private international law legislations were not neutral in welcoming one or other solution: the reason that France, Italy, Spain or Germany adopted the national law to govern the personal status in some cases obeyed political considerations of affirmation of the national identity and in others the fact of being countries of emigration at that time. It is not by chance either that the challenge of this option and the defence of the law of the domicile are prevalent in countries that are traditionally receivers of foreigners. As has been indicated, in the group of Latin American countries the national connection underpinned by the Bustamante Code is not suited to the characteristics of many of these countries that were receiving a very significant number of emigrants in those years.[205]

But this is a historic debate, to some extent belonging to the past. Currently, the option between the nationality and the domicile is motivated by other reasons and is limited to the countries of the Romano–Germanic tradition, since in other legal circles such as the United States the question is reduced to determining whether or not the US regulation applies to the case of international transaction. For that the traditional method of the rule of conflict will be replaced by the determination of whether the circumstance has sufficient connection to this country so that its courts are declared to have jurisdiction and apply their own law.

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[203] T. B. de Maekelt, *Ley venezolana de derecho internacional privado: tres años de su vigencia,* Discurso y trabajo de incorporación a la Academia de Ciencias Políticas y Sociales de la Doctora Tatiana B. de Maekelt, discurso de contestación de la Académica Doctora Hildegard Rondón de Sansó, acto celebrado el 18 de junio de 2002, Caracas, Venezuela, p. 55.

[204] *Vid. infra*, commentary on **art. 5**.

[205] A. Sánchez de Bustamante y Sirvén, "La nationalité et le domicile. Étude de droit international privé", *Rev. crit. dr. int. pr*., 1927, pp. 375 *et seq.*

Besides this change of perspective, there are conciliatory solutions. Most of the conventions of private international law that have sought to unify the solutions of the problems of international legal transactions in recent decades use as an alternative the "habitual residence". This connection offers the advantage of locating the person in a real social environment and through its nature as a factual criterion tends to avoid the difficulties engendered by both the nationality as well as the domicile.[206] Specifically, the Inter-American Convention on Domicile of Natural Persons in Private International Law of 1979 classifies the domicile firstly as the location of the habitual residence and secondly as the location of the principal place of business, in absence of these circumstances, as the place of mere residence and, in absence of this, as the place where the person is located (article 2). The article shows the factual tendency of the residence that is observed in the compared legislations.

D) Modernisation of the system

69. It is evident that with the present Model Law the conception of private international law currently in force in many countries of the Caribbean needs to change and, within it, the consideration of the legal practice sometimes conceived based on a single legislative provision derived from article 3º of the Napoleonic Code, a nutritious source of various doctrinal constructions often inaccessible for uninitiated persons.

i) One of the most innovative elements of the Model Law has been the incorporation of many solutions adopted for the international codification of private international law with the subsequent coordination of the clearly diversified laws involved. The Model Law thereby aims to reduce the delay of most of the countries of the OHADAC zone in the incorporation of rules originating from conventions in order to avoid the inevitable problems resulting from the "conflict of conventions". The choice of the said solutions has been made after scrupulously pondering the advantages and disadvantages of the various alternatives and with the belief that, in legal matters, the most acceptable solution is simply the one that results in the fewest disadvantages in practice.

ii) The Model Law is also sensitive to the evolution of society, incorporating rules adapted to the new times. In a number of its provisions it reflects the incidence of human rights in the area of private international law which are exercised in various matters and in various circumstances for guaranteeing, for example, access to justice, tempered with the logical limitation of national immunities (**articles. 7 and 77**), the rights of workers (**article 47**) or the bests interests of children (**article 38**);[207] it is also sensitive to new phenomena such as the appearance of an

[206] P. Rogerson, "Habitual Residence: The New Domicile?", *Int' Comp.L.Q.*, vol. 49, nº 1, 2000, pp. 86-107.

[207] Y. Lequette, "Le droit international privé et les droits fondamentaux", *Libertés et droits fondamentaux* (R. Cabrillac, M.A. Frison-Roche and T. Revet, dirs.), 10th ed., Paris, Dalloz, 2004, pp. 97 *et seq.*

international regulation of consumption (**article 48**). In this framework attention is paid to an increasingly common phenomenon, which is the family relationship between two persons apart from the institution of marriage, but with an affective relationship and life plan similar or very close to the traditional marriage. **Article 34** in this sense opts for a moderate solution, and does not intervene beyond where this is necessary in practice but is conscious that an increasingly more specialised regulation exists in the comparative law regarding these figures.

iii) The new reading of human rights and a central role of the person and their autonomy could not pass unnoticed in a modern regulation of private international law.[208] The idea that the parties are the best judges of their interests is an essential argument of legal construction for providing a response to multiple issues of international legal transactions.[209] Without entering into the polemic of what some years ago A.E. von Overbeck categorised as "irresistible extension of the autonomy of the will to private international law",[210] the Model Law significantly innovates the traditional consideration of the autonomy of the will, whose scope has been considerably restricted in private international law. In the Law the said autonomy is not restricted to the scope of international contracts, which itself already implies a considerable advance compared to the Bustamantine model, but is extended to other areas beyond the traditionally decentralised areas:[211] property relationships in marriage (**article 31**), divorce and legal separation (**article 33**), succession *mortis causa* (**article 41**), gifts (**article 44**), contracts in general (**article 45**), employment contracts (**article 47**), contracts concluded by consumers (**article 48**) and non-contractual obligations (**article 52**). This tendency reinforces the tendency to eliminate the conflict of laws problems in order to give rise to the connecting factor "nationality" to the action of the habitual residence in this area.

iv) From the point of view of the international process, the Model Law incorporates an overriding objective of the traditional notions of sovereignty, territorialism and jurisdictional power. For this, it clarifies the difference between international procedural jurisdiction in the civil courts and domestic procedural jurisdiction. It also facilitates the determination of the jurisdiction of the forum, the exequatur of the acts emanating from foreign authorities, reinforces international judicial coop-

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[208] S. Sánchez Lorenzo, "Posmodernismo y Derecho internacional privado", *REDI*, 1994, pp. 557-585; *id.*, "Postmodernismo e integración en el Derecho internacional privado de fin de siglo", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz (1996)*, Madrid, Tecnos, 1997, pp. 149-173.

[209] J.-Y. Carlier, *Autonomie de la volonté et statut personnel*, Brussels, Bruylant, 1992; S. Álvarez González, "Breves notas sobre la autonomía de la voluntad en Derecho internacional privado", *Soberanía del Estado y Derecho Internacional. Homenaje al Profesor Carrillo Salcedo*, vol. I, Seville, 2005, pp. 137 *et seq*.

[210] A.E. von Overbeck, "L'irrésistible extension de l'autonomie en droit international privé", *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Brussels, 1993, pp. 619 *et seq*.

[211] P. Gannagé, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille", *Rev. crit. dr. int. pr.*, 1992, pp. 425-454; J. Basedow and B. Diehl-leistner, "Das Staatangehörigkeitsprinzip im Einwanderungsland", *Nation und Staat im Internationalen Privatrecht* (E. Jayme y H.-P. Mansel, eds.), C.F. Müller, 1990, pp. 13-43; C. Kohler, "L'autonomie de la volonté en droit international privé: un principe universel. Entre libéralisme et étatisme", *Recueil des Cours*, t. 359, 2013, pp. 285-478.

eration and adapts the procedural rules. And, for their part, the rules on international enforcement of judgments also imply a modernisation and rationalisation of the current provisions, which are better adapted to the criteria of technique and justice required by one of the most resonant problems in the life of private international law. It has become evident in this regard that, for practical reasons and as a matter of good legislative technique, other questions must continue to serve as specific matters of the procedural legislation or each State in particular.

4. Options regarding its acceptance

70. Private international law is an essential instrument in the management of the relations between the companies by facilitating the movement of persons and the exchange of goods and services and by fostering integration. From the early stages of the codification work, two essential alternatives have existed. Firstly, the first alternative consists in a global focus which considers a body of rules for addressing all of the regulatory requirements of relations of international transactions, while the second alternative opts for a more gradual and progressive process, which assumes the incorporation of international instruments in relation to specific issues. Without relinquishing the latter, i.e. without ignoring the codification work through international conventions, the option followed in the OHADAC Model Law of Private International Law is to provide a response to private international transactions in the globalised world, especially within the Inter-American integration processes. But it is a mission that must be measured, prudent and attached to the consolidated practice in Caribbean countries and its most immediate environment. In addition, the Law does not exclude the application of the special provisions related to private international law and included in other laws, and consequently its regulations have a general nature. Its article 2 expressly excludes certain matters which in view of their special nature recommend their insertion in a special law, in particular arbitration[212] or bankruptcy.

The Model Law's claim of generality, however, must include some nuances in order to be accepted by a State of the OHADAC area:

i) It does not have to be an all-or-nothing option. Mechanisms currently exist, which reconcile the possible conflicting interests by favouring the autonomy of the will. The necessary specialisation of the solutions for the specific problems also offers the possibility of choosing a speciality: there is no need to deposit the entire regulation in the national law, or any in the law of the domicile, or in the law of the habitual residence. An *ad hoc* choice is not only possible, but can be desirable. From this perspective, the present Model Law must thus be seen as a balanced mechanism of autonomous rules that can be incorporated into domestic law as a

[212] Both Venezuela in Latin America and Italy in Europe have opted for this solution. The Dominican draft law as well is inclined towards such separation. In Panama, an arbitration law and a code of private international law introducing a detailed regulation of international commercial arbitration came into force in 2013 and 2014 respectively, which will certainly lead to legislative coordination issues. *Vid*. J.C. Araúz, "La porfiada reforma del arbitraje en Panamá", *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, vol. VII, nº 1, 2014, pp. 127-143.

single text or as part of a specific area of the regulation of relations of international transactions.

ii) The option is not neutral from a strictly practical point of view: it is vital to know the consequences of the option from the point of view of the application of foreign law. It is indisputable that the application of the judge's own law raises far fewer problems than the application of a foreign law. In addition, the justice dispensed in the application of an extremely well known domestic law is of better quality. Traditionally, the option for the law of the domicile tends to determine an increased percentage of application of the domestic law, given the connection that exists between domicile and legal jurisdiction. It depends on the demographic configuration of each State as well as on the particular type of dispute that is received by the courts and, also, on the criteria of international legal jurisdiction that attribute the legitimacy of action to their courts. This evolution corresponds to the social transformation of recent decades and the loss of relevance of nationality as an indicative element of special connection, in a context of wide-ranging migratory movements that frequently give rise to situations of dual nationality.

iii) A preference for use of the habitual residence as a connecting criterion facilitates the coordination with the solutions established in the most modern of international cooperation instruments, including those already involving various countries of the OHADAC zone, as is the case of The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

Against this background, the Model Law merely intends to serve as a guide for the development of the codification of private international law in the countries of the OHADAC zone and as a reference for other initiatives of this type that occur in the American hemisphere.

71. In such a much discussed area as private international law the codification work is really very complex. If an articulated text is too technical and detailed, it risks imposing abstract constructions, which often are the result of sterile academic debates, quite remote from the specific interests of the Caribbean society. Regardless of its inadequacy for the contemporary needs, the Bustamante Code has been a foretaste of this type of texts which have lacked real significance. But by opting for the contrary solution, that is to say by developing an excessively simple and generalist system, there is a risk that the legislator's responses will lose their significance and be diluted when being applied by the judges, thereby giving rise to a breach of the necessary legal certainty required by the rules of private international law.

The Model Law aims as far as possible to correct this situation in order to achieve the two ultimate objectives of justice and legal certainty in the sphere of private international relations, a *raison d'être* of any rule of law, and harness the provisions to the characteristics and needs of the social, economic and human reality of the countries of the OHADAC zone. More specifically, the objectives pursued by it seek: a) to resolve the problems of the systems of private interna-

tional law, characterised by their contradictions between codes and special laws; b) to adapt private international law legislation to the social reality of the States involved; c) to make the domestic solutions adequate for the accomplishments achieved in the international codification, especially based on the experiences obtained in the Hague Conference on Private International Law at the global level and in the Specialised Inter-American Conference on Private International Law at the Latin American level, without losing sight of the solutions reached by the unification of the private international law of the European Union based on the genuinely European origin of some OHADAC systems; and, d) to adapt the existing solutions in the countries involved in the universal development of the area and the most recent legislations, which have been converted into valid instruments for the harmonious development of the cross-border legal relations.

The principal objectives pursued by the present Model Law can therefore be synthesised into three objectives: transparency, modernity and international openness. For this, all of the provisions of private international law necessary for a Caribbean State are grouped together in a single text through simple and precise formulations.

5. Structure of the proposed text

72. The considerations made so far make it possible to lay down the guidelines of the present Law, justify the choice of a special law as an adequate legislative technique and the tripartite design of the matter regulated. It also makes it possible to distinguish the influences in the solutions adopted. Once the tripartite design is accepted – legal jurisdiction, applicable law, recognition and enforcement of judgments – the matter of the fundamental choice is raised: either to consider each private law institution individually and project onto this the solutions of each of these sections (as is reflected in part in the Swiss Private International Law Act, in the Belgian Code of Private International Law or in the Panamanian Code of Private International Law) or to introduce the institutions considered in each of the sections. It was considered that the latter option was more appropriate for allowing the legal practitioner to identify the specific matter of private international law at the time of its specific solution. The latter technique, which was adhered to by the Italian Private International Law Act, has also been followed by the Uruguayan Draft Law and by the Dominican Draft Law. In addition, the choice of a special law not only responds to the autonomous character of private international law, but for practical reasons and where and when required, it also facilitates its possible update.[213]

73. Title I ("Common provisions") is preceded by the determination of the object of the Law which is none other than the regulation of the civil and commercial private international law relations regarding the extent and limits of Caribbean jurisdiction, the determination of applicable law and the conditions of the recognition and enforcement of foreign judgments, with three express exclusions: administrative matters, commercial arbitration and bankruptcy and other analogous procedures. Two general reservations to the application of the Law are then established: firstly, the preference for the international treaties ratified by the State that incorporates the Model law, meaning that these treaties will prevail over the provisions of the Model Law and, secondly, the preference for the provisions in special laws governing private international relations. The Title ends with a paragraph dedicated to the definition of the determining criteria of the law of the domicile and the habitual residence, both of natural persons and legal persons.

74. Title II ("Scope and limits of Caribbean jurisdiction in civil and commercial matters") governs the scope of action of the courts of the State that adhered to the Model law and its limits through a series of criteria that connect the private international relations with these courts. The said criteria, classified as fora of jurisdiction, are the expression of the interests and objectives of legislative policy of the said State.

[213] T. B. de Maekelt, *Ley venezolana de derecho internacional privado: tres años de su vigencia*, *op. cit.*, p. 48.

The provisions govern the exclusive fora that assign exclusive, unique and irrevocable jurisdiction to the courts of the State that incorporated the Model Law without it being possible for the court seized of the cases to refer to another court: real estate properties that are located in their territory, companies, entries made in a register of that State, intellectual property, recognition and enforcement of judgments in the territory of that State and arbitration awards handed down abroad, protective measures that are enforceable in the said territory and the matters related to the nationality. Secondly, two general fora are inserted, which assign jurisdiction to the courts of the State that incorporate the Model Law, whatever matter is affected in the case of international transactions when a submission is made to the said courts or the domicile of the defendant is located in its territory. Thirdly, special fora are included on the subject matter; in other words, if the courts of the State that incorporate the Model Law do not have jurisdiction according to the general fora, or if it is not a matter subject to the exclusive jurisdiction, the jurisdiction of said courts can be affirmed, due to the specific subject matter, according to the special fora. Each one of these fora regulates a specific matter or an institution or specific legal relationship within a same subject matter, and consequently it is impossible for two fora to be called on to determine international legal jurisdiction in the same subject matter.

To this is added the so-called "forum of necessity", when it can be inferred from the circumstances that the situation shows some connection to the State that incorporates the Model Law and cannot include it in the international legal jurisdiction of any of the courts of the various States connected with the case, or if the reinforcement of the foreign judgment handed down is denied in the territory of the State that incorporates the Model Law. It admits the possibility that the Caribbean courts can, at the request of one party, abstain from hearing or continue hearing a case because of reasons that arise outside of the territory of the said State in a series of cases which in Anglo-Saxon terminology is determined as *foro non conveniens.*

75. Only if the matters related to international legal jurisdiction have been dispelled, and only then, will it proceed to raise the second question of private international law: the determination of applicable law. This point is dealt with in Title III, which is organised in two chapters.

The first chapter includes the so-called "regulatory rules", whose function is to provide a response to the law governing the specific case of the private international transactions and which is organised in the following manner: law of the person, family relationships, protection of persons without legal capacity and support obligations, successions and donations, contractual obligations, non-contractual obligations and goods.

As far as the special options provided by the Draft Law are concerned, it must be taken into account that:

i) The responses to the questions on applicable law provided in the law are not in conflict with the commitments in conventions that oblige the State to incorporate the Model Law; when this circumstance occurs, they use the technique of incorporation by reference of the substantive content of the Convention into the legal system with *erga omnes* effects.

ii) The normative model selected has been the model of the multilateral rule of conflict in a functional dimension, surpassing the model designed almost two centuries ago and that was in force for a good part of the twentieth century. The said model is characterised by substantification criteria, concerning the factual situation, and flexibilisation with the establishment of successive or alternative connecting points, and substantification, through the search for the fairest solution possible.

iii) As regards contractual obligations it opted for the responses provided by one of the more technically precise Inter-American legal texts, the Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico on 17 March 1994 which, among other things, leans towards the expediency of transferring to the judge the task of locating the legal system strictly connected to the contract, in the absence of choice by the parties, permitting him to resolve the question of applicable law on a case-by-case basis.

iv) Although the substantive scope of this Title pays special attention to civil and commercial matters, it has been considered appropriate to provide a response to applicable law regarding the employment contract, which, as a typical contract concluded with a weak party, has undergone a specific evolution geared to the protection of the individual worker depending on the intrinsic protective nature of the employment legislation.

76. The second section comprises a normative block related to the so-called "rules of application" addressed to the judge or the authority in charge of carrying out the mandate of the "regulatory norms". It is a block that provides responses to the so-called general problems of application of the rules of conflict and which in the past provided significant developments of court rulings and doctrine due to the intrinsic shortcomings of the rule of conflict in its original formulation. With a new model of the rule of conflict which is included in the Model Law many of these problems disappear, which is why it does not appear appropriate to produce a detailed management of these following, for example, the model incorporated in the CIDIP's Convention on General Rules of Private International Law of 1979[214] (which does not have particular prestige the Caribbean States). It justifies that this paragraph is written in very brief terms and with a simplifying objective,[215] as is

[214] The scope of application of this convention explicitly establishes the primacy of international law over private international law rules from internal source. The convention is based on the principle of *ex officio* application of foreign law, except in the case when the law of a State party has institutions or procedures which are essential to its sound application and that are not covered by the legislation of another State party. The Convention also acknowledges that interpretation shall comply with the legal system of which the applicable law is part and not with the interpretation of the judge hearing the case. Another exception to the scope of application is the rule establishing that in case of evasion of the law, the States party have the right to refuse to apply the law of another State party. The convention provides that the judicial remedies will be determined in accordance with the law of the forum (*lex fori*) and establishes mutual recognition of legal situations under the convention. Lastly, the convention requires seeking the fairest situation in case one legal relation is subject to different laws.

[215] K. Siehr, "General Problems of Private International Law in Modern Codification: *De lege lata* and *de lege ferenda*", *Yearb. Priv. Int'l L.*, vol. 7, 2005, pp. 17-61.

evident, for example, from the exclusion of the *renvoi* doctrine. Even so, it is necessary to pay attention to the rules of determination and interpretation of foreign law, including the rules of public law, as well as recourse to public policy as a functional corrective. And, without blindly relying on the tradition, it has appeared appropriate to include in the Model Law three institutions which, despite their formulation in the past, continue to play a relevant role today: the adaptation, the referral to a legal system with more than one system of law and the rights acquired.

77. The third question of private international law, in relation to the recognition and enforcement of judgments and foreign acts, is the object of Title IV, which refers to foreign judgments and is supplemented by specific provisions regarding the recognition of legal acts executed abroad with a special emphasis on the acts of voluntary jurisdiction and on a particularly sensitive matter for Caribbean society, the recognition of adoptions and the resolutions on parent-child relations pronounced abroad. Finally, the Title pays attention to a section required by a response in our legal system which is related to the effectiveness of the foreign public documents.

6. Methodology and participants

78. The methodology adopted has been based on the collection, analysis and selection of the available information on private international law of the States of the area concerned based on sectoral studies, some based on a specific State system and others focused on the common denominator of States currently sharing the same legal orientation. This is the case of the territories to some extent governed by the British, French, Dutch and US system. This methodology has made it possible to process quantitative and qualitative information in order to provide systematic and multidimensional insight into the regulations involved in the area concerned.

79. During the first stage, a questionnaire aimed at the territories and States that constitute the OHADAC zone was produced for exploring the specific solutions that are held in these in relation to private international law.

In general terms, after a brief discussion of the political, social and economic situation of the territory or State concerned, the inquiry sought a response to the following questions:

i) Membership of a regional economic integration system or a free trade treaty of the territory concerned;

ii) Connection of the legal model to a specific legal family, both from the perspective of substantive law as well as from the perspective of private international law;

iii) Characteristics of the domestic system of private international law, namely if they have a special law or reform projects in this regard, if the provisions are based

on different legal corpora, if the Civil Code is the basis of the regulation or, finally if the solutions result from the judges' own creation;

iv) List of the domestic rules that provide a response: a) to the questions of international legal jurisdiction, b) to the questions of applicable law and, c) to the questions of recognition and enforcement of judgments;

v) Participation in international treaties of private international law, with reference to the date of incorporation and the possible existence of reservations or interpretive declarations : a) Multilateral treaties (of the Hague Conference on Private International Law, on UNCITRAL, on UNIDROIT, on the Specialised Conferences on Private International Law, and others); b) bilateral treaties: on recognition and enforcement of judgments in civil and commercial matters, judicial assistance in civil matters, nationality, international adoption, protection of children, and others. This list of conventions is well known to be based on the scope of the participation of the States and territories that conform to the OHADAC in the international treaties of private international law, both in their multilateral dimension, mainly expecting those stemming from the CIDIP and the Hague Conference on Private International Law, as well as in its bilateral dimension. This examination claims two essential objectives, firstly, to observe the level of acceptance in the territory considered of the rules of conventions for the purposes that can serve as an inspiration for the planned Model Law; secondly, to verify the contradictions that these instruments could provoke in a modern regulation of private international law, and to alert the recipient States that the adoption of the draft of the Model Law, in whole or in part, would entail the risk of certain provisions being relinquished by the recipients of the same.

vi) Established court rulings of the system ("*les grands arrêts de la jurisprudence en matière de droit international privé"*). This was a matter of obtaining the broadest possible information on the decisions of the courts of the member territories and States concerned in relation to international legal transactions. The said information has been of invaluable usefulness at the time of drafting the text of the Model Law and opting for the specific solution in the regulation of the various matters to be considered.

The observations of the said questions were to be accompanied by annexes of relevant legislation and established court rulings in relation to the State or territory concerned.

80. Once the legal basis or established court rulings of each specific system are in place, a study of the responses, if any, to the three basic questions of the subject matter is carried out. These are: firstly, the regulation of international legal jurisdiction of the courts; secondly, the determination of applicable law; and, finally, the rules of recognition and enforcement of foreign judgments. This examination comprised private international law *stricto sensu*, with the inclusion of the law of the person, both natural and legal, and of the family, the law of succession, the law of obligations and contracts and the rules on rights *in rem*.

The matters in relation to the law on the international transactions, which are the subject of other paralegal studies in the framework of this project of the OHADAC zone directed by Professors Sixto Sánchez Lorenzo and Rodolfo Dávalos Fernández and which in future will require greater consideration based on the complexity of the matter, were excluded.

81. During this first stage the team was large and covered various Caribbean areas. The study of the British overseas territories was carried out by **Jose Maria del Rio Villo, Rhonson Salim and James White**, who, after evaluating the data of the survey carried out in these territories, published a document entitled "Collective Notes on Private International Law in Certain Caribbean States"; **Lukas Rass–Masson**, a researcher at Université Paris II–Assas in another document emphasised the vitality of the Dutch influence in a context of diversity of the emancipation models; finally, a study by Professor **Bertrand Ancel** at Université Paris II–Assas emphasised the current robustness of French sovereignty in the OHADAC zone, in particular on four island groups and one continental territory, inhabited by more than one hundred thousand inhabitants.

Moving on to the study of the national systems of private international law, there has been a comprehensive study, also based on the results of the previously prepared questionnaire on the Colombian rules of private international law by **Patricia Orejudo Prieto de los Mozos**, titular professor of private international law at Complutense University of Madrid and **José Luis Marín Fuentes** at University of Medellín; Professor **Ana Fernández Pérez** at University of Castilla la Mancha has paid attention to the systems of Costa Rica and Puerto Rico, the latter of very great interest for two reasons, on the one hand, because it constituted the crossroads of two traditionally contrasted models (*civil law* and *common law*) and, on the other hand, because of an important reform initiative based on a text in which Professor Symeon C. Symeonides of the University of Willamette was a special rapporteur; Professors **José Carlos Fernández Rozas** and **Rodolfo Dávalos Fernández** studied the Cuban system and the first of these professors, together with Professor **Nathanael Conception** of the Global Foundation for Democracy and Development of the Dominican Republic, the system currently in force in that country together with the detailed analysis of the Draft Private International Law Act presented to the Parliament in 2014, in which both professors participated as members of its drafting committee; turning now to Central America, the Nicaraguan rules have been examined by **Enrique Linares**, research fellow at Complutense University of Madrid, while the Honduran investigation has been carried out by Professor **Gaudy Bustillo** of the National Autonomous University of Honduras; for the study of the Panamanian system and the Draft Reform Law of 2013 **Dr. Juan Cárlos Aráuz Ramos**, Vice-Dean of the College of Lawyers of Panama, has very much taken into account the contributions of the Dean of the Faculty of Law of the University of Panama, Gilberto Boutin and the ambitious Mexican Code of Private International Law has been the subject of examination by Professor José Carlos Fernández Rozas as a member of the Mexican Academy of Private International Law and Comparative Law; finally, the complete Venezuelan model has been exhaustively examined by Dr **Claudia Madrid Martínez**, Associate Professor at the Central University of Venezuela and in the Catholic University Andrés Bello.

82. Once the results of the survey were examined, Professor **José Carlos Fernández Rozas** was named as rapporteur for producing a preliminary draft. In the said preliminary draft the model was determined from the perspective of the legislative technique based on the option of a special law. For this, the rapporteur followed the processes that were taking place in Europe based on the Austrian, Turkish, Swiss, Belgian, Italian and Polish experiences and in Latin America at very close quarters, taking as a reference the processes pursued in Venezuela and Panama, which concluded satisfactorily, and the landmarks that have been achieved in Puerto Rico, Colombia and Uruguay and, more recently, those that are being developed in Mexico and in the Dominican Republic.

The rapporteur was faced with the alternative to determine whether a system that referred to the matters regulated was more suitable or, on the contrary, it was more appropriate to introduce a tripartite structure, in which the determination of international legal jurisdiction must proceed to the solution of the problems of applicable law concluding with the questions referring to the recognition and enforcement of judgments opted for this second method.

The draft of the Model Law was presented for the consideration of the five members of the Drafting Committee of the Draft Law: Prof. Dr. **Bertrand Ancel**, Chair of Private International Law at University Paris II–Assas, Prof. Dr. **Pedro A. De Miguel Asensi**o, Chair of Private International Law at Complutense University of Madrid, Prof. Dr. **Rodolfo Dávalos Fernández**, Principal Professor at the University of Havana and Prof. Dr. **Santiago Álvarez González**, Chair of Private International Law at the University of Santiago de Compostela. After extensive debates between the Committee and the rapporteur, the latter incorporated the observations into a new text, which was again the subject of discussion and as a result the text of the Model Law, which is now being presented for discussion and debate.

83. In order to facilitate the discussion of the said text, the Drafting Committee and the rapporteur were distributed the provisions contained in the articulated text of the draft law for the purpose of drafting the appropriate remarks, where the option chosen in each one of the provisions will be justified, from a perspective of the legislative and doctrinal technique and backed up in the data provided by the responses to the pre-drafted questionnaire, with the appropriate comparative law references compared to the various legal systems of the States and territories that form the OHADAC zone and examples of the implementation. In the preparation of the said individualised commentaries the Drafting Committee had the cooperation of Professor **Rafael Arenas García** Chair of Private International Law of the Autonomous University of Barcelona and **María Pilar Jiménez Blanco**, titular professor, habilitated Chair of Private International Law at the University of Oviedo.

7. Public dissemination and debate

84. The presentation of the present Model law is not an end in itself. It is no more than the completion of a stage whose aim was to present in a codified form an entire series of studies prepared by a committee as part of a collaboration agree-

ment with ACP legal. The dissemination of these results seeks to contribute to the knowledge of the current situation and open up a debate on the strategies, instruments and management of a future codification of this matter.

Considering the great political or economic importance of the Model Law and taking into account that the proposed regulation is highly complex and very extensive, the participation with the interested agents (either through the lobbies or directly) may easily be considered as inadequate or incomplete. For this reason, it is necessary to commence with a public dissemination of this instrument with the objective of making known its points of view and any of its ideas in the study, inviting all of the agents or individuals concerned to participate in order to make them listen to their impressions, opinions or fears concerning a possible regulation of this matter. The consideration that takes hold after the publication of the results of this phase will be essential for making it possible to have sufficient perspective of the opinions and concerns shown and be able to proceed to develop a definitive proposal, which will subsequently have to be followed its legislative course.

The process of public debate that will be commenced after the adoption of the text is an excellent opportunity for the pressure groups and other interested parties to be able to make their opinions known, defend their interests, and have a conclusive influence on the decision-making process. For this, after the phase that ended with the present instrument, another more important phase will be opened with its implementation by the legal practitioners, organisations and interested individuals in order to invite them to participate in a consultation and debate process, whose results will again result in a new consolidating text. It is a matter of establishing a participation mechanism of the areas involved which permits them to present their proposals, opinions or any discrepancies in the process of adoption of the final text of the Model Law. An international congress should evaluate the results and establish the definitive drafting mechanism.

One should not forget that it is not the States but private individuals who directly experience the consequences of the rules of private international law: the submission of a dispute to other State jurisdiction or the application of one or other substantive law are consequences that directly benefit or adversely affect the individuals involved and only indirectly the States.

85. In summary, the purpose of the Model Law is to use an integrated and structured normative block:

i) To show, in a coherent manner, a series of quantitative data and qualitative information which permits an evaluation of the existing instruments, their potentialities and their demands, which can be useful for the optimisation of the codification of private international law in the delimited geographical framework. In this respect, a set of resources and essential procedures is provided for developing a draft regulation based on a justification and the drafting of the substantive content in an accessible manner to the subjects for whom it is intended.

ii) To specify the necessity, social or institutional need that one wishes to satisfy through the regulation that is going to be addressed, and to delimit the scope regu-

lated with an assessment of the legal and substantive viability and the procedures and documents that might be deemed appropriate.

In this phase the only word spoken is by the national parliaments, who are the only depositories of popular sovereignty.

ARTICLE-BY-ARTICLE COMMENTARY OF THE TEXT[216]

TITLE I

COMMON PROVISIONS

Article 1. ***Subject matter of the law.*** **1. This law sets the rules governing private international relations in civil and commercial matters. It governs, in particular:**

i) the scope and limits of Caribbean jurisdiction;

ii) the determination of the applicable law;

iii) the recognition and enforcement of foreign decisions.

2. Private relationships are termed international when they relate to more than one legal order via their constituent elements, corresponding to the person of their subjects, to their subject matter or to their creation.

86. Article 1 is very classically an opening provision describing the subject matter of the model law and thus indicating its ambition.[217] While not immoderate, that ambition is relatively far-reaching. While certain contemporary legislations choose to deal only with conflict of laws or with issues of applicable law – this is the case of the Polish law dated 4 February 2011 or of the Dutch law dated 19 May 2011 introducing a book X into the Civil Code of the Netherlands – and to leave jurisdictional conflicts, i.e. issues of international jurisdiction and of international circulation of judgments and public acts, to be covered by a separate statute or by a Code of civil procedure, the model law proposes to encompass jointly all three groups of problems encountered by the international development of a private law relationship. The design is thus to offer a codification of the objective part of private inter-

[216] **General observation:** The term "Caribbean" of the present Law refers to the State and the relations with the State that decides to adopt the Model Law.

[217] CONC.: Arts. 1.2 and 2 of the Panamanian Code of PIL; art. 1 of the Swiss PIL Act; art. 1 of the Italian PIL Act; art. 2 of the Belgian Code of PIL; art. 1 of the Polish PIL Act; art. 1 of the Bolivian draft law; art. 1 of the Dominican draft law; art. 1 of the Puerto Rican draft law; art. 1 of the Argentine draft law; art. 1 of the Colombian draft law; art. 2 of the Mexican draft law; art. 1 of the Uruguayan draft law.

national law.[218] Inspired as it is by the aim of harmonising the legal treatment of cross-border relations in order to facilitate them inside the Caribbean zone, the OHADAC programme does not plan to set up a common system of substantive law in civil and commercial matters, possibly organised into several codes (civil code, commercial code, code of civil procedure) among which the provisions relating to conflict of laws and conflicts of jurisdiction could be distributed, as they are in various States. At the present time, that would be a rash undertaking. More realistically and wisely, the model law assumes the persistence, for some time yet, of a certain degree of diversity safeguarding the identity of each legal order. Consequently, it does not aim at affecting or modifying the domestic law of the States concerned. However, since a model law constitutes no more than an offer of legislation, it may, once it has been received by a State and to the extent that the latter deems it necessary, be divided up and distributed between the various legislative monuments in force in that State. Such dismemberment cannot, however, be recommended; indeed, by thus subjecting the rules of private international law to domestic law, one would incur the risk of encouraging divergent interpretations and of jeopardizing the consistency of the whole.[219]

87. The make-up of the model law, if not its structure, corresponds to that of the Italian Act n°218 dated 31 May 1995 reforming the Italian system of private international law, or to that of the Venezuelan private international law Act dated 6 August 1998, or again to that of the Belgian Code of private international Law (Act dated 16 July 2004). We may also refer here to the precedent constituted by the Swiss private international law Act (French acronym LDIP) dated 18 December 1987; however, while the spectrum of subject matter is comparable, the overall economy of the text is different and more akin to the first draft of the private international law Act of the Dominican Republic issued in 2013.

The model law, indeed, includes three central parts, preceded by a Part I containing some common provisions and followed by a Part V devoted to the final provisions.

88. Article 1 specifies the focus of all of those rules, i.e. private relationships of a civil and commercial nature having an international character.

Its paragraph 2 provides some clarifications regarding the *internationality* liable to characterise private law relationships. A relationship is international when one or more of its constituent elements relates to more than one legal order. The formula thus opts for a legal conception of internationality, which in such a general text is justified by the inadequacy of the economic criterion; based as it is on a cross-border movement of economic values, that criterion, on the one hand, is legitimate only as regards the application of a limited group of the non–State rules specific to some aspects of international trade placed under the heading of *jus mercatorum* and, on the other hand, it is aimed only at a limited fraction of all the relationships

[218] Establishing the international regime of private law relationships, the objective part contrasts with the subjective part relating to the condition of persons, i.e. nationality and condition of foreigners.

[219] *Vid*. *infra* commentary on art. 3.2.

apprehended by the model law, to which a much wider substantive field has been assigned. Moreover, the legal criterion is the one chosen by most modern private international law statutes when they see fit to define internationality (see the draft laws of Mexico, Panama and Uruguay and the Venezuelan, Polish and Rumanian legislation).

The elements determining internationality relate either to the person of the subjects or to the subject matter, or again to the source of the relationship; we may thus be dealing with the nationality of one of the parties or with the latter's domicile or habitual residence, or with the location of the personal or real asset or with the place of performance of the obligation, or finally with the place where the contract was made or where the prejudicial event occurred, or again with the authority intervening or having intervened in the creation of the relationship. Inasmuch as they attest that the private relationship also develops in a legal order distinct from the one within which it is being interpreted, but just as well equipped to resolve legal issues, those elements, usually referred to as elements of foreign status, indicate the risk of a "conflict", that is, a hesitation arising from the competition between legal systems concerning either the determination of the courts of competent jurisdiction or that of the applicable law, or possibly the authority of the decision taken abroad.

89. The private relationships having an international character to which the model law is devoted pertain, as specified by Article 1, to *civil and commercial matters*. This specification, which links up with the concept of private law, is borrowed directly from the law of the European Union,[220] understood according to the interpretation by the Court of Justice of the Brussels Convention dated 27 September 1968 (now Brussels I Regulation); its function is to delimit the scope of those instruments and in particular to eliminate public law relationships. Such borrowing for such a purpose may be justified as follows: considering the fluctuating character of the distinction between private and public law in the systems where it exists and plays a major role and its slightly enigmatic nature for those systems which, while not ignoring it, do not grant it a cardinal role, the Court of Justice has undertaken to build up an autonomous interpretation answering the objectives and system of the convention within the framework of the general principles shared by all the national systems; now, the States belonging to the OHADAC area are, no less than the European Union, heirs to various traditions inside the Romano-Germanic and Anglo-American families, and the criterion of matters of public law, founded by the Court on "the intervention of a public authority acting in the exercise of its prerogatives of public power", appeared able to form an operating foundation, on the basis of which all the States having adopted the model law will have to develop the concept according to the requirements of cooperation to which they will have agreed.

[220] It no doubt borrowed it from the conventions of the Hague relating to procedure (for instance: 1st March 1954 [civil procedure], 15 November 1965 [notifications], 18 March 1970 [securing evidence], 1st February 1971 [with a protocol dated the same day: recognition and enforcement of judgments] or 25 October 1980 [access to justice]), but presently gives it a more general bearing. *Vid.* Regulation (EC) n° 595/2008 and Regulation (EC) n°846/2007.

Article 2. *Matters excluded.* The following are excluded from the scope of this law:

i) tax, customs and administrative matters;

ii) Social Security;

iii) commercial arbitration;

iv) bankruptcy and other analogous proceedings.

90. Article 2, whose European ancestry is obvious,[221] contributes some additional clarifications regarding the scope covered by the model law, as does the Dominican draft law.

91. It thus confirms **Article 1** by excluding *tax, customs and administrative matters*, which from its point of view relate to public law. It is by no means useless to insist somewhat on this point: historically speaking, the division between private and public law is a corollary of the distinction that structures the organisation of the judiciary in some States by distinguishing between judicial and administrative courts. Now, the correspondence between authorities and subject matter is not always strict; in the French system, for instance, the jurisdiction with which the judicial courts are endowed in tax or customs matters may blur the dividing lines. Article 2, i) substitutes its own architecture for national creations which may have been rendered somewhat baroque by their specific historical experience.[222]

92. *Disputes in Social Security matters* are also excluded from the scope of the model law; this is justified and measured by their mixed nature, which in many regards bears the mark of public law. The relations between provident institutions and either of the two categories of contributors, i.e. employers and employees or eligible parties, do not come under the model law. Such relations are set up on the mode of compulsory subjection or membership rather than of equality and autonomy of the parties involved. Conversely, remedies against third parties responsible for any damage caused by the institution having compensated the insured do not bear the mark of such subjection and come within the scope of the model law, provided that they comply with ordinary law.

93. *Arbitration* has also been removed from the scope of the model law. It suffices here to recall that international arbitration has already given rise to quite a dense network of international agreements and that it may not be advisable to dis-

[221] Regulation (EC) n° 44/2001, Art. 1, § 2 (EU n°1215/2013, art. 1 §2); Lugano Convention dated 16 September 1988, Art. 1 (Lugano Convention dated 30 October 2007, Art. 1 §2); Dominican draft law, art. 2.

[222] CONC.: Art. 2 of the Dominican draft law.

turb their operation by introducing additional special norms. Indeed, within the framework of the OHADAC programme such an exclusion hardly needs to be justified; arbitration forms the subject matter of a specific study aimed at preparing model rules. Nevertheless, the model law includes some rare provisions whose purpose is to ensure coordination between state courts and arbitration activities.

In contrast to the Dominican draft law, the exclusion concerns not only international commercial arbitration, but also civil arbitration, or more precisely arbitration inasmuch as it relates to differences pertaining to civil law. In fact, at the international level the role and characteristics of this method of resolving disputes do not vary significantly depending on whether the matter to be settled is a quarrel between heirs or a difference between a supplier and his customer.

94. Finally, Article 2, iv) rules out *insolvency proceedings*, that is, "proceedings relating to […] debtors who have declared themselves unable to meet their liabilities, insolvency or the collapse of the debtor's creditworthiness, which involve the intervention of the courts culminating in the compulsory 'liquidation des biens' [liquidation of assets] […] or at least in supervision by the courts";[223] this is how the Court of Justice of the European Community marks out the scope of the exclusion provided by Article 1st, §27 of the 1968 Brussels Convention, while specifying that that exclusion concerns only actions that "derive directly from the bankruptcy and [...] [are] closely connected with the proceedings for the 'liquidation des biens' or the 'règlement judiciaire'"[224]. It follows, for instance, that the incrimination of the officers of a firm on the basis of the amount of the liabilities is outside the scope of the model law, whereas claims against the debtor aimed at securing payment for materials purchased in order to continue a company's operation during insolvency proceedings is not affected by the exclusion and must comply with the rules of the model law. Thus defined, the exclusion is justified both by the nature of the proceedings and by their modalities, which entrust the public authorities with an important role; we are dealing with a procedure which is a substitute for compulsory enforcement and which, in the common interest of all the operators on a market, aims at stabilizing business relations. Bankruptcy is not viewed as a mere matter of private interest.

95. Unlike the Brussels I system, Article 2 of the model law does not exclude the status and capacity of natural persons, marital property systems, wills and inheritance, all of which naturally come within the general scope of private international law.

But it must also be stressed that an exclusion that strikes at the principal subject matter of a dispute may extend to issues touching on those non-excluded matters when the latter are raised incidentally. Likewise, conversely, a court to which a dispute concerning, on a principal basis, a non-excluded issue has been referred may, depending on what its procedural law authorises, deal with incidental issues that fall within the scope of the exclusion.

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[223] CJEC 22 February 1979, case 133/78, *Gourdain c. Nadler*
[224] *Ibid*.

Article 3. ***International treaties.*** **1. The provisions of this law apply inasmuch as they are in accordance with the provisions of the international treaties to which the Caribbean is party. In the event of a conflict, the provisions of the treaties shall prevail.**

2. For the construction of such treaties, their international character and their required uniform interpretation shall be taken into account.

96. The first paragraph of this Article 3 establishes or confirms a hierarchy between norms within the legal order of a State adopting the model law.[225] That adoption, which constitutes a unilateral normative step on the part of the State, cannot result in the alteration of any commitments undertaken by treaty by the latter towards one or several other States to introduce into its legal order (and therefore to oblige its internal organs to enforce) the norms reflecting the provisions of the treaty. Paragraph 1 simply recalls a solution which has gained very wide acceptance in constitutional law, establishing the supremacy of international treaties, or more exactly of the norms whose introduction into the domestic system they command; this supremacy, which results from the international commitment, impacts the rules unilaterally adopted by the State and pertaining to its national legislation, even when they are borrowed from an instrument of international harmonisation such as a model law.

97. Paragraph 2 reiterates a guideline found in several multilateral international treaties, which aims at fostering a common interpretation between the States that are party to them. This is done by replacing the reference to the legislative principles, categories and policies governing the operation of the system of domestic law, which varies from one legal order to another, by a reference common to the principles and ends chosen by the treaty; this is what is meant by "taking into account the international character" of the latter's provisions.

To the extent that the rules deriving from the model law belong, within the legal order of a State adopting it, to the national legal system, one and the same situation may come to be perceived differently, as regards its qualification or the effects it produces, according to whether it is considered from the viewpoint of the treaty or from that of the national system. Paragraph 2 rules out the resolution of such diver-

[225] CONC.: Art. 1.1 of the Panamanian Code of PIL; art. 1.2 of the Swiss PIL Act; art. 2 of the Italian PIL Act; art. 2 of the Belgian Code of PIL; art. 2557.3 of the Romanian code of civil procedure; art. 1 of the Venezuelan PIL Act; art. 4 of the Treaty of the Hague of 11 May 1951 introducing a Uniform Law on Private International Law for Benelux; art. 7.1 of the Vienna convention of 11 April 1980 on Contracts for the International Sale of Goods; Art. 18 of the Roma Convention of 19 June 1980 on the Law Applicable to Contractual Obligations; art. 38 of the preliminary draft of the Convention of the Hague Conference of 1999 on Jurisdiction and Foreign Judgments in Civil and Commercial Matters; art. 2 of the Argentine draft law; art. 3 Dominican draft law; art. 3, g) and h) of the Mexican draft law; art. 1.1 of the Uruguayan draft law.

gences or antinomies in favour of national conceptions resulting from the 'naturalisation' of the model law.

98. From a rational viewpoint, such a solution is not mandatory. A formulation inciting cooperation between the States having adopted the model law could, without modifying §1, have stated:

Art. 3. *International treaties. 1. The provisions of this law shall apply inasmuch as they are in agreement with the provisions of the International Treaties to which the Caribbean is party. In the event of a conflict, the provisions of the treaties shall prevail.*

2. However, as in the interpretation of such treaties, the construction of the provisions of this law shall take into account their international nature and their required uniform interpretation.

The guideline to interpretation resulting from the above wording is completely different; it would doubtless not modify in any way the requirement of referring to the principles and objectives of the treaty, as well as to its economy, when dealing with the interpretation of the rule laid down by that treaty, and neither would it challenge the supremacy of treaty-derived law, but it would loosen the bond between the rules of the model law and the national system of domestic law into which their adoption would spontaneously integrate them, and would link the interpretation of those rules to the principles and objectives of the model law. Such an inflexion might incidentally reduce the risks of discordance with the treaty-derived law. Above all, its first virtue would be to foster the harmonisation of private international law solutions between the various States having adopted the model law, thereby guaranteeing the consistency of their approach.

But we must not conceal the practical difficulties which would be encountered in following such a guideline, as it involves taking into account elements whose definition is delicate; at present, those elements seem, among the advocates of this guideline, to come down to the jurisprudence of each of the States having adopted and enforced the model law; the decisions making up that jurisprudence should, therefore, be collected and made available to the courts and legal practitioners of the "OHADAC club" in order to allow them to ponder and motivate the interpretation which they choose to adopt.[226]

[226] See the developments devoted to the matter by A. Giardina, "Le convenzioni internazionali di diritto uniforme nell'ordinamento interno", *Riv. dir. int.*, 1973, p.101; S. Bariatti, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, Padova, Cedam, 1986, K. Parrot, *L'interprétation des conventions de droit international privé*, Nouvelle bibliothèque de thèses, Dalloz, 2006, pp. 256 *et seq*.

Article 4. *Special laws.* The provisions of this law shall apply subject to any special laws regulating private international relationships. In the event of a conflict, the special laws shall prevail.

99. *Specialia generalibus derogant.* The model law is a body of general legislation relating to private international law; as such, it must lay down the principles of that discipline and stake out the paths to be followed in the absence of legally defined specific solutions.[227] Therefore, in the face of special laws settling this or that specific problem, it is only called upon to orient the interpretation that may sometimes be required by the variety and complexity of the situations to which they refer; it is not up to the model law to set aside and replace special laws.

Article 5. *Determination of domicile and habitual residence*. 1. For the purposes of this law:

i) domicile shall be understood to mean the place of habitual residence;

ii) habitual residence shall be understood to mean:

a) the place where a natural person has his principal abode, even in the absence of any registration and independently of any residence or settlement permit. In order to determine that place, any circumstances of a personal, family and professional nature revealing durable connections to such a place shall, in particular, be taken into account;

b) the place where the company or entity has its registered office, central administration or main centre of business;

c) the place where the administration of a trust or the centre of its main interests is located.

2. No natural person can have two or more domiciles.

100. Generally speaking, the model law opts for connection through *domicile* rather than nationality and seeks to specify what is meant by domicile when its provisions use that criterion. Distinctions should then be made depending on whether a natural person, an entity or a trust is involved.[228]

111. As regards *entities*, the model law accepts three possible locations: the place of the registered office, that of the central administration and the principal place of

[227] CONC.: Art. 2 of the Belgian Code of PIL; art. 2557.3 of the Romanian Civil Code; art. 4 of the Dominican draft law.

[228] CONC.: Arts. 20 and 21 of the Swiss PIL Act; art. 4 of the Belgian Code of PIL; art. 2570 of the Romanian Civil Code; arts. 11 to 15 of the Venezuelan PIL Act; art. 1.2 of the Uniform Benelux Law; art. 6, b) to g) of the Argentine PIL draft code; arts. 16, 17 and 34 of the Colombian draft law; art. 5 of the Dominican draft law; art. 4 of the Puerto Rican draft law.

business. Each of them has its own set of difficulties. The principal place of business may fail when the company – for instance an airline resulting from a merger between two companies based in different countries – continues to conduct more or less equal shares of its business in each of them, or when the company develops operating, manufacturing, transformation and distribution activities in different countries… The place of the central administration may be that of the main operational management or the meeting place of the company's management and control organs… The registered office, which heads the list, is traditionally liable to be split into a registered office as set by the Articles and an actual registered office; unlike Article 60, §1 of the Brussels I Regulation from which it draws its inspiration, Article 5 does not resolve that hesitation. A conceivable interpretation which would, nevertheless, allow an escape from the dilemma of the registered office as set by the Articles and the actual registered office, would consist in considering that the latter is the place of the firm's central administration and that, by registered office, b) means only the one mentioned in the Articles, which is generally located in the territory of the State in which the entity was incorporated and registered.

112. In spite of those uncertainties, the trio of locations will not give rise to any insurmountable difficulty when domicile is used to determine jurisdiction: it offers the plaintiff an option, and it will be up to him to persuade the court, in the event of an objection, that his choice does in fact correspond to one or another of the connections listed; the system is thus characterised by great flexibility, which will be appreciated by plaintiffs, in return for the non-negligible risk of encouraging pleas of lack of jurisdiction (which may be raised for dissuasive or dilatory purposes) and of fostering simultaneous proceedings (a remedy for such conflicts may be found in **Article 20**).

The problems would doubtless be more acute if the domicile of the entity as understood above were called upon to determine the law applicable to companies; its "floating" character would impact the designation of the applicable law and result in the instability of the company's legal status. **Article 27** of the model law prefers a connection via the place of incorporation and the location of the registered office. Such a connection may appear cumulative, but corresponds in most cases to the location of the registered office as set by the Articles.

Thus restricted to jurisdictional conflicts, an alternate connection on the basis of the registered office, the location of the central administration and the principal centre of business, on the one hand makes available to the State a ground of exclusive jurisdiction under **Article 9** which is liable to encompass rather broadly the disputes relating to companies significantly integrated into its economic area and, on the other hand, prompts some mitigation of the rigor with which the legitimacy of the jurisdiction of the foreign courts whose decisions will be subject to recognition or enforcement is to be appreciated.

113. As regards *trusts*, which the model law means not to neglect since a certain number of legal systems pertaining to the OHADAC area are acquainted with that institution and intend to foster its use, Article 5 §1, ii), c) proposes two criteria for

the identification of the domicile: the place where the administration of the trust is located and the centre of its main interests.

It is obviously in the territories belonging to the British heritage and located within the orbit of common law that trusts are widespread. However, as a result of the competition between legal systems, the institution has diverged somewhat from the English model and rather resembles that of the "international trust"[229], judged to be more attractive and no doubt more accessible to settlors with a civil-law culture; this "international trust" model is the one set up by Articles 2 and 3[230] of the Hague Convention dated 1st July 1985 on the law applicable to trusts and their recognition, in order to ensure a place for voluntary trusts in countries whose tradition is Romano-Germanic. Although that convention does not concern itself with the domicile of trusts, it indirectly supplies a guideline allowing their localisation via the rules governing conflict of laws (Art. 6 and 7). Those rules implement the principle of autonomy and, on a subsidiary basis, of the closest or nearest connection in order to determine the applicable law, to whose observance recognition is subject (Art. 11). In that perspective, the law chosen by the settlor should first be referred to. In the absence of such a choice, various elements shall be taken into account, such as the place of administration of the designated by the settlor, the place of the assets of the trust, the place of residence or business of the trustee, the objectives of the trust and the places where they are to be achieved. However, the c) of §1 of Article 5 does not grant first place to the intention of the settlor, which it does not mention explicitly, even though it does not rule out the effect of that intention for the determination of the domicile.

114. Under the model law, the domicile is theoretically called upon to intervene as regards both conflict of jurisdiction and conflict of laws. However, no special provision aimed at determining the law applicable to trusts that might prevent their international status from being governed by the conflict solutions found in **Part III, Chapter 1st** (unless the latter are supplanted by those of the Hague Convention) has been introduced. On the other hand, it would appear dangerous for a claimant disputing the existence or operation of the trust to leave the choice of the court hav-

[229] According to Lupoi, *Trusts*, Milano, Giuffrè, 1997, p. 257 *et seq.*, Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, Bermudes, the British Virgin Islands, the Cayman Islands, Saint Kitts & Nevis, Saint Vincent and Turks and Caicos have followed this model; *vid.* also art. 122 of the Belgian Code and Book 10, art. 142 of the Dutch code.

[230] *Art. 2:* "For the purposes of this Convention, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics:

a) the assets constitute a separate fund and are not a part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust."

Art. 3: "The Convention applies only to trusts created voluntarily and evidenced in writing."

ing exclusive jurisdiction to the settlor alone under **Article 10**. For instance, disputes concerning the internal relations of a trust operating from the Cook Islands might be subject to the exclusive jurisdiction of the courts of Nevis (or Saint Vincent, Porto Rico or even the Dominican Republic) if thus provided by a mere stipulation of the settlor, whose obvious purpose would be to put several thousand miles between the plaintiff and the court of competent jurisdiction.[231] Therefore, Article 5, §1, c) bases the domicile on two more objective elements, which summarise the non-limitative list found in Article 7 of the Convention while remaining permeable to the influence of the settlor's intention: the place of administration of the trust and the centre of its main interests. The first is based on the totality formed by the trust assets, which are grouped together in a "separate fund […] [from] trustee's own estate" This implies autonomous administration, associated with specific liability; the domicile of the trust would be the place where the trustee exercises his powers and assumes his liability, whether that place is determined by the intent of the settlor or left up to the initiative of the trustee alone. The second element is based on the ends for which the settlor created the trust; it points to the place where they are mainly pursued, whether this is the place of the assets whose income is allocated to the beneficiary or the place of performance of the obligations.

Although each of these elements ensures the trust's insertion into a socio-economic environment, they do not necessarily converge. As in the case of the domicile of entities (see above), a court whose jurisdiction is disputed will have to require the plaintiff who chose to refer the matter to it to evidence that his choice is based on one of those two elements.

115. Finally, as regards the domicile of *natural persons,* Article 5, ii, a) chooses to reduce it to their habitual residence. This connection has met with some success, or at any rate has been rather widely adopted by contemporary legislations and international instruments.

It is true that in the Romano-Germanic tradition domicile, for its part, is a slightly disconcerting concept;[232] it is the subject of a dogmatic definition associating principal establishment and *animus manendi*, whereas it is the very exemplar of a functional concept. If only on account of the ease of interpretation offered by the subjective component, the significance of the relation to a territory varies according to the areas in which it is appealed to. Levasseur has shown that domicile depends

[231] The Brussels Convention of 27 September 1968, as amended by the Luxemburg Convention of 9 October 1978, had made a different choice which was approved by the Brussels I and II Regulations: legality of prorogation of jurisdiction (Art. 23, §4 and 5 of Brussels I) in the absence of exclusive jurisdiction (Art. 22) of the courts of the domicile of the trust (Art. 60, §3) which is determined by the private international law of the State member of which the judge is assigned. Obviously these solutions are only relevant in matters of conflict of jurisdiction and their liberalism can be justified by the fact that they only used in the European Union Club and not on an international level.

[232] It may seem even more disconcerting in Common Law, in which it covers an *origo* which may be overshadowed by a *domicilium* or even several successive *domicilia* and may reappear when those are abandoned.

on the law applicable to the institution to whose operation it contributes,[233] thus highlighting the protean character of the concept, which is frequently contrasted with the certainty and stability of nationality.

Precisely in order to combat instability, the domicile of a natural person is set, for private international law purposes, at the place of his or her registration on the population register by the Belgian code of 2004. But in so doing that code obviously considers only domicile in Belgium, where such a register exists; it does not claim to make such a domicile a universal principle at the international level, or to totally ensure the sincerity of the registrations; moreover, many of its provisions – not restricted to personal and family law – show a preference for habitual residence.

The model law opts for another solution. It concentrates on the objective element by equating domicile with habitual residence (see the 1979 Inter-American Convention, Art. 2. 1, Venezuelan law, Art. 11). By so doing, it joins a trend which is dominant in comparative private international law, thus reinforcing the position of domicile as against nationality. But this move, which is quite appropriate in view of the demographic situation of the OHADAC area, involves no more than a semi-definition of habitual residence. At least paragraph a) marks out the process which should allow a natural person's place of habitual residence to be identified. It begins by rejecting the formal criterion of registration on a population register (see the Rumanian civil code, Art. 2570, §1) and even the possession (or not) of a residence permit, in favour of a factual notion: the place where the natural person has settled on a principal basis. It thus uses etymology (by referring to the place where the individual repeatedly [: *re*] settles or rests [: *sedere*]), insisting on the usual and regulated character of such behaviour and avoiding any reference to the intentional element. The text goes on to supply a certain number of indications liable to demonstrate the individual's insertion into the local social environment, resulting from participation in a network of personal, family and professional relationships (see the Rumanian civil code, Art. 2570, §2), all of which presupposes a lasting presence, a settlement. By thus laying down the course to be followed, par. a) makes it possible to determine a connection which is relatively stable and naturally flexible, since one is led to appreciate, on a case-by-case basis, various factors whose relative weight is not predetermined; it is obvious that personal and family ties will be stronger than professional factors when defining the domicile of a minor child or of a housewife, whereas, on the contrary, the fact that an unmarried physician has his practice on the other side of the border where his office is located may be decisive.

[233] G. Levasseur, Le domicile et sa détermination en droit international privé, Paris, Rousseau & cie, éditeurs, 1931.

TITLE II
SCOPE AND LIMITS OF CARIBBEAN JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

Chapter I
Scope of Caribbean jurisdiction

Article 6. ***General scope of jurisdiction.*** **1. The Caribbean courts have jurisdiction for proceedings initiated in Caribbean territory between Caribbean nationals, between foreigners, as well as between foreigners and Caribbean nationals, in accordance with the provisions of this law and of the international Treaties and agreements to which the Caribbean is party.**

2. Foreigners have access to the Caribbean courts in the same manner as nationals and are entitled to effective judicial protection. No deposit or security, however called, may be required of a claimant or intervening party, whether on grounds of his foreign status or on account of his absence of domicile or residence in the territory.

3. Choice of forum agreements are licit when the dispute is international in nature. A dispute is international in nature when it includes an element of foreign status corresponding to those referred to in Article 1 §2.

116. Article 6 opens Part II of the model law by beginning a Chapter One devoted to the scope of the jurisdiction of the Caribbean State.[234] The term *jurisdiction* refers to the sovereign prerogative enabling the State or its organs to settle disputes and, in this instance, to settle disputes in civil and commercial matters, as the title indicates. This is the power to judge, as confirmed by §3. That paragraph admits the legality of choice of forum clauses for disputes of an international nature; as the case may be, that legality either moves the border that the Caribbean courts' power to judge may not cross closer, thus erasing their jurisdiction, or on the contrary moves that border further away, thus increasing their jurisdiction.

Thus liable to be moved by choice of forum provisions, that border is in principle drawn by §1, which proceeds to perform a twofold determination of the power to judge, that is, *ratione personae* and *ratione loci*.

[234] CONC.: Arts 4 and 21 LOPJ (Spain); arts. 3 and 4 of the Italian PIL Act; art. 39 of the Venezuelan PIL Act; art. 15 of the Panamanian PIL Act; art. 251 of the Nicaraguan code of civil procedure; art. 6 of the Dominican draft law; arts. 145 *et seq.* of the Mexican draft law; art. 7 of the Colombian draft law.

117. Caribbean judges are authorised to exercise the power to judge in relation to any person, whether or not a Caribbean national. This settles an issue concerning the situation of foreigners; §2 then goes on to further specify that solution. By neutralising the opposition between citizens and foreigners, the text begins by providing a foundation for universal jurisdiction in relation to persons.

118. But that jurisdiction is restricted in space: the dispute to be settled must "occur in Caribbean territory". The solution is realistic. The territory is precisely the space in which the authority of the State enjoys the monopoly of compulsory enforcement. In exchange for the relinquishment of private justice and of the individual use of brute force, the modern State has undertaken to ensure public justice and to guarantee its effectiveness, through organised constraint if need be; thus, among sovereign prerogatives, the power to judge and the power of constraint are associated. All in all, by requiring a territorial connection, Article 6 indicates that, except in the case of choice of forum, a lawsuit escapes Caribbean jurisdiction when none of its elements locates the dispute in Caribbean territory, since in that case not only does the quarrel not disturb the course of Caribbean social life, but the decision handed down would not be able to benefit from the action of the Caribbean enforcement organs.

119. However, a dispute occurring in the territory will not necessarily be settled by the Caribbean courts. By defining the scope of jurisdiction, the territorial connection makes it possible to submit both domestic and international disputes to Caribbean judges. The former are not exposed to any competing jurisdiction and must be settled by the Caribbean courts. The latter, on the other hand, arise from situations that may develop in contact with several legal orders, each of which is endowed with a judicial and coercive system which is able to resolve them; consequently, such international disputes are exposed to competition between jurisdictions. This puts the Caribbean in a position where it must determine what share of international litigation it judges advisable to entrust to its own courts and what share may be left to foreign courts without jeopardizing the interests of the parties or the civil peace in the life of the societies which it controls. Thus, §1 warns that the jurisdiction to be exercised by the Caribbean courts shall be implemented according to the system of international jurisdiction "established by this law and by the international treaties and agreements to which the Caribbean is party". It follows that in practice an international dispute having a territorial connection with the Caribbean will not (except in the event of a choice of forum) fall under Caribbean jurisdiction unless legal or contractual grounds to that effect can be verified.

120. Universal jurisdiction is thus reduced by the interlocking effect of territorial connection and of the system of international jurisdiction. §2 guarantees that litigants shall not come up against any restriction on account of their foreign status; those who are not Caribbean nationals will have access to Caribbean jurisdiction on the same terms as Caribbean citizens and will therefore be entitled to effective judicial protection on an equal footing. Equality of treatment between nationals and foreigners obviously condemns the old *cautio judicatum solvi* which, in some

States, may have been required in one or another form of foreigners alone, suspected as such of being inclined to initiate reckless lawsuits and later evading the payment of the related costs by retreating to their country;[235] in the era of globalisation, such a portrayal of foreign litigants is anachronistic, to say the least. In order to highlight the value of such equality of treatment and to place it under the aegis of the principle of non-discrimination, as reaffirmed by human rights conventions, persons having no domicile or residence in the Caribbean are also mentioned; their access to justice shall not be hindered, any more than that of foreigners.

§2 does not specify whether this implies that any litigant, even if a non-domiciled, non-resident foreigner, is called upon to receive "legal aid" if impecunious. It is conceivable that national solidarity would support only litigants who reside in the territory or are domiciled there, inasmuch as they alone contribute to national prosperity and to the funding of public services. Since the text is silent on this point, each State adopting the model law may choose the terms on which legal aid may be granted, within the limits set by the principle of non-discrimination and the right to effective judicial protection.

121. §3 imposes on universal jurisdiction, thus circumscribed, an additional and occasional limitation resulting from private intent. It does in fact admit the legality of choice of forum clauses for disputes of an international nature.[236] In so doing, it does not make any distinction according to whether the clause, by designating a foreign court, restricts Caribbean jurisdiction, or, by designating a Caribbean one, rather extends it. Nevertheless, it does not follow that the model law raises private choices or the autonomy of private individuals to the rank of principle and reduces the jurisdictional grounds set forth by it or by treaty law to a subsidiary level. **Article 10** will show, for instance, that although arising from the law, the exclusive jurisdiction referred to in **Article 9** or the jurisdiction in matters of personal and family law dealt with in **Article 13** thwarts choice of jurisdiction clauses. In other words, the autonomy of private individuals is sanctioned only when the subject matter of the dispute is such that the coming to terms of the private interests is not under the control of *publica utilitas*, i.e. the public interest. To each his sphere. The autonomy of the parties may prevail only when expressed in areas in which they may freely dispose of their interests.

122. §3 does not mention that restriction; it remains on a general plane. Neither does it indicate the conditions to which the validity of a choice of forum agreement is subject; those that are specific to jurisdiction clauses are found in **Articles 10 and 12**, whereas the others pertain to the ordinary rules governing agreements. On the contrary, §3 clearly marks that the legality it proclaims concerns only provisions referring to a dispute of an *international nature*. And the importance of such a specification is highlighted somewhat insistently by a reference to the definition

[235] *Vid*. on this institution, M. Philonenko, "La caution 'judicatum solvi'", *Journ. dr. int.*, 1929, pp. 609 and 896; on its suppression in French law, G. Droz, "La sentinelle perdue ou la disparition subreptice de la caution *judicatum solvi*", *Rec.gén.lois*, 1973, p. 281.

[236] *Vid*. C.A. Arrue Montenegro, L'autonomie de la volonté dans le conflit de jurisdictions, Paris, LGDJ, 2011.

of internationality in **Article 1, §2**[237] which must, therefore, be referred to. The model law obviously does not presume to rule on the legality or illegality, whether absolute or relative, of voluntary extensions of the scope of jurisdiction in domestic law; such a matter pertains to the private judicial law of each State and comes up within the framework of a homogeneous judicial organisation, not in the event of a plurality of jurisdictional orders. A jurisdictional clause that has international disputes in mind aims especially at preventing the disadvantages of that plurality and of the diversity of the judicial offers resulting from it; foremost among these is the devastating risk of providing the quickest party with the judge most convenient for it from a procedural viewpoint and most favourable as regards the substance of the case. Those are in fact dangers specific to private international relationships as defined in **Article 1, §1**.

123. Thus, for international disputes, Article 6 sets up a system acknowledging the universal jurisdiction of the Caribbean, with no discrimination between persons, circumscribed by the requirement of a territorial connection and exercised according to the legal and treaty-based rules of international jurisdiction, subject to choice of forum agreements in matters where the parties may freely dispose of their interests. The following two provisions impose other limitations of different origin on Caribbean jurisdiction.

Article 7. *Jurisdictional immunity.* 1. In accordance with the rules of international law, the jurisdictional immunity of foreign States and of their organs is an exception to Caribbean jurisdiction. In civil and commercial matters, the Caribbean courts define the scope of that immunity restrictively by including in it solely those disputes concerning acts implying the exercise of public authority (acts jure imperii).

2. The jurisdictional immunity in civil and commercial matters of diplomatic agents accredited in the Caribbean is defined by the international treaties and agreements to which the Caribbean is party.

3. The jurisdictional immunity in civil and commercial matters of the international organisations of which the Caribbean is a member is defined by the treaties constituting them. The agents of those organisations benefit from immunity in accordance with the terms set by those treaties.

[237] "Private relationships are termed international when they relate to more than one legal order via their constituent elements, corresponding to the person of their subjects, to their subject matter or to their creation".

124. Caribbean jurisdiction may be neutralised when jurisdictional immunity comes into play.[238] In contrast to the limitations provided by **Article 6**, which could be termed intrinsic because they proceed from the very structure of Caribbean jurisdiction, the restriction imposed by immunity acts from outside, thus raising an extrinsic obstacle. This explains that it is rarely mentioned in laws dedicated to private international law or to international judicial law. That obstacle is due to the law governing the relations between States, to international public law, and is not specially related to the requirements of procedural justice, which configure the power to judge.[239]

125. In fact, it is basically the notion of state *sovereignty* that justifies jurisdictional immunity.[240] Inasmuch as it acknowledges the sovereignty of other States, a sovereign State chooses to view them as its peers: the dispersion of sovereignty results in equality. Now, equality does not allow one sovereign State to be subject to the power of another, even if it is in a situation which, when considered objectively, should be subject to the latter's courts, as admitted or prescribed by the former; for instance, in the situation of the tenant of an apartment located on the territory and whose rent has not been paid to the landlord. Equality is also an inducement to courtesy – *comitas* or comity of nations – which would be ignored if a State were to allow the progress before its courts of proceedings directed against another State and liable to restrict in one way or another the freedom and independence of the latter in the pursuit of its governmental missions.

Immunity is thus granted first to States and to the public entities through which they act; it is also granted to the natural persons in charge of representing them in relation to their peers. Finally, for reasons of efficiency and independence in the pursuit of their missions in the host country, it is conceded to international organisations.

126. The first concern of Article 7, §1 is to recall this limitation imposed on Caribbean jurisdiction in favour of foreign States. But this clause then finds it necessary to set forth a guideline for its interpretation, due to the fact that many contemporary States engage in activities which do not pertain to the exercise of sovereign prerogatives, while others use the means provided by civil or commercial law for the performance of their governmental missions.

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[238] CONC.: the Vienna Convention of 18 April 1961 on Diplomatic Relations; the Vienna Convention of 24 April 1963 on Consular Relations; United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and their Property; *Foreign Sovereign Immunities Act*, 21 October 1976 (United States); *State Immunity Act*, 20 July 1978 (United Kingdom); *Foreign Sovereign Immunities Act*, 6 October 1981 (South African Republic); *Foreign Sovereign Immunities Act*, 16 December 1985 (Austria); art. 7 of the Dominican PIL draft law; art. 15 of the Panamanian PIL draft law.

[239] *Vid. infra*, commentary on **article 77.**

[240] *Vid*. P. Andrés Sáenz de Santa María, "El estatuto internacional del Estado: La inmunidad soberana del Estado extranjero (Jurisdicción y ejecución)", *Cuadernos de Derecho Judicial*, 1994, vol. XI, pp. 91-223; H. Fox, *The Law of State Inmunity*, Oxford, Oxford UP, 2002.

127. From the outset, the principle of jurisdictional immunity is related to the rules of international public law; to make up for this, the action of that principle on the functioning of the courts is purely incidental. As a result, it constitutes an exception from the viewpoint of private judicial law, to which that functioning pertains. As such, that exception must be interpreted strictly. The fact that organs of government are mentioned in addition to the States themselves does not contradict that rule, since it is actually no more than the natural development of the principle: a State can act only through its organs (ministry departments, agencies), and it is the latter's action that could be disturbed by proceedings liable to distract them from concern for the sovereign interests for which they are responsible. Moreover, such organs do not traditionally enjoy any real management autonomy and have no legal personality distinct from that of the State whose instruments they are; they are therefore inseparable from the State manoeuvring them, as acknowledged by the wording of Article 7.

128. The fact that this is an exception (which, technically speaking, does not take the form of a mere procedural exception, but more radically of a bar) is stressed by the second sentence of the same paragraph; though addressed literally to the Caribbean courts, it must be understood as directed at whoever will interpret it, as well as at the States themselves[241] and at their private partners. Its aim is to rule out any possibility of extending the scope of the protection ensured by immunity beyond disputes arising from acts involving the exercise of public authority or performed in the interest of a public service. The model law thus adjusts the scope of immunity to its acknowledged basis, at a time when States have considerably developed and varied their activities, which often exceed the mere exercise of sovereign prerogatives, and diversified their modes of action by making broad use of the means afforded by private law or, generally speaking, ordinary law. At present the dominant orientation of international public law, as it appears, for instance, from the United Nations Convention dated 2 December 2004, consists in seeking delimitation criteria in the nature of the act giving rise to the dispute, particularly its nature as a "commercial transaction"[242]. Faced with the resistance put up by that concept when it comes to qualifying practical situations, this approach lists a series of operational schemes typical of the figure (Article 2, 1, c of the said convention), which are thus deemed not to challenge the sovereignty of the State involved.[243] This objective approach is not, however, universally accepted. Various States (China, France, Japan, etc.) do not hesitate to examine, beyond the nature of the act, the purpose for which it is carried out. This, by the way, does not radically rule out the 2004 convention (Art. 2, 2). The model law inclines towards the second conception. It first refers to the non-involvement of public authority, that is, the failure to exercise those sovereign prerogatives generally signalled by provisions overriding

[241] The first paragraph did not consider it useful to mention the elements or components of the sovereign State, subject of international law. These States cannot claim the benefit of the privilege to refuse jurisdiction in so far as they are entitled to exercise on the international level the prerogatives belonging to the sovereign State itself. The immunity claimed is thus that of the sovereign State.

[242] Comp. *Foreign Sovereign Immunities Act* 1976 (United States).

[243] Comp. *State Immunity Act* 1978 (s.3, *et seq.* 3).

the regime of ordinary law that public authority alone can impose on a contracting party; thus, as a general rule immunity will be refused if the State has acted according to the forms of private law. However, the model law provides a reservation by then introducing, alternatively and additionally, a second criterion allowing the salvage of acts performed by the State or its organs in the interest of public service, even in the absence of overriding clauses.[244] Correlatively, in view of the tendency on the part of States to have recourse to entities (public corporations) or to emanations whose structures sometimes pertain to private law (public limited companies or the like), this alternative and finalistic criterion will cover disputes resulting from transactions carried out according to the forms of private law, but destined to be part of the missions for which public authority is responsible and which consequently, through a third party, come within the scope of the exercise of state sovereignty.

129. The combination of those two criteria delineates the scope of immunity, but their relative flexibility calls for the guideline set forth in the second sentence of Article 7, §1, which requires a strict, not to say a restrictive interpretation. Indeed, a lax use of the bar would run the risk of seriously prejudicing the right to effective judicial protection of the private person to whom immunity might be objected. Even more than the exceptional character of the privilege of sovereignty, it is its possible conflict with that fundamental principle laid down by **Article 6** that leads the model law to enjoin the Caribbean courts to refrain, despite any political considerations, from any indulgence or excessive deference towards foreign sovereignty or those acting for its account.

130. The immunity of diplomatic personnel forms the subject matter of a specific paragraph of Article 7. On this point, the model law by no means claims to innovate, nor even to inflect the positions taken by each State adopting it; it simply recalls, on this specific point, the primacy of international treaties and agreements. The Vienna Convention on diplomatic relations dated 18 April 1961 immediately comes to mind here, the more so since that treaty, which codifies the customary practice of States, must bind virtually all of the OHADAC territories, whether because they have adhered to it or via state succession. Nevertheless, if a State belonging to the Caribbean area and not bound by that treaty were to adopt the model law, the latter does not undermine any bilateral agreements which it may have entered into. Moreover, if that State were not bound by any jurisdictional immunity treaty (a case about which it says nothing), it would not have any impact on its unilateral practice.

131. The jurisdictional immunity of international organisations is dealt with in analogous fashion by §3; the primacy of international treaties, and especially here of the treaties setting up the organisation and signed by the Caribbean, shall determine the principle and extent of immunity, as well as the identity of those benefiting from it.

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[244] *Vid*. the analogous position of French law, Cass. 1st civil chamber 22 June 1969, *Société Levant Express*, *Rev. crit. dr. int. pr.*, 1970, p. 102, note P. Bourel, *Grands arrêts*, n°47.

132. The model law naturally acknowledges each State's latitude, under international public law and each person's right to effective judicial protection, to organise the procedural rules governing immunity according to its own views.

Article 8. ***Plea of arbitration*****. 1. When a dispute covered by an arbitration agreement is submitted to a Caribbean court whereas the matter has already been referred to the arbitral tribunal, the Caribbean court shall state the claim to be inadmissible.**

2. When a dispute covered by an arbitration agreement is submitted to a Caribbean court whereas the matter has not yet been referred to the arbitral tribunal, the Caribbean court shall state the claim to be inadmissible, unless the arbitration agreement is obviously null and void or obviously unenforceable.

133. The model law, by its **Article 2, iii)**, excludes arbitration from its scope. But in practice the latter competes with the jurisdiction of the State when the rules of the model law relating to jurisdiction submit a dispute covered by an arbitration agreement to the state courts. This possibility necessitates Article 8, whose purpose is to delimit the respective scopes of state and arbitral jurisdiction. It is simply a matter of setting the limit of the state courts' power to judge in the face of the arbitrators' power to judge, not of interfering in the regulation of arbitration.[245]

134. The arbitral authorities are useful only if the arbitrator (or the arbitral tribunal) is endowed with jurisdiction for the dispute to be settled. Any challenge of this power to judge comes under the so-called *jurisdiction/jurisdiction* principle.[246] This rule is widespread in the comparative law of international arbitration as well as in treaty law or in the rules of arbitral institutions. It commonly takes the form of the *positive effect* consisting in acknowledging the arbitrator's power to rule on his own jurisdiction, that is, on the validity or effectiveness of his investiture concerning the dispute submitted to him.[247]

[245] CONC: Arts. V and VI of the Geneva Convention of 1961 on International Commercial Arbitration; art. II.3 of the New York Convention of 1958; arts. 8 and 16 of the UNCITRAL Model Law; art. 41.1 of the Washington Convention of 1955; art. 7 of the Swiss PIL Act; arts. 9, 30 and 32 of the Arbitration Act of 1996; arts. 1679 and 1697 of the Belgian judicial code; arts. 1448, 1465 and 1506 of the code of civil procedure (France); art. 202 of the Constitution of the Republic of Panama; arts. 1022 and 1052 of the code of civil procedure (Netherlands), arts. 1032 and 1040 of the ZPO; art. 6.2 of the 1998 ICC Rules; art. 23 of the UNCITRAL Rules; art. 23.1 of the LCIA Rules; art. 15 of the AAA Rules.

[246] This designation comes from the German legal language and is traditionally used with regard to arbitration although in the case in point it refers to the courts rather than jurisdiction.

[247] The arbitration agreement can be affected by a hidden defect which nullifies the agreement. It may also not apply to the dispute for not engaging one of the parties or because the interests in-

The jurisdiction/jurisdiction rule has been charged in vain with resting on a *petitio principii,* a sort of auto-legitimisation or bootstrapping on the part of the arbitrator. It shall suffice to answer that the latter's power to rule on the validity of the arbitration agreement does not proceed from the arbitrator himself, but from the appearance of an arbitration agreement, and that that appearance has been judged sufficient by the lawmaker (adopting the model law) to found the power thus challenged.[248] Moreover, procedural justice requires such an ability to rule on one's own investiture when the latter is disputed by the defendant. Indeed, to deny an arbitrator the possibility of ruling himself on the matter of his jurisdiction is to force the claimant, who believes in that jurisdiction to the point of relying on it, to seek its confirmation from a state court; meanwhile, the defendant would simply have to wait for the outcome of that remedy, whereas it is he who, by challenging the arbitration agreement, gave rise to the dispute regarding the arbitrator's power to judge. In principle, it is up to the party putting forward the nullity of an act to establish its flaws; here, the interlocutory nature of the question would result in inverting the procedural positions of the parties, and the burden of allegation and proof would be transferred to the other party; moreover, the settlement of the dispute on the merits would be significantly delayed. This would not be fair, and it would not be appropriate to thus reward the defendant's dilatory manoeuvres. Therefore, this positive effect of the jurisdiction/jurisdiction rule is strong enough to ensure that, generally speaking and, indeed, with the risk of simultaneous proceedings, the arbitrator's power to rule on his own jurisdiction is not affected by a challenge submitted to a state court by one of the parties.

135. Like certain national laws on international arbitration,[249] the model law duplicates and reinforces this positive effect by a *negative effect* which does not offer the arbitrator any additional prerogative and is not addressed to him directly, but rather to the state judge to whom a dispute is referred whereas the defendant claims that the arbitral tribunal has jurisdiction. The ordinary case is that of the plea of arbitration.[250]

When the latter is raised, the two paragraphs of the model law's Article 8 reiterate the solution provided in Article 1448 of the French code of civil procedure, thus distinguishing two possible cases:

> "When a dispute covered by an arbitration agreement is submitted to a State court, the latter shall decline jurisdiction, unless the matter has not yet been referred to the arbitral tribunal and unless the agreement is obviously null and void or obviously unenforceable."

Either the arbitral proceedings have already been initiated, in which case the state court, to which the matter has been referred secondly, must immediately dis-

volved are not arbitrable. These cases of inefficiency are governed by arbitration law, excluded from the Model Law (art. 2, iii).

[248] This appearance is also deemed sufficient by many national laws and conventional law.

[249] It is the case in Panamanian and French law; *vid*. C.-A. Arrue Montenegro, *L'autonomie de la volonté*, *op. cit.*, n° 139 *et seq.*, p. 82 *et seq.*

[250] The issue of validity or of the scope of appointment of the arbitrator may arise as an incidental question before the *juge d'appui* in case of difficulties for setting up the arbitration court.

claim jurisdiction without reviewing the merits, on the sole basis of the arbitration agreement,[251] and there will be no other control by the state courts concerning the existence or scope of that agreement, unless they are later called upon to exercise such control following an action for cancellation or when an enforcement order is sought.

Or the arbitral proceedings have not been initiated, in which case the state court shall decline jurisdiction after carrying out a *prima facie* review of the arbitration agreement in order to verify that it is not blatantly or obviously flawed to the point of dissuading the parties from making use of the possibilities which it is deemed to offer them. The obligation of disclaiming jurisdiction aims, of course, at protecting the arbitrator's power; the reservation concerning obvious nullity or unenforceability aims at protecting the parties from the risk of denial of justice, at guaranteeing them nondeferred access to the effective judicial protection of their rights when the illegality or ineffectiveness of the agreement is clear for all to see and when it is obvious that it could not escape an arbitrator to which the matter might be referred.

136. It is true that, thus understood, the negative effect involves possible disadvantages, particularly that of forcing the party disputing the investiture of the arbitrator to pursue the arbitral proceedings until an award is handed down, whereas that award may be defeated on that count before the judge ruling on its cancellation or enforcement and turn out to be useless, despite the costs and time expended. This constitutes an undeniable risk, which must be balanced against the risk of simultaneous proceedings and therefore of irreconcilable decisions, encouraged for its part, without regard for costs and delay, by the conception according to which the state court must disclaim jurisdiction only once it has found the arbitration clause to be valid or enforceable after examining it on the merits.

It is certain that the negative effect solution, shared by the laws of France and Panama,[252] is isolated in comparative law. The priority which it grants the arbitrator over the judge clashes with the systems that are circumspect as regards the autonomy of arbitral jurisdiction and prefer to maintain it under the firm rule of state jurisdiction. The model law nevertheless chooses, against the majority, to have the judge disclaim jurisdiction without examining the arbitration agreement on the merits and thus opts for liberalism and for the emancipation of international arbitration. This choice has no other purpose than to offer the States of the OHADAC area who are ready for it the possibility of moving away from the traditional state-centred or Westphalian conception of jurisdiction…

[251] Art. 1465 of the French code of civil procedure: "Only the arbitral tribunal has jurisdiction to give rulings on any objections in respect to its jurisdiction".

[252] An interpretation favourable to the effect can associate Art. VI of the Geneva Convention of 21 June 1961 to these rights.

Chapter II
Grounds of jurisdiction

Article 9. *Sole jurisdiction.* The Caribbean courts shall have sole jurisdiction for disputes whose subject matter is:

i) rights *in rem* in immovable property and tenancies of immovable property when the property is located in Caribbean territory;

ii) the formation, validity, nullity and dissolution of companies or entities whose domicile is located in Caribbean territory, as well as the validity of any agreements and decisions of their organs affecting their existence *erga omnes* and the rules governing their operation;

iii) the formation, validity, nullity and extinction, as well as the existence in relation to third parties, of trusts domiciled in Caribbean territory;

iv) the validity or nullity of entries in a Caribbean register;

v) the registration or validity of patents and other similar rights giving rise to a deposit or registration, when the deposit or registration was filed or made in the Caribbean;

vi) the recognition and enforcement in Caribbean territory of judicial decisions and arbitral awards handed down abroad;

vii) provisional and conservatory measures which must be enforced in the Caribbean;

viii) the determination of Caribbean nationality.

137. Although the cases in which the Caribbean courts have sole jurisdiction are the first to which Chapter 2 of Part II is devoted, they must not be viewed as establishing a mechanical jurisdiction to which the following provisions would provide some exceptions.[253] The model law does not follow the outline of the 1968 Brussels Convention or of the Brussels I Regulation, which give preference to the mechanism of general jurisdiction based on the domicile of the defendant, thus suggesting that the other grounds of jurisdiction are derogatory and subject to strict interpretation. It sets them forth in the order chosen by distinguished commentators

[253] CONC: Art. 22 Regulation (EC) EC n°44/2001; art. 24 Regulation (EU) n°1215/2012; art. 22 of the Organic Law 6/1985, of 1 July, of the judicial power (Spain); arts. 1078, 1079 and 1081 of the Romanian code of civil procedure; art. 8 of the Dominican draft law; art. 8 of the Colombian draft law.

of those European instruments.[254] That order expresses, no doubt better than a sort of hierarchy of grounds of jurisdiction, an operating priority of sole jurisdiction over voluntary extensions of the scope of jurisdiction and the provisions based on domicile: whoever wishes to refer a dispute to the Caribbean courts must seek to determine whether the latter are designated under some grounds of sole jurisdiction; if not, he shall then seek to determine whether they are designated by a choice of jurisdiction clause; if not, subject to making sure that no derogatory clause can move the case abroad, he will verify that the defendant is domiciled in the Caribbean, or that on account of the nature of the disputed interests the lawsuit can usefully be referred to the Caribbean courts. This operating chronology, which goes down the ladder of eliminatory force, does not prejudge the status of the various forms of jurisdiction: sole, voluntary, general or specific.

138. Listed imitatively in Article 9, the cases of sole jurisdiction immediately lead to the Caribbean courts when the connecting element found in them is materialised within the Caribbean legal order. Five of them are included in the catalogues found in Article 22. 1 of the LOPJ (Spain) and Article 22 of the Brussels I Regulations; they are provided in the case of buildings, companies and entities, registrations on public registers, intellectual rights and enforcement of decisions. The model law completes that list by adding jurisdiction in matters of trusts, provisional measures and Caribbean nationality. That jurisdiction is exclusive in the sense that, from the Caribbean point of view, the litigants may not submit the dispute to courts other than the Caribbean courts. No competition with foreign courts is allowed; the plaintiff has no choice; he must refer his claim to the Caribbean courts. This necessary devolution presents several characteristics.

139. *In the first place,* sole jurisdiction is *global jurisdiction* (or *international*, or again *general jurisdiction*, according to Bartin's terminology) in the sense that the designation resulting from the dispute's being located within the Caribbean legal order concerns all of the judicial organs; this is the solution adopted both by the law of the European Union (Brussels I Regulation, Art. 22) and by Spanish law (LOPJ, Art. 22, 1). It is doubtless justified by the idea of a significant implication, in the disputes thus reserved, of the State's own interest at the international level, much more than by a specific relationship connecting the case to a definite court. Consequently, it is up to the Caribbean State and legal order, once their general jurisdiction has been established, to identify within the national judicial system, through their internal jurisdictional rules, the court to which the case shall be referred.[255]

Second, exclusive jurisdiction is *mandatory jurisdiction*. It follows that the clauses under which the parties may have agreed to entrust the dispute to this or

[254] H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 4th ed., 2010; J.C. Fernández Rozas and S. Sánchez Lorenzo, *Derecho internacional Privado*, n. 43 *et seq. Vid*. also the Dominican draft law, art. 8 *et seq*.

[255] *Contra*, the Mexican draft law, art. 148, *litt*. g), h) and j), in which the rules of international jurisdiction (which, it seems, are non-exclusive) designate the Mexican court having special jurisdiction.

that court of a foreign State are inoperative and cannot weaken Caribbean jurisdiction. This unavailability of Caribbean jurisdiction is the natural corollary of its exclusive character: by authorising referral to the Caribbean courts only, it does away with competition between courts and does not leave any choice up to the litigants.

Third, exclusive jurisdiction has two effects: an obligation of referral to the Caribbean courts and a prohibition from going before foreign courts. The positive effect, i.e. the obligation, affects direct jurisdiction and founds the legality of the proceedings initiated before the Caribbean courts; the negative effect affects *indirect jurisdiction* and decrees that any suit prosecuted before a foreign court is illegal, so that the resulting decision cannot be recognised and enforced in the Caribbean (see **Art. 74, *iii***).

140. *Fourth*, exclusive jurisdiction produces a specific effect in the relations between the States that have adopted the model law. This is what some authors have called the *reflex effect*[256] or *mirror effect*. It will lead the Caribbean court to which the case has been referred to disclaim jurisdiction when the grounds of jurisdiction listed in Article 9 are materialised within the legal order of a foreign State. By the effect of Article 9, that foreign State claims a monopoly over the dispute, as the Caribbean would have done on the same basis if the grounds of exclusive jurisdiction had been materialised in its own territory. The special value of this reflex effect becomes clear when the circumstances of the case do not allow the Caribbean judge to rely on Article 9, but would offer him the possibility of basing his jurisdiction on another rule, for instance when the defendant's domicile is located in the Caribbean (**Art. 11**); in that case, if the suit is brought and prosecuted in the Caribbean, there is no guarantee that the claim will not also be submitted to the courts of the foreign State, so that the risk of conflicting proceedings and therefore of conflicting decisions is in no way prevented. Now, while those risks of conflict are resolved from the viewpoint of Caribbean law in **Article 74**, which, at the level of recognition and enforcement, leads to a preference for the Caribbean suit or judgment and to the censure of the foreign suit or judgment (**Art. 74, *iv* or *v***), this can be no more than a pseudo-solution for the parties. Indeed, it is obvious that in practice, since the difference is located abroad, the Caribbean decision will not prevail there and will be unable to give rise to compulsory enforcement; on the contrary, the foreign judgment, while disqualified in the Caribbean, will be readily enforced by the authorities of the State in whose name it was handed down. By admitting the reflex effect, which guarantees a single lawsuit thanks to the Caribbean court's disclaimer of jurisdiction, Article 9 submits to the requirements of procedural economy. Moreover, it is in line with the method of "soft" unification embodied by the model law by ensuring a common solution for the States adopting it. Conversely, it may appear more daring to provide such a jurisdictional division of labour with States that have not adopted the model law and that, rather than setting out in the direction of harmonisation, prefer to retain their own system of international jurisdiction, whose tenor may be different, whether the differences concern connec-

[256] G. Droz, Compétence judiciaire et effets des jugements dans le Marché commun, Bibl. Dr. int. pr., vol. xiii, Dalloz 1972, n° 165; P. Gothot and D. Holleaux, La Convention de Bruxelles du 27 Septembre 1968, Paris, 1985, n°37.

tion or qualification of the claims. This may result in leaving jurisdiction to the courts of some third-party State whose claims to it may be less relevant than those of the Caribbean courts.

Thus, the reflex effect simply obliges the Caribbean court to disclaim jurisdiction, if necessary of its own motion, in one case only, that is, when it is sure that the dispute will be settled abroad by courts whose jurisdiction cannot be disputed (**Art. 17, §4**[257]); this is guaranteed, precisely, by the adoption of the model law by the State in which the criterion provided in Article 9 is materialised. The reflex effect gives rise to a judicial cooperation network that may develop into a true OHADAC judicial area.

141. Article 9 lists eight cases of exclusive jurisdiction. Only one of them is clearly outside the territorial dimension; it is the last on the list (Art. 9, viii), which establishes the jurisdiction of the Caribbean courts concerning disputes relating to the determination of *Caribbean nationality*. It is easy to understand why, in such a matter, the claim of the Caribbean courts is not based on a territorial connection, on the one hand, and on the other hand is exclusive. An individual's nationality may doubtless be based on *jus soli*, but the relationship which it establishes between the individual and the State is a personal bond which endures even beyond borders and retains its vitality and authority wherever the individual is. That bond, which forms the subject matter of the suit, no doubt concerns the private individual who is its subject; but it also concerns, and very closely, the State which, as a sovereign entity, has a monopoly when it comes to determining who are its nationals, that is, its personal component. The necessary impact on that component of judgments ruling, on a principal basis, on the granting, acquisition or loss of nationality justifies exclusive jurisdiction. The State's interest, evidenced by the enforceability of its own law, is too closely involved for it to leave such a matter to a foreign court. That fact is so clear that we may conjecture that whoever, *on a principal basis,* claims a certain nationality or disputes his having it will submit the matter directly to the courts of the State concerned. As a result, there is hardly any chance that the question of the reflex effect of exclusive jurisdiction will come up before the Caribbean courts.

142. But a foreign court may consider that it has jurisdiction to rule on a matter of Caribbean nationality. This may happen, for instance, because its own rules of international judicial law allow it to rule *on an incidental basis* on a matter of nationality which must be resolved in order to settle the principal claim submitted to it in its capacity as the court of the domicile of the defendant. This possibility concerns the Caribbean in connection with the recognition of the decision thus secured abroad: under **Article 74, iii**), is the exclusive jurisdiction provided in Article 9 an obstacle in the way of the legality and therefore of the effectiveness of that foreign decision? Although the wording of Article 9 does not draw any distinction between a principal claim and a collateral issue, it seems that here the exclusive character of international jurisdiction and the monopoly which it grants the Caribbean courts

[257] Art. 17, §4: "Where a Caribbean court is seised of a claim which is principally concerned with a matter over which the courts of another State having adopted the present law have exclusive jurisdiction by virtue of Article 9, it shall declare of its own motion that it has no jurisdiction."

must be restricted to cases in which Caribbean nationality is the principal subject matter of the suit. A refusal to recognise the foreign decision would lead to a denial of justice allowing the suit to be reiterated before the Caribbean court (**Art. 15, ii**), whereas the solution to the issue of Caribbean nationality dealt with on an incidental basis in the foreign suit receives its authority, at most, in view of the solution given to the principal issue; the costs and delays required by the duplication of the proceedings would be so disproportionate as to interfere with the right to effective judicial protection, and such an interference could not be justified by the minor disturbance which is feared, consisting in its recognition. Reciprocally, a restriction to the sole cases in which the issue of Caribbean nationality forms the principal subject matter of the suit must be admitted when interpreting and enforcing **Article 17 §4:** the Caribbean courts shall disclaim jurisdiction of their own motion when a question relating to a foreign nationality, for which the courts of another State having adopted the model law have exclusive jurisdiction under Article 9, is referred to them *on a principal basis*; on the contrary, if an issue of foreign nationality is raised on an collateral basis in connection with a principal issue for which they have jurisdiction, the Caribbean courts need not decline.

This point of interpretation, which relates to the scope of the reflex effect, also concerns the other grounds of exclusive jurisdiction listed in Article 9, to which, for the same reasons, the same solution applies.

143. These other grounds of exclusive jurisdiction are all territorial in nature. This territoriality results from considerations of sound administration of justice and procedural economy whose intensity varies from case to case, but on a relatively narrow scale. The interest of the State also comes into play for each of them. That interest is involved by claims aiming at securing or denying *the recognition and performance of foreign decisions and arbitral awards* in the Caribbean (Art. 9, vi), since we are dealing with the integration into the Caribbean legal order of decisions taken outside its own judicial and coercive system in the name of a foreign sovereign or through the enforcement of a private agreement; no authority other than that of the Caribbean may, without compromising Caribbean sovereignty and the Caribbean organisation of justice, rule usefully on such matters. In this area, the operating scope of that sovereignty and organisation coincide with the national territory. It must, moreover, be observed that exclusive jurisdiction here encompasses, beyond the procedures for the reception of decisions, the disputes relating to enforcement measures; indeed, the latter materialise the State's monopoly on the use of legitimate constraint, and that monopoly is limited to the national territory. That last justification, together with the previous one, also holds as regards *conservatory measures* to be enforced in Caribbean territory (Art. 9, vii).

144. Again, sovereignty is involved, though no doubt less closely, when dealing with the *public registers* instituted and managed in order to consolidate various kinds of rights of private individuals and facilitate their exercise by providing information to third parties (civil status register, land registry, trade register, companies register…). These organisms, established in the national territory and operating in accordance with formalistic procedures, produce information which is both

coded and has geographic consequences limited to the territory.[258] The publicity of legal situations thus forms the subject matter of public services which the State organises in the interest of private individuals, not only the holders of rights, but also the entire community. This mission of public administration of private interests cannot be subject to the control, be it merely judicial, of a foreign State without undermining the sovereignty of the Caribbean or creating risks of disruption. Thus, the model law adopts the solutions sanctioned by the Brussels I system (Art. 22, par. 1, n°3 and 4) both for public registers in general, as is acknowledged by Article 9, v), and for the *registration and validity of patents* and other rights subject to filing or registration, as referred to in Article 9, vi).[259]

145. Though perhaps less visibly, the hand of the State nevertheless weighs on two categories of institutions able to act autonomously in civil and commercial life. These are, on the one hand, *companies and entities* (Art. 9, ii) and, on the other hand, *trusts* (Art. 9, iii). By opting for identical solutions for those two categories, the model law departs from the Brussels I system and from the LOPJ, which, by not providing any exclusive jurisdiction for trusts and even neglecting their autonomy, submit their internal disputes to the system of jurisdiction based on domicile, unless ruled out by a voluntary extension of the scope of jurisdiction. But, as observed above under **Article 5, §1, *c***), a certain number of legal systems within the OHADAC area are familiar with that institution and intend to foster its development; therefore, it appeared opportune to provide lawsuits challenging its existence or status with appropriate rules in the matter of jurisdiction. Since, like companies or other legal persons, trusts (as opposed to natural persons) are artificial entities, their corporate reality, which allows them to manage interests to which they are independently ordained, is the product of the legal order under the aegis of which they exist; it is thus appropriate to make domicile, as defined by **Article 5, §1, *c*)**, a ground of jurisdiction, since that is where that reality is manifested and the decisions concerning it will make their effect felt – an effect that can be none other than the one provided and sanctioned by the State under whose protection they are.[260]

146. Finally, the State in which real property is located is granted exclusive jurisdiction for lawsuits having as their principal subject matter the rights *in rem* re-

[258] *Vid.* S. Corneloup, La publicité des situations juridiques. Une approche franco-allemande du droit interne et du droit international privé, Paris, LGDJ, 2003.

[259] The CJEC, on 15 November 1983, case C. 288/82, *Duinjstee*, precised that in the Community meaning, the category of "disputes in proceedings concerned with the registration or validity of patents", subject to exclusive jurisdiction, does not encompass disputes on ownership of rights, contracts of the said rights nor their infringement. The same CJEC (13 July 2006, *GAT*, case C-4/03) decided, without taking into account the particular configuration of the action for declaration of non-infringement, which inverts the position of the parties in the procedure, that the exception of patent nullity arising as an incidental question on counterfeit is a matter of exclusive jurisdiction; *vid*. M. E. Ancel, « L'arrêt GAT, une occasion manquée pour la défense de la propriété industrielle en Europe », *Rev. Communic. Comm. Electronique*, May 2007, ét. n°10, M. Wilderspin, « La compétence jurisdictionnelle en matière de litiges concernant la violation des droits de propriété intellectuelle », *Rev. crit. dr. int. pr.*, 2006. p. 777.

[260] On the difficulties raised by the plural definition of the domicile of companies and natural persons and of the trust, *vid*. *infra*, under art. 5.

lating to that property. This solution, here approached last, is the first to be sanctioned by Article 9 (i). That order reminds us that, from a historical viewpoint, it is at the origin of the Euro–Continental tradition of private international law. It has been retained and has come into general use because it remains in consonance with the contemporary representation of the State-based legal order. Rights *in rem* relating to immovable property are perceived as elements of the status of property which are inseparable from an essential component of the State, that is, its territory. Moreover, as a bundle of prerogatives allowing uses to be separated from the thing itself, rights *in rem* participate in their distribution between the members of the social body; as a basis of social exchange, they require *local uniformity*, so that those exercising them and those upon whom they are binding will be, as regards the same property, entitled to the same freedoms or subject to the same limitations, all strictly coordinated and adjusted together, failing which anarchy would develop. This requires the State to ensure the *policing of land* and to guarantee the *security of transactions*, which does not brook any interference on the part of foreign lawmakers. The involvement of the State is here reinforced still more by its sovereign missions consisting in the promotion or protection of an *economic system* and of *management of the environment*. The proper performance of those various tasks demands that the State on the territory of which the real property is located have a monopoly of the legal treatment of the rights relating to it; the same is not true of movable property (see below, **Art. 58 *et seq.***). Besides, reasons less related to the public interest and applying with more or less force to the other cases referred to in Article 9 militate in favour of such exclusive jurisdiction. In the event of a dispute, the State where the property is located is the one on whose territory it may be necessary to carry out investigation measures, as well as the one whose law will normally be applicable in that matter of rights *in rem*; therefore, the courts that are "ready to do the job" and familiar with the rules governing the case correspond to the twofold dimension, both geographic and intellectual, of the "principle of proximity" which thus localises the lawsuit on that territory and aims at guaranteeing the sound administration of justice through correct knowledge of the facts and correct application of the law. Together with the requirement of procedural economy, which recommends that the action be initiated before the courts of the place where the prerogatives are exercised, and where, therefore, the conflict of interests arises and the decision will necessarily be materialised, that "principle" imposes a solution on the parties, regardless of their personal procedural positions (neither *actor sequitur forum rei* nor *forum actoris*). The jurisdiction thus established is so well-founded in reason that it does not, in fact, leave them any useful choice. But backed as it is both by the interest of the State and by that of private individuals, such exclusive jurisdiction might develop a *vis attractiva* that would risk extending its scope improperly beyond rights *in rem* alone.

147. That risk did not escape the authors of the model law, who, following the example of the authors of the 1968 Brussels Convention or of Article 22, 1 of the LOPJ, supplemented Article 9, i) by adding disputes concerning *building leases* to those relating to rights *in rem* in immovable property. That addition is justified inasmuch as the reasons founding exclusive jurisdiction apply just as intensely to the former as to the latter. But at the same time, since they are limited to disputes

"relating to the existence or interpretation of leases or to the repair of damage caused by the tenant, to the vacation of the premises"[261], that is, relating to the occupation and use of rented property, it must be admitted that they do not extend to other lawsuits between lessors and tenants in which the obligational or contractual aspect is predominant. Precisely, the extension takes place only as regards the relationship between the tenant and the thing rented. That relationship is often governed by specific legislation corresponding to public policies (economic or social); on account of that legislation's complexity and mandatory character, it is preferable to reserve its application to the courts of the countries where it is in force.

Contrary to the successive versions of the Brussels Convention and to the Brussels I Regulations, the model law has not removed holiday rentals or short-term leases from the exclusive jurisdiction provided in Article 9. As a result, the Caribbean courts will necessarily have sole jurisdiction for any disputes arising in connection with those modes of occupation and use, and will thus be able to apply to them whatever provisions their legislation considers to be mandatory.

Article 10. ***Voluntary extension of the scope of jurisdiction of the Caribbean courts.*** **1. The scope of the general jurisdiction of the Caribbean courts shall be extended when such courts, or one of them, are expressly or tacitly designated by the parties, unless the dispute concerns one of the matters referred to in Articles 8 and 12, for which no derogation by agreement is permitted.**

Voluntary extension for the matters referred to in paragraphs iv), v) and vi) of Article 14 is valid if:

i) it is based on a choice of forum agreement made after the difference arose; or if

ii) both contracting parties have their domicile in the Caribbean at the time that the agreement is made; or if

iii) the plaintiff is the consumer, employee, policyholder, insured, victim or beneficiary of the insurance policy.

2. The jurisdiction thus established extends to the matter of the validity of the choice of forum agreement, which must meet the conditions set forth in the next paragraph.

3. A choice of forum agreement is an agreement whereby the parties agree to submit to the Caribbean courts or to one of them certain or all of the differences arising or which may arise in the future in connection with a definite legal relationship, whether contractual or non-contractual in nature. Unless

[261] *Rapport Jénard*, JOCE, C 59, 5 March 1979, p. 35.

otherwise agreed, a choice of forum agreement establishes exclusive jurisdiction.

A choice of forum agreement shall be evidenced in writing. A written agreement is an agreement recorded in one and the same document signed by the parties, or resulting from an exchange of letters, faxes, telegrams, e-mails or any other methods of remote communication allowing the agreement to be evidenced and ensuring its storage and subsequent accessibility in electronic, optical or other mode.

An exchange of writings in claim and defence in the course of a lawsuit submitted to a Caribbean court constitutes a written agreement when the existence of the agreement is stated therein by one party and not contradicted by the other.

148. Article 6, §3 lays down the rule of the legality of choice of forum agreements within the scope of private international relationships (see above). Article 10 implements that rule of legality when the choice made by the agreement between the parties leads to an extension of the scope of exercise of Caribbean jurisdiction, through an extension of the scope of the general jurisdiction of the Caribbean courts.[262] **Article 12** is, moreover, specifically devoted to a case which is symmetrical in appearance but structurally different. It occurs when the choice of the parties aims, in derogation of ordinary forum selection, at restricting the scope of the exercise of Caribbean jurisdiction by designating the courts of a foreign State.

Article 10 defines the specific conditions to be met for the legal referral of the case to the Caribbean court or courts forming the subject matter of the agreement, even though none of the grounds of jurisdiction set forth by the model law is verified. While a choice of forum agreement results from an exchange of consents and is, from that viewpoint, contractual in nature, it is related to procedural law on account of its subject matter, and especially to the law governing jurisdiction. That mixed nature justifies specific rules departing from the ordinary law governing legal acts. The three paragraphs of Article 10 detail those specific rules; they do not, for all that, erase the terms of formation or the effects provided in the ordinary law governing contracts, which they do not mention. Silence here means acceptance; for example, the question of the capacity (see below, **Art. 23**) or authority (see below, **Art. 27**) required in order to agree a choice of forum clause shall be subject to the usual solutions.

[262] CONC.: Art. 5 of the Swiss PIL Act; art. 4.1 of the Italian PIL Act; art. 19 of the Panamanian Code of PIL; art. 22.2 LOPJ (Spain); art. 6 of the Belgian Code of PIL; arts. 43 *et seq.* of the Venezuelan PIL Act; art. 4 of the Tunisian PIL Act of 27 November 1998; arts. 17 and 18 of the Argentine draft law; art. 108 of the Bolivian draft law; art. 7 of the Colombian draft law; the Dominican draft law; art. 155 of the Mexican draft law; art. 1066 of the Romanian code of civil procedure; art. 59 of the Uruguayan draft law; art. 23 of the Brussels I Regulation; the Hague Convention of 30 June 2005 on Choice of Court Agreements.

149. The choice of forum clause is the expression, at the level of international jurisdiction, of the autonomy of the parties. Its effect is to leave the choice of the court up to them, and – since the court refers to its own rules of private international law – the choice not only of the law applicable to the proceedings, but also of the law applicable to the substance of the dispute. Therefore, the use of choice of forum agreements should be reserved to cases in which the choice of the court of competent jurisdiction and of the governing law may be freely elected by the parties. As a result, the disputes referred to in **Article 9** do not fall under the rule of legality. That article, by instituting exclusive jurisdiction for reasons of public or common interest, develops a reflex effect which goes against referral to a Caribbean court (see above under **Art. 9**). The proceedings under personal and family law referred to in **Article 13** are also removed from the scope of the rule of legality; the traditional reason for this is that in that area the parties may not dispose freely of their interests under domestic law and that the international dimension of the disputed relationship has no impact on that consideration. Since the effect of the international dimension is usually to offer the litigants a choice between several jurisdictions, the argument is not absolutely convincing. It seems rather that the prohibition from derogating from foreign jurisdiction in favour of the Caribbean courts results from the intention of allowing each party to make use, until the actual lawsuit, of the range of courts offered by the legislations of the States in contact with which the disputed relationship is developing. The choice of the Caribbean forum would prohibit them from turning to those foreign fora. We will therefore assume that the specific character of the matter involved goes against an advance determination, via an agreement, of the court of competent jurisdiction and justifies an exception to the rule of legality.

150. The exercise of autonomy in international litigation is widely acknowledged;[263] the plurality of legal orders, each of which defines its offer of justice, puts the party that hastens to initiate hostilities in a position to choose its judge and thus to gain a unilateral advantage over its opponent, both at the procedural level and at the level of the applicable law, by bringing the difference before the court most convenient for it or the one whose private international law promises it the most favourable solution. Plurality is a source of insecurity and unpredictability and weakens the relationship even before a dispute sets in. It is in order to deal with that risk that the rule of legality is necessary. If the choice is made by mutual agreement before the dispute arises, the parties will know by which court and under what law it will be settled; they will thus be able to determine with some measure of security what behaviour is dictated by the development of their relationship. If exercised *post litem natam*, the choice of forum agreement prevents the ruinous appearance of simultaneous proceedings. However, those benefits will not be secured unless each of the parties is fully informed and aware of the consequences of the agreement. Some legislations, for fear that consent may be imprudently given, subject such an agreement to restrictive provisions. Thus, by measure of precaution, in order to guarantee respect for private autonomy and allow it to be effective,

[263] N. Coipel-Cordonnier, Les conventions d'arbitration et d'élection de for, *op. cit.*; C. A. Arrue Montenegro, L'autonomie de la volonté, *op. cit.*, n. 55 *et seq.*; A. Briggs, Agreements on jurisdiction *op. cit.*

the model law institutes specific protection for freedom of consent, and out of consideration for the subject matter of the clause, which is Caribbean jurisdiction, it delimits the import of choice of forum.

151. I. – The protection of consent is ensured in two different ways; paragraph 3 of Article 10 provides general protection, applicable to all persons seeking justice and to all agreements. Its first paragraph provides special protection, which concerns choice of forum agreements entered into or to be entered into when the parties are not deemed to be on an equal footing.

152. These cases of special protection correspond to situations for which **Article 14** institutes a system of unequal jurisdiction by extending the jurisdiction of the Caribbean courts in favour of one of the parties because, generally speaking, the relationship between the latter involves inequality of economic power and therefore of bargaining power. Such inequality is deemed to exist structurally between a consumer and the trader supplying him, between an employee and his employer, between a policyholder, insured, victim or beneficiary and an insurance company. It is obvious that in those cases one of the contracting parties normally has a legal, physical, commercial and financial potential allowing it to deal on promising terms, whereas the other contracting party, stated to be the *weaker party*, because he is constrained by need or forced to alienate his work power, or anxious in the face of an uncertain future, does not enjoy full freedom of information and judgment and thus suffers a loss of autonomy. For that reason, and also to avoid jeopardising the functions of consumption, production and foresight which condition participation in social exchange and civic life as handled by contemporary society, **Article 14** offers additional grounds of jurisdiction to the weaker party and to it alone, on a compensatory basis. It is within this framework that private autonomy is exercised. It is then directed towards the protection of the weaker party and may be expressed only when the latter's full consent is recognised.

153. This functional protection limits the legality of the agreement to three possibilities. The first is that in which the choice of forum is agreed *post litem natam*, once the dispute has arisen; it will then be assumed that the litigious form assumed by the relationship undoes the relationship of domination between the parties and that from then on each of them has full freedom to defend its own interests. The second possibility is that in which both contracting parties have their domicile in the Caribbean at the time that they choose the Caribbean courts. In this case, on the one hand, the extension of the scope of jurisdiction answers a requirement of convenience and is based on a common intent supported, at a rational level, by a characterised objective connection, thus removing any suspicion of improper or arbitrary dealing. On the other hand, the validity of the extension neutralises any improper change of domicile on the part of the consumer. The third possibility is that of a choice of forum that benefits the weaker party only; the clause is valid inasmuch as it offers the latter the possibility of submitting its claim to a Caribbean court not designated by any Caribbean jurisdictional rule. However, it is not valid unless it allows the stronger party the same faculty. In sum, the autonomy of the

parties is only permitted to come into play in the area of jurisdiction according to modalities that rule out its exercise to the detriment of the weaker party, thus aggravating the domination to which the latter is subject and which could lead it to accept the law of the strongest. But in order to ensure the validity and effectiveness of the extension of the scope of jurisdiction of the Caribbean courts, the conditions aiming at the general protection of consent to the choice of forum must be met.

154. The general protection applicable to all persons seeking justice and to all agreements designating the Caribbean courts is based on a classical legal technique, since we are dealing with formal conditions aimed at guaranteeing that the parties have made an actual commitment with full knowledge. Those conditions are not drastic; they are summed up by the requirement of a *writing* evidencing and formalising the agreement and ensuring its preservation with a view to its possible production in court. Such an agreement may be recorded in a specific, separate instrument, or incorporated into the contract simply as a provision. The definition of a writing matters more. Even though it seems to assign to the formal element an aim of predetermining the proof of the agreement, that definition mainly denotes the concern of admitting only those extensions of the scope of jurisdiction actually consented to by the parties. The writing is primarily intended to attest the existence of the parties' consent, whether traditionally expressed by the making of a document signed by the persons involved or through the use of the most standard or most modern means of remote communication, provided that the latter reflect an exchange allowing a common intent to be ascertained and then proven in court.

155. Next to those forms of bilateral expression of consent and equated with them, the model law admits an exchange of writings between the parties after proceedings have been initiated before a Caribbean court, from which it results that the choice of forum agreement alleged by the claimant is not disputed by the defendant. That stipulation does not set aside the definition of a writing, but rather implements it in the specific case of the *tacit mode* referred to in paragraph 1. Such a tacit agreement is not effective in law unless its existence is stated by the claimant in his writings as communicated to the defendant and if the latter not only does not object, but on the contrary and more positively signifies by his own writings that he relies on the jurisdiction of the Caribbean courts; this device does away with the doubt that silence pure and simple would have created as to the actual consent of the party that did not take the initiative of going before the Caribbean courts.

156. II. – This formalism is sometimes said to limit the autonomy of the parties; quite the contrary, it serves it, inasmuch as it subjects the extension of the scope of jurisdiction to an actual agreement between their free and informed wills. Moreover, the precaution is justified by the specific issue that is Caribbean jurisdiction. By extending the scope of the latter, the choice of forum agreement takes on a public-law dimension inasmuch as it proposes to compel a State judge to hear a case which, in principle, is not significantly part of the life of Caribbean society. The extension also influences the operation of a public service pertaining to the sovereignty of that State; the latter cannot unreservedly accept such an onus, thus taking

the risk of weakening the credit of its courts by administering justice too accommodatingly, thus depriving its decisions of credit and effectiveness in relation to other States. It must, therefore, limit its availability to what is useful to the parties. Such a consideration has, for instance, led the Belgian lawmaker to grant a Belgian court designated by choice of forum the power of "disclaiming jurisdiction when it appears from all of the circumstances that the dispute does not have any significant connection with Belgium"[264]. Article 10 of the model law does not include any such provision, which brings back the exercise of jurisdiction within the limits of its function. But we must take **Article 18** into account; it accepts as admissible the exception of *forum non conveniens*. There is nothing to indicate that such an exception could not be raised against an agreement in the cases it delimits, where the configuration of the suit would render the taking of evidence impossible or excessively difficult or expensive.

157. In the same spirit, the freedom of the parties is reined in and by that very fact protected against itself by a very relative limitation, which, by the way, agrees with a requirement of contract law according to the Romano–Germanic tradition. Indeed, under paragraph 3 of Article 10, the choice of forum must concern at the very most any present or future disputes that can be connected with "a certain legal relationship". A specialist of contract law will recognise here the condition requiring "a certain object forming the subject matter of the commitment"[265]. But that condition can also be understood as corresponding to the derogatory and exceptional nature of the clause, as a functional addition to the Caribbean system of international jurisdiction, and as such subject to the general rules governing the administration of the public service of justice. Conversely, the parties, who may of course restrict the extension solely to the disputes arising from any phase of the development of a certain relationship, cannot enter into an agreement covering all of the differences liable to arise between them in connection with any present, past or future legal relationship binding them to one another; they cannot, by a private agreement, place themselves generally under Caribbean jurisdiction and force, if only as regards their mutual relations, the jurisdiction of the Caribbean judiciary without any assessment of the connections, if any, between the dispute arising from them and the life of Caribbean society. An unlimited choice of forum clause would give rise to a risk of non–proximity of the court chosen and consummate the misuse of the institution by requiring the extension of the scope of jurisdiction to effect an actual change of allegiance.

158. The special nature of the object of choice of forum would also justify its being legally separable from the clauses of any contract into which it is formally incorporated. This is provided by the second paragraph of Article 10, which states that "the jurisdiction thus established extends to the very validity of the agreement". The issue is in fact the autonomy of the clause. That autonomy authorises

[264] Belgian PIL code, Art. 6§2; *vid.* also the Romanian code of civil procedure, Art. 1066 §3. The Swiss private international law Act, Art. 5. 3, implies such a power of the courts to disclaim jurisdiction if one of the parties is part of the Swiss legal order or if the Swiss law is the law applicable.

[265] Art. 1108 of the French Civil Code.

the court chosen to rule on its own jurisdiction, even if the defendant objects the nullity of the agreement containing the choice of forum; the validity and nullity of the agreement are distinct from the validity and nullity of the clause, which are respectively subject to specific terms, so that the nullity of the contract does not necessarily imply the nullity of the clause,[266] just as the nullity of the clause does not necessarily result in the nullity of the agreement.

159. Article 10, paragraph 1 takes care to specify that a choice of forum agreement may result from a designation of the Caribbean courts or of one of them. The object always remains the extension of Caribbean jurisdiction, but that extension may be carried out according to two different modalities. The first is limited to an overall designation of the Caribbean judicial order, leaving it up to its domestic law to determine the court having specific jurisdiction to which the case shall be referred; the claimant will thus have to comply with the rules of territorial jurisdiction and of jurisdiction *ratione materiae* in force in the Caribbean (see below, **Art. 21**). The second modality consists in agreeing on the Caribbean court having specific jurisdiction; such a designation also results in the extension of the scope of Caribbean jurisdiction, since it is assumed that none of the objective grounds of jurisdiction defined by law founds the jurisdiction of a Caribbean court. Although the practice is very common and very widely admitted in private international relationships, this modality nevertheless gives rise to the risk of going against a mandatory domestic jurisdictional rule, especially one regarding jurisdiction *ratione materiae* that would, for instance, require a referral to the labour relations court and not to the commercial court chosen by the clause; in such a case, inasmuch as extension of the scope of jurisdiction must basically be regarded as an instrument of localisation of the suit, it will be up to Caribbean law to decide whether the flaw can or cannot be remedied, depending on the intent of the parties.

160. At the end of section 1 of paragraph 3, it is stated that "unless otherwise agreed between the parties, a choice of forum agreement establishes exclusive jurisdiction". This provision, which is modelled on Article 23 of the Brussels I Regulation, enables the parties to render referral to a Caribbean court totally contingent, as it leaves them free to approach any foreign courts claiming jurisdiction. This faculty is related to the autonomy of the parties. It must be acknowledged, however, that in itself it does not exactly tally with the basis for the legality of the choice of forum agreement. By enriching the range of jurisdictions possible between the parties, such a faculty accentuates unpredictability and encourages forum shopping. Nevertheless, common law courts, especially those of English allegiance, readily presume that the jurisdiction of the court(s) chosen is not exclusive. We must believe that this is not solely in order to legitimate the warm welcome which they readily reserve to cases which a choice of forum clause claims to direct towards another judge. Practice, supported by the authority and wisdom of the English

[266] CJEC, 3 July 1997, *Benincasa*, JDI 1998. 581, note Bischoff; Cass. 1st civil chamber, 8 July 2010, *Bluebell Trading Company*, D. 2010. Pan. 2333, obs. L. D'Avout, *JCP* 2010. 2246, obs. T. Clay. But it obviously does not mean that both distinct regimes cannot contain the same cause of nullity.

courts, has persuaded that the ravages of non-exclusiveness must not be exaggerated and that it is possible to a certain extent to allow the autonomy of the parties' free rein on this point. Non-exclusiveness is thus admitted, but it must be negotiated and agreed between the parties and recorded in the written form of a choice of forum agreement. Although thus tempered, the principle of the exclusiveness of the chosen jurisdiction remains; it commands the litigants to approach the Caribbean courts only and condemns any proceedings initiated and decisions secured before a foreign court in contempt of the extension of the scope of jurisdiction.

Article 11. ***General jurisdiction based on the domicile of the defendant and specific jurisdiction*****. 1. In disputes other than those referred to in Article 8 and failing voluntary extension in accordance with Article 9, the Caribbean courts have jurisdiction when the defendant is or is deemed to have his domicile in the Caribbean, without prejudice to the jurisdiction established in Articles 13 and 14.**

2. In the event that there are several defendants, at least one of whom has his domicile in the Caribbean, the Caribbean courts have jurisdiction, provided that the claims are so closely connected that it is advisable to investigate and rule on them together.

161. *Actor sequitur forum rei*. This rule, borrowed from the Code of Justinian,[267] enjoins the claimant to submit the dispute to the court of the defendant. It is reiterated for the Caribbean courts by the first paragraph of Article 11 of the model law, which specifies that the *forum rei* is the judicial order of the territory in which the domicile of the defendant is located: when the latter has or is deemed to have his domicile in the Caribbean, the Caribbean courts have jurisdiction.[268] It is clear that the domicile here referred to is the one defined by Article 5 (see above).

162. This reference to domicile signs a certain inflection of the basis for the solution. In Rome, citizenship rivalled with domicile;[269] the latter prevailed in the Middle Ages and in pre-revolutionary France because it had replaced citizenship as a reflection of the individual's subordination to the judge. The connection was political in nature; it was a bond of allegiance to the authorities, who enjoyed the right to command and punish their subjects, no doubt for their own good and salvation. The Napoleonic Code ratified the supplanting of domicile by nationality as a political bond (see Art. 15 of the French Civil Code), exalting the latter to the point of ad-

[267] C. 3, 19, 3, *ubi rem in actio;* C. 3, 13, 2, *de jurisd. omn. jud.*

[268] CONC.: Art. 3 of the Italian Act n°218; Art. 40 of the Venezuelan Act; Art. 3 of the Tunisian Act of 27 Nov. 1998; Art. 5 of the Belgian PIL code; Art. 1065 of the Romanian code of civil procedure; Art. 7 of the Colombian draft law; Art. 10 of the Dominican draft law; Art. 56 of the Uruguayan draft law; Art. 2 of the Brussels I Regulation.

[269] The Roman law founded the *forum rei* on the *domicilium* but also on the *origo*, without clearly indicating how cases were divided between those two connecting factors, *vid*. C.F.v. Savigny, *Traité de droit romain*, §355.

mitting the jurisdiction of the French courts whenever the plaintiff was a French national (Art. 14 of the French Civil Code). The State, which at the time was less concerned with the individual welfare of its subjects, thus meant to subject them more tightly to itself, including judicially. Contemporary law has moved away from that perspective, without totally rejecting it; domicile, even though reduced to mere habitual residence (see above, **Art. 5**), retains a political significance, since it evidences the person's integration into a given social environment which is politically organised, in whose life he participates, benefiting from its public and social services and contributing to their functioning. It may then appear natural, "legitimate and necessary in a democratic society", to acknowledge that such a person is entitled to the protection of the judiciary of the place where he lives.

163. Today, however, that consideration, from the angle of its public-law aspect thus toned down, is doubtless no longer dominant; it is overshadowed by a requirement of procedural fairness which, after competing with it for a long time, finally prevailed. The "natural judge" is no longer that of political allegiance, but the one designated by "natural law" via an essential principle of justice regarding private interests: *ubi emolumentum, ibi onus.*[270] Because he deems the state of affairs to be unsatisfactory, the claimant takes the initiative of triggering the judicial and coercive machinery of the State, while the defendant, for whom, on the contrary, the state of affairs is satisfactory, does not undertake any action aiming at modifying it. It is only fair that whoever means to profit from his move should assume the related burden. Therefore, if there is a border between the parties, it is up to the plaintiff to cross it and to submit his claims to the defendant's court. The *onus of judicial internationality* must be shouldered by the claimant.[271]

164. This predominantly private-law interpretation of the rule of forum based on domicile has allowed the recognition of other grounds of jurisdiction, whether "positive" (as opposed to the "natural judge") or "specific" (in the words of Savigny, reproduced by the Brussels I Regulation). Indeed, while in civil and commercial matters considerations of private interest must be foremost when organising litigation and determining the court to which the case must be referred, the requirement of sound administration of justice comes into competition with *actor sequitur*. The purpose of that requirement is to combine a proper application of the law with a correct assessment of the facts. Now, the court of the domicile of the defendant is not always, in practice, that of the State on whose territory the facts of the case took place and are accessible, nor that whose law will determine the solution of the dispute. The sound administration of justice, which aims at optimal protection of the interests of the parties, implies a certain proximity of the judge, whether relating to the facts of the case or to the law to be applied to them. This is why **Articles 13 and 14** of the model law admit the jurisdiction of the Caribbean courts in a whole series of cases in which the defendant is not domiciled in the Caribbean, but where the matter in dispute implies a certain localisation in that country

[270] Inst. I, 17, *de legitima patronorum tutela.*

[271] M. Virgos Soriano, F. J. Garcimartín Alférez, *Derecho procesal internacional. Litigación internacional*, Civitas, 2000, n.87

of the relationship to be ruled on. Thus, an option at the level of international jurisdiction is opened up to the claimant. This is sanctioned by the last phrase of the sentence forming the first paragraph of **Article 9.**

165. The weight of the consideration for the interest of private individuals is felt on two other points. On the one hand, it shields all the cases for which there is a clause extending the scope of jurisdiction in favour of the Caribbean courts against any possible negative effect of *forum rei*: although the defendant may not be domiciled in the Caribbean, the claimant benefits from Caribbean jurisdiction because this has been validly agreed with the defendant (**Art. 10**). The parties are deemed to be the best qualified to appreciate their own interests. On the other hand, conversely, this weight of private interest does not suffice to draw cases which, from the Caribbean viewpoint, come within the scope of grounds of exclusive jurisdiction materialised outside the Caribbean into the scope of *forum rei* (**Art. 9**); inasmuch as such grounds of jurisdiction answer requirements of collective or public interest, they prevail over *utilitas privatorum*.

166. By adopting this mode of organisation of international jurisdiction, the model law follows the Romano–canonical or civil law tradition. In principle, the common law courts refer to a very different conception, traditionally territory-based, by preferring a connection via service inside the jurisdiction (i.e. the place of the delivery of the summons to the defendant) to *forum rei*. Although this solution has been considerably tempered, it remains the axis of the jurisdictional system of those courts. But the United Kingdom's membership in the European Union has secured it to the Continent, so that the English courts now increasingly apply the Brussels I Regulation; in so doing, they have shown themselves as well armed as the courts of the other member States when faced with the difficulties encountered in the enforcement of that instrument, which is the most modern embodiment of the Romano–canonical tradition.

167. The second paragraph of Article 11 establishes the derivative jurisdiction of the Caribbean courts when the claimant's action is directed against several joint defendants. In such a case, the requirement of procedural economy – which intends to prevent the multiplication of proceedings and an increase in costs and delays, in the interest of the parties – advocates the joinder of the claims. Although desirable, such a concentration of the litigation is admitted only conditionally: one of the defendants must be domiciled in Caribbean territory, and the claims must be so closely connected that it is advisable to investigate and rule on them together.

168. The *vis attractiva* giving rise to derivative jurisdiction is recognised in the only ground of jurisdiction based on domicile established in paragraph 1 of Article 11. As a result, if for instance several debtors are liable for the same debt, the fact that one of them is domiciled in the Caribbean is not enough to found the jurisdiction of the Caribbean courts. The claim must also be in fact directed against that domiciled debtor and an extension of jurisdiction based on domicile is not provided unless it has been activated by the claimant. But such *forum rei* jurisdiction does

not have to be activated as such, in express terms, on the basis of Article 11, §1; a claim basing itself on specific jurisdiction in order to refer a case to a court which is, moreover, that of the domicile of one of the joint defendants would exercise the same force of attraction and would allow the litigation to be concentrated before that *forum rei*. On the contrary, if the same coincidence were to occur with an exclusive forum or an agreed forum, paragraph 1 would rule out the *forum rei* and therefore any jurisdiction that might have been derived from it (see above, n° 140).

169. The second condition required is that "between various claims brought by the same plaintiff against different defendants, there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings"; this requirement, thus formulated by an order of the Court of Justice of the European Communities,[272] is reiterated in almost the same terms by the Brussels I Regulation. It indicates clearly that procedural economy is not so powerful an imperative as to allow the neglect of procedural fairness to the detriment of the non-domiciled joint defendants. Such a sacrifice can be contemplated only if the benefit it promises is tangible; that is why, in the law of the European Union, connexity between the claims is required and the danger entailed in disregarding it is recalled. The model law is less strict: connexity is not mentioned, and neither is the irreconcilable nature of the decisions. Those notions are difficult to define, as appears from the jurisprudence of the Court of Justice,[273] and the model law has deemed it more prudent to limit itself to wording which does in fact refer to the cost-benefit ratio, but refrains from prejudging the basis on which it can be established and leaves the responsibility of specifying this up to each State.

Article 12. Derogatio fori. However, the jurisdiction of the Caribbean courts resulting from Article 11 may be excluded by a choice of forum agreement in favour of a foreign court or courts. In that case, the Caribbean courts shall stay the proceedings until the court to which the matter has been referred on the basis of choice of forum has declined jurisdiction.

170. Article 12 stresses the twofold nature – both unilateral and formally specific – of the private international law legislation that the model law will bring to each State adopting it.[274] When the rules of international jurisdiction have a multilateral source, or one common to several legal orders, it is by no means necessary, as between the States bound by them, to dissociate the treatment of choice of forum agreements and to devote different provisions to extension of the scope of jurisdic-

[272] CJEC, 27 September 1988, *Kalfelis* (case 189/87)

[273] CJEC, 27 October 1998, *La Réunion européenne* (C-51/97), 13 July 2006, *Roche Nederland BV* (C-539/03), *Reicsh Montage AG* (C-103/05) and 11 October 2007, Freeport Plc (C-98/06).

[274] CONC.: Art. 5 of the Swiss PIL Act; Art. 4 of the Act nº 218 (Italy); Art. 7 of the Belgian PIL code; Art. 47 of the Venezuelan Act; Art. 17 of the Argentine draft law; Art. 17 of the Panamanian draft law.

tion and to derogation of forum. Since both national courts are subject to the same rules, the choice will be similarly valid from the viewpoint of both of them, with both a derogatory effect and an extending effect.

On the basis of the still relevant assumption that each sovereign State retains the control of its private international law, the model law separates the question of extension of the scope of jurisdiction from that of its narrowing. In order to answer the first, there is no need to concern oneself with the point of view of the foreign State from whose courts the agreement removes the dispute; it is enough to define the conditions to which the forum chosen subjects the referral. On the contrary, when the case is to be removed from the Caribbean courts, the latter must, in determining the conditions to which that removal is subject, include the viewpoint of the forum chosen in order to ensure that the latter is ready to hear the case and to dispense justice to those choosing it. The excluded Caribbean forum will not withdraw the offer of justice made by the rules of jurisdiction giving access to its courts unless the litigants' choice is accepted by the forum chosen. This can be done in an abstract fashion at the level of the terms of validity of the derogation, or concretely at the level of procedure. Article 12 has preferred the level of procedure for the consultation of the chosen forum.

171. This option does not, of course, prevent the *derogatio fori* from being regulated in accordance with its purpose, which is not limited to the choice of a foreign court, but aims at setting aside the jurisdiction of the domestic one. The qualification of the jurisdiction agreement as a *choice of forum agreement* in Article 12 makes it virtually mandatory to submit the validity of the derogation to the conditions provided in **Article 10**. Instituting special protection for the weaker party and general protection for all persons seeking justice is no less necessary when setting aside a court is at issue; likewise, the limitations placed on autonomy are just as well-founded here as in the case of the extension agreement.

172. We must simply note the difference limiting the derogatory effect of the autonomy of the parties to the sole Caribbean jurisdiction based on Article 11, that is, on the domicile of the defendant. From the Caribbean viewpoint, this restriction shields the autonomy of the parties from the exclusive jurisdiction provided by **Article 9** and the specific jurisdiction provided by **Article 13** in the matter of personal and family law, which are mandatory, but also from the specific jurisdiction in property matters provided by **Article 14**; it follows, for example, that contract partners having agreed a clause allowing them to approach one or several foreign courts, whereas **Article 14** gives them access to Caribbean jurisdiction, retain the faculty of referring a dispute to the Caribbean courts. This lack of symmetry as compared with **Article 10** is questionable, inasmuch as it enables the contract partner who is quickest to initiate proceedings to go back on his commitment; the model law no doubt considers here that it is not possible to deprive a person seeking justice of the benefits of Caribbean jurisdiction and that this must be taken into account by both parties when entering into the agreement. If that agreement is judged to be valid and effective by the forum chosen, it may be complied with by the parties, and the decision handed down by the foreign judge on that basis may

even be recognised in the Caribbean inasmuch as it does not imply going against **Article 74, iii**. It remains, however, that the prospect of such an outcome makes up only imperfectly for the loss of usefulness of the clause, which aims at ensuring predictability and legal security.

173. The second sentence of Article 12 has chosen the procedural route in order to introduce the taking into account of the viewpoint of the forum chosen. This will occur when a case is referred to the Caribbean judge of the *forum rei* in disregard of the clause. In this case, the exception of lack of jurisdiction, possibly raised at the initiative of the court, must, if acknowledged to be well-founded, lead to a stay of proceedings, to their suspension. It would no doubt have been possible to be more dogmatic and to prescribe that once the validity of the clause is acknowledged the proceedings before the Caribbean court shall be discontinued. That solution would, however, have threatened the claimant and even his opponent with a jurisdictional void in the event that under the law of the forum chosen the clause should be null and void. The model law, which concretely links the derogatory effect to the extensive effect, prefers a less radical solution, which does not result in the declining of jurisdiction by the Caribbean judge unless the court to which the case is transferred proves ready to hear it. If the matter is referred simultaneously to that chosen forum, the wait will not be a long one. In the reverse case, the parties will make use of the stay of proceedings in order to secure a decision on that point. Article 12 does not, however, set any timeframe for obtaining that information; we must therefore believe that if it is late in coming this is due to the inadequate diligence of the parties and that such inadequacy allows it to be presumed that they have given up referring the matter to the court chosen. We may thus believe that when the silence as to the position of the chosen forum will have lasted for a reasonable time, the suit before the Caribbean court may be resumed at the request of either party. This judicial means of taking the viewpoint of the forum chosen into account may not be perfect, but seems more effective than an abstract rule that would first require the parties and then possibly the judge to refer to the foreign law to make sure of the validity of the agreement.

Article 13. *Personal and family law.* Without prejudice to the jurisdiction established in the previous articles, the Caribbean courts have jurisdiction:

i) in the matter of declaration of absence or death, when the person concerned has had his last habitual residence in Caribbean territory; the Caribbean courts also have jurisdiction regarding a declaration of absence or death when the latter forms the subject matter of an issue collateral to the principal issue referred to them;

ii) in the matter of incapacity and of measures for the protection of the person or property of minors and adults lacking capacity, when the minor or adult lacking capacity has his domicile or habitual residence in the Caribbean;

iii) in the matter of measures for the protection of the person or property of adults, when the adult has his domicile or habitual residence in the Caribbean;

iv) in the matter of personal and property relations between spouses, of nullity of marriage, of divorce and legal separation, when the spouses both have their habitual residence in the Caribbean at the time of filing, or when both have had their last common habitual residence in the Caribbean and when the claimant continues to reside in the Caribbean at the time of filing, likewise when both spouses are Caribbean nationals;

v) in the matter of filiation, when the child has his habitual residence in the Caribbean at the time of filing or when the claimant is Caribbean and has resided in the Caribbean for at least six months on the date of filing;

vi) in the matter of the formation of adoption, when the adoptee has his habitual residence in the Caribbean or shares common Caribbean citizenship with the adopter;

vii) in the matter of support, when the creditor has his habitual residence in Caribbean territory and when the claim for support is joined with a status action for which the Caribbean courts have jurisdiction.

174. This article again refers to special fora *ratione materiae* as regards personal and family law.[275] The denomination "special fora" graphically and semantically reflects the latter's very nature. If the dispute does not relate to an area pertaining to exclusive jurisdiction or does not require that the suit be brought by both parties, the plaintiff is offered a twofold choice. On the one hand, a claim may be filed before the courts of the domicile of the respondent; on the other hand, the claim may be filed in accordance with the rules governing the corresponding special jurisdiction *ratione materiae*, thus opening up an additional possibility of bringing suit. Such fora are based on the principle of proximity and consist in designating the courts of competent jurisdiction in view of the very nature of the dispute. However, in other cases, the neutrality of the principle of proximity must yield to the protective fora, provided that there is a weaker party to the dispute, such as a consumer, an insured, a worker, etc.

When the Caribbean courts lack jurisdiction as general fora (**Art. 10 and 11**), or if the subject matter does not pertain to the scope of exclusive jurisdiction of the Caribbean courts (**Art. 9**), the latter may be granted jurisdiction *ratione materiae* as special fora, as provided in this article. Each forum governs a specific subject matter or a concrete legal institution or relationship within one and the same subject matter. As a result, it is impossible to leave it up to two fora to determine international jurisdiction for the same subject matter.

Due to their nature and function, special fora, whether protective or neutral, must be interpreted restrictively. They constitute an exception to the forum of the domicile of the defendant, and as such they must be interpreted restrictively in order to

[275] CONC.: Art. 22.3 LOPJ (Spain); art. 12 of the Dominican PIL draft law; Brussels II bis Regulation.

guarantee a high level of predictability of the rules governing international jurisdiction. However, there are no grounds for restrictive interpretations that consist in confusing a special forum with the general jurisdiction based on the domicile of the defendant. A special forum offers, precisely, an alternate forum to the forum of the domicile of the defendant. That is precisely why, in a majority of cases, a special forum may coincide with the forum of the domicile of the defendant without for all that becoming an exorbitant forum.[276] Indeed, in that case it is based on reasonable and specific evidence of proximity, such as the place of performance of the obligation, the place where the damage occurred, the place of the secondary establishment or of the branch, etc.

175. The same is true of **Art. 14** (*see below*) of the model law, whose literal tenor might lead one to believe that there is a hierarchical system of fora. Thus, exclusive fora would have priority, provided that there is a sufficient connection allowing jurisdiction to be assigned to our courts. Failing that, the matter would be left to the general fora, and if the latter were to prove inoperative and only then, the Caribbean courts of competent jurisdiction would have to be designated on the basis of the special fora *ratione materiae* "without prejudice to the jurisdiction established in the previous articles". Such a hierarchically based explanation of the structure of the model law is not, however, very fortunate, and many arguments may challenge it. In the first place, resorting to a method based on hierarchy is inappropriate and contrary to the very nature of the rules governing jurisdiction. Such a method works perfectly for the applicable rules of law, and more specifically for the rules governing conflicts of laws, where it is possible and often useful to articulate hierarchical links on the basis of a rational criterion or of a substantive point of view. This method functions, for the conflict of laws rule is as concrete as the determination of the applicable law and varies depending on whether one is dealing with the first, second, third or fourth point of connection according to the order of priority established. Likewise, the method founded on the hierarchical relationship functions in international treaties or for the uniform rules binding several States, as may be the case for the Brussels I Regulation, since the various fora which they provide are integrated as a jurisdictional norm of a bilateral or unilateral type. However, the method based on the hierarchical relation lacks logic as far as domestic jurisdictional rules in private international law are concerned. Indeed, the latter are unilateral by their very nature, and the result of any forum of jurisdiction pursuant to Articles 9 and following of this model law is always the same: to assign jurisdiction to the Caribbean courts.

The general jurisdictional rules determine the Caribbean courts without any reference to the subject matter concerned. We are dealing here with the two fora provided in **Articles 10 and 11.** The rest are special fora which are set forth from the viewpoint of the subject matter with which they deal (**Art. 13 and 14**). However, all the special fora *ratione materiae* do not have the same characteristics. In fact, there are two kinds of special fora, i.e. exclusive and competing ones. The first are set forth in **Article 9**. The others are scattered throughout **Articles 13 and 14**. The

[276] P. Buisson, *La notion de for exorbitant (étude de droit international privé)*, Thèse Paris II, 1996.

difference between the two concerns the fact that the former imply the exclusive jurisdiction of the Caribbean courts, which radically prevents the recognition of a foreign judgment handed down under such circumstances. The latter, even though they assign jurisdiction to the Caribbean courts, are termed competing, because they do not rule out the possibility of recognising a judgment handed down by a foreign court having stated that it has jurisdiction in view of those same criteria, or on the basis of other criteria deemed to be reasonable. It must, however, be stressed that among the competing fora, some, for concrete reasons of *ratione materiae*, are liable to be termed "protective fora" (support or filiation) and very distinctly reflect the need to protect the weaker party to the relationship involved.

176. Declaration of absence and declaration of death constitute acts of voluntary jurisdiction which are intimately interrelated and which have to do especially with legal personality, with the protection of the assets of the person declared to be absent or deceased and with the interests of third parties. We are dealing with institutions that are very heterogeneous in comparative law, so that some legal orders only are acquainted with declarations of absence or death, while the others mingle those two concepts, which in all cases leads to a great diversity of procedure, content or effects.

Paragraph i) of this article provides that the Caribbean courts have jurisdiction in the matter of declaration of absence or death, provided that the dead or missing person had his last domicile in Caribbean territory. This forum is justified by the close connection implied by domicile, from the viewpoint of both the person and his assets. It thus guarantees the bond of proximity, as well as the effectiveness of the decision and of the protective measures adopted. It is also appropriate from the procedural point of view, since it allows a special connection to be made in view of the circumstances of the disappearance; therefore, such a connection is not warranted if the person vanishes, with certainty, in another country. The rule of jurisdiction has been criticised on account of its restrictive nature; preference has been given to the forum of the habitual residence, which in itself is broader, or even, in some cases, to the forum of nationality. But especially, this injures the interests of third parties (family members, heirs apparent…) who are also concerned by substantive law, and this may lead to actual situations of denials of justice. In particular, the possibility of justifying the jurisdiction of the Caribbean courts as the forum of necessity in many cases of negative conflicts of jurisdiction must not be ruled out, especially when the State in which the absent person had his last domicile opts for the forum of that person's nationality.[277]

The possibility of adopting interim protective measures such as those provided in the legislation of the forum in view of the principle of defence of the assets of the dead or missing person opens up the avenues of international jurisdiction referred to in **Art. 16** of the model law, provided that those assets are located in the Caribbean and that those measures are to be carried out in that country.

[277] P. A. de Miguel Asensio, "La ausencia y la declaración de fallecimiento en Derecho internacional privado", *REDI,* vol. XLVII, 1995-2, pp. 41-70.

177. Legal age does not imply legal capacity in the event that an illness or psychic deficiency should occur, thus justifying a declaration of incapacity. In the case of persons who are of age, a declaration of incapacity is a prior and mandatory condition for the adoption of most protective measures. The case is different when dealing with minor children. The measures for the protection of minors referred to in paragraph ii) of this article apply due to the very fact of being under age, without it being necessary to demonstrate incapacity. Of course, it is also possible to decide to place minors suffering from a cause of incapacity under preventive protection, since the incapacity is liable to persist once the minor has come of age. This, moreover, does not prevent other measures from being set up additionally for the specific protection of a minor lacking capacity. In the case of the adults lacking capacity referred to in paragraph iii), the declaration of incapacity is a prior stage which is mandatory for the adoption of protective measures such as guardianship or certain types of curatorship.

Incapacity is a prior condition for setting up protective measures for a person lacking capacity, independently of the fact that both may be pronounced concomitantly within the framework of the same legal proceedings. It is understood that if the declaration of incapacity is handed down by a foreign judgment, it will be liable to produce its effects in the Caribbean through recognition of the judgment or exequatur. Pursuant to this article, the Caribbean judicial organs have jurisdiction provided that the person presumed to lack capacity has his habitual residence in the Caribbean. This is an obviously reasonable criterion, for if the person resides in Caribbean territory on a stable basis, it is quite naturally up to the Caribbean courts and more specifically to the Caribbean judges to appreciate the causes and origins of the lack of capacity. However, in order to allow the adoption of protective or provisional measures, and particularly for purposes of commitment to a specialised institution, it suffices that the person concerned be in the Caribbean, even if he does not have his residence there, or that his assets be located in the Caribbean. The urgency of such measures largely justifies those two criteria.

While a declaration of incapacity is a prior condition for the adoption of permanent protective measures for an adult lacking capacity, it remains, nevertheless, that this does not apply to provisional or emergency measures liable to be adopted. Usually specific protective measures, such as commitment, may be adopted in the course of the same proceedings, or measures such as placement under guardianship or curatorship may be adopted immediately after the declaration of incapacity.

In certain cases, such as curatorship on grounds of extravagant expenditure, the adoption of protective measures does not require a prior declaration of incapacity, since curatorship is aimed rather at persons having a higher level of discernment. Consequently, the model law has quite appropriately adopted identical fora of competent jurisdiction in the matters of incapacity and provisional measures regarding persons and their assets, by assigning jurisdiction to the Caribbean courts when the person lacking capacity resides habitually in the Caribbean.

The model law provides that general jurisdiction is based on habitual residence, while properly taking into account the best interests of the minor and the principle of proximity as criteria determining its rules of international jurisdiction. The concept of “habitual residence” says clearly that mere physical presence does not suf-

fice to consider that the minor is a habitual resident; this will have to be determined in each specific case. For that purpose, several factors will have to be combined in order to conclude whether the physical presence is simply temporary or occasional or whether, on the contrary, it reflects the minor's integration into a social and family environment. Consequently, the following must be taken into account: the duration, regularity, conditions and reasons for the stay on the territory of the member State and of the family's travel to that State, the nationality of the minor, the place and conditions of his school attendance, his linguistic knowledge, the family and social relations entertained by the child in that State, the acquisition or rental of housing by the parents, or even their application for social housing. On the contrary, the fact that the minor child leads a wandering life in a State for a short period of time may constitute a contrary criterion. If it proves impossible to determine whether a minor has his habitual residence in a member State, his sole presence in the territory of a State may trigger the assignment of the forum of necessity provided in **Article 15** of the model law.

178. Paragraph iv) establishes a preferential system which determines the international jurisdiction of the Caribbean courts for the settlement of disputes concerning persons and property in marital relationships and in the matter of divorce. Three fora of alternate jurisdiction are instituted. First of all, the Caribbean courts may have jurisdiction if both spouses have their habitual residence in the Caribbean at the time that they file their claim. If they do not have common habitual residence at the time of the filing of the claim, the Caribbean courts shall be considered to have jurisdiction if both spouses have had their last common habitual residence in the Caribbean and if the defendant continues to reside there at the time of the filing of the claim. Finally, the Caribbean courts shall be considered to have jurisdiction if both spouses are Caribbean nationals.

The international jurisdictional rules in question, particularly those relating to separation and divorce proceedings, pose the problem of their area of application. More specifically, the point consists in knowing the scope of this ancillary jurisdiction applied to matters which are usually settled in proceedings of this kind, i.e. child custody, support, filiation.

This possibility will be analysed for each area concerned. In all cases, the Caribbean courts will make use of their rules of international jurisdiction in order to revise the measures adopted in separation or divorce proceedings abroad. In such cases, it is appropriate to turn towards "automatic" or "probationary" recognition of a judgment handed down abroad in marriage proceedings, without requesting its exequatur as a prior condition. Moreover, the impact of interim protective measures in this type of proceedings requires that the terms of Art. 16 of the model law, that assign jurisdiction to the Caribbean courts, be recalled.

179. Failing an international agreement, the international jurisdiction of the Caribbean courts in the matter of filiation and paternal filiation shall be determined in accordance with paragraph v), subject to the provisions mentioned as regards the protection of minors. This article provides two special fora in the matter of filiation. First, when the child has his habitual residence in the Caribbean at the time of

the filing of the claim, and secondly, when the plaintiff is Caribbean and has resided habitually in the Caribbean for at least six months prior to the filing of the claim. In all cases, the special forum corresponds to the general fora that acknowledge the jurisdiction of the Caribbean courts when the domicile of the defendant is in the Caribbean, or when the parties expressly or tacitly leave the decision up to the Caribbean courts.

Likewise, paragraph vi) refers to two fora on a subsidiary basis in the matter of adoption proceedings: the Caribbean courts will have jurisdiction if the person adopting resides habitually in the Caribbean or if the person adopting and the person adopted are both Caribbean nationals.

180. Finally, paragraph vii) concerns support. The question of the autonomy of the support obligation was the initial problem to be solved in an international context. In the case of support between parents, including spouses living together or separated *de facto*, who are liable to make up an autonomous category, support obligations may derive and be directly connected to specific legal institutions subject to their own set of legal rules, such as extra-contractual liability, the nullity of marriage, separation, divorce, guardianship, contract, legacy, etc. In such cases, the basic principle is founded on the application of the rules of private international law for the institutions forming the subject matter of the dispute relating to support. For that reason, the fora and conflict rules relating to contracts, extra-contractual liability, successions, etc., shall appropriately be applied.

The determination of the international jurisdiction of the Caribbean courts in the matter of support is mitigated, as we have just seen, by the nature of the support owed. The diversity of the reasons liable to justify claiming a support obligation before the courts opens the way to the application of the rules of international jurisdiction specific to certain areas (contract, extra-contractual liability, successions…). Therefore, the criteria of international jurisdiction that come into play for claims based on support allowances, and more specifically those between parents or spouses, must be determined. To that effect, the model law provides two fora on a subsidiary basis. First, when the creditor has his habitual residence in Caribbean territory, and second, when the claim for support is part of proceedings relating to civil status for which the Caribbean courts have jurisdiction.

Article 14. *Property law.* 1. Without prejudice to the jurisdiction established in the previous articles, the Caribbean courts have jurisdiction in the following matters:

i) contractual obligations arising or to be performed in the Caribbean;

ii) non-contractual obligations, when the damaging fact has occurred or could occur in Caribbean territory or when the author of the damage and the victim both have their residence in the Caribbean; the Caribbean courts having jurisdiction in criminal matters also have jurisdiction to rule on the civil liability for the damage resulting from the offence;

iii) disputes relating to the operation of a branch, agency or business establishment when located in Caribbean territory;

iv) contracts entered into by consumers when the consumer has his domicile in the Caribbean while the other party operates in the Caribbean or, by any means, directs the business activities within the framework of which the contract was made towards the Caribbean. In all other cases, the rule set out in paragraph i) above applies to the consumer contract;

v) insurance, when the insured, the policyholder, the injured party or the beneficiary of the insurance have their domicile in the Caribbean; the insurer may also be summoned before the Caribbean courts if the damage is suffered in Caribbean territory and if dealing with civil liability insurance or insurance relating to real estate, or, in the case of civil liability insurance, if the Caribbean courts have jurisdiction for the action initiated by the injured party against the insured pursuant to paragraph 2 of this article;

vi) actions relating to movable property, when the latter is located in Caribbean territory at the time of the claim;

vii) successions, when the deceased had his last domicile in the Caribbean or owned real estate in the Caribbean.

2. In the matter of employment contracts, employers may be sued before the Caribbean courts if the work is habitually performed in the Caribbean; or, if the work is not habitually performed in one and the same country, when the establishment having hired the worker is located in the Caribbean.

181. The concise list of the special fora *ratione materiae* in property matters contained in this article evidences continuity with that included in **Art. 13** in matters not relating to property rights. Thus, and subject to the jurisdiction of the Caribbean courts for the adoption of interim protective measures or of guarantees relating to persons or property located in Caribbean territory and which must be performed in the Caribbean (**Art. 16**), Art. 14 reduces the scope of the international jurisdiction of the Caribbean courts.[278] The scope of the special fora justifies the internal structure of the international jurisdiction of this model law by clearly drawing its inspiration from the principle of reasonable proximity. These fora reveal an appropriate, acceptable and justified jurisdiction of the Caribbean courts. Such jurisdiction may be modulated in a few fora only, in the case of protective fora requiring a specific response which may sometimes be very restrictive.

182. Paragraph i) relating to contractual obligations provides two special fora for the benefit of the Caribbean courts in the matter of contractual obligations: the *forum executionis* and the *forum celebrationis.* On account of its unilateral character, the model law opts for an extensive interpretation of the fora in paragraph i). As a result, it avoids situations of deprivation of the rights of the defence or of *non liquet*, which are hardly compatible with the principle of effective judicial protec-

[278] CONC.: Art. 22.3 LOPJ (Spain); art. 13 of the Dominican draft law; Brussels I bis Regulation.

tion. For that reason, contracts made between absent parties must be taken into consideration, not only when the offer took place in the Caribbean, but also when one of the essential elements of the formation of the contract (acceptance included) took place in Caribbean territory. First of all, the paragraph in question refers to the place where the undertaking is to be performed, that is, the Caribbean. Apparently, the interpretation of this criterion could be similar to that of the forum provided in Art. 5.1 of the Brussels I Regulation,[279] since it refers to the undertaking forming the subject matter of the claim. However, that meaning cannot tone down the interpretation of a domestic norm, the more so if the addition of the forum of the place where the contract was made marks a notable difference as to the criterion. Secondly, although literally speaking the article refers to the Caribbean as being the place of performance of the undertaking forming the subject matter of the claim, a broader interpretation could go so far as to admit a claim relating to an obligation of payment, provided that the Caribbean is the place of performance of the obligation arising from the contract.

183. Next to the solutions provided by international treaties, paragraph ii) refers to two special fora which are alternatives to the general fora provided in **Articles 10 and 11.** The first is the *forum delicti commissi,* which has not yet raised any problems of interpretation in the Caribbean judicial organisms. The second is the common habitual residence in the Caribbean of the author of the damage and of the victim, which tends to be absorbed by the forum of the domicile of the defendant. These fora apply, generally speaking, to all cases of extra-contractual civil liability relating both to traffic accidents and to direct consequences in the event of environmental damage. In the vast majority of cases, extra-contractual civil liability does not present any problems as regards the determination of the place where the fact giving rise to the damage occurred or could occur. Consequently, even when the extra-contractual international relationship is characterised by elements of the illicit fact potentially located in other States, the determination of the place of the fact giving rise to the damage is usually a verifiable and demonstrable reality. Indeed, we are dealing with a factual element which can be spotted, and which almost immediately indicates the place where the interests, assets and persons concerned are located. From that point of view, the identification of the court having international civil jurisdiction should not raise any problems. However, there are cases where the place of the damage is located in several spots, that is, there is a special dissociation in more than one State between the place where the fact generating the damage occurred and the place where the consequences of that fact make themselves felt.[280] One and the same damage-generating fact may produce several damaging facts in different States, where the consequences occurred, and as a result jurisdiction belongs not only to the court of the place where the damaging fact occurred, but also to that of the place where it "could occur". This removes doubts as regards the application of this article in the case of preventive actions

[279] Art. 7.1 a) Regulation (EU) nº 1215/2012 12 December 2012 (Brussels I bis Regulation).

[280] M. Requejo Isidro, "Incertidumbre sobre la materia delictual en el Convenio de Bruselas de 27 de septiembre de 1968: método de delimitación y determinación del tribunal competente", *La Ley (Unión Europea),* nº 5709, 21-1-2003, pp. 6-9.

aiming at the adoption of measures of protection, cessation or mitigation, in order to avoid or reduce any potential damage.

A specific forum in the matter of civil liability for damage resulting from a criminal offence is added. It is provided that the Caribbean courts shall also be competent when such facts in criminal matters pertain to their jurisdiction.

184. Next to the forum with exclusive jurisdiction in the matter of incorporation, validity, nullity or winding-up of a company whose registered office is located in Caribbean territory, as well as in accordance with any agreements and decisions of its managing organs which might call into question its existence *erga omnes* and its rules of operation (provided in **Art. 9**), it is also customary to establish the jurisdiction of the court of the domicile of the defendant on the basis of the general jurisdiction defined in **Art. 10**. It is understood that the determination of the company's registered office is confronted with the difficulties posed by the various models existing in private international company law.

Since a company may be sued in the place where its registered office is located, that domicile can in turn be considered to be at the place of its registered office as determined by the Articles of Association, or at the place where its central administration is located, or again at the place where it has its main establishment. However, companies, in addition to the country where they were incorporated, can establish themselves in several countries via branches. In such cases, however, a company having branches in countries where neither its registered office as determined by the Articles, nor its central administration, nor even its main establishment are located may not be sued on the basis of the general jurisdiction founded on the domicile of the defendant before the court of the location of its branches. This solution proves inappropriate, for whoever enters into an agreement with a company must logically be able to file suit before the court of the forum of the making of that agreement, that is, the place where the branch is located. Such a situation has been provided for by establishing a special forum for agreements entered into by companies through their branches. As a result, companies having their registered office as determined by the Articles, their central administration or their main establishment in one State may be sued in another State of the Caribbean if they have a branch, agency or any other place of business relating to their activities in that State. As a result, the claimant is granted an "attack forum" offering him the choice of filing his claim against the company either in the territory of the State where its main office is located or in the place where the branch with which he contracted is located. Paragraph iii) of this article provides that the Caribbean courts shall have jurisdiction for disputes relating to the operation of a branch, agency or place of business, provided that the latter are located in their territory. This paragraph draws much of its inspiration from the provisions of the Brussels I Regulation on that point.

185. Paragraph iv) contains special fora also inspired by the regulations of the 1968 Brussels Convention and of the present Brussels I Regulation.[281] The jurisdiction of the Caribbean courts is established provided that the consumer has his domicile in the Caribbean in the matter of contracts for credit sales of movable property or of loans intended to finance such transactions. However, the jurisdiction of the Caribbean courts is also provided for other consumer contracts relating to movable property and services, provided that the agreement entered into was preceded by a personal offer or by advertisement in the Caribbean, or that the consumer did what was required for the making of the contract in Caribbean territory. The concurrence between special jurisdiction and the general jurisdiction expressly provided in **Art. 10** proves very questionable. If one considers that this article establishes a series of protective fora, which in a majority of cases draw their inspiration from constitutional provisions, its unlimited application as an autonomous principle would void the intended protection of all content. It must therefore be understood that special jurisdiction enters into competition only with the general jurisdiction based on the domicile of the defendant, except in the case of choice of forum agreements, inasmuch as it exists for the sole benefit of the consumer.

186. Insurance contracts, with their multiple variants, are among the main concerns of contract law. This is due to the complexity of the institution as regards both life insurance and other forms of insurance. The international jurisdiction in the matter of insurance contained in paragraph v), like that provided for contracts entered into by consumers or for employment contracts, is based on the protection of the weaker party by offering jurisdictional rules more favourable to the defence of their interests than those included in paragraph ii). In such cases, the autonomy enjoyed by the parties to the contract when it comes to designating the court of competent jurisdiction proves limited, without prejudice to the criteria of exclusive jurisdiction laid down in **Art. 9**. The paragraph forming the subject matter of this commentary draws its inspiration from the provisions of Section 3, Chapter II of the Brussels I Regulation.

The protection is expressed by the fact that, while the insurer can only sue the insured, the policyholder or the beneficiary on the basis of the domicile of the defendant, the insured can, on the contrary, sue the insurer before the courts of the latter's domicile, as being the domicile either of the defendant (**Art. 11**) or of the claimant. Consequently, this article opens up several possible fora for the benefit of the insured, the policyholder or the beneficiary when acting against the insurer. Such fora may also be used by the injured party acting directly against the insurer, but only in case such an action is possible.[282]

[281] G.A.L. Droz and H. Gaudemet Tallon, "La transformation de la convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale", *Rev. crit. dr. int. pr.*, 2001 pp. 601 *et seq*.

[282] *Vid*. V. Fuentes Camacho, *Los contratos de seguro y el DIPr en la Unión Europea*, Madrid, Civitas, 1999.

187. Paragraph vi), for its part, does in fact refer to special jurisdiction by assigning actions relating to movable property to the Caribbean courts, provided that such property is located in the territory of the Caribbean at the time of the filing of the claim. Such jurisdiction is very advisable, since the domicile of the defendant does not necessarily coincide with the location of the movable property. This special jurisdiction contributes a very useful supplementary "attack forum" inasmuch as, on the one hand, it reflects a reasonable proximity between the dispute and the *forum rei sitae* and as especially, on the other hand, it proves particularly effective in economic terms. It should, moreover, be pointed out that the exercise of rights in rem in respect of movable property is far from rare; actions for recovery of property based on ownership, third-party claims to protection or separation of property interests, or proceedings to determine paramount title, are very frequent in international trade where property interests are used as security for goods.

188. The jurisdiction provided in paragraph vii) is all the more important because it is not established by any treaty-based norm. Next to the general jurisdictions based on the domicile of the defendant and on their application, whether express or tacit (**Art. 10 and 11**), two kinds of special jurisdiction are added here, both of which essentially reflect the same idea (the *forum patrimonii*): the last domicile of the deceased in Caribbean territory, or the existence of real assets in the Caribbean. The last domicile of the deceased in the Caribbean is a reasonable ground of jurisdiction, inasmuch as it designates, on the basis of a presumption, the place where the debtor's estate is located, as well as a place having a certain importance and concerning last wills and testaments. This jurisdiction fosters the proper progress of the proceedings, the securing of evidence, the performance of the decision and provisional measures, as well as the administration of the net estate. As for the jurisdiction relating to real assets in the Caribbean, the attractive force of real property does not appear to be reasonably justified.

189. Paragraph 2 draws its inspiration from the Brussels I Regulation, which governs the provisions relating to jurisdiction in the matter of employment contracts. Those autonomous provisions, in the line of consumer contracts, would correspond more to the special nature of those contracts and to a structure already present in the Rome Convention dated 19 June 1980 on the law applicable to contractual obligations. The fora of international jurisdiction contained in this article are relatively more generous. Indeed, in addition to the fact that the work is performed in the Caribbean, or that the domicile of the defendant is located in that country – in the broad sense, in the case of the employer –, the article accepts other criteria: employers may be sued before the Caribbean courts if the work is habitually performed in the Caribbean, but also when the work is not performed in one and the same country, provided that the establishment having hired the worker is located in the Caribbean.

Article 15. *Forum of necessity*. 1. The Caribbean courts also have jurisdiction when it is established that the case has a connection with the Caribbean that is such that it can be usefully dealt with there and

i) that proceedings abroad are impossible in law or in fact, or

ii) that the decision resulting from proceedings conducted abroad would not be able to be recognised in the Caribbean.

2. When the claimant is domiciled in the Caribbean or is a Caribbean national, the useful connection condition is satisfied.

190. In delimiting the scope of Caribbean jurisdiction, **Article 6** of the model law sanctions the principle of universal jurisdiction in relation to persons (see above, **Art. 6. 1 and comm. §2**). The following provisions organise the exercise of that universal jurisdiction by setting the competences of the Caribbean courts, with the effect of excluding an immense share of international litigation in civil and commercial matters and submitting only cases having a significant connection with the Caribbean to them.

191. Such self-limitation is as reasonable as it is legitimate. As in all modern democratic States, the public service of justice is instituted by the members of the social body in exchange for the reciprocal relinquishment of the free exercise of private justice, so that differences will be settled by an impartial third party according to a set procedure and in accordance with predetermined substantive rules. That pact is agreed between and for those subscribing to it with a view to establishing and maintaining order and civil peace; it binds only those taking part in the life of the community whose harmony it strives to ensure, so that the public justice owed by the State in the Caribbean can be claimed first and foremost by those who contribute to the animation of that society. The rules of international jurisdiction then trace the borders of that social life, inside which the litigious private interest relationships which the local courts are called upon to pacify must be located. Thus, any private interests not within the scope of that society's life remain outside the jurisdiction of its courts. Such a conception cannot, however, be absolute. The insertion of private interests into the social life of the forum is often relative and the rules governing jurisdiction set the level of intensity to be attained by that insertion in order to justify access to the courts. But since each State unilaterally determines that level, it may happen that due to such lack of coordination some interests that are too moderately engaged in Caribbean social exchange will be unable to find a judge there, whereas no court is open to them elsewhere. It is in this specific case that the assertion of the principle of universal jurisdiction stands out particularly. That assertion proceeds from the idea which is part of the compendium of human

rights according to which, by his very nature, an individual is entitled to effective judicial protection of his interests. The model law has chosen to adhere to it.[283]

192. As a result of that adhesion, jurisdictionally orphan disputes will nevertheless be accepted by the Caribbean courts, provided that the effective judicial protection thus promised can actually be materialised within the Caribbean legal order. This is expressed first of all by paragraph 1 of Article 15, when it requires, on the one hand, a connection such that the difference can be usefully dealt with by the Caribbean court, that is, form the subject matter of a decision whose effects (possibly including enforcement) may make themselves felt within the life of the local society and, on the other hand, that that connection be proven in each specific case to the satisfaction of the court. The exceptional extension of Caribbean jurisdiction requires an estimation *in concreto* of its advisability.

However, this deliberately casuistic and therefore restrictive orientation is tempered by Article 15 §2, which, on the basis of the Caribbean nationality or of the Caribbean domicile of the claimant, presumes that the dispute is sufficiently a part of the Caribbean legal order to be entrusted to its judges, failing foreign jurisdiction. Based as it is on domicile, the *forum actoris* is no more than an abstract recognition of the relationship between the conflict of interests to be resolved and the Caribbean legal order. While it institutes a privilege, the latter is acceptable provided that it is granted solely under the cover of the law to effective judicial protection, whose exercise is not, failing available courts abroad, necessarily detrimental to the defendant. As for the criterion of nationality, its revival is no doubt not fully compatible with **Article 6** inasmuch as it reintroduces the opposition between citizens and foreigners as regards jurisdiction; but is it legitimate to remove from the notion of nationality the dimension of belonging to the population forming the State which it normally associates with the dimension of allegiance to the constituent authorities of the State? The model law suggests a negative answer. It will be up to each State adopting the model law to nuance or even reject this solution.

193. The exceptional extension of Caribbean jurisdiction also requires an assessment of its necessity. Paragraph 1 measures this necessity by referring to two hypotheses. The first stresses the nature of the *forum necessitatis*, which is as helpful as it is subsidiary. It assumes that it is impossible for the parties to initiate and conduct proceedings before foreign courts. It is specified that such impossibility can arise both from legal obstacles and from factual obstacles. First, legal obstacles, outlining the figure of the negative conflict of jurisdiction: like the Caribbean, the foreign States in contact with which the disputed relationship is developing keep the doors of their courts shut pursuant to their jurisdictional rules. If such an impasse can be proven, a difference that can be usefully dealt with by the Caribbe-

[283] CONC: Art. 3 of the Swiss PIL Act; Art. 65, §1, d) of the Portuguese code of civil procedure; Art. 3136 of the Cc of Quebec; Art. 6 of the Dutch code of civil procedure; Art. 11 of the Belgian PIL code; Art. 1069 of the Romanian code of civil procedure; Art. 19 of the Argentine draft law; Art. 110 of the Bolivian draft law; Art. 7 of the Colombian draft law; Art. 14 of the Dominican draft law; Art. 156 of the Mexican draft law; Art. 56.8 of the Uruguayan draft law.

an courts will be. Next, factual obstacles, when it would be unreasonable to subject the parties to the risk of excessively dangerous circumstances which might be involved in going before a foreign court (state of belligerence, civil war, discrimination, excessive cost of the suit); a doctrine based on the right to a fair trial proposes to enrich the notion of factual obstacle by incorporating into it a value judgment as to the quality of the judicial work habitually produced by the foreign court.[284] Enriched or not, both legal and factual obstacles will have to be proven by the claimant.

194. The second reference is to the case in which it is established that the judgment handed down abroad would be denied recognition in the Caribbean. Proof of the refusal of recognition is obviously brought when the Caribbean court has rejected a principal or incidental claim aiming at the recognition of the international legality of the foreign decision; in such a case, the matter may be re-judged in the Caribbean, but only, although this is not specified by Article 15, if it is verified that no other foreign court is available. The proof of the refusal is more delicate when it is alleged because its prospect dissuades the claimant from going before a foreign judge. The characteristics determining the international legality of the foreign decision from the viewpoint of Caribbean law are quite hypothetical and have not yet materialised, and it is to be feared that a purely conjectural illegality would have to suffice. In fact, however, certain elements, such as the foreign court's indirect lack of jurisdiction, are accessible before the hypothetical suit is brought. They may lend themselves to proof, thus founding a prognosis of non-recognisability. That is no doubt why this hypothesis is referred to in Article 15, since otherwise it merely proposes a specific application of the solution emerging from the first one, which is generic in nature.

[284] V. Retornaz and B. Volders, « Le for de nécessité: tableau comparatif et évolutif », *Rev. crit. dr. int. pr.*, 2008, p. 225; L. Corbion, *Le déni de justice en droit international privé*, Puam, 2004.

Article 16. *Provisional and conservatory measures*. The Caribbean courts also have jurisdiction for the purpose of ordering provisional or conservatory measures when the latter

i) concern persons or property located in Caribbean territory and must be enforced there, or

ii) are requested in connection with a difference pertaining to their jurisdiction.

195. It is appropriate to establish a specific jurisdictional rule for provisional and conservatory measures, thanks to which the judicial authorities secure the situation of the parties in order to prevent any manoeuvres aiming at altering the configuration of the case or disturbing its investigation and jeopardising the actual enforcement of the decision ruling on the merits of the case. In principle, such measures pertain to the court to which the substance of the case has been referred, which has pre-eminent jurisdiction in their regard. However, it may happen that proceedings before that court have not yet been initiated, or that in practice the latter is not in the best position to order such measures, when, for instance, they concern persons or assets that are beyond its reach. Such circumstances must not, however, deprive the litigants of their right to effective judicial protection, which includes the right to temporary judicial protection safeguarding their respective rights until the outcome of the conflict of interests between them. The cooperation of the judicial authorities that are able to act must then be secured, and the referral to them of the matter must be authorised. Article 16 meets this requirement by defining the jurisdiction of the Caribbean courts.[285] This provision very classically associates jurisdiction in provisional matters with jurisdiction in principal matters, so that the measures may always be taken by the Caribbean judge to whom the case was referred on the basis of one of the grounds of jurisdiction provided in Part II, Chapter II of the model law. But concurrently with that authorisation, Article 16 confers another one on the Caribbean court when it turns out to be the useful court because the persons or assets on which the measure must be enforced are located within its jurisdiction, that is, in the territory of the Caribbean.

196. Provided that in principle the power to judge – both on the merits and on a provisional basis – is exercised according to the rules of the State conferring it, the measures that may be obtained from the Caribbean courts are those organised by the private judicial law of the Caribbean. But although their tenor is identical, they will not all have the same bearing. Indeed, the effectiveness of those that are requested from the useful court because they are to be enforced on persons or assets

[285] CONC.: Art. 10 of the Swiss PIL Act; Art. 10 of the Italian PIL Act; Art. 22.5 LOPJ (Spain); Art. 43 of the Venezuelan PIL Act; Art. 1074 of the Romanian code of civil procedure; Art. 111 of the Bolivian draft law; Art. 20 of the Argentine draft law; Art. 15 of the Dominican draft law; Art. 56.9 of the Uruguayan draft law.

located in Caribbean territory will, depending on the basis of the ancillary jurisdiction under which they are ordered, be limited to that territory. On the contrary, those decided by the Caribbean court ruling on the merits may, just like the substantive decision which it is authorised to hand down, be recognised and, if called for, enforced outside the territory.

Article 17. ***Lack of jurisdiction of the Caribbean courts*****. 1. The Caribbean courts do not have jurisdiction for cases not allotted to them by the provisions of this law, nor by those of the international Treaties and agreements to which the Caribbean is party.**

2. When the defendant appears, the exception of lack of jurisdiction must be raised prior to any defence on the merits under pain of inadmissibility.

3. When the defendant does not appear, the Caribbean courts shall disclaim jurisdiction of their own motion.

4. Where a Caribbean court is seised of a claim which is principally concerned with a matter over which the courts of another State having adopted the present law have exclusive jurisdiction by virtue of Article 9, it shall declare of its own motion that it has no jurisdiction.

197. Recalling a principle, even if not mandatory, rarely does any harm, and when announcing modes of application liable to temper the syllogisms whose major it may be, such a recall may even usefully affirm it. That is no doubt why the first paragraph of Article 18 does not hesitate to state that the Caribbean courts lack jurisdiction for matters not allotted to them by legal or treaty-based rules.[286] A logical mind would unreservedly accept such a proposition and would conclude that the said Caribbean courts shall refrain from hearing cases not within the scope of any of the provisions governing their international jurisdiction. A legal mind will not despise such an inference, but will be inclined to amend it by taking into account the practical steps involved.

198. The first hypothesis contemplated relativises the principle set forth. It concerns the defendant who appears before the court to develop his defences on the merits without having first protested against the lack of international jurisdiction. This is a transposition of the rule, rather widespread in comparative private judicial law, which expresses a concern for procedural economy by attempting to prevent, in the event that jurisdiction is doubtful or questionable, a discussion on the merits from beginning immediately and being pursued too far before it is found to be illegitimate and thus vain. The exception of lack of jurisdiction must therefore be

[286] CONC.: Art. 11 of the Act n. 218; Art. 57 of the Venezuelan Act of 6 August 1998; Art. 10 of the Tunisian Act of 27 November 1998; Art. 12 of the Belgian PIL code; Art. 1070 of the Romanian code of civil procedure; Art. 147 of the Mexican draft law; Art. 15, *ult. al*. of the Panamanian draft law.

raised *in limine litis*, "simultaneously with other procedural exceptions and prior to any defence on the merits or objection to admissibility", according to the terms of Article 74 of the French code of civil procedure. The solution may be analysed as a legal extension of the scope of jurisdiction resulting from inadmissibility based on the lateness of the exception of lack of jurisdiction and aimed at sparing the energies of the members of the court. But it may also be analysed as a tacit voluntary extension, since by presenting his arguments on the merits the defendant accepts the debate to which he is invited by the claimant. The latter interpretation requires that the solution be restricted to lawsuits whose subject matter allows voluntary extension, that is, those relating to interests which the parties may freely dispose of[287] (see above, **Art. 10 and comm. §2**); however, it hardly appears compatible with the last paragraph of **Article 10 §3**, which states that the choice of forum agreement meets the condition of written form when it is recorded in an exchange of writings in claim and defence during the proceedings which reveals that one of the parties alleges the existence of an agreement which the other party does not dispute, but on the contrary performs. This rule implements a restrictive conception of the notion of tacit agreement, whose useful effect would be completely ruined if an extension based on the mere silence of the parties appearing were to be admitted. This observation does not allow us to conclude that the condition relating to the time at which the exception of lack of jurisdiction must be raised is valid in all matters, including interests of which the litigants may not freely dispose; that would imply that the exception always remains at the discretion of the defendant. The observation simply shows that the model law says nothing about the substantive scope of this condition, which is mandatory when the defendant appears.

199. On the contrary, when the defendant does not appear, paragraph 3 of article 18 grants the court to which the matter has been unduly referred the power of declining jurisdiction of its own motion. This power is indispensible for the performance of the duty of doing so, but nothing in this provision indicates that the court has such a duty, or that it does not. The court is simply enabled to find that it lacks jurisdiction, either because a special provision of Caribbean law outside the model law requires it to do so or because it is left free to appreciate the advisability of relinquishing jurisdiction. Both the system set up by Brussels I Regulation (Art. 26) and that of the *Ley de Enjuiciamiento Civil* explicitly favour the exercise as a matter of course of the protection of a defendant who does not appear although duly summoned.

200. The last paragraph of Article 17 is in agreement with the position of the Brussels I Regulation as concerns the referral to a Caribbean court of a suit whose subject matter pertains to the exclusive jurisdiction provided in **Article 9**, where the basis for the connection is materialised in a foreign territory. If the foreign State designated by that connection has adopted the model law, the Caribbean court shall decline jurisdiction of its own motion in favour of the court which is in the best position to hear the case, according to what has already been referred to as the reflex effect of exclusivity (see above, Art. **9 and comm. §4**).

[287] Comp. Art. 36. 2. 3° of the code of civil procedure.

Article 18. Forum non conveniens. 1. The Caribbean courts may, upon a request by the defendant, decline jurisdiction due to facts occurring outside the Caribbean territory if:

i) it is useful to hear testimony when the witnesses reside abroad and when hearing such testimony abroad or the appearance of the witnesses before the Caribbean court would entail excessive expense for either party; or

ii) it is useful for the court to proceed to personal verifications to be carried out regarding disputed facts occurring abroad;

iii) the facts were committed abroad.

2. The Caribbean courts shall decline jurisdiction when the applicable law assumes that they have powers not granted them by Caribbean law, whose exercise would be called for in the case at hand.

201. The exception of *forum non conveniens*[288] first appeared in Scottish private international law in the nineteenth century. In the twentieth century, it became widespread in the legal orders pertaining to the common law tradition, while not fitting spontaneously into the system of international jurisdiction cultivated by the civil law tradition. Its acceptance by the model law is strictly measured. This mechanism, which aims at effecting a transfer of the suit from a domestic to a foreign court, is based on granting the judge to whom the case is referred a certain latitude to decide whether he may appropriately exercise his jurisdiction in view of the specific circumstances of the case at hand; it operates as an exception clause when the abstract configuration of the disputed relationship places the latter under the heading of a ground of jurisdiction whose basis is challenged by some singular aspect of the suit. In such a case, the argument drawn from *forum non conveniens* which the defendant objects to the development of the proceedings aims at having concrete compliance prevail over abstract compliance and therefore at leading the judge to disclaim jurisdiction. One essential characteristic of the exception resides in the discretionary power to re-evaluate its own jurisdiction which it grants the court. In English law, no doubt, that power is bounded by a series of factors which must be taken into account before referring the parties to a more appropriate court, so that its discretionary character affects mainly the weighting of those factors. There is nothing arbitrary about such a process, which must remain guided by the objective of sound administration of justice; however, the longer the list of factors to be considered, the broader the discretionary power. As a result, the predictability of international jurisdiction is weakened, and so is legal security.

[288] A. Nuyts, *L'exception de* forum non conveniens. *Étude de droit international privé comparé*, Bruylant-LGDJ, 2003; C. Chalas, *L'exercice discrétionnaire de la compétence juridictionnelle en droit international privé*, PUAM, 2000.

202. For that reason, Article 19 subjects the admissibility of the exception to deliberately narrow terms.[289] The first is not explicitly formulated in the body of the provision, but is implied by its title: an available court to which the case can be transferred must exist abroad; moreover, this cannot be any court in any country that states that it has jurisdiction, but the court of the State which is close enough to the elements of fact whose knowledge is required in the case at hand for the sound administration of justice. Indeed, the second condition is that the access of the Caribbean court to *facts occurring outside the territory* must be so difficult as to jeopardise the possibility of proving them judicially. This condition rules out the admissibility of the exception when the matter has been referred to the Caribbean court on the basis of a ground of exclusive jurisdiction provided in **Article 9**. First of all, one of the grounds of exclusive jurisdiction is precisely the location of the relevant elements of the disputed situation in Caribbean territory; next, its typical effect is to deem, from the Caribbean viewpoint, that the courts of other States are radically devoid of jurisdiction, so that they cannot hand down a decision liable to be recognised in the Caribbean.

203. This second condition is summed up by two alternative possibilities. First, the taking of evidence, and especially the production to the court of relevant facts occurring outside the territory, may require the participation of witnesses who are themselves outside Caribbean territory, so that cumbersome and lengthy procedures involving letters rogatory would have to be implemented, or the witnesses' travel expenses would have to be paid for. If those solutions turn out to be excessively expensive for either party, the court may consider it advisable to transfer the suit to a neighbourhood venue, provided that it considers it appropriate. Second, the taking of evidence by the court may require the performance of personal verifications by its members or by one of them, where cross-border travel to the place in question is legally, physically and financially impossible. By specifying those two possibilities, **Article 19** sets the boundaries of the scope of the exception of *forum non conveniens.*

204. It would not have been inconceivable to broaden the scope of the exception by including cases where, rather than the geographical proximity of the relevant facts, their intellectual or even technical proximity is lacking. Without even mentioning knowledge of the foreign law involved, it may happen that the Caribbean court does not have the necessary means to implement the applicable foreign law because the latter presupposes the exercise of powers not granted to it. The model law has not opted for this possibility. On the one hand, it calls more directly on the judge's discernment and initiative and for that reason it is not clearly within the framework of an exception offered to the defendant. On the other hand, it calls rather for a settlement from the angle of conflict of laws via adaptation or recourse to the general subsidiary function of the *lex fori*, rather than from the angle of international jurisdiction. For all that, this sort of difficulty most often comes up when the substance of the case is examined, that is, once the proceedings are well on the way

[289] CONC: Art. 7, *ult. al.* of the Colombian draft law, Art. 17 of the Dominican draft law; Art. 15 of the Panamanian draft law.

– whereas, on the contrary, the facts occurring outside the territory already appear in the summons issued by the claimant – and it will be too late to raise the exception of *forum non conveniens* which, by inviting itself into Romano-canonical procedural law, joins *in limine litis* the exception of lack of jurisdiction.

Article 19. *Objection of* lis pendens. 1. When, prior to the referral of a case to the Caribbean court, another claim having the same subject matter and the same cause has been brought between the same parties before a court of another State, the Caribbean courts shall stay proceedings until the foreign court to which the case was first referred has ruled on its jurisdiction. If the foreign court to which the case was first referred states that it has jurisdiction on the basis of a ground of jurisdiction judged to be reasonable from the viewpoint of the rules governing the recognition and enforcement of foreign decisions, the Caribbean court to which the case was subsequently referred shall decline jurisdiction.

2. However, the objection of *lis pendens* of proceedings shall be rejected if the referral to the Caribbean court is based on the provisions of Article 9. The objection shall also be rejected if the referral to the Caribbean court is based on a choice of forum agreement which complies with Article 10 and under which the chosen forum has exclusive jurisdiction.

205. Article 19 of the model law sanctions the principle of the admissibility of the objection of international *lis pendens*: the Caribbean judge must take into account, and possibly draw the consequences of the existence of proceedings pending abroad, which were initiated earlier for the very claim which has just been referred to him.[290] For a long time, this regard for foreign judicial facts and the related consequences was admitted only within the framework of treaty law; some bilateral treaties, such as the 1969 Franco-Spanish convention, or multilateral ones, such as the Brussels Convention dated 27 September 1968 (Art. 21, which has become Art. 27 of the Brussels I Regulation and will soon be Art. 29 of the recast Regulation) provide for this form of cooperation: a court in one country waives its jurisdiction and trusts the court in another country before which the suit was previously initiated. The model law is neither an international treaty nor a European Community instrument. However, as it diffuses common values among the States adopting it, it is a means of standardisation of legal systems and thus contributes in its own way to the establishment of international harmony between solutions; it thus plays its role fully when it proposes a mechanism intended to settle procedural conflicts, which generate conflicts between decisions at the international level, and thus to

[290] CONC.: Art. 58 of the Venezuelan PIL Act; Art. 18 of the Panamanian PIL code; Art. 9 of the Swiss PIL Act; Art. 7 of the Italian PIL Act; Art. 14 of the Belgian PIL; Art. 1075 of the Romanian code of civil procedure; Art. 46 of the Argentine draft law; Art. 160 of the Mexican draft law; Art. 18 of the Panamanian draft law; Art. 57 of the Uruguayan draft law; Art. 10 of the Colombian draft law; Art. 27 of the Brussels I Regulation.

guarantee that one and the same dispute will have one and the same outcome as between the countries involved.

206. This "spirit of judicial cooperation" is not the soul of all national systems of international civil procedural law. Must we recall here the silence of the *Ley de Enjuiciamiento Civil* or the outspoken hostility of the draft "model code of private international law" developed by the *Academia Mexicana de Derecho internacional privado y comparado*[291] (Art. 160)? Such a position can no doubt rely on arguments which, though not contemptible, are certainly not fully convincing. The major complaint to the admissibility of the objection of *lis pendens* is that the latter not only casts doubt on the soundness of the grounds for the jurisdiction of the court to which the matter is secondly referred, but especially creates a risk of relinquishment of jurisdictional sovereignty. Sovereignty assuredly deserves consideration, but the Dutch school, when constructing the notion of *comitas* in the eighteenth century, showed that it is not incompatible with consideration for foreign legal realities. All in all, the idea of jurisdictional sovereignty only requires here that a court may freely choose to refrain (or not to refrain) from ruling in foreign proceedings liable to produce a decision whose quality will be equivalent to its own. As for the soundness of the grounds of jurisdiction, it will not be tested in any measure by the objection of *lis pendens* unless the latter amounts to an exception of *forum non conveniens;* the narrow scheme of *forum non conveniens* chosen by the model law does not suit it to that function, since it is developed at the territorial level alone,[292] whereas *lis pendens* is also developed at the chronological level.

207. On the contrary, it should be recalled that by preventing conflicts of proceedings from prospering, the objection of *lis pendens* prevents conflicts between decisions. Such a conflict may be indifferent to a particularistic legal order, since it does not challenge its consistency. But it is very damaging to the parties themselves, who, after bearing the costs and delays of two lawsuits, will find themselves faced with two decisions whose enacting provisions may be divergent, not to say conflicting. Such an antinomy at the international level breaches the right to effective judicial protection, since the dispute, after being judged twice, has not actually been settled. Indeed, the parties are subject to orders that differ according to place and time. This might, to the detriment of procedural economy, respectively incite them to alternately and indefinitely thwart in one country the enforcement of a decision secured against them in another. Thus, in order to prevent such blows at the beneficial unity and continuity of cross-border legal treatment, and counting on the Caribbean spirit of judicial cooperation, Article 19, like many modern legislations, opts for the admissibility of the objection of *lis pendens* and even grants the court the power of decreeing it of its own motion. As a result, it shall determine the well-foundedness and consequences of the objection.

[291] J.A Silva, "Una codificación jus internacional privatista para México…", *AEDIPr*, t. VI, 2006, p. 1221.

[292] *Vid. supra*, **Art.18**.

208. The conditions required for international *lis pendens* correspond to the conception widespread in comparative private international law. They relate to the *chronology of the concurrent referrals* and to the identical nature of the dispute.

As regards the first point, the situation is characterised by the existence of claims successively admitted by two courts pertaining to two different States in compliance with the rules governing jurisdiction. Since the admission of the objection leads to the removal of the case from the court to which the matter was referred secondly, the order of the successive referrals must first be discerned; the model law does not seem to express any special preference as regards that dating requirement. This silence amounts to a reference to the procedural law of the Caribbean as regards the claim submitted to the Caribbean court, which, in the absence of any specific indication, cannot consider that the case has been referred to it until the formalities provided to that end by its own law have been carried out. That reasoning is not as obvious as regards the claim submitted to the foreign court: since it is incorporated into Caribbean private international law, the provision found in Article 19 can just as well be read as opting for the solution of the law to which it now belongs rather than for the procedural law of the foreign court. However, the weak point of the latter interpretation resides in the fact that it reconstructs reality according to the manner of Caribbean law, whereas according to the view of foreign law the date of referral would be different; it is difficult to neglect the foreign law when determining the date of referral to the foreign court, and, more generally, its legality, since a claim which is irregular from the viewpoint of that court cannot effectively initiate proceedings and therefore result in a conflict. Thus, in establishing both the chronology of the referrals and the jurisdiction of the courts involved, the law proper to their respective States shall be referred to.[293]

209. Next, and this is the heart of the problem, *the dispute must be identical*. Article 19 characterises this as the concurrence of two claims whose subject matter and cause are the same and which are promoted by the same parties. The model law here transposes to claims the conditions usually required for decisions concerning the authority of res judicata, which is justified by the prospect of conflict of decisions which forms the context of the objection of *lis pendens*. The experience of the Court of Justice of the European Communities shows that this threefold identity can give rise to various interpretations which must be stabilised inside a common system of distribution of jurisdictions. Without going into the details of the rather comprehensive choices made by that jurisprudence,[294] one may hope that the application of Article 19, both by the Caribbean and by the other States adopting the model law, will take into account its international origin and the need for its uniform interpretation.

[293] But it should also be taken into account when doing so that the lack of jurisdiction and any deficiency under this law does not necessarily lead to the court declining jurisdiction. It is the effective dual proceedings that cause the problem.

[294] *Vid*. H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 4th ed., 2010, n. 324 *et seq*.

210. The conditions spelled out above (chronology of referrals and threefold identity of disputes) open up for the Caribbean court, when second in the order of referral, the *prospect of the removal of the case.* This does not entail any risk of denial of justice, since the proceedings will continue before the court to which the case was first referred. The removal is not immediate, but subject to verification that the decision expected from abroad has the best chances of being recognised and effective in the Caribbean. The Caribbean court cannot relinquish the exercise of its jurisdiction (which is no less legitimate than that of the foreign court) unless it is reasonably predictable that the lawsuit which is, so to speak, delegated to the foreign court will succeed in settling the difference between the parties from the viewpoint of the Caribbean legal order also. Indeed, the purpose of the objection is precisely to guarantee unity of decision. Consequently, the court will decree a stay of proceedings in order to confront the difficulties of a prognosis regarding the qualities of a decision which is expected, but not yet handed down. That court is not able to rule as yet on compliance with the public order, nor in short order on the fairness of the summons; in order to make an assessment possible, it is only asked to base itself on the indirect jurisdiction of the foreign court as defined by **Article 74**, iii. whose respect or breach are established. The second paragraph of Article 19 takes care to specify that this sole condition of indirect jurisdiction cannot be met when the referral to the Caribbean court involves exclusive jurisdiction, that is, jurisdiction under **Article 9**, but also jurisdiction resulting from an extension under **Article 10** if the parties have not waived its exclusivity.[295]

211. If it appears to him that the condition of indirect jurisdiction is not met, the Caribbean judge orders the resumption of the proceedings and rules as though there were no concurrent proceedings, since it is a known fact that the latter cannot result in a decision liable to be recognised in the Caribbean. If on the contrary the condition of indirect jurisdiction is verified, the Caribbean court shall decline jurisdiction and the proceedings shall continue before the foreign court, but obviously with no guarantee that the expected decision will be lawful in view of the other requirements of **Article 74**. If it were to prove deficient, the parties would then be able to renew the suit in the Caribbean.

Article 20. *Exception of connexity*. When two claims are so closely related that it is advisable to investigate and judge them at the same time and if one of them is submitted to a foreign court and the other to a Caribbean court, the Caribbean court may, at the request of a party and aside from the cases of exclusive jurisdiction referred to in Articles 9 and 10, decline jurisdiction, provided that the foreign court has jurisdiction for the claims in question and that its law allows their joinder.

[295] This last solution concurs with the one that was refused by the *Gasser* ruling, CJEU 9 December 2003 (C-116/2), but that was imposed as from 10 January 2015 by the recast Brussels I Regulation, Art. 31.2.

212. The exception of international connexity concerns the case where two distinct claims are respectively submitted to two courts pertaining to different States and where it appears that they are so closely related that joining them in a single lawsuit before a single court will prevent the production of conflicting decisions. For instance, it would be appropriate to entrust to one and the same judge a petition for divorce by a husband acting before the foreign court of the place of residence of the family, which is still his, but no longer that of his wife, and the wife's claim for a contribution to the expenses of the marriage submitted to the Caribbean judge of her habitual residence: it would be unfortunate to have the marriage bond dissolved on the one hand and spousal support granted on the other, whereas the latter assumes that the marriage still exists. In this case, the affinity with *lis pendens* is quite obvious: in both cases, the purpose is to avoid having two proceedings lead to results whose coexistence is rationally unacceptable. The differences are nonetheless obvious: the notion of conflict between decisions covers not only contradiction, in which one of the terms excludes the other, but also irreconcilability or incompatibility, in which one of the terms does not fit the other. Thus, both the conditions and the effects of connexity differ from those of *lis pendens*.

213. In both cases, no doubt, two suits must actually have been brought, one first before a foreign court, the other subsequently before a Caribbean court. The method of dating the referral is the same and direct jurisdiction need be appraised only according to the procedural law of each State.[296] On the other hand, the claims need not have the same cause or the same subject matter, nor must the parties be the same. The definition of connexity, taken from the Brussels I Regulation (Art. 28. 3) by the model law, covers the case in which the separate suits, whether or not brought by the same persons, are based on factual elements that are at least partially common, on the basis of which each makes a different claim, so that it is advisable to investigate and judge them at the same time in order to arrive at a homogenous evaluation of the overall situation, leading to coordinated solutions.

214. When such is the case, the Caribbean court can decline jurisdiction; since connexity is less serious a situation than *lis pendens*, it shall exercise that power only if one of the parties requests it, and within precise limits. Thus, it may not decline when its own jurisdiction is exclusive according to the meaning of **Articles 9 and 10**, which, indeed, prohibit it from declining. Thus, again, it will have to ascertain that the foreign court is, according to its own jurisdictional rules, able to join, in one and the same suit, the matter proposed to be transferred to it with the one already referred to it. Outside those limits, the Caribbean court has a discretionary margin of appreciation which will no doubt lead it to verify other parameters; thus, after ensuring that the matter can be dealt with by the foreign court, it will check that its transfer will not deprive the parties of the possibility of appealing the decision (see Brussels I Regulation, Art. 28.2), or examine whether the expected decision will be liable to be recognised and enforced in the Caribbean.

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[296] CONC.: Art. 1076 Romanian code of civil procedure; Art. 19 of the Panamanian draft law; Art. 28 of the Brussels I Regulation.

Article 21. *Internal allocation of jurisdiction*. When the Caribbean courts have jurisdiction under this law, jurisdiction ratione materiae and territorial jurisdiction shall be determined, if need be, by the relevant provisions of the code of civil procedure.

In the absence of provisions liable to found territorial jurisdiction, the latter shall be determined by transposing the grounds of international jurisdiction. When such a transposition does not make it possible to determine territorial jurisdiction, the claim shall be submitted to the court chosen by the claimant in compliance with the requirements of sound administration of justice and of procedural economy.

215. On the basis of the argument that the issues of internal allocation of jurisdiction pertain to the domestic law of civil procedure, since they relate directly to the operation of the State's judicial apparatus and to the distribution of tasks between its organs, the model law, dedicated as it is to private international law, could have left them aside. However, while that thesis can be sustained with some reason, the fact remains that, generally speaking, the rules governing internal allocation of jurisdiction were made solely for disputed private law relationships devoid of any international character. For a long time, the dominant conception of international jurisdiction was a public-law one, involving notions such as the natural judge and the bond of political allegiance. According to that conception, the designation of a national court was understood as a devolution of the case for the benefit of the State, globally considered in its capacity as a sovereign. As a result, the subsequent assignment of the case to a court among all those exercising such national jurisdiction concerned a private international relationship converted into a domestic relationship. Today, that doctrine is forced to make ever more room for one more marked by private law, where the rules of international jurisdiction are guided in their choices by consideration for the private interests of the litigants; thus, the idea of an international law relationship naturalised, so to speak, by the rule of international jurisdiction has strongly declined. The settlement of the matter of international jurisdiction does not do away with internationality; even though the apprehension of the case by the domestic court formally mitigates that character (since the relationship is destined to be integrated into the machinery of State justice), substantively it remains marked (since the relationship is still as composite and multilocal). It is precisely that resistance of internationality that justifies the model law's incursion into the field of internal allocation of jurisdiction.

216. In fact, the matter is dealt with cautiously.[297] The first paragraph of Article 21 leaves free rein to the rules governing the internal allocation of jurisdiction,

[297] CONC.: Arts. 34 and 35 of the Swiss PIL Act; Art. 1071 of the Romanian code of civil procedure; Art. 146 of the Mexican draft law; Art. 20 of the Dominican draft law; Art. 112 of the Bolivian draft law; Art. 20 of the Uruguayan draft law.

whether *ratione materiae* or territorial. It thus bows to the public-law conception. However, it assumes that those rules, though hardly attentive to the needs of private international relationships, do not run contrary to them. It is only in cases where they prove to be ineffective that the second paragraph opts for solutions specific to international disputes. This can happen with regard to territorial jurisdiction when, for instance, Caribbean jurisdiction is based on the nationality of the parties whereas neither of them is domiciled in the Caribbean. The model law then provides that the lack of a connection shall be remedied by transposing or adapting the rule of international jurisdiction, thus conferring on it, as an extension of its "general" function, a "specific" function of localisation inside the Caribbean judicial organisation; here this could lead to the court of the parties' residence, even if occasional, in the territory. But this method may fail to produce a result. In that case, the claimant's choice shall be followed, provided that it complies with the requirements of sound administration of justice and procedural economy; the court to which the matter is referred shall verify, for instance, that the claimant, relying on a choice of forum clause designating the Caribbean courts in general, has chosen, by approaching it, a court close enough to the facts of the case, or sitting where the decision will have to be enforced, or which is simply the most convenient for both parties.

TITLE III

DETERMINATION OF APPLICABLE LAW

Chapter I

Regulatory rules

Section I

Persons

Article 22. ***Enjoyment and exercise of rights*****. 1. The attribution and the end of legal personality are governed by Caribbean law.**

2. The exercise of civil rights is governed by the law of the domicile.

217. Article 22, in its first paragraph, governs the law applicable to the birth and the end of legal personality. The strength of personal law in some families of comparative law has led to consider that these aspects were being governed by this personal law, whether it is the law of the nationality or the law of the domicile of the person. This solution always gave rise to a particular logical and practical problem in relation to the birth of personality and other matters that have traditionally gone

hand in hand with this birth, such as the problem of the legal protection of the rights that might apply to the conceived but not yet born child.

The real question addressed by this provision is: when is a being considered to be born and to have legal personality? The answers, as is well known, are not uniform in comparative law; various possible options exist, which we could summarise between those that are based on the notion of human life, including before the birth, and those based on the notion of birth. Among the first group, in the minority, the key priority in legal terms is the determination of the moment of conception. The second group shows important variations between the options that rely on mere *vitality*, the complete birth of the foetus, requiring not only the complete detachment from the mother's womb (with or without rupture of the umbilical cord), and the options which, additionally, require a birth that entails *viability* in survival, a certain vital autonomy that is projected onto the future of the birth. There are provisions that call for a particular and specific period of life after birth (24 hours, for example) and even some that require a particular human form, rejecting any provision that might consider so-called "abortive figures" as persons born – although this is no more than an insufficiently updated historical remnant.

In any event, the mere divergence between the regulations, however small it may be, requires the identification of the applicable law: for example a mere difference between requiring a period of independent life of 24 hours after birth or not requiring it already suggests a *questio iuris* in the live and viable birth, which, however, dies within those first 24 hours.

218. Given the distinct factual component that all of these positions possess and, ultimately, the significant public policy burden that likewise has the crucial issue to consider whether or not a living being is a person and consequently a subject with rights and obligations, the proposed provision opts for a simple and unilateral solution, which is none other than the application of the law itself. The nuclear concept of person and legal capacity may not be removed by a foreign legislation, whatever it may be.

219. This solution also facilitates the logical and practical problems that other alternatives could pose, notably recourse to the law of the nationality and the law of the domicile of the person. It is obvious that to consider the beginning of personality on the basis of the national law of the person leads to a certain vicious circle, which cannot even be broken adequately by introducing the presumption of having recourse to the *hypothetical national law* and to ratify it only if this considers that the personality has actually been born, or otherwise deny it. The same is true for the domicile. In any case, it is necessary to recognise that both possibilities would be viable when it is a question of verifying the birth of personality of an *actually* born being. But in cases affecting the *conceptus* or the *concepturus* and which have legal relevance in terms of rights and obligations, the solution to have recourse to a certain hypothetical personal law is practical.

In fact, provisions such as, for example, article 17 of the Venezuelan Civil Code determines that "The foetus will be deemed to be born where its wellbeing is concerned: and in order to be considered as a person, it is sufficient that it was born

alive"; moreover, it not only refers to the *nasciturus conceptus*, but also to the *concepturus*, or not yet conceived child, when, for example, its article 1.443 states that "Unborn children of a certain person may receive gifts, although they have not yet been conceived..." Obviously, having recourse to a future national law or the law of the domicile is to have recourse to an uncertain factor: it is unknown what the national law of *conceptus* or *concepturus* is going to be until the birth of the child. In terms of nationality, it is not known for certain what will be the nationality of the parents at the time of the birth (in the case of transmission *iure sanguinis*) or even known what will be the place of birth (in case of transmission *iure soli*). The presumption at the time when the provision has to be adopted – for example the registration of any rights – is complex. Waiting for the birth is inefficient.

The application of the law of the forum is a safe and simple solution which, however, must cede its place in these latter cases described in favour of the law applicable based on the law at issue: thus, concerning inheritance rights, in favour of the law governing inheritance; concerning, for example, a donation in the terms of the cited article 1443 of the Venezuelan Civil Code, in favour of the law governing donations.[298]

220. Although the end of personality, which currently can only be associated with the physical death of the person, certainly could be regulated by the personal law of the individual (whatever that might be) without any technical problems at all, given that it would be entirely ascertainable (nationality, domicile, etc.). The choice of the law of the forum is equally simple and foreseeable and, above all, the most adequate option if we take into account the obvious proximity between the strictly medical or forensic data and any legal provisions that determine the time of the extinction of personality.

221. As regards the second paragraph, the application of the civil rights referred to does not affect those that have a constitutional guarantee, which we might call public policy rights within the meaning of article 3(ii) of the Bustamante Code, but rather those that refer to individuals or "internal public policy" rights, whose compliance with the law of the domicile is relatively common for purely operational reasons.[299]

[298] *Vid. infra* commentary on **art. 44** of the present Law.

[299] It is also the case in the systems built around national law as the personal law.

Article 23. *Capacity and civil status*. 1. Notwithstanding the provisions of the present Law, the capacity and the civil status of natural persons are governed by the law of their domicile. Nonetheless, the special conditions of capacity prescribed by the law applicable to a particular legal relationship shall be governed by the law governing that legal relationship.

An exception is made for the cases of incapacity governed by article 50.

2. A change of domicile does not restrict the already acquired capacity.

222. Article 23 contains the basic rule regarding capacity and civil status, providing that these aspects directly related to the person will be governed by the law of their domicile.[300]

223. As regards capacity, comparative law shows two major options regarding the determination of the law applicable to the capacity to act of natural persons: what identifies the problems of capacity in the act or transaction that is required of the participant with capacity, and what identifies the topic in the particular person regardless of the act relating to the problem or problems encountered. The first option would consider the capacity of a person as the sum of all of the unique capacities that there might be by virtue of various laws. An absolutely surprising consequence for this view is that someone could have capacity for one type of legal transaction under certain circumstances and governed by a certain law, and lack capacity for a similar or even identical legal transaction, but governed by a different law. The stability of the legal rights of the person would be impaired. Maybe for this reason, this view of the capacity unfailingly associated with the unique and specific transaction is accompanied by a more stable solution, which, primarily in the sphere of influence of common law, ensures that the law of the transaction is alternatively combined with the law of the domicile of the person.[301] This combination introduces a favour to the capacity of the person and consequently a greater possibility that as a result they will have capacity to perform a particular act.[302] In any case, this favourable view of capacity should be seen against the backdrop of the cited possibility that incapacity in accordance with their personal law (in this case the law of the domicile) might or might not have capacity depending on the specific act for which the said capacity is evaluated.

Article 23 proposes a fixed, foreseeable and stable solution regarding the personal law specified in the law of the domicile as a centre of life and interests of the person concerned. The choice of the connection with the domicile is not unique in

[300] CONC.: Art. 16 of the Venezuelan PIL Act; art. 26 of the Panamanian PIL Code; art. 3083 (Civil Code of Quebec); art. 34 of the Belgian PIL Code; arts. 20 and 23 of the Italian PIL Act; art. 12 of the Austrian PIL Act; art. 11 of the Polish PIL Act; art. 21 of the Dominican draft law; art. 21 of the Bolivian draft law; art. 17 of the Uruguayan draft law; art. 18 of the Colombian draft law.

[301] *Cf.* J.C. Fernández Rozas and S. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Cizur Menor, Civitas–Thomson–Reuters, 2013, p. 348, with warnings concerning the other virtues of this approach.

[302] Art. 18 of the Venezuelan PIL Act.

comparative law and even in the Caribbean nations both personal laws based on the nationality[303], as well as based on the domicile[304] can be found. Both criteria are sufficiently strong and the degree of difference in their stability, routinely greater in the nationality, is offset by the degree of difference in the link or connection of the person, routinely greater in the domicile.

224. In any case, when, besides the general capacity to act, additionally, there are accessory and special requirements for the valid performance of a particular act, it will be the regulatory laws of the legal relationship into which this act is incorporated that will be called upon to establish those *special* conditions of capacity referred to in the article. The special conditions or requirements, for example, for devising or implementing an agreement as to succession, will either be determined by the law governing the succession, or by the law governing the form of the testamentary disposition, in the cases in which these requirements might have the formal classification.[305] The same occurs with certain capacities or special incapacities for receiving inheritance based on the particular situation or relationship that the deceased might have with whoever raises the problem of capacity (their final confessor, their legal adviser, the notary authenticating the act, etc.). Requirements or special conditions would fall as well within this scope of exception to the pure and simple application of the personal law of the individual, such as those which are required, for example, for issuing a declaration of voluntary recognition of paternity, or for adopting a minor (minimum age or age difference between the adopter and the adopted), for marriage, for disposing of assets of a ward in the case of the guardian, and other similar situations.

225. Article 23 also makes an exception regarding the so-called *exception of national interest* which is regulated in **article 50** of the present Law. It is an exception with a rich tradition in the field of the protection of the reliance on dealings[306] in favour of the law of the place in which a transaction is performed. This exception can have a bilateral formulation, as occurs with its most recent statements in EU[307] agreements or institutional provisions or unilateral formulations (in favour of the

[303] Art. 12.1 of the Cuban Civil Code; art. 3 of the Dominican Civil Code; French Departments and territorial communities in the Caribbean area: legacy of the solutions of French law.

[304] The Bustamante Code (art. 7) considers both as possible personal laws.

[305] *Vid. infra* commentary on **art. 42** of the present Law.

[306] The first and paradigmatic case was that decided by the French *Cour de Cassation* in the judgment of 16 January 1861, in the *Lizardi* case, where a Mexican citizen who sought to assert his lack of capacity derived from the Mexican law in France for avoiding fulfilment of the contracts concluded in that country. The *Cour de Cassation* ruled personal law is unarguable and held that sr. Lizardi had capacity by virtue of French law (B. Ancel, Y. Lequette, *Les grands arrêts de la jurisprudence française de droit international privé*, 5th. Ed., Dalloz, Paris, 2006, pp. 39–40 and the observations, pp. 40–46).

[307] Art. 36 of the Swiss PIL Act or art. 13 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) provide that "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence". This provision is also in force in some territories of the Caribbean (*vid.* the Report on the French legacy).

law of the Caribbean) as contained in the present Law. It defines, in any case, a clear and quite coherent answer from the point of view of the allocation of the costs of information in commercial traffic.[308]

226. The second major concept governed by the provision relates to the civil status of the person. This concept is hardly defined in any of its dimensions and regarding which a hard core of positive certainty exists, which integrates filiation, marriage, age of majority (capacity), and area of uncertainty, in which it can be discussed if, for example, the nationality or domicile form part of its content. In one of the best descriptive analytical exercises that have been carried out regarding the topic it is noted that "civil status is a quality of the person dependent on the natural (manner of existing) or social (manner of living, with security, in the transcendental social groups) reality, determining their legal independence or dependence, their capacity to act and their scope of power and responsibility... if there is no natural or social quality of the person, there can be no talk of civil status; but if this quality not is taken into account as a determining factor of the capacity to act by the legal framework a real civil status does not exists either".[309] In any case, as seen, it is described as a very broad set of possible circumstances and legal relations which, in accordance with the article commented, will equally be governed by the law of their domicile. The case here concerns a principal or general rule that is subject to the existence of other rules of conflict, which may establish particular solutions for equally particular solutions relating to the civil status: forenames and surnames, natural filiation, adoption, marriage, etc. The rationale of this general rule is to bring to light the importance of the law of the domicile in relation to the matters that make up the so-called personal status, reaffirm its nature as a structural principle of the applicable system of law laid down by the law and, in this condition, to serve to elucidate, where applicable, any gaps that may arise regarding situations not specifically provided for in the law. These situations are far from rare if we take into account that this law is aimed at the regulation of private international relations of a civil and commercial nature,[310] which does not preclude, but quite the contrary, affirms the possibility of unknown matters being presented to the Caribbean authorities, or without an exact accommodation in the institutions governed by the law of the forum, to which a precise answer must be given. The force of the law of the domicile influences these answers, because it also determines in a certain way the classification of the problem: a strong personal status with an absorbent character concerning the connection with the domicile.

227. Article 23 concludes with the already classical provision in the treatment of the law applicable to capacity, which clears up the transit from an applicable law (law of the domicile), which considered the subject to have capacity, to another (new domicile), which does not consider them to have this. For obvious reasons of

[308] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Cizur Menor, Civitas–Tomson–Reuters, 2013, p. 350.

[309] F. de A. Sancho Rebullida, "El concepto del estado civil", *Estudios de Derecho público y privado ofrecidos al Profesor Dr. D. Ignacio Serrano y Serrano*, Valladolid, 1965, pp. 741–810, pp. 797–798.

[310] *Vid. supra*, commentary on **art. 1** of the present Law.

legal certainty, the rule prevents the loss of the capacity already acquired. Possible examples are anyone who could be considered to be of majority age in accordance with the previous law but as a minor in accordance with the new law; or anyone who could be considered emancipated in accordance with the previous law (*v.gr.*, a minor after marriage) and not in accordance with the new law.[311]

Article 24. *Personality rights.* 1. The existence and the content of personality rights are governed by the law of the domicile of the person. However, personality rights resulting from a family or inheritance relationship are governed by the law applicable to that relationship.

2. The consequences of a violation of the rights indicated in the previous paragraph are governed by the law applicable to liability for wrongful acts.

228. The idea of protection of the person through the recognition of so-called personality rights appears late in the European privatist doctrine of the nineteenth century and is reflected in the twentieth century civil codes, and although there is no legal definition of personality rights which sets out its concept, it should be noted that in the most classical consideration of personality rights they constitute the instrument through which the civil protection of the natural person is produced, basically believing that this is a bearer of certain attributes, assets or rights that are inherent to their human condition and whose violation produces the duty to compensate for the damage, both pecuniary and non-pecuniary, caused by the infringer.

Their list includes the rights that are aimed at protecting the personal integrity of the human being, both in its physical aspect – life, physical as well as physical integrity – and its moral aspect – moral integrity, honour, privacy, image, informational self-determination, identity, including the right to a name, which in this law has its own individual solution. Along with the cited rights, it usually includes the author's moral right; this category also includes the right to freedom in its multiple concrete manifestations (freedom of ideology and religion, expression, information, movement, etc.).[312]

229. Article 24 of the Law submits the existence and the scope of these rights to the law of the domicile (to the personal law)[313]. This is no surprise if we take into account their physiognomy and their indissoluble connection to the person. It should be noted, however, that the personal law simply only determines the *existence and content*, but not under what circumstances they might be considered to be

[311] Art. 17 of the Venezuelan PIL Act.

[312] *Vid.* A. Bucher, *Personnes physiques et protection de la personnalité*, 5th ed., Basel, Helbing Lichtenhahn Verlag, 2009.

[313] CONC.: Art. 24 of the Italian PIL Act; art. 16 of the Polish PIL Act; art. 22 of the Dominican draft law; art. 11 of the Mexican draft law.

violated, under what circumstances redress of the same must be carried about, the possible types of redress and the extent of the redress[314].

However, it is necessary to bear in mind the significance of some of these rights just as we have listed them and of the possibility that the personal law assigns to the law of the forum. This is given because the relationship between the so-called personality rights and the fundamental rights continues without being perfectly shaped. It appears increasingly clear that the value of the personality in the legal order is unitary and enjoys an integral protection. In this context, it may even appear artificial that the existence, for example, of ideological freedom or the right to privacy may depend *in their very existence* on a law that is not that that of the forum (and the essence of the forum). In fact, when speaking of rights or assets of the personality, we are referring to what can be called civil protection of the personality, which also enjoys constitutional, criminal and administrative protection, and which, in modern legal frameworks, is more or less under the protection of the fundamental rights and, therefore, within the sphere of the law of the forum. Obviously, the matter is very clear regarding the right to one's own name, of the rules governing surnames, the right to one's own image... All of these are susceptible to a greater margin of discretion by the legislator, if not by now in their existence (although it is probably also the case) but certainly in their *content*.

230. The significance of this provision must be emphasised, because although the extrapatrimonial nature of personality rights is frequently reaffirmed in treatises and manuals, nobody can sensibly deny the sharp increase in the economic value that they are undergoing today: one only has to think of image, privacy, name or voice, especially if they are associated with persons with a public profile, which at the same time significantly increases the possibility of their commercialisation. The extrapatrimonial aspect is thus currently being seriously questioned, with the emphasis on the fact that after personality rights there may be interests both of a patrimonial as well as an extrapatrimonial nature. The question is of the utmost importance, because when that duplicity of interests coincides in a specific personality right one may wonder whether or not the patrimonial aspect of the right in question merits the same absolute protection as the extrapatrimonial aspect of the same right or as the rights that only have this extrapatrimonial aspect. The provision does not regulate, for example, the contracts that can be concluded which have as their object any of these personality rights (image rights, voice rights...); this aspect will be governed by the law applicable to the corresponding transaction.

231. The principal and general solution is exempted by an accessory referral to the law from which the personality right is derived. The provision concerns a family or inheritance relationship and must also be considered to be exempted (although coincidentally the response of the law applicable is the same).

The personality rights whose existence (and protection) can be extended beyond the death of the holder will be regulated by the law governing the succession, not

[314] *Vid. infra*, commentary on **art. 53** of the present Law.

only in their extrapatrimonial aspect (protection of the honour of the deceased), but also in their patrimonial aspect.[315]

232. Thus, as has been pointed out, the strictly commercial aspects relating to personality rights liable to be the object of trade will be regulated by the status of the transaction, the attacks on the same will fall within the scope of the law applicable to non-contractual liability.[316]

Article 25. ***Names and surnames*****. 1. The names and surnames of persons are governed by the law of the domicile at the time of their birth.**

However, at the time of the registration of the birth, the parents by mutual consent, or whichever of them has parental responsibility, may determine that the name and the surnames are governed by the national law of the person concerned.

2. In any event, the birth certificate of a person and the record thereof in the corresponding Caribbean registers is governed by Caribbean law.

233. The rules governing the name of natural persons have traditionally been an aspect linked either to the personal law, whatever it is the national law or law of the domicile, or to the law of the legal relationship in which the determination of the name and particularly of surnames is being proposed. In this sense, one could choose between the personal law and the law governing parent-child relationships, or the law governing the effects of the marriage, for example, for determining the regime of the name and the surnames derived from filiation or marriage.

The solution adopted is characterised, primarily, by providing a response based on the personal law, i.e. law of the domicile and, secondly, by locating the law of the domicile temporarily at the time of the birth of the person.[317] A targeted and

[315] There are not very many examples in comparative law, but an extremely graphic one is the judgment of the German Supreme Court (BGH) of 1 December 1999 (*Marlene Dietrich* case), in which that the German Supreme Court had to decide on whether or not, for German law, the right to control the commercial exploitation of one's own personality was part of the inheritance. The only daughter and heiress of Marlene Dietrich sued a musical producer who permitted a company to use the name and the image of the actress for a special edition of an automobile and authorised the manufacturer of the Xerox photocopiers to use the pseudonym "Blue Angel" in an advertisement. The claimant alleged the violation of the personality rights of the deceased; she called for the cessation of the activities described and the compensation for the damage incurred, until then denied by German courts in similar cases. The BGH had to decide on two fundamental questions (a) if the personality rights, besides protecting intangible values, also protect economic interests (b) if such rights can or cannot be transmitted to the heirs after of the death of their holder.

[316] *Vid. infra* commentary on **art. 53** of the present Law.

[317] CONC.: Art. 37 of the Swiss PIL Act; arts. 37 to 39 of the Belgian PIL Code; art. 13 of the Austrian PIL Act; art. 15 of the Polish PIL Act; arts. 12 to 15 of the Mexican draft law; art. 23 of the Dominican draft law; art. 19 of the Colombian draft law.

uniform treatment subject to a single law is therefore appropriate: this single law governs regardless of the vicissitudes of the subject in question (if they have one or several marriages successively, if their filiation is changed as a result of an action concerning a claim or challenge of the same, or as a result of voluntary recognition of filiation...). In addition, the problem of the so-called change of connecting factor is solved: to determine which of the personal laws governs the determination of the regime of the name and the surnames when the person concerned has owned more than one domicile in the course of their life. The connection to the domicile at the time of the birth provides security and stability.

From this perspective, the law invokes, on the one hand, and departs from, on the other, some of the traditional responses that international codification reflects in this regard, notably Convention No. 19 of the International Commission on Civil Status (ICCS), on the law applicable to surnames and forenames, signed at Munich on 5 September 1980. Thus, for example, it invokes the solution of retaining the personal law as the single law and not dependent on the legal relationship in which the problem of the name appears.[318] On the other hand, it resolves the problem of the change of connecting factor in a different manner to that provided by the said Convention, which opts to consider the different personal laws that the person concerned could have over the course of time to be applicable successively. This is not only because domicile is a connection that is somewhat easier to change than nationality, but essentially for reasons of stability of one's name, the Law does not conceive a change of system to be applicable as a result of a change of domicile. In this way, the stability of the regime of the name is reinforced; this stability is a clear substantive value, connected even with the right to an identity and respect for human rights.[319]

234. Also regarding this last consideration, the principal solution of the Law, however, is accompanied by a possibility of resorting to a *professio iuris* in favour of the national law of the person concerned. Notwithstanding that the names and surnames of a person constitute a fundamental element of their identification in the society in which they are integrated and, as such, that the application of the law of the domicile conforms to the forthcoming law, a known law and an easily identifiable law, another dimension, which cannot be discarded, also exists: the names and surnames of a person are a fundamental element of their personality and of their personal identity and culture, which must be preserved and in which an unques-

[318] However, in the case of the aforementioned Convention, the personal law chosen is the law of the nationality and not the law of the domicile.

[319] The examples in the jurisprudence of the European Court of Human Rights are numerous. Although it cannot be radically affirmed that the idea favourable to the continuity of the name based on the interests of the person is absolute (against the cases in this sense, ECHR 22 February 1994, *Burghartz*, or ECHR 19 February 2005, *Ünal –Tekeli*, there are also those that appreciate to a greater extent the interest of the State: ECHR of 7 December 2004, *Mentzen alias Mencena*; ECHR 17 February 2011, *Golemanova*) there certainly exists a preponderance of the right to the identity and the continuity of the name when the State's interests that advocates the change involve a significant prejudice to the person, who is prevented from continuing to use a name with which they feel identified.

tionable psychological, family and social identification of the individual with their name exists.[320] The law of the nationality of the natural person, a personal law disregarded by the present Law, is a basic reference in terms of an identifying connection; probably the fundamental reference, since it is normal that natural persons classify or define themselves as Colombians, Venezuelans, Cubans, etc., instead of alluding to the place where they reside. This is the reason for introducing a second paragraph, in which, without any kind of obligation – inasmuch as the provision still keeps the connection to the domicile at the time of the birth – the possibility of a choice of the national law of the person concerned is introduced. Due to the fact that this Law is temporarily located at the time of the birth, also in order to solve the problems raised by a possible change of connecting factor, the option relates to the person or persons who have parental responsibility. If there is more than one of them, the option will have to be exercised by mutual consent, without which the lack of this agreement permits recourse to other instances, which might be a judge or other decision-making authority. In these cases, the conflict resolver is the general rule: application of the described law of the domicile.

For the scenario in which the person concerned possesses more than one nationality, no obstacle may exist in which the choice can relate to any of the nationalities that they have at the time of the birth. It must be taken into account that the possibility of choice of the national law is not devised for being the most connected to the case being analysed (in this case the regime of the names and the surnames), but by virtue of its faithful consideration of being the law that represents the cultural identity of the person concerned to a greater extent, in accordance with their own will (obviously, in this case, the will is that of whoever has parental responsibility). In these circumstances, no type of factor exists that advises a restriction in the potential number of laws, such as to limit them to the effective nationality or to the nationality coinciding with the permanent domicile of the individual (something which, on the other hand, would make the possibility of the choice of law meaningless, the presumption being covered by the general rule). It must be taken into account that the presumption considered now is situated at the time of the registration.

235. The provision does not regulate a typical problem that permanently arises in relation to the regime of the names and the surnames: that of the law applicable to the preliminary matter of what the regime of the names and the surnames potentially depends on. It is a classic problem of the operation of the conflict rule, which has been the subject of hectic doctrinal dispute,[321] but which has not found very much endorsement in legislative texts.[322] Thus, while the specific legal regime of

[320] M.A. Lara Aguado, *El nombre en Derecho internacional privado*, Granada, Comares, 1998, pp. 32–40.

[321] *Vid.* The classical approaches of W. Wengler, "Die Vorfrage im Kollisionsrecht", *RabelsZ,* 1934, pp. 148–251 and P. Lagarde, "la règle de conflict applicable aux questions préalables", *Rev. crit. dr. int. pr*., 1960, pp. 459–484.

[322] An exception is provided by art. 6 of the Venezuelan PIL Act, according to which, "The prior, preliminary or incidental issues that may arise with the main issue need not necessarily be resolved in accordance with the law applicable to the latter". As can be seen, the rule is an open rule that does not offer a restrictive solution.

the names and the surnames is unequivocally determined by the law of their domicile at the time of the birth, the paternal or material filiation that can determine the regime of surnames, or the marriage from which their possible modification *ex lege* is derived or their possible modification by the will of one of the spouses are aspects that are outside of the scope of the substantive application of article 25. Although Chapter II of Title III of the present Law does not allude to any express solution of the typical problem of the preliminary matter (*v.gr.*, which law applies to the filiation – preliminary matter – on which the attribution of the surnames – principal matter – depends), the response most in accordance with the structure and principles of the present Law is in the independent application of each one of the laws, without any interference by any one on the other. The most obvious consequence of provisions of article 64 of the Law is which prescribes the application *ex officio* of the conflict rules both of the present Law as well as those contained in international agreements signed by the Caribbean.[323]

236. Nor is the provision extended to matters relating to the system of the change of names and surnames. Notwithstanding the significant public burden that any of these changes can have, where the requested authority has to issue a real decision on the request for a change of name and surname, it must be noted that article 25 also covers the cases in which a change of name and surname operated *ope legis* occurs as a result of a change in the civil status of the person concerned. The fact that civil status generally is also governed by the law of the domicile[324] facilitates a possible legal coherence and avoids the potential negative consequence of applying two different laws to two aspects of a same overall relationship.

However, the aforementioned intimate relationship between a competent authority and reasons for the changes of names and/or surnames probably requires a necessary *forum-ius* correlation, based on which each requested authority applies its own law for the authorisation of a change of names and/or surnames. In practice, it can lead to the Caribbean authorities not being eligible to authorise a change of names and/or surnames in cases when its own law is not applicable, that is to say when they are not the authorities of the domicile of the person concerned at the time of the birth. In these cases, the matters relating to a change of names and surnames of a person will be settled not as a matter of applicable law, but as a matter of the conditions of recognition of the change authorised by a foreign authority. It is reasonable in this case that there is no obstacle to the recognition of this change when it has been authorised by the authority of the domicile of the person concerned at the time of the birth and that in the other cases (*v.gr*., authorisation of the change of surnames by of the national authorities of the person concerned) this is verified on a case by case basis. Therefore, in the absence of an express provision, this means that the situation created in accordance with a foreign or Caribbean law by an authority that has jurisdiction based on internationally rational criteria, which is admissible for authorising a change of names or surnames, should produce effects in the Caribbean unless they are contrary to their public policy.[325]

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[323] A different solution is that prescribed by art. 1 of the above-mentioned Munich Convention of 1980.

[324] *Vid. supra*, **art. 24** of the present Law and its commentary.

[325] *Vid.* the generic regulation of art. 5 of the Venezuelan PIL Act.

Article 26. *Declaration of disappearance or death*. The declaration of disappearance or death is governed by the law of the State where the person had their domicile before their disappearance.

The provisional administration of the property of the missing person shall be governed by the law of the State in whose territory the absent person had their domicile and, if this cannot be determined, by Caribbean law.

237. The connection used in this provision coincides with that generally employed regarding capacity and civil status in the present Model Law, which corresponds to the systematic framework of absence and the declaration of death between the matters related to civil status.[326]

According to the most widely held opinion in comparative law, the declaration of absence or death falls under the personal status. Many emphasise the similarities between these situations and a change in the civil status or the capacity. Generally, one can say that the ultimate basis of this solution lies in the fact that it concerns situations that affect the entire personality and legal condition of the individual, since it is a principle recognised in all of those jurisdictions that the situations of this nature are subject to the law applicable to personal status, a regulation with which the natural person is considered more connected. In addition, additional advantages of this option are that it makes possible a uniform treatment of conflicts of all of these situations and tends to coincide – without doubt, not always – with the law applicable to the relationships onto which the basic effects of the declaration are projected (inheritance and family).

The choice of the personal status in any case requires its coordination with the necessary recourse to the *lex fori* in relation to procedural matters, whose identification of the substantive provisions turns out to be particularly complex in this sphere.

Article 27. *Commercial Entities and Individual Limited Liability Companies*. 1. Commercial entities and individual limited liability companies are governed by the law in accordance with which they were incorporated.

2. The law applicable to commercial entities and individual limited liability companies comprises:

i) the existence, capacity and nature of the company;

ii) the name and the registered office;

[326] CONC.: Art. 41 of the Swiss PIL Act; art. 41 of the Belgian PIL Code; art. 22 of the Italian PIL Act; art. 14 of the Austrian PIL Act; art. 14 of the Polish PIL Act; art. 24 of the Dominican draft law; arts. 17-19 of the Mexican draft law; art. 25 of the Bolivian draft law; art. 19 of the Uruguayan draft law; art. 38 of the Colombian draft law.

iii) the incorporation, dissolution and liquidation;

iv) the composition, the powers and the functioning of the executive bodies;

v) the internal relationships between the members and the relationships between the members and the entity, as well as the corporate duties of the directors;

vi) the acquisition, loss and transfer of capacity as member;

vii) the rights and obligations corresponding to the shares or interests and their exercise;

viii) the liability of members and directors for infringement of company regulation or of the articles of association;

ix) the scope of the company's liability to third parties as a consequence of the action of its bodies.

238. Article 27 deals with two essential matters for the private international law of companies: on the one hand the determination of the company's personal law (its *lex societatis*) and of the scope of this law on the other; i.e. of the accomplishment of the matters that will be governed by this *lex societatis.*[327] It is, without doubt, an issue in which it is not easy to find the right balance between the interest of the various parties involved in the traffic and the interest in ensuring that the solutions that are adopted in the framework of an international organisation such as OHADAC will have to respect the specific characteristics of international integration, which in principle are alien to the unilateral approaches that might be adopted in the provisions laid down by the internal legislator.

239. Where it refers to the determination of the *lex societatis* it opts for the law of the State of incorporation. This Law will coincide in most cases with the law of the registered office; this registered office being understood to be the formal head office or registered office according to the provisions of the certificate of incorporation; this is stated in the company's certificate of incorporation or in its articles of association, depending on the law of the country of incorporation. This concept in some countries will be replaced by the registered office.[328]

In the cases of capital companies there will be no doubt at all about the determination of the State of incorporation or any discrepancy with the company's formal head office. In these types of companies the legal personality requires the entry of the new company in some kind of registry connected to the public power, so that it is the law of the State that the register belongs to which determines the law of the

[327] CONC.: Art. 27 of the Panamanian PIL Code; arts. 154 and 155 PIL of the Swiss PIL Act; art. 3087 (Quebec Civil Code); art. 25 of the Italian PIL Act; art. 1 of the Belgian PIL Code; arts. 17-21; of the Polish PIL Act; art. 25 of the Dominican draft law; art. 26 of the Bolivian draft law; art. 33 of the Uruguayan draft law; art. 45 of the Colombian draft law.

[328] *Registered office*, *vid.*, for example, art. 3.5.b) of the *Companies Act* of Bahamas of the year 1992, or art. 168 of the *Companies Act* of Barbados: "A company must at all times have a registered office in Barbados".

company. In addition, what usually happens will be that the valid incorporation of the company requires the registered office according to the provisions of the certificate of incorporation or registered office to be established in the State of incorporation, so that there should be no doubt regarding the determination of the *lex societatis* in these circumstances. It is a criterion that is easy to identify, which, in addition, as we will see, responds to the requirements of international traffic flows.

Two points must be made: the first is that the choice of the law of the State of incorporation implies the abandonment of a particular tradition of connection in the American sphere such as the nationality of the company, followed in the Bustamante Code (articles 18 and 19 of the Code: "The commercial or industrial civil corporations that are not public limited liability companies will have the nationality established by the certificate of incorporation and, where appropriate, the law of the place where its main administration or management is usually located" -Article 18-; "The nationality of public limited liability companies is determined by the certificate of incorporation or, when appropriate, by the law of the place where the general meeting of shareholders normally meets and, failing that, by the place where its main Board or the Board of Directors or administrative board is located"). As is known, the connection to the nationality projected onto the companies poses problems because not all of the laws determine which associations must be considered to be national. In addition, the connection to the nationality makes it necessary to adopt a unilateral approach, which is not very appropriate in a regulation of international origin that must be adopted by a plurality of States. It is therefore more convenient to avoid the reference to the nationality – which does not cease to be just a detour – and directly address the issue of the determination of what law has to govern the company.

240. The possible connections in the private international law of companies are basically the State of the incorporation of the company and the State where the company has its actual head office. Between the two, the Model Law opts for the first possibility, because that is the one that best responds to the interests of international traffic. The connection to the "actual head office" primarily requires a determination of where that place is, since there are several possible specifications on this (the place where the company's administration is carried out, where company's activities are mainly carried out or where the company's main establishment is located). Secondly, based on factual circumstances, the actual head office may change much more easily than the formal head office, which does not facilitate the security of dealings. A change of actual head office can cause a perfectly capable company before the transfer to cease to be so afterwards, with the consequences that this has for the rules governing the company's contracts and other relationships. As a result, it is more appropriate to opt for the connection to the formal head office, which, as we have seen, coincides with the State in which the company has been incorporated.

The law of the State of incorporation has to be interpreted as the law of the legal system that attributes legal personality to the company, regardless of where the prior acts necessary for the birth of the company were carried out. In this way, it

will not be impossible that the company's act of incorporation or its bylaws will be drafted in one State, while the company is registered in another. In these cases, what is relevant is the attribution of legal personality, which the State effects by concluding the process of creation, while ensuring that this law will have to assess the legality of the operations that have been carried out in other States.

A problem arises in the cases in which the company's incorporation has not been concluded, since it will not be possible to apply the rule of incorporation properly in such cases. This situation will occur in the cases in which the company and its founders are held liable for acts prior to the birth of the company, and the company has not managed to acquire legal personality. In such cases, the most appropriate thing to do would be to defend the application of the law that would govern the company if it had been finally incorporated. The start of the incorporation of the company must already incorporate elements that make it possible to determine in what State it was intended to incorporate the company and this Law will be the law that will have to be taken into account.

The same solution must be applied to partnerships: the *lex societatis* will be that of the State of the agreement under whose law the company has been incorporated. However, in the case of the partnerships it might occur that it will not be obvious what legislation has been used for the incorporation of the company. In the absence of any evidence on this in the company's certificate of incorporation or the documents that are relevant to its birth, we should opt for the law that was taken into account in the creation of the company, in accordance with the presumed will of the founders. If no right can be identified in accordance with this criterion, which will be really exceptional, one must opt to apply the law that apparently has a more significant connection to the company, presuming that such a law is the law chosen by the founders for the incorporation.

241. The list of matters governed by the *lex societatis* includes the existence of the company, its capacity and legal nature. It will be the law governing the company that will determine at what point it acquires legal personality and what is its corporate type and its nature (partnership or joint-stock company). The company's capacity will also be governed by the *lex societatis*. This does not imply, however, that the exception of the national interest,[329] according to which persons without capacity in accordance with their personal law may under certain circumstances be considered to have capacity in accordance with the provisions of the law of the State where the business in respect of which it wishes to have the capacity determined is concluded cannot be applied to companies. The rules governing the name of the company and the determination of the registered office is also governed by the *lex societatis*. The *lex societatis* also governs the determination of the identities of the members of the company's executive bodies and, therefore, of the persons who can be connected to it by their actions (subparagraph ix of article 27.2). The voluntary representation of the company, on the other hand, is determined by the law that specifically governs the representation.

[329] *Vid. infra*, the commentary on **art. 50** the present Law (*Incapacity*).

242. The incorporation, dissolution and liquidation of the company are also governed by the *lex societatis*. This will be the law that determines the requirements that will have to be met for the effective incorporation of the company. As we have seen, the law that would have to govern the company after its incorporation will also be the law that determines the rules governing the company in incorporation. The dissolution and liquidation of the company is also a matter which is undeniably regulated by the *lex societatis*. However, this application of the *lex societatis* must be coordinated with the application of the law governing insolvency procedures the company might be involved in. The application of the *lex societatis* should not preclude the application of the law governing insolvency to the liquidation of the company's assets, even though the liquidation of these assets should not lead to the dissolution of the company, unless this is provided for by the law governing the company.

243. The company's internal organisation will also be determined by the *lex societatis*. This will be the law that determines what will be the executive bodies, their composition and operation as well as the relationships between the executive bodies, the members and the managers, also the internal relations between the members. The reference to the internal relations between the members must be interpreted as the relations between the members specifically governed by company law. The member agreements that the members might establish among themselves, given their contractual nature, do not have to be governed by the *lex societatis*, although the material scope of such agreements will only be what is permitted by the mandatory rules of the law governing the company. In this way, the *lex societatis* will establish the framework of the member agreements, but not their specific system of rules, unless the regulations governing the agreements (which are of a contractual nature, as just mentioned) refer to the law governing the company.

It will also be the *lex societatis* which determines the corporate obligations of members and directors. This provision is particularly necessary because it refers to the liability of the directors, and opts for a corporate classification of these obligations, precluding the application of the law governing criminal liability. This corporate classification is limited, however, to the corporate obligations of the directors, i.e. the liability that might be generated by the director with regard to the company for actions that are unrelated to their corporate obligations will not be governed by the *lex societatis* but, predictably, by the law arising from the rule of conflict regarding non-contractual obligations.[330] This liability resulting from the corporate obligations, on the other hand, will necessarily be governed by the *lex societatis*, as is made explicit in subparagraph viii) of article 27.2º.

244. Finally, it will also be the *lex societatis* that determines how the status of member, as well as the rights and obligations derived from the shares and corporate interests, will be acquired, lost and transferred. The application of the law governing the company to this second aspect (rights and obligations derived from the shares and corporate interests) is a consequence of the projection of that law onto the company's organisation and internal workings, with close connections with

[330] *Vid. infra*, **art. 52**.

respect to the rights and obligations of the members, at least as regards the rules governing the shares.

The *lex societatis* must also govern the acquisition, loss and transfer of the status of member; even if we have to distinguish carefully between the acquisition, loss or transfer and the dealings or legal acts that involve these variations in the relationship between the company and a certain person. The *lex societatis* will only govern what requirements are necessary for acquiring, transferring or losing the status of member; but the dealings or acts necessary for this change will be governed in their own law. It will be the *lex societatis* that determines whether it is possible to transfer the status of member contractually; but if that is the case, the rules governing the contract will be determined by the *lex contractus*, although if the *lex societatis* establishes any specific requirement for the transfer to be enforceable against the company, such requirement must be met regardless of the provisions of the *lex contractus*.

Article 28. *Transfer of the registered office*. The transfer of the registered office of a commercial entity or an individual limited liability company from one State to another shall affect personality only in the terms permitted by the laws of those States. In the case of transfer of a registered office to the territory of another State, the company is governed by the law of that State from the time of the said transfer.

245. Article 28 deals with the transfer of the registered office of the company.[331] The transfer of the actual head office not subject to regulation since, whereas it is not a connection criterion for determining the *lex societatis*, its transfer lacks any relevance for the conflict. It might have effects on fiscal or administrative matters, but not on private law.[332]

The transfer of the registered office, on the other hand, will certainly have consequences from the perspective of the law governing the company. It is usual that the laws of different States require that the registered office be located in the State of incorporation.[333] According to this, therefore, the transfer of the registered office

[331] CONC.: Arts. 161 to 163 of the Swiss PIL Act; art. 112 of the Belgian PIL Code.

[332] *Vid.* the articles 226 to 231 of the Costa Rican Commercial Code, where it was provided that the transfer of the registered office of foreign companies to Costa Rica, understood registered office to be a place where the company's Board of Directors holds its meetings or where the centre of corporate management is situated (art. 231).

[333] *Vid.*, *v.gr.*, art. 111 of the Colombian Commercial Code, where it is required that the deed of incorporation of the company be entered in the commercial register of the chamber of commerce with jurisdiction in the place where the company establishes its principal domicile, which may only be fulfilled if this domicile is located in the Republic of Colombia; this idea is confirmed by art. 469 of its Commercial Code, where it is established that "companies incorporated in conformity with the law of another country and with principal domicile abroad are foreign companies". Art. 18.10 of the Costa Rican Commercial Code is even clearer since it provided that the domicile of the company must be stated in the deed of incorporation of any commercial company which "must be a current and certain address within Costa Rican territory in which notification can be validly delivered" or

may not take place without transforming the company, which, through the transfer, will cease to be governed by the law of the State of origin to become governed by the law of the State to which its registered office is transferred. This operation of transformation of the registered office must be the object of a detailed substantive provision, which also permits the coordination between the laws of the State of origin and those of the State of destination of the company. Consequently, in article 28 it is established that the manner in which the transfer affects the legal personality of the companies will be that provided for by the law of the States of origin and the law of the State of destination. That is to say, the transfer is possible only if permitted both by the State of origin and the State of destination. If either of these two laws does not authorise the emigration or the immigration of the company through the transfer of its registered office according to the provisions of the articles of incorporation, such transformation will not be possible.

On this point, the regulation governing the transfer is not made clear, since, as has been indicated, it does not have a conflictual but a material nature.[334] This regulation will have to include both the procedures that have to be carried out in the State of origin for deciding on the change of the registered office and the transformation of the company as well as the procedures to be carried out in the State of destination and also the cooperation mechanisms between the authorities of both States.

246. Article 28, on the other hand, certainly specifically deals with how the transfer of the registered office affects the *lex societatis*, by providing that after the change the company will become governed by the law of the State of its new head office. In other words, the application of the law of the State of incorporation to the company is an exception to the provision of **article 27** , which is why it will be necessary to link the Law referred to by **article 27** with the law derived from **article 28**.

In the first place, the incorporation of the company will and must always be governed by the law designated by **article 27** as well as the operation of the company prior to the transfer. The law of the State to which the registered office has been transferred is not intended to be any applicable retroactively to companies that have transferred abroad their registered office. The relations between the executive bodies and their operation, the rights and obligations of members and directors as well as the loss, acquisition and transmission of the status of member will be governed by the law of the new registered office of the company, which will coincide with the law that will govern the company once the transfer has taken place, only from the time of transfer, and thus, it will be necessary to adapt the company's articles of association and operating rules.

The linking of the laws of the company's State of origin and State of destination poses specific problems where it refers to the very process of the transfer of the head office. In principle, it will be the law of the State of origin that governs the

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the already cited art. 168 of the *Companies Act* of Barbados which requires that a "*registered office*" of the company in Barbados must exist at all times.

[334] *Vid.*, *v.gr.*, arts. 201 to 209 of the *Cayman Islands Companies Law*, where the form in which a company registered abroad can transfer its headquarters to the Cayman Islands is governed.

adoption of the transfer agreement; but it should be the law of the State of destination that would apply to the change in the articles of association necessary for adapting the company to the law of the State of destination. Certainly, the provision of article 28 is that the new law will only govern from the time of the transfer, but must be applied provisionally to the change in the articles of association. This provisional application must be conditional on the effective implementation of the transfer, so that the provision of the article is not affected. That is to say, the effective application does not take place until the time when the transfer is effected; the operation of the company, the relations between the bodies and the rights and obligations of members and directors must be governed by the law of the State of origin up until the time when the transfer is effective, even if the agreement to transfer the registered office abroad has already been adopted. The article is clear on this point in order to avoid any doubts that might arise during this transition stage between the company's State of origin and the State to which it transfers its head office.

247. Article 28 establishes the application of the law of the new State once the transfer of the head office has taken place; that is to say, it is not expected that the application of the previous *lex societatis* might be maintained after the transfer of registered office. In existing practice, it is customary that the transfer of the registered office is precisely intended to achieve the transformation of the company into one of the companies existing in the State of destination, and governed precisely by that law, the law of the State of destination. However, there have also been cases in which the sponsors of the transfer were willing to maintain the application of the company's law of origin (*vid.* in Europe the case decided by the ECJ in Luxembourg in its judgment of 16 December 2008, Case C-210/06 *Cartesio*). Article 28 does not admit this possibility. The alternative would be to allow the company to decide between the application of the law of origin or the law of destination or indeed to refer the solution to the laws of origin in the States involved. Both solutions are inadequate and since either they will introduce a foreign element into the regulation, as is the company's intention, or they will open the possibility of discordant solutions between the State of origin and the State of destination. It is therefore preferable to establish clearly that it will be the law of the State to which the head office is transferred that will govern the Company from the time of the transfer.

It is obviously not a matter of unreasonably reducing the company's scope of autonomy, which exists at a high level from the time when a change in its system of regulations is permitted to take place during its lifetime, without requiring its dissolution and reincorporation. However, this possibility of a change in the corporate regime during the lifetime of the company must be accompanied by certain safeguards designed to safeguard the interests of the States involved and legal protection. As regards the first aspect, the interests of the States, this is because, as we have already seen, the transfer of the head office will only be possible when permitted both by the law of the State of origin and the law of the State of destination. As regards the latter, the clear determination of the time when the company passes to being governed by the laws of the State of immigration, which coincides with the final time of application of the law of the State of emigration, satisfies the needs of a clear international system regarding this point.

Section II

Family relations

Article 29. *Celebration of marriage*. 1. Capacity for marriage shall be governed by the law of the domicile of each of the future spouses.

2. The requirements of matters of substance and of form of a marriage celebrated in the Caribbean shall be governed by Caribbean law.

3. A marriage celebrated abroad shall be deemed valid if it is in conformity with the law of the place of celebration or if it is recognised as such by the law of the domicile or of the nationality of either of the future spouses.

248. Article 29 of the Law summarises the intricate matter of the validity of the marriage in three simple and easily applicable provisions, distinguishing between the legal rules governing the marriage celebrated in the Caribbean and that celebrated abroad.[335] In the first case, besides the corresponding issue relating to the Caribbean authorities' competence to authorise a marriage, the problem of the law applicable to the different aspects arises, surrounding the celebration and validity of a marriage: essentially, the capacity for marriage, the form of the manifestation of the matrimonial consent and what we might call the law applicable to the substance of the marriage. In the second case, the provision is not constituted as a rule of the applicable law, but as a provision that establishes the conditions of recognition. This set of regulations responds to a modern view of marriage in private international law, which differentiates between domestic marriages and foreign marriages depending on the nature of the authority celebrating the marriage (national or foreign) and, as a result, also establishes a different legal rules governing each of them: as has been said, the first type poses problems of applicable law, while the second type poses problems of recognition.[336] The importance of considering a marriage validly celebrated transcends the mere aspects of private law, where the marriage is a nuclear institution, from which effects can be derived for many other matters (name, maintenance obligations, inheritance rights), to establish itself even as an important piece in the identification of the own population of the Caribbean.

[335] CONC.: Art. 44 of the Swiss PIL Act; arts. 46 and 47 of the Belgian PIL Code; art. 3088 (Civil Code of Quebec); arts. 27 and 28 of the Italian PIL Act; arts. 48 and 49 of the Polish PIL Act; art. 21 of the Venezuelan PIL Act ("The capacity for marriage and the requirements of matters of substance are governed for each of the future spouses by the Law of their respective domicile"); arts. 38 and 39 of the Panamanian PIL Code; arts. 16 and 17 of the Austrian PIL Act; art. 27 of the Dominican draft law; arts. 38 to 40 of the Bolivian draft law; art. 22 of the Uruguayan draft law; art. 21 of the Colombian draft law.

[336] It is the basic thesis of P. Orejudo Prieto de los Mozos, *La celebration y el reconocimiento de la validez del matrimonio en el Derecho internacional privado español*, Navarra, Aranzadi, 2002, which has general validity beyond its concrete projection on a specific system.

The relationship between marriage and obtaining the nationality of the Caribbean is crucial in some systems.[337]

249. In accordance with provisions of **article 23** of the present Law, the capacity for marriage is subject to the law of the domicile of each of the future spouses. It is therefore a solution that is linked in a distributive manner, in such a way that it is the law of the domicile of each one of the future spouses that determines their singular capacity. Obviously, this solution in terms of validity of the marriage by reason of the capacity of the future spouses will require that both laws consider that this capacity coincides for each of the future spouses. It is sufficient that either of the future spouses lacks capacity in accordance with the law of their domicile so that such a defect can determine some degree of ineffectiveness of the marriage celebrated.[338]

The law of the domicile thus not only governs the strict issues of capacity related, for example, to the minimum age for marriage[339] or the cases in which, despite having this minimum age, there is a lack of actual capacity to give truthful and informed consent (concurrence of deficiencies or mental anomalies, which, however, will be more of a factual than a legal evaluation), but also the so-called matrimonial impediments, which focus on personal or family circumstances, such as the impossibility of marriage between family members related up to a certain degree of kinship. Again, this distributive application can lead to the thwarting of the marriage in those cases in which the impairment is of the so-called bilateral variety (articulated according to the relationship with the other spouse) and only provided for by one of the two laws. Thus, *v.gr*., if the law of one of the future spouses connected by kinship in the third degree in the collateral line (aunt and nephew) considers this third degree to be an impediment, they will have to conclude that there is no authorisation of the marriage, even if the law of the domicile of the other party does not provide for such obstacle.

This Law is also required to establish the circumstances and conditions in which the impediments might be "dispensed" with as well as under what circumstances and who is responsible for integrating the capacity in the cases in which it is lacking. This fact is not free of problems in those cases in which the law of the domicile instructs a specific authority to substantiate the petitions for dispensation, since according to the specific cases, this dispensation may be granted by the equivalent Caribbean authority (forum) and in other cases, the future spouses will be the ones who have to obtain this from the foreign authorities. It must be considered, however, that many of those that theoretically can be considered as impediments to a marriage are an integral part of the very concept or notion of marriage which, in any

[337] *Vid.* in this sense the rules governing the systems related to the British legacy as regards Bermuda or Antigua.

[338] *Vid. infra*, **art. 32** and its commentary.

[339] Take into account the special provision contained in art. 2 of the New York Convention of 20 December 1962 on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, in force in various Caribbean countries.

case, is the concept of the Caribbean (of the forum). This can be the case of the sex or, to a lesser degree, of the traditional impediments of nuptial tie.

It is certainly arguable that is the sex of the future spouses is a matter to be regulated by the law of the domicile of each person as if it were one of the above-mentioned bilateral impediments. The progressive openness of different legal systems to the authorisation of marriage between persons of the same sex has meant that the cases in which such marriages are celebrated tend to be restricted to the territory (or the consulates, as appropriate) of the countries that recognise it. In practice, the celebration of marriage between two men or two women is not going to be requested from a Caribbean authority that does not provide for such a marriage. If one were to seek to extend this condition to a question of capacity, two persons domiciled in Argentina, or in Uruguay or in Spain could claim such a possibility. Probably, in some cases, the public order of the Caribbean[340] would enter into operation, although such recourse is not necessary. The issue of the sex of the future spouses is an integral part of the concept and content of the marriage of the forum and, from this perspective, falls within the second paragraph of this article 29, also exempting the provisions of **article 23** on the law applicable to the civil status, since, even discarding its classification as a question of capacity, does not cease to be undoubtedly a question of civil status. It must be taken into account, in any case, that the celebration of this type of marriage may not be alien to the practice of the Caribbean, according to which it is thus recognised progressively by each State of the Caribbean and, even today, according to principles such as "concordance" and "recognition" in the systems with a Dutch[341] legal legacy or the beginning of "identity or legislative assimilation" in the countries with a French[342] legal legacy.

250. The above-mentioned paragraph two governs the requirements of substance and of form of a marriage celebrated in the Caribbean and, once again, a simple and fully consistent response is given with the nature of the matter. The authorities of the Caribbean cannot celebrate a marriage that is not their own, since both the formal matters as well as the substantive issues are subject to the law of the Caribbean (law of the forum).

With regard to the first aspect, the form of manifestation of the matrimonial consent, there is no doubt from the perspective of the marriage that is going to be entered into: the consolidated rule *auctor regit actum* indicates that each authority complies with its own law at the time of completing or demanding the formalities inherent in the act for whose grant it is required. It is inconceivable that a marriage celebrated in a Special Notary's Office of the Cuban Ministry of Justice or before a circuit judge or notary of one of the future spouses in Colombia, is subject to the

[340] *Vid*. *infra*, commentary on **art. 68** of the present Law.

[341] *Vid*. the systems related to the Dutch legacy, where a certain manifest opposition is raised in the matter, precisely of the marriage between persons of the same sex, regarding which the Netherlands were pioneers in Europe.

[342] *Vid*. the systems related to the French legacy. France has recognised marriage between persons of the same sex from the *Loi no. 2013–404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*.

formal requirements of a different foreign law than Cuban law, in the first case, or Colombian law, in the second case. The forms and solemnities will be those of the Caribbean.

Less absolute is the subjecting of the law governing the substance of the marriage to local law, because other solutions would be imaginable, but the acceptance by the second paragraph of article 29 that we are currently discussing is the most appropriate. On the one hand, the "type of marriage" which an authority celebrates is "theirs". Taking into account the evolution in the concept of the family and the concept of marriage – as one of the possible ways through which the family is organised – that there has been in comparative law in the last few years, it could no longer be said that marriage is a universal institution which substantially means the same thing in any place of the world.[343] The marriage celebrated in the Caribbean is a Caribbean marriage, and, therefore, the underlying conditions are those established by the Caribbean legislation. The present provision thus deviates from others in that the substantive requirements of the marriage are potentially subject to different laws to the law of the forum, but coincides with others that opt for the same solution.[344]

Among these substantive conditions, one should mention, in particular, the condition relating to the sex of the future spouses since it has already been mentioned, and the content of their consent. It is this second aspect, which is of paramount importance, since, not infrequently, it has traditionally been considered as inextricably linked to the personal law of each of the future spouses.[345] In a strictly logical sense, there can only be one matrimonial consent, as this is a nuclear requirement of the marriage. That is to say what the future spouses agree to is nothing other than to constitute a union as the conjugal bond subject to the legal rules. And these rules may only be singular and not plural. It is an attack on logic to conceive the provision of the matrimonial consent as an asymmetric reality, in which each of the spouses can consent to something different to what other consents to, according to which the consent of one is subject to their personal law and consent of the other to theirs. This is not possible. It is a kind of traditional residue of the expansive force of the personal law, which lacks any basis. Matrimonial consent is thus univocal and that is which the law of the Caribbean provides for connected to its concept of marriage.

251. It is also possible to extend this to the possible defects of consent and the most common problem of marriage celebrated though a simulation in the consent. The so-called sham marriages are those in which the will of the future spouses does not coincide with the manifested matrimonial consent. The reasons for this practice are manifold, but among them are reasons related to an attempt to defraud the regu-

[343] *Vid.* the classic quote by L. Raape, "*Les rapports juridiques entre parents et enfants comme point of départ d'une explication pratique d'anciens et de nouveaux problèmes fondamentaux du droit international privé", Recueil des Cours de l'Académie de Droit International de la Haye*, t. 50 (1934–IV), pp. 399–544, p. 511, where with the statement "*mariage vaut mariage*" the unique and universal concept of marriage is postulated, which, without doubt, does not exist today.

[344] In Cuba simply Cuban law is applied (*vid.* art. 13.1º and First Special Provision of the Civil Code).

[345] Regarding consent: Bustamante Code art. 36 on personal law; *id*. Guatemala.

lations on the acquisition of nationality or the regulations on a person's situation as being an alien. The control of this type of situations tends to be eminently factual and, in many cases, unrelated to a specific policy: it is noted that the future spouses (or the spouses, if the verification is performed *a posteriori*), did not know one another before the marriage, did not have any kind of relationship, did not live with one another before or after of the celebration of the marriage, etc., and if it is deduced from this that there was a simulation. However, proper treatment of the subject requires a more scrupulous verification of the simulation, taking into account, above all, the fact that it is not a mere legal transaction, but one which represents the exercise of the *ius connubi* that is called into question. From that point of view, the existence of fixed rules or mere presumptions with a greater or lesser degree of predictability makes clear the identification of an applicable law beyond the merely factual assessment. In the case of article 29, which we are discussing, this is the law of the forum for the cases of marriages celebrated or to be celebrated before the Caribbean authority.

252. This article concludes with a provision on the recognition of the marriages celebrated abroad. Despite its appearance, it is a genuine recognition standard (and not of applicable law), which establishes a generous range of possibilities, from the recognition of the validity of the marriage to its ineffectiveness. While in the marriage concluded with the Caribbean authorities the provision is the application of the law of the forum, except as regards the capacity, concerning the validity of marriage concluded before foreign authorities, the standard is oriented towards the validity of the marriage through a threefold possibility articulated in an alternative form. The marriage is valid if it conforms to the law of the place of its celebration. The reference is to a single law, although its provisions of private international law may be taken into account. If it is not an *application* of the law of the place of the celebration of the marriage by the authorities of the Caribbean, the rule excluding the referral referred to in this Law[346] is not relevant. Thus, a marriage celebrated abroad that is valid applying the local law and the personal law for the capacity in accordance with the provisions of private international law of the local law will have to be considered valid for the Caribbean.

And that is the case of the two alternatives that are linked beside local and foreign law: depending on the cases, these two alternatives can be four: each of the spouses' national law and each of the spouses' law of the domicile. In this case a prerequisite of recognition has to be considered again, which instead of being established unilaterally by the law of the Caribbean, refers to an entire competent legal system: if the marriage is valid for any of those laws, whatever the law or laws effectively applied to its celebration, the marriage must be considered to be valid in the Caribbean. It is a generous response to the problems that that may arise with limping marriages (valid in one place and invalid in another) under the prism of the stability of the civil status and the law regarding the family and personal life, as well as to *ius connubi*. In any case, it is fair to remember that this recognition, as noble as it may be, cannot grant efficiency to cases contrary to the public policy of

[346] *Vid. infra,* **art. 67** of the present Law.

the Caribbean, in whose determination the prohibition of sham marriages once again plays an important role (lack of specific provisions on the subject).

Article 30. *Personal relations between spouses*. Personal relations between spouses shall be governed by the law of the common matrimonial domicile immediately following the celebration of the marriage; in the absence of such domicile, by the law of the common nationality at the time of the celebration of the marriage and, failing this, by the law of the place of celebration of the marriage.

253. A valid marriage gives rise to a bundle of varied and heterogeneous relations. Some of these are essentially economic, while others cannot be classified as such. Among these, there are various types: effects on the spouses' or either one of their surnames, effects on the rules governing the filiation of the child born beforehand (*v.gr*., legitimation by subsequent marriage) or due to having (presumptions of paternity of the mother's husband), obligations (at least formal) of cohabitation, mutual respect, fidelity, support, etc. Some of these effects have their own legal regime in terms of the applicable regulations: thus, *v.gr*., the rules governing the name of natural persons will be regulated, as seen before, by the law established in **article 25** of the present Law; while the filiation will be governed by the provisions of **article 35**. The same can said of the property relationships referred to in **article 31** of the present Law. Both the provision governing the law applicable to the personal relations between spouses as well as the law governing the property relationships are general provisions (the first more than the second), which yield in the face of the more specific ones that we are referring to.[347]

From a point of view of opting for specific connection criteria, it must be stated that in the modern legal systems that understand marriage to be a direct expression of the will of the spouses as autonomous persons acting under their own responsibility, this will be the determinant factor of their own cohabitation, the category of personal relations of the marriage, as comprising rights and obligations imposed by the law, is certainly questionable.[348] But it should not be lost sight of that private international law must take into account any set of different situations and concepts that might be presented in the forum of no matter what foreign legal system.

[347] CONC.: Art. 48 of the Swiss PIL Act; art. 3089 (Civil Code of Quebec); art. 48 of the Belgian PIL Code; art. 29 of the Italian PIL Act; art. 18 of the Austrian PIL Act; arts. 51-53 of the Polish PIL Act; art. 28 of the Dominican draft law; art. 43 of the Bolivian draft law; art. 24 of the Uruguayan draft law.

[348] M. Amores Conradi, "Las relaciones entre cónyuges en el nuevo Derecho internacional privado de la familia: valores jurídicos y técnicos de reglamentación", *ADC*, vol. 40, nº 1, 1987, pp. 89–138.

254. In this sense, whether the scope of application of article 30 is based on a narrow or broader definition, it should be noted that it has a special significance, since it constitutes a kind of *general statute* or *law applicable to the substance of the marriage* with potential significance in matters such as the dissolution of the same by notification of death of one of the spouses or even in cases where a case of separation or divorce has to be interpreted, where the law applicable is causalist. Indeed, the notification of death of one of the spouses regulated by their personal law – that of their domicile, in accordance with **article 26** of the present Law – will govern the conditions for this notification to be made[349] but it is debatable whether the effects on other legal relations can automatically be under the protection of that law. One of those questions is the matter of the dissolution of the marriage bond that the person declared deceased has. It does not seem very respectful of the equality between the spouses that has to govern the marriage, from its celebration to its dissolution or termination, to consider that it is the personal law of the person declared deceased that unilaterally decides on whether it implies, and under what circumstances, the dissolution of the marriage bond: what is its legitimacy when, for example, the regulation is different from the other spouse's personal law? Neither, obviously, would it be fair if it were precisely the "present" spouse's personal law that was the determining factor of this matter. A neutral law closely linked to the marriage would be the best option: that law is the law governing the personal relations between the spouses.

The second example has similar characteristics. In those cases in which, in accordance with **article 33** of the present Law, the law applicable to divorce has a material content that refers to any of the typical conjugal obligations as a cause of the divorce, the interpreter is required to interpret such causes and two possibilities are opened up: to simply do this according to the law applicable to divorce, or to introduce, by way of interpretation, the provisions of another law: the law governing relations between the spouses. Article 154.2º of the Civil Code of Colombia provides a paradigmatic example, when it establishes as causal "The serious and unjustified failure by either of the spouses to fulfil the duties imposed by law as spouse and as parent." Indeed, since the law governing divorce is Colombian law, but the law governing personal relations between spouses is different, what is the law that determines the content of those *duties* imposed by operation of the law? It is not unreasonable to think that it is precisely the law governing the personal relations between the spouses; the law that the spouses know and to which they adapt their behaviour, even if another law has to be the law governing divorce.

255. Article 30 is constituted in this context as a provision that identifies the law presumably closer to the marriage. It uses for this three subsidiary or cascaded connections that reflect different proximity criteria. Without any doubt, the law of the common matrimonial domicile immediately after the celebration of marriage is the most closely linked with this, since not surprisingly it coincides with the personal law of both spouses. In the absence of this law, i.e. when the spouses have a different domicile after the celebration of the marriage, the rule selects the common

[349] *Vid. supra*, commentary on **art. 26** of the present Law.

national law at the time of the celebration. Once again, it is a closely linked law, given the absence of a common domicile and taking into account that in terms of the personal law, the nationality is the natural alternative to the domicile.[350] In the cases in which the peculiarities of the marriage determine that there is neither a common domicile immediately following the marriage nor a common nationality at the time of its celebration, one opts for the relations between spouses being governed by the law of the place of the celebration. This is clearly not a law closely linked to the marriage. The place of the celebration in many cases may be merely random or coincidental, but as a close connection in light of a degree of internationality as significant as that of the specific marriage (spouses' different nationality and different domicile) fulfils the function of granting sufficient legal protection.

Finally, it must be considered that in order to avoid the problems arising from a possible change of connecting factor, that is to say the occasional change of circumstances (domicile, nationality) that determines the applicable law, article 30 locates these laws temporarily in the immediate period after the celebration of the marriage (common domicile) or at the time of the celebration (common nationality). Thus, the law governing the personal relations between spouses will be known and be the same as that of the celebration of the marriage, so that a change in the above-mentioned circumstances cannot modify it. Although this circumstance may introduce a degree of rigidity to the solution, the close connection created between this provision and the next, regarding the property relationships in marriage, calls for a rigid and predictable solution. This rigidity is also mitigated by the evolution of the different domestic systems that are moving towards solutions based less on mandatory rules and more on the spouses' capacity to regulate their own relations according to their common interests.

Article 31. *Property relationships in marriage*. 1. The property relationships between spouses shall be governed by any of the following laws, chosen by the spouses before the celebration of the marriage:

i) the law of the nationality of either of the spouses at the time of the designation;

ii) the law of the domicile of either of the spouses at the time of the designation;

iii) the law of the domicile of either of the spouses after the celebration of the marriage.

The choice of any of these laws must be express and stated in writing and relate to the totality of the conjugal property.

[350] And it continues being the personal law in different systems of the OHADAC region: in the French Departments and Territorial Communities in the Caribbean Area, as a result of the French legacy; *vid.* also the solution of Cuba and the Dominican Republic.

2. In the absence of such a choice, the property relationships between the spouses are governed by the law applicable to the personal relations in accordance with article 30 of the present Law.

3. The spouses may agree in writing during marriage to submit their matrimonial regime to the law of the domicile or of the nationality of either spouse.

This choice may not prejudice third party rights.

4. The law governing property relationships between spouses in accordance with the above paragraphs, whether chosen or not, shall be applicable as long as the spouses have not validly chosen a new law, regardless of the possible changes in nationality or domicile of either spouse.

256. As already noted in the commentary on **article 30**, the concept of property relations between spouses has a generic nature and therefore a wide scope of application. The bundle of property relations between the spouses includes the duty to provide support and assistance obligations which are translated into maintenance obligations during marriage or as a result of a relaxation or breakdown of the marriage bond; the primary matrimonial regime, governing issues as important as the contribution to the ordinary burdens of the marriage, the duty to provide mutual assistance, the solidarity for the debt assumed for the shared support of the marriage, provisions on the matrimonial domicile, etc.; it also comprises the inheritance rights of a property nature that the surviving spouse may have and fundamentally the so-called matrimonial property regime. Some of these relationships have their own applicable law: this is the case of maintenance obligations and inheritance rights, both subject to the provisions of **articles 41**, **42 and 43**, respectively. Others, such as those relating to the matrimonial property regime, are the fundamental core of the present article.[351] As regards the general or primary matrimonial regime, it is common that the strong public order nature of their provisions leads to a territorial application thereof.

257. The structure of the solutions provided by the provision in question, article 31, is close to that of the Convention on the Law Applicable to Matrimonial Property Regimes of 14 March 1978,[352] which is in force in various departments and territories of the Caribbean, based on their participation in the international obliga-

[351] CONC.: Arts. 52 to 57 PIL of the Swiss PIL Act; arts. 3122-3124 (Civil Code of Quebec); arts. 49 to 54 of the Belgian PIL Code; art. 30 PIL of the Italian PIL Act; art. 41 of the Panamanian PIL Act; art. 19 of the Austrian PIL Act; art. 29 of the Dominican draft law; art. 44 of the Bolivian draft law; art. 25 of the Uruguayan draft law; arts. 51 to 58 of the Mexican draft law; arts. 23 to 27 of the Colombian draft law. Art. 22 of the Venezuelan PIL Act has renounced to integrate this modern view of the conflictual autonomy.

[352] G.A.L. Droz, "Les nouvelles règles de conflit françaises en matière de régimes matrimoniaux (Entrée en vigueur de la Convention de La Haye du 14 mars 1978 sur la loi applicable aux régimes matrimoniaux)", *Rev. crit. dr. int. pr*., 1992, pp. 631 *et seq.*; A. Bonomi, M. Steiner (eds.), *Les régimes matrimoniaux en droit comparé et en droit international privé. Actes du Colloque de Lausanne du 30 septembre 2005*, Geneva, Librairie Droz, 2006.

tions of the mother country[353]. Thus, like the aforesaid convention, the present Law starts from an essential recognition of the autonomy of the will of the spouses as the primary regulatory criterion. Not only does it respond in greater measure to the guarantee of predictability and legal certainty, but, combined with other possibilities of choice of law, such as for example the provision regarding the law applicable to inheritance rights, it can serve to consolidate a highly desirable unity of applicable law between the inheritance law (governing the rights that the surviving spouse is entitled to through the operation of the law) and the law governing the property regime. With this a possible problem of maladjustment or misalignment of the compared practices will be avoided.[354]

258. The choice of law can be made at any time before of the celebration of the marriage and this marriage continuing, either to change a previously made choice or to change the law applicable until then in accordance with the reference that article 31.2º makes to the law governing personal relationships. However, the scope of the choice is different, whether it is made before the celebration of the marriage or subsequently. In the first of the cases, the range of possible laws available is greater. Although personal laws (of the domicile or of the nationality of either of the spouses) continue to exist, their temporal determination means that when the choice of law is made before the celebration of the marriage it is necessary to choose both the nationality or *actual* domicile of any one of the spouses as their *future* domicile after the celebration. This idea responds to the possible changes that the marriage may entail.

The option to choose a future law allows the future spouses to submit their property relationships for example to the law of a future domicile, where both (or one of them immediately, while waiting for the other) will locate their centre of life or one of the centres of their life. Certainly, the choice of a future (and uncertain) law always raises the doubt of its execution: if the law of the future domicile of one of the spouses is chosen and supervening circumstances unrelated to the will of the spouses lead to a change of plans, is the choice valid? The Law opts for a factual solution. The choice does not rest on a future proposed or desired domicile but on what becomes real and effective, although the reason for this it does not have to be established absolutely immediately. The very philosophy of the choice depending on the circumstances of the change that the celebration of the marriage implies makes the choice effective when one of the spouses moves to the address chosen within a reasonable period after the celebration of the marriage. If this does not happen, the choice will have no effect and the law applicable in the absence of the choice will govern the property effects of the marriage.

There is also another difference between the choice made prior to the celebration of the marriage and the one operated thereafter. In the second case, the choice cannot affect the rights of third parties, in accordance with the law that was applicable to the property relationships between the spouses. One of the problems that fre-

[353] *Vid.* the systems related to the French legacy.

[354] *Vid.* the monograph by E. Zabalo Escudero, *La situación jurídica de la cónyuge viudo en el Derecho internacional privado e interregional*, Aranzadi, Pamplona, 1993.

quently arise in relation to the succession of two laws applicable to the same factual situation is precisely to determine the scope of the application of the new law or, more precisely, in the case covered by this article 31, the problem of the possible retroactivity of the new law. Paragraph 4, as will be seen, does not directly address this question. The logic of the autonomy of the will recommends leaving the potential determination of the "retroactivity" of the new law in the hands of the spouses, but in any case, the rights of third parties may not be affected, either for the past or for the future. If the spouses do not decide anything, the logic of the provision indicates that each applicable law will have a temporal scope of application closed from the time this is in force; the first from the time of the celebration of the marriage up until when it ceases to be so, in the ordinary cases, through the choice of the new law.

That does not mean there is a complete partition between the potential successively applicable laws. The total compartmentalisation between both laws from the time when they continuously apply to the same property is almost impossible: it is not dismissible for example that one of the spouses would acquire a benefit, utilising both assets acquired under the previous regime as well as property acquired under the new regime after the term of validity of the new law, with a possible change in the matrimonial property regime that was in force until then. It is really difficult to avoid these types of problems of maladjustment or mismatch between different successively applicable regimes. In practice, before the dissolution and liquidation of the property regime as a consequence, for example, of divorce or the death of one of the spouses, in the cases of successive regimes the most appropriate thing to do is to carry out a kind of retrospective liquidation of the regime on the date of the change of law, take into account the results of that liquidation in order to know the state of affairs at the start of the new regime and finally to liquidate this second regime.

259. A case not specifically covered by the provision is the case of the revocation of an agreement on the applicable law without its substitution by a new agreement. The case will be extremely rare, but cannot be dismissed. In this case, the objectively applicable law governing the personal effects of the marriage would automatically be the law governing the property and effects, and consequently, this law would determine the matrimonial property regime.

All of the agreements on the choice of law, whether prior to the celebration of the marriage or completed during its period of validity, must be express, stated in writing and refer to the totality of the conjugal property, since a partial choice is not possible. The difference of drafting between article 31.1º *in fine* and article 31.3º of the Law does not imply that no express or unitary or complete nature of the choice is also required in the case of this second article. Its eligibility is provided directly by this Law and its possible ineffectiveness will be resolved in accordance with the personal law of each of the future spouses or spouses, if it were a problem of capacity, or otherwise in accordance with the law chosen.

260. It should be borne in mind that the choice of law regulated in the various paragraphs of article 31 of the Law must not be confused with the possibility the spouses have to regulate matters or their property regime substantively through the choice of whatever they consider appropriate or through the celebration of settlements, in which, besides the determination of the matrimonial property regime they regulate in detail whatever they consider appropriate, any matters related to the management of the matrimonial property. These types of substantive agreements, both in their admissibility and in the scope of their content, will depend on what the applicable law says, which is indicated in article 31 of the Law through any of its paragraphs. Thus, if the spouses decide in marriage settlements to choose as their matrimonial property regime the regime of joint ownership of property acquired during marriage, or that of the separation of goods or that of the sharing of property acquired after marriage, this choice will be overseen by the law governing the property relationships. That does not necessarily mean that a property regime system specially provided by that law must be chosen, but only that it is the law determined by article 31 which will serve to measure the validity of the agreement.

261. The last paragraph of article 31 of the Law didactically establishes that the application of a particular law governing the property effects continues to apply until it is replaced by another as a result of the exercise of the spouses' autonomy to resolve conflicts, without which no other change in another type of circumstances can alter this law. In other words, only the will of the spouses can alter the law governing of their property relationships and only will do so from the time when this agreement applies.

Article 32. *Nullity of marriage*. Without prejudice to the other provisions of the present Law, the causes of nullity of marriage and its effects shall be governed by the law applicable to its celebration.

262. Nullity of marriage is a remedy that a legal system prescribes for certain cases in which one of the conditions of marriage is not fulfilled (sex of the spouses, bilateral exclusivity), or diriment impediments (consanguinity, religious order, adoption, crime ...) have been infringed or essential formal requirements have been absent from the celebration (competent authority, witnesses ...). These examples of the requirements that can determine the nullity of the marriage is plural and can vary – in fact they do vary – from one legal system to another. Even the very concept of nullity is equally plural: different types of the same concept exist inside a single legal system (absolute or relative nullity, for example in Venezuela, absolute nullity, absolute voidability, relative voidability, for example in Bolivia) or a single concept of nullity.

The scope of application covered by the present article relates to all the cases in which the marriage may be null, different to the declaration of legal separation or

divorce.[355] The term nullity is thus used in a broad sense to refer to the consequences of the breach or simply a failure to meet certain requirements that accompany the celebration of the marriage and the same essential issues that can determine their inexistence, nullity and as well as their voidability to varying degrees, with potentially different names.

263. Although the provision relates only to the causes and the effects of the nullity, it should be taken into account that, behind this description, aspects relating to the standing to bring the corresponding action can also be found. This standing is closely linked to each type of ineffectiveness that is sought: thus, the standing is commonly wider (any interested party, public prosecutor's office...) the more serious the defect likely to induce is (radical or absolute nullity, non-existence of the marriage); and narrower the less serious this requirement is and the closest it is located to the concepts of relative nullity, voidability or even relative voidability. The same is true for the confirmable or remediable nature of the defect and the prescriptive nature of the action for asserting the nullity or voidability. These are questions that are also governed by the law determined by the article in question, being the substantive questions that they are. This is not true for the possible intervention by the public prosecutor's office, when this is provided in the law of the Caribbean with general reference to the actions of a civil nature, where public policy and morality is affected or with specific reference to the matrimonial processes. The qualification of this intervention should be regarded essentially as procedural and not substantive, which, on the other hand, would be especially problematic in strictly practical terms.

264. Turning to the specific solution of applicable law, article 32 of the Law provides a simple, reasonable solution as regards the essence of common and matrimonial nullity in comparative law: the law governing the validity of the marriage, which is nothing other than all of those laws that are really or potentially called on to regulate this validity.[356] This makes it necessary once again to draw a distinction between marriages in the Caribbean and marriages abroad.

In the case of the first kind of marriages, it is the law of the domicile of each of the spouses that establishes if the marriage was celebrated in breach of any requirement of capacity, which determines some degree of ineffectiveness of the marriage, who can enforce it, for how long, its possible recognition, etc.[357] The remainder of the potentially relevant aspects (competent authority, form, consent, substantial budgets of the marriage, etc.) remain under the application of the law of the Caribbean.

[355] CONC.: Art. 30 of the Dominican draft law; arts. 64 and 65 of the Mexican draft law.

[356] It is, for example, the general solution that the Bustamante Code provides in its art. 47: "The nullity of marriage is governed by the same law that the intrinsic or extrinsic condition giving rise to it is subject to". Notwithstanding this, the Code provides additional specific provisions.

[357] *Vid. supra*, commentary on **art. 29.2º** of the present Law.

However, as seen before, the marriages celebrated abroad subject their validity to a very powerful regime of *favor matrimonii*.[358] Therefore, the determination of the law applicable to the marriage nullity is articulated differently: the cause of nullity provided by one of the laws potentially applicable to the validity of the marriage is not in itself relevant if it is unknown by any other law: that the marriage is null because the law of the husband's domicile or the law of his nationality, for example, does not determine its nullity if the law of the wife's nationality or the law of her domicile does not make provision for such annulment. In other words, the strength of the *favor matrimonii* in the marriages celebrated abroad only declines with regard to nullity when none of the potentially applicable laws considers the marriage valid.

265. This last observation raises one of the most common interpretive problems regarding the law applicable to the effects of the nullity: the existence of a plurality of laws that provide for such nullity. While this element may not be relevant to the effects of the observation of the nullity (a marriage is null whether such nullity is provided by a particular law or whether it is provided by two different laws), it is when it comes to determining its effects and the effects are different in each potentially applicable law. It will always be the case in the event of declaration of the nullity of marriages celebrated abroad (thus their validity is not covered either by the law of celebration, or by the personal law of the spouses, or by the law of their nationality), but it can also occur in the marriages celebrated in the Caribbean, when, for example, there are defects leading to the annulment provided both by the law of Caribbean and by the personal law of one (or both) of the spouses. What is the law governing the effects of the nullity in these cases? Certainly, one could conceive of a law governing the particular nullity and a different law governing its effects,[359] or simply that the category of the effects of the nullity does not have its own identity with regard to which an effect is subject to any specifically considered[360] law but none of the options is a solution expressly assumed by the Law under consideration now.

The answer to the question posed and, consequently, its significance assumes an option regarding the demarcation between the scope of application of article 33 and the remainder of the provisions that can equally be applied: the law applicable to filiation in respect of the consequences for the children of the marriage, law applicable to the maintenance obligations (both regarding children, and, possibly, the former spouse), the law applicable to the rules governing the surnames when these depend or might depend on the existence of a marriage, the law applicable to inheritance rights, etc. The rule has to be that these special statutes are governed by their own law. This choice of the specialisation is the general rule governing the relationships between the different rules of conflict of this Law.

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[358] *Vid. supra*, commentary on **art. 29.3º** of the present Law.

[359] *Vid*., *v.gr*., art. 50 of the Bustamante Code.

[360] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Cizur Menor, Civitas–Thomson–Reuters, 2013, p. 430.

That said, the provisions of article 32 should not be considered trivial. Firstly, it is not improbable that some of the intended effects will not be able to be framed clearly in the rules of conflict provided by this Law and, secondly, because there is sometimes an express link between the law governing the effect and the law of the specific nullity. That is what happens with the provisions of **article 40.3º** of the present Law: "The law applicable to annulment of the marriage, separation of the spouses and divorce shall govern the maintenance obligations between the spouses or ex-spouses arising from these situations". In this case, the plurality of laws applicable to the marriage nullity presents a real problem that is not easy to solve in strictly formal terms: an option, founded on the principle of *favor matrimonii* (disconnected, on the other hand, from nullity) would be to prefer laws in place, which preserve more "effects" of the marriage. In the case at hand, it would be the law which provides maintenance to the detriment of the law which does not provide it. However, if we take into account that the provision being interpreted now (**article 40.3º** of the Law) is not caused by any kind of *favor creditoris*, quite the opposite, another option, perhaps more faithful to the purpose of the said provision, would be to apply the law more closely linked with the former spouses.

Article 33. ***Divorce and legal separation*****. 1. The spouses may agree in writing before or during the marriage to designate the law applicable to divorce and legal separation, provided that it is one of the following laws:**

i) the law of the State in which the spouses have their common domicile at the time of the conclusion of the agreement;

ii) the law of the State of the last place of the conjugal domicile, provided that one of them still resides there at the time when the agreement is concluded;

iii) the law of the common nationality of the spouses at the time when the agreement is concluded.

2. In the absence of a choice, the law of the spouses' common domicile at the time of presentation of the petition shall apply; otherwise, the law of the last common conjugal domicile, provided that at least one of the spouses still resides there; otherwise, the Caribbean law.

3. Once the petition is filed, the spouses may decide that the conjugal separation or the divorce is governed by Caribbean law.

266. The determination of the law applicable to divorce and legal separation is governed by two of the essential principles governing the solutions of the Law regarding the individual, family and inheritance: the importance of the autonomy of the will on the one hand, and, in its absence, the application of a law closely linked

to the case, based, primarily, on the personal law or law of the domicile of natural persons.[361]

In this structure, the first option is to grant to the spouses the possibility to choose the law applicable to their divorce and / or separation. In an international context, in which the international mobility of persons has become somewhat trivial and in a socio-familial context, in which marriage has undergone a profound metamorphosis, and marriage crises, (nullity, but above all, separation and divorce) are an everyday reality, one of the most obvious targets that the choice of the applicable law must guarantee is to find the right balance between flexibility and legal certainty for the spouses. The autonomy of the will is the best instrument. On the one hand, permitting spouses to be able to choose the law of the country with which they have a certain connection as the law applicable to divorce or legal separation places them in a comfortable legal framework resistant to surprises resulting from the application of an unexpected or unanticipated law. On the other hand, the flexibility provided by the autonomy of the will means that a change of circumstances in conjugal or family life can be assumed and adequately dealt with through a change in the choice of the applicable law. In this sense, practical reasons require that the agreement to designate the applicable law may be concluded and amended at the latest by the date when the application is filed to the jurisdictional body. After this time, the choice can only be made in favour of the law of the Caribbean, the law of the court that is hearing the case.[362]

267. This possibility of choice has to be based on an informed, and not merely a casual or alleged choice; a bilateral choice by both spouses, such that each one of them knows exactly what will be the legal, economic and social consequences of the choice of the applicable law. The mutual choice of the law applicable must additionally be free and absent of any kind of error or duress, without which the spouses' rights or equality of opportunities could be affected. In this sense, it seems reasonable to limit *a priori* the list of potentially eligible laws around the personal laws of the spouses: the law of the common domicile at the time of the conclusion

[361] CONC.: Art. 61 PIL of the Swiss PIL Act; art. 3090 (Civil Code of Quebec); arts. 55 to 57 of the Belgian PIL Code; art. 31 PIL of the Italian PIL Act; art. 54 of the Polish PIL Act; art. 43 of the Panamanian PIL Code; art. 20 of the Austrian PIL Act; art. 31 of the Dominican draft law; arts. 60-63 of the of the Mexican draft law; art. 48 of the Bolivian draft law; art. 26 of the Uruguayan draft law; Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[362] The conjunction between choice of law (certainly limiting the a priori form to a predetermined list) and the law applicable to the defect of choice is clearly a modern response that can be found both in the most recent regulation of the European Union as well as in national texts that end up affecting countries and territories of the Caribbean. *Vid*. in this sense, Regulation (EU) No 1259/2010, of the Council, of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (arts. 5 and 8 mainly) which affects the Departments and Territories with a French legacy (*vid.* the report on the French legacy and taking into account the qualification that is done regarding Saint–Barthélemy that left the EU territory on 1 January 2012: it must be remembered that this Regulation came into force on 30 December 2010, although it was not of application until 21 June 2012). *Vid.* also, in relation to some territories subject to the Dutch legacy, art. 10.56 of the Dutch Civil Code. *Vid*. P. Orejudo Prieto de los Mozos, "La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España", *Revista Jurídica Española La Ley*, nº 7912, 2002.

of the agreement of choice of law, the law of the last matrimonial domicile if one of the spouses still resides there at the time of the conclusion of the agreement and the law of the common nationality if one of the two above criteria is not applicable. It should be noted that the allusion to the last matrimonial domicile must refer to the last common domicile, based on systematic nature of the rules governing the provision. It should also be noted that the potentially eligible laws are temporarily located at the time of the choice; i.e. it is possible that the spouses have had a common residence for much of their married life, but during that time they did not opt to choose this law for their separation or divorce; this possibility falters when the common domicile disappears.

Another point to consider in the same vein is not only does the law not endlessly open up the possibility of choice but the limits imposed are opening up choice to laws that are really very similar. It was chosen to make an offer of really very similar laws, all linked to *both spouses* in the present or in the past (*v.gr*., reference to the last matrimonial domicile), in such a manner that when none of the criteria offered coincide (the spouses have no common domicile, neither of them continues to reside in the common domicile that they had and they have a different nationality), the choice of law will not be possible. The balance between the dominance of private interests (choice of law) and public interests in any case means that the law governing the separation and divorce is the law closely linked with the marriage.

268. Another result of the significance that the law attaches to the necessary awareness raising on the part of the spouses is the requirement that the agreement of choice of law be concluded in writing. This formal requirement incorporates the need for such agreement to be dated and attest to the agreement of the spouses. The date is an inevitable consequence of the limitation of the number of potentially applicable laws at a certain critical moment. The *admissibility* of the agreement of choice of law results directly from the Law and cannot be subject to any other condition or requirement. This does not exclude either the possible operation of the personal law of each spouse in order to determine their capacity, or the application of the law chosen in matters such as the concurrence of error, violence, intimidation, etc., in the conclusion of the agreement, so that the law applicable to the separation or divorce is chosen.

269. In the absence of agreement, an applicable law equally connected with the spouses, on the personal law is envisaged: the law of the common domicile at the time of filing the petition, or the law of the last common matrimonial domicile, provided that one spouse still resides there and, in the absence of both of these laws, the law of the Caribbean. This Law in any case may be chosen in the process itself, precluding the laws that were applicable objectively until that time. The application of the law of the forum to separation and divorce is one of the major options of comparative private international law.[363] On the other hand, as the solu-

[363] *Vid*., *v.gr*., L. Pålsson, "Marriage and Divorce", *Int. Enc. Comp. L*., vol. III, cap. 16, 1978, which deals with the "*strong power of attraction*" of the *lex fori* in systems based on the personal law. And it is certain that this force of attraction brings to what the law of forum is on occasion the principal law: the example of the cited art. 10:56 of the Dutch Civil Code, before giving entry to the

tions of this article 33 are in some harmony with the solutions that will be arbitrated regarding the international jurisdiction of the courts of the Caribbean, it can be concluded that the application of their own law in their own forum will not be uncommon.

270. The Law governing separation or divorce, whether chosen or objectively applicable, will govern the causes and conditions of the divorce or separation, the time frame, if it exist, that might be necessary for applying for the separation or the divorce, or for applying for the transformation of the separation into divorce, the possibility that the separation or divorce will be declared to be by mutual consent, the burden of proof in the case where certain grounds are invoked, etc. This applicable Law is generic compared to other laws provided by the present Law, in a manner that will not cover the aspects related to the legal capacity of the spouses, the existence, validity or recognition of the marriage subject to the separation or divorce; the nullity or annulment of the marriage; the possible economic consequences that the separation or divorce bring to bear on the name and surnames of the spouses; the consequences that the separation or divorce might have on the children; maintenance obligations, with the exception of the obligations established between the spouses on the occasion or after the separation or divorce;[364] or the inheritance rights that each spouse or former spouse might have in respect the other.

271. In any case, it should be stated clearly that, whatever it is, the law applicable cannot oblige an authority of the Caribbean to pronounce the divorce or the separation of a marriage that considers one of the effects of the separation or divorce to be invalid or non-existent. This would be the case, for example, of the application for separation or divorce of spouses of the same sex, with a shared home in the Caribbean, who chose the law of the country in which they contracted marriage and which was their common domicile at the time of the choice as the law applicable to their divorce. Although it is possible that the exception of public policy provided in **article 68** of the present Law might not be properly applied to the provisions on separation or divorce laid down by the foreign law (considering that this is a law whose causes of divorce are considered abstractly equivalent to the causes of the law of the Caribbean), the very fact of being confronted with a reality that the law of the Caribbean does not recognise will determinedly influence the rejection of the application.

autonomy of the will, prescribes that "*Whether a dissolution of a marriage or a legal separation can be decreed and on which grounds, shall be determined by Dutch law*".

[364] *Vid*. *infra*, commentary on **art. 40**.

Article 34. *Non-matrimonial unions*. 1. The law of the place of the establishment of non-matrimonial unions registered or recognised by the competent authority shall govern the establishment and registration conditions, the effects on the property of the union and the conditions for dissolution of the non-matrimonial union.

2. The cohabitants may agree in writing during the term of validity of the union to submit its property regime to the law of the domicile or of the nationality of either one of them.

This choice may not prejudice the rights of third parties.

3. Any effect of the union that does not have a specific solution attributed by the present law shall submit to the law of the habitual residence of the cohabitants.

272. A modern law on private international law cannot ignore an increasingly common phenomenon: the family relationship between two persons outside of the institution of marriage, but who have an affective relationship and life project similar or close to that of traditional marriage.[365]

Unlike what happens – or happened[366] – with regard to marriage, which, until very recently, was presented in a conceptual and, in some sense, common institutional form in comparative law (the most notable exception was so-called polygamous marriage, which has recently been complemented by marriage between persons of the same sex), the situation regarding stable unions of couples is highly variegated. Indeed, their definition includes heterosexual, same-sex couples, or undefined couples for reasons of gender or sexual orientation, the effects of their recognition are more or less close – sometimes, merely similar – to those of marriage, and obviously, the situation of these unions includes the conditions necessary for considering the said unions as realities with legal relevance above and beyond their obviously purely factual reality.

We should not overlook either that in many of these cases respect for the freedom of persons not to be united under any regulated institution (marriage or even a "typical" stable union) should be very much taken into account, since it is an issue related to the free development of the personality; it is a fundamental and inalienable right with a very profound impact on the regulation of the issues affecting the person, the family, marital status, etc. This idea raises questions as regards the possible treatment of this heterogeneous combination of close and diverse realities at a given time: can they be individualised by the law, or are they rather a bundle of relationships that can ignore this identification? Does the freedom had by persons in stable unions not to rely on the typical offer – marriage or other equally typical

[365] CONC.: Art. 3090.1, 2 and 3 (Cc of Quebec); art. 60 of the Belgian Code of PIL; art. 42 of the Bolivian draft law; art. 27 of the Uruguayan draft law.

[366] It has certainly already been pointed out (*vid. supra* the commentary on A**rt. 29** of the present Law) that the institution of marriage itself is now subject to an ever increasing degree of heterogeneity in comparative law.

institution – made to them by the legal system render them immune to any other type of institutional constraint? This basic duality (freedom – submission to legal rules) not only affects the substantive aspects (favourably regulating stable unions, through a set of rules, or not doing this), but also private international law and, more specifically, the determination of the applicable law: is it necessary to have a general law to regulate stable non-marital unions? Or are each of the laws applicable to the other issues sufficient to regulate the problems between cohabitants?[367]

273. Caribbean law opts for a moderate solution by not intervening beyond where required in practice. On the one hand, it is aware that there is an increasingly more specialised regulation of these cases in comparative law. In other words, they are increasingly identifiable and more specific in legal terms. This must lead to individualise them in terms of applicable law. But, besides this requirement, the present law equally takes into account that many of the conflict rules are potentially applicable to these relationships and the effects of this non-marital union. Although not specifically conceived for this type of relationship, they are perfectly adapted to the issues raised: the law governing maintenance obligations between spouses does not need to distinguish between maintenance due as a result of a relationship of a specific type: conjugal, parent-child, any other type of kinship, or, merely as a result of a non-marital union; the manner of determining natural legal parentage or parentage by adoption, parent-child relationships, the protection of children born out of marriage, etc., are all aspects that do not need to be given a different response than if the parents were married, if this concerns a single-parent family, or parents who are not married, regardless of whether or not they are cohabiting with each other in a stable union, putting them into the category we are addressing now. The same is true for rights of succession, where the option taken in favour of the law of the deceased's last domicile disregards the legal relationships on which this law can base the allocation of rights of succession.

However, there are common core aspects of stable non-marital unions, which are either not regulated by any conflict rule, or are governed by existing conflict rules which are not capable of providing satisfactory answers. Among the latter is the law related to the legal property regime that might reasonably be applied to the union: something similar to the matrimonial property regime. The option in this case not to establish any rule and rely on the general rule on the individually considered property regime, apart from the existence of a real asset, would mean submitting this to the law where the property is located (*lex rei sitae*), as provided for by **article 58** of the present Law. This can easily disassociate the law most closely connected to the stable non-marital union from its property regime, as well split up this regime into as many laws as there are different States corresponding at a particular time to the place where the property is located. The option for a uniform solution is more in keeping with the familial or equivalent nature of these unions. A

[367] *Vid*. S.A. Sánchez Lorenzo, "Las parejas no casadas ante el Derecho internacional privado", *Revista Española de Derecho Internacional*, vol. XLI, nº 2, 1989, pp. 487–532; *id*., "El principio de libertad personal en el Derecho internacional privado de la familia", *Revista de la Facultad de Derecho de la Universidad de Granada*, nº 4, 2001, pp. 207–230.

comprehensive overview of the problem undoubtedly places it closer to the personal attachment than to the patrimonial attachments.[368]

This is primarily identified with the law of the State in which the union was established or registered, this being the law connected, either by the cohabitants' own implicit will, in the case of registration (which normally is also accompanied by certain conditions of stability and additional connections), either out of necessity regarding connections associated with the cases in which a particular law connects the status of stable non-marital union to a couple. However, as indicated, individual liberty and free development of the personality is a fundamental element in this type of relationships and their translation in terms of applicable law consists in leaving the choice of law to the interested parties. This could be exercised by submitting the couple's property ownership regime to the law of the domicile or law of the nationality of either one of them, as reflected in **article 30** on the law applicable to the property ownership relations between the spouses.

274. The other core aspect for which there is no specific conflict rule liable to provide a satisfactory response stems from the formation of a non-marital union. The factual situation is complex and, in any case, cannot be submitted to other potential rules, as would be the case for the celebration of marriage, with which it does not share the same justifications. Article 34 opts to govern exclusively two types of stable non-marital union: registered unions and unions recognised by a competent authority. Consequently, the law applicable to stable non-marital unions established or recognised *ipso iure* thus remains outside of the scope of application of the article. The difficulty of determining a law applicable to their mere existence is a constant feature of international comparative law and inhibits the work of international codification.[369]

Article 35. ***Establishment of legal parentage.*** **1. Legal parentage shall be governed by law of the child's habitual residence at the time of birth.**

2. However, the law of the child's habitual residence at the time of an action to establish legal parentage shall apply if this is more favourable to the child.

[368] From the perspective of qualification, S. Álvarez González, *Comentarios al Código civil y compilaciones forales*, dir. by M. Albaladejo and S. Díaz Alabart, t. I, vol. 2, 2nd ed., Madrid, Edersa, 1995, pp. 842–880, pp. 872–873.

[369] The document established by the Hague Conference on Private International Law, *Aspects de droit international privé de la cohabitation hors mariage et des partenariats enregistrés, Note établie par le Bureau Permanent. Private* (2000), is particularly representative of this difficulty. In this document, some similar attempts are made (*v.gr.*, parental responsibility), but they didn't have any success to this day. Because of its importance, this theme was kept in the agenda but it is so complex that it has been put on hold. Most recent works show as well its obvious absence in comparative private international law and a still ill-defined range of proposals (*Note sur les développements en droit interne et droit international privé sur la cohabitation hors mariage, y compris les partenariats enregistrés*, drawn up by Caroline Harnois (former Legal Officer) and Juliane Hirsch (Legal Officer), established in March 2008, pp. 40–41.

3. The voluntary recognition of paternity or maternity shall be valid if it is in conformity with the law of the child's habitual residence at the time of birth or at the time of recognition, or with the law of the habitual residence or the law of the nationality of the person who carries out the recognition.

275. The Law aims to establish two rules to refer to two principal forms of proof of legal parentage, those derived from adoption and the rest, within which so-called biological legal parentage is the key condition. It cannot be ruled out that any other types of legal parentage, such as those derived from surrogate maternity, might also be subject to this rule. The present article refers to legal parentage derived from facts or titles other than adoption.[370] As we will see,[371] the current conception of adoption, in the cases of adoption of minors, reflects rather a form of protection of minors or persons without legal capacity than a form of establishment of legal parentage (even though it is both of these at the same time).

276. The law applicable to the determination of the legal parentage raises many questions at the time of selecting a specific factor for determining it. On the one hand, this is a real situation related to more than one person. Indeed, in the ordinary cases of the determination of legal parentage, there are at least two persons, the child and one of their parents; not infrequently there are three persons, the child and both parents; and it cannot be ruled out that more than three persons can exist, for example, in the above-mentioned cases of surrogate maternity. This potential plurality of personal reference points, all of them affected by the legal parentage relationship which, by definition, is bilateral or trilateral, complicates the choice of applicable law if we take into account a new variable: the intrinsic relationship that exists between the personal laws of the father and the mother and the child, whether one opts for the law of the domicile or for the law of the nationality. In this second case, we must take into account the added factor of the structural relationships between legal parentage and nationality in the cases in which the nationality is passed down *iure sanguinis*.[372]

Article 35 of the present Law opts for a solution that is consistent with the principle of the personal law and focuses this on the person of the child. This is a neutral solution that avoids any type of different treatment that takes into account the possible parents (as would be the case, for example, if the personal law of the mother were chosen). This simplifies the structure of a conflict rule that wishes to take into account both of them and which would require collective linkages (common domicile

[370] CONC.: Arts. 68 and 69 of the Swiss PIL Act; art. 3091 (Cc Quebec); art. 63 of the Belgian Code of PIL; art. 33 of the Italian PIL Act; arts. 55 and 56 of the Polish PIL Act; art. 24 of the Venezuelan PIL Act; arts. 44 and 45 of the Panamanian Code of PIL; art. 33 of the Panamanian draft law; art. 20 of the Mexican draft law; art. 28 of the Uruguayan draft law; art. 29 of the Colombian draft law.

[371] *Vid. infra*, the commentary on **art. 36** of the present Law.

[372] Arts. 57 to 66 of the Bustamante Code attest to this multiplicity of options, sometimes applying the personal law of child, sometimes the personal law of the parent and sometimes the law of the forum.

or nationality, for example) which are not always present in reality. The law of the child's domicile is unique and always exists.

However, this does not avoid all kinds of interpretive problems. Retaining the law of the domicile, which is an essentially variable connection, for governing an essentially permanent civil status situation can raise a problem of identification in the cases in which a person's domicile has changed during their life. Article 35 fully recognises this potential problem and stipulates the birth of the child as the critical time. This solution is coherent and efficient in the majority of cases. It is coherent because it does not separate the general principle from the connection with the domicile and efficient since the majority of the problems related to the determination of the legal parentage of the physical persons are raised at the time of the birth or at a time immediately after this: in other words, in most cases at the time of the registration of the new born baby and their legal parentage. The connection of birth and legal parentage is a constant option in comparative law.

277. However, two observations regarding this option must be made. Firstly, while an adult physical person's domicile can easily be identified by the habitual residence – which is the place where a person has their principal residence and materialises through the existence of stable and durable connections[373] – these details of long-lasting connection and habitual residence cannot be exploited in the case of recently new born babies who, by definition, have just been born. **Article 5** of the present Law refers to personal, domestic and professional circumstances. Clearly, the habitual residence of recently new born babies cannot ignore their parents' habitual residence, including their will regarding the determination of the child's future domicile. The regulatory options made by the Law mean that, in any case, the child's domicile is assessed and given concrete form as the child's private domicile and not as a dependent domicile or legal domicile.[374]

278. Secondly, although the birth is actually the most favourable time for determining natural legal parentage, it is not always so: the vicissitudes of the determination of legal parentage can be prolonged throughout a person's entire life, either by the search for the proof of legal parentage still to be determined, through corresponding legal parentage proceedings, either through an action for annulment of parentage that does not reflect the reality, through corresponding actions to challenge legal parentage, or through mixed actions encompassing both claims successively.

If the child's domicile at the time of the birth is different from their domicile at the time of lodging the corresponding action, reasonable doubt might arise regarding the relevance of the law of the domicile at the time of the action. This time serves to determine the international jurisdiction for hearing the action, which among other things is based on the child's habitual residence in the Caribbean at the time of filing the action. A correlation between *forum* and *ius* (application of Caribbean law by Caribbean courts) must be seriously considered. Article 35.2 of

[373] *Vid. supra*, commentary on **art. 5**.
[374] Art. 13 of the Venezuelan PIL Act.

the Law does not derogate radically from the rule established in its paragraph one, but tempers this and makes it more flexible by permitting that in these cases of a change of connecting factor the applicable law is either the law of the child's domicile at the time of the birth, or the law of their habitual residence at the time of filing the action, if this is more favourable. The introduction of a factor favourable to the child regarding legal parentage for the cases of a change of connecting factor includes the search for a tangible result, which will not always be easy to determine[375]. The *favor filii*, the protection of the child regarding legal parentage, can be interpreted both as a desire to establish legal parentage, which is formally lacking, consolidate the legal parentage established or, simply, demonstrate that what has been established does not reflect the biological reality. And the interests in each of these cases can be compared. Without calling into question its generally accepted validity, which is the *favor filii*, one may indeed wonder how to determine what law is more favourable to the child? Without doubt the rule is geared towards the child themselves – or their representatives – who are going to evaluate its tangible result. In some cases, this will be easy: in the case of paternity actions brought by the child and for one of the laws the deadline for filing the action has lapsed or expired, as the case may be, and not for the other law, it is clear that the law *a priori* more favourable to the child will be the second law. If, on the other hand, this is an action to challenge the legal parentage also by the child, the applicable law will be the law that for the most part will enable the successful outcome of the action. In practice, other less clear-cut situations will have to be resolved, such as, for example, in the case of an action to challenge paternal filiation brought by the legal father.

279. In addition to these contentious situations, there are also traditionally less problematic situations, but which in some way depart from the legally required conditions and for which the proof of the legal parentage is its voluntary recognition. In these cases, the present provision has opted for a solution clearly favourable to the validity of the voluntary recognition of paternity or maternity by adhering to the laws of the child's domicile at the time of the birth or at the time when the recognition arises, the law of the domicile or the law of the nationality of the person carrying out the recognition in such a way that for the recognition to be valid under any of these laws it will be sufficient for this to be considered as such.

280. It should be taken into account in all of these cases of determination of legal parentage that there are rational limits to the substantial objectives of paragraphs two and three of article 35, since the establishment of legal parentage that will conflict with other already determined legal parentage without the prior challenge to the latter will very probably raise public policy issues. Thus, a voluntary recognition of paternity considered valid by one of the four possible applicable laws considered under article 35.3 of the Law does not appear to be compatible with a pa-

[375] The art. 29 of the Colombian draft of general private international law act provides a solution which also seeks a substantive result, with two alternative law organised in favor of the child: "Filiation in terms of its existence and effects shall be governed by the law of the domicile or of the habitual residence of the minor [...]. Filiation may also be determined in relation with each parent in accordance with the national law governing them".

ternal legal parentage in effect and that will currently unsatisfactorily be challenged.

281. The scope of application of the rule must be considered broadly, covering not only the possible forms of proof of natural legal parentage (maternity resulting directly from childbirth, maternity by recognition, presumptions of paternity of the mother's husband or of third parties, recognition of paternity, legitimation of legal parentage by subsequent marriage of the parents, any type of legal parentage actions , etc.) but also all aspects related to this that can have a substantive, procedural or mixed nature: deadlines for filing legal parentage actions and the nature of these, the type of proof admitted in these actions, presumptions connected to legal parentage, active and passive legitimation in legal parentage actions, etc.

Article 36. *Adoption of minors*. Caribbean law shall apply to the adoption of a minor granted by a Caribbean authority. However, the requirements related to the necessary consents and authorisations required by the national law or the law of the habitual residence of the adopter or child being adopted must be taken into account.

282. This article establishes a simple and efficient solution regarding the law applicable to international adoption.[376] It is simple since it provides that it will be the competent authority itself that will determine that law to be applied, which not only eliminates the significant problem of the knowledge and proof of foreign law as well as the demand for this to be applied,[377] but which includes a higher quality legal solution. In addition, the rule distinguishes between the adoption of minors and the adoption of adults. Two types of adoption have very different characteristics and interests and must also be given a different legal response.

It is important to emphasise that the article refers only to the granting of the adoption by a Caribbean authority. This provision does not consider other aspects, such as international cooperation concerning the adoption of children or the requirements for the recognition of adoptions occurring abroad. In the countries of the OHADAC zone, implementation of the Hague Convention, of 29 May 1993, on Protection of Children and Co-Operation in Respect of Intercountry Adoption, has been disparate. Nine countries (Belize, Colombia, Costa Rica, Cuba, Dominican Republic, Haiti, Mexico, Panama and Venezuela) are States party to this convention, the most important convention on cooperation and the international adoption

[376] CONC.: Art. 77 of the Swiss PIL Act; art. 3092 (Cc Quebec); arts. 67-71 of the Belgian Code of PIL; art. 38 of the Italian PIL Act; arts. 57 and 58 of the Polish PIL Act; art. 47 of the Panamanian Code of PIL; art. 34 of the Dominican draft law; art. 23 of the Mexican draft law; art. 49 of the Bolivian draft law; art. 32 of the Colombian draft law.

[377] *Vid. infra*, the commentary on **art. 63** of the present Law.

of minors.[378] It is important to note in any case that this convention applies exclusively between the States party and does not contain any rule on the determination of the law or laws applicable to adoptions that are granted under its purview, so that the regulation of the law applicable to international adoptions is essential both for the Caribbean States that are not parties to the said convention as well as those that are.

283. The international adoption of children has experienced a significant evolution in the past few decades both quantitatively and from a social and a legal perspective, which is more interesting to us here. In merely quantitative terms, it becomes evident that the increase of the number of international adoptions of children, i.e. those involving the transfer of an adopted minor from their country of origin to another, their host country, with their new family. This type of adoption also includes other types, in which there is not necessarily any move, but can also be categorised as international on account of the adopter and adoptee being of different nationalities, for example. Article 36 covers both groups of cases. It is important to recall that even though international adoption, in which the adopted child's habitual residence is moved from one country to another, can be granted both in the country of origin as well as in the country of reception or host country, it is common to find that the authorities of the country of origin require that the adoption be granted by its authorities before the transfer of the child.

284. This last point is closely related to the other perspective referred to in the previous paragraph: the legal perspective. International adoption has evolved from being understood as a manner of determining legal parentage to being considered as a means of protection of minors. In the cases where the adoption is a so-called plenary adoption, the adoption will put the adoptive children on an equal footing with the natural born children, which therefore constitutes a maximum degree of protection. This point (the passage from a close evaluation or an approach identified with legal parentage to one focused on the protection of the best interests of the child) has a decisive impact on the approach that needs to be followed in private international law, starting with the determination of the applicable law. If this topic is considered (merely) from the perspective of the question of legal parentage, it is wholly appropriate to have recourse to a personal law, generally that of the adopted child, in this case, regardless of whether or not that law is a foreign law: the national law or the law of the habitual residence/domicile are appropriate laws. Indeed, for governing legal parentage, the present Law opts for the law of the child's domicile. If, on the other hand, this question is addressed from the perspective of the protection of minors, the approach changes: the role of international jurisdiction increases and the role of the applicable law is related to this. This is the solution adopted by the Law. It provides a broad international jurisdiction of the Caribbean authorities for granting an adoption (when the adopter or the adoptee is

[378] It should be noted that the said Convention also applies to the Caribbean part of the Netherlands (Bonaire, Sint Eustatiu and Saba) in accordance with the declaration of this State after the restructuring of the Kingdom of the Netherlands (*vid.* the report regarding the Dutch legacy). That is also the case of the Departments and Territories to which the law and international obligations of France apply (*vid.* the report regarding the French legacy).

Caribbean or habitually resides in the Caribbean) and, assuming a judiciarised and interventionist perspective of the adoption, provides that its own law will apply.

This combination of extensive international jurisdiction and application of Caribbean law is clear, predictable and respectful of the protection of the minor, but can lead to potentially limping and unsatisfactory situations from the perspective of the international strength of the adoption granted by a Caribbean authority. Indeed, the granting of an adoption regarding a minor who does not reside in the Caribbean, even though this scenario very rarely occurs in practice, is theoretically considered by the solutions of the law: it is sufficient that the adopter or the adoptee have Caribbean nationality or that the adopter has their habitual residence in the Caribbean, whatever their nationality. This type of adoption may be more or less connected with the Caribbean: for example, it will not be the same if the non-resident minor is a national of the State where the granting of the adoption is or, on the contrary, is not sought. In any event, and to varying degrees, depending on the proximity of the adoption with the Caribbean, these adoptions run the risk of not being valid beyond the country where they were granted. To avoid this undesired result, the second provision of article 36 provides: "However, the requirements related to the necessary consents and authorisations required by the national law or the law of the habitual residence of the adopter or child being adopted must be taken into account".

The second provision of article 36 intervenes to safeguard the international validity of the adoption granted in the Caribbean, by introducing a requirement to take into account necessary authorisations and consents in these other countries. Although the drafting may appear tepid due to its use of the phrase "take into account", instead of, for example, "obtain", "require", "apply" or other similar terms, the fact remains that their correct use is sufficient guarantee of a completely valid adoption in all of the countries actually connected with it. On the one hand, the provision has an imperative focus ("must be taken into account") and is not merely optional ("may take into account"[379]). On the other hand, the conditions required here have been considered to be fundamental in any adoption process, up to the point that one of few imperative rules of the cited Hague Convention is apparent. Article 4 of this Convention makes the adoption subject to the existence of truly free and informed consent and the authorisations necessary for the adoption to be clean and internationally valid being obtained.[380] Ultimately, "take into account"

[379] Modern laws, such as the Spanish Law 54/2007 on international adoption, provide a similar mechanism in which a mandatory instruction becomes a possibility, "shall take into account" becoming "may require". In addition to the provisions of this Law, it "may [be] require[d], furthermore, the consents, hearings or authorisations required by the national law or the law of the habitual residence of the adopter or adopted" (art. 20).

[380] "An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –
c) have ensured that
(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

makes available to the Caribbean authority a necessary instrument of flexibility, which requires them to consider and make a decision on a case-by-case basis and in the light of the circumstances of each case, which can be very different in the light of the circumstances in each case. It is a mode of action particularly well suited to the protection of minors, where the best interests of the child must prevail over any other interest. A more formal provision (*v.gr*., "apply") would make it extremely difficult to grant an international adoption, for it would imperatively have to compile the consents and authorisations of all of the laws involved into a kind of complex minute legal mosaic.

Article 37. ***Adoption of legal adults.*** **The adoption of a legal adult shall be governed by the law of their domicile at the time of the granting.**

285. Article 37 establishes the law applicable to the adoption of legal adults with a different philosophy, closer to that of the determination of legal parentage than adoptive legal parentage. The law of the habitual residence of the person adopting the legal adult will apply. The caution regarding the formation of an internationally valid adoption, by taking into consideration authorisations and consents of other laws, is not considered to be necessary in this case, where no party worthy of special protection is involved.

Section III

Protection of persons without legal capacity and maintenance obligations

Article 38. ***Parental responsibility and protection of minors*****. 1. Parental responsibility or any other similar institution shall be governed by the law of the child's habitual residence.**

2. The measures for the protection of the person or property of a minor shall be governed by Caribbean law. However, the competent authority may

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
(4) the consent of the mother, where required, has been given only after the birth of the child; and
(d) have ensured, having regard to the age and degree of maturity of the child, that
(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
(2) consideration has been given to the child's wishes and opinions,
(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
(4) such consent has not been induced by payment or compensation of any kind."

apply the law of the minor's habitual residence if this is more favourable to the best interests of the child.

3. Caribbean law shall apply for provisionally adopting urgent measures for the protection of the person or the property of the minor without legal capacity.

4. For the application of the laws mentioned in the preceding paragraphs, the best interests of the child must absolutely be taken into account.

286. The provision included in the present Law brings together the solutions of law applicable to parental responsibility and other similar institutions as well as the law applicable to the other measures for the protection of the child, whether these measures present some degree of permanence or have already been adopted as a consequence of a temporary or urgent situation.[381] The article has as its axiological background the best interests of the child, which specifically allows the possibility of deviating from Caribbean law, which is the law primarily applicable to the adoption of protective measures (paragraph 2) and, generally, the application of any of the laws that might be applicable (paragraph 4).

The passage of the protection of the child from the perspective of the family to the perspective of the protection of the child in the public sphere has meant that classical institutions such as parental authority,[382] anchored in an essentially familial if not paternal view of the relationships between parents and children, having left this familial sphere, are located in the more specific sphere of the protection of minors. This leads to treat the determination of the applicable law differently. The most efficient approach from the point of view of the protection of the interests of the minor is to apply the law of the authority seized of the case. This adjusts to the recognition of a relationship that is established *ex lege*, such as that of parental authority and other similar institutions, which will be determined by the law of the child's habitual residence. Even though it can raise certain questions regarding the delimitation of the respective scope of application, the collaboration of these two rules reflects the collaboration of the two dimensions, private and public, in the protection of minors, and is a proven solution in the international codification of private international law, which is present, both in the Hague Convention, of 5 October 1961, concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants,[383] as well as in the more moderate Hague Con-

[381] CONC.: Art. 3093 (Cc of Quebec); art. 34 of the Belgian Code of PIL; arts. 59-62 of the Polish PIL Act; art. 35 of the Dominican draft law; arts. 25 to 27 of the Mexican draft law; arts. 52 and 53 of the Bolivian draft law; art. 21 of the Uruguayan draft law.

[382] The Civil Code of Colombia provides a generic and internationally equivalent definition in its art. 288: "Parental authority is the body of rights that the law recognises the parents over their unemancipated children, in order to facilitate the execution of their obligations as parents. It is up to the parents to exercise their parental authority jointly over their legitimate children. In the absence of one of the parents, the other parent shall exercise such authority. Unemancipated children are so-called children of family and their father or mother are so-called mother or father of family".

[383] Arts. 2 and 3 of the Convention reflect this collaboration between the law of the forum for the adoption of protective measures and a personal law (in this case, the law of the nationality) to determine parental authority.

vention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (done on 19 October 1996), between the States of the OHADAC zone and including the Dominican Republic.[384]

287. Article 38.1 of the Law refers to the existence of parental authority or of any equivalent institution (parental responsibility…), to the relationships between them, as well as to the allocation, content and extinction of the same, without the intervention of any authority. The law of the minor's habitual residence will determine, in this manner, if the parental authority is attributed to one of the parents or to both, what rights and obligations are derived from that parental authority and under what circumstances are they extinguished without a decision by a competent authority (*v.gr*., due to the child reaching majority age, through their getting married, through being emancipated, etc.). It should be noted that although the article remains silent in this regard, the change of habitual residence should not by itself challenge the parental authority attributed in accordance with the law of the habitual residence prior to the change. Thus, whoever is attributed parental authority in accordance with the law of the child's habitual residence will continue to have this in accordance with the law of the new habitual residence, even if it would not have been granted to them. This derives from the principle of stability and maintenance of civil status, which is especially important in the relationships between parents and underage children. In this way, if the law of the child's habitual residence provides that the father and mother are the holders of parental authority regardless of whether or not they are married, while the law of the new habitual residence only attributes this to the mother if the parents are not married, the father will continue to have parental authority that was attributed to him in accordance with the prior law.

On the other hand, the new law will be able to attribute parental authority to anyone to whom it was not attributed by the law of the previous habitual residence, provided that this is compatible with the already recognised parental authority. In this way, inverting the previous example, if the law of the (previous) habitual residence considers the parental authority to be attributed solely to the mother, and the law of the new residence attributes the parental authority jointly to the father and the mother, this attribution will be equally valid. This rule of maintenance of the holding of the parental authority acquired together with a possible new attribution for the benefit of another person presents limits related to the exercise of parental authority itself in the cases of multiple attribution: for example, the parental authority is attributed jointly to the unmarried father and mother by the law of the habitual residence and is attributed to the mother's husband (different, obviously, from the father) by a new law of the child's habitual residence. This case, where three persons are considered to retain the parental authority at the same time, can be problematic and require some type of measures for adaptation or adjustment be-

[384] The Dominican Republic directly included it in its draft bill on private international law whose art. 35 refers to the aforementioned Convention. This Convention is also applied in the French overseas departments and collectivities (*vid.* the systems with a French legacy) and in Curaçao, Bonaire, Sint Eustatius and Saba (*vid.* the systems with a Dutch legacy).

tween the two laws to be adopted. In any case, if the conflict of interests actually gets very intense, we will very probably face the situation anticipated by section 2 of this article, in which a competent Caribbean authority will apply its own law for deciding the law more favourable to the best interests of the child.

Obviously, these examples do not take into account the exception of public policy if, for example, it is considered that the attribution of parental authority to only one of the parents would be contrary to the principle of their equality before the law, taking into account the best interests of the child or if it is considered that the holding of the parental authority by several (three or more) persons is likewise contrary to public policy.

288. While the attribution of parental authority is determined by the law of the child's "current" habitual residence and persists despite the change of habitual residence, its content, the exercise of the rights and prerogatives as well as submission to the obligations related to it will in any case be governed by the law of the new habitual residence to which they will have to adapt their behaviour as holders of parental authority of the child. In this way, even though the parental authority is recognised in application of the law of the previous habitual residence, the holders of the parental authority will not have to not seek legal authorisation for a particular act in relation to the child, unless if this is provided by the law of the new (current) habitual residence.

In all of the cases of adoption of measures for protection by a public authority, the law of the child's habitual residence gives way to the law of the forum, that is to say the law of the authority that is seized of the case. The provision of a specific law in a specific forum is inherent to the activity of the authorities regarding the protection of minors, where, besides the legal rules, the very idea of the best interests of the child plays a key role. However, the present Law does not consider that this rule has to be applied rigidly. The very consideration of the interests of the child/minor can mean that, after considering the specific circumstances of the case, the authority will decide to apply the law of this child/minor's habitual residence, although this does not coincide with the *lex fori*. This escape clause based on substantive criteria can be applied to all cases of attribution of custody, the definition of visiting rights or even including the withdrawal of the parental authority of one or both holders.

In the case of the adoption of temporary protective and urgent measures regarding the person of the minor without legal capacity or their property, the *lex fori in forum propio* rule does not allow any exceptions: the law of the forum will be applicable in any case.

289. Article 38 ends with an essentially didactic provision regarding the need to bear in mind in any case the best interests of the minor, which is enshrined in article 3 of the Convention, of 20 November 1989, on the Rights of the Child.

It is important to recall that the law designated as applicable by the present article must specifically take into account the provisions of other laws that can frequently be presented regarding the adoption of measures related to children, such

as, in particular, the law governing marital crises, whatever they may be.[385] The measures regarding the protection of the person and property of the child who is a minor will be adopted in conformity with Caribbean law, unless there is a particular reason for the application of the law of the habitual residence. On the other hand, the other rules provided by the present Law will be considered as special rules: this will be the case of the law governing the law applicable to maintenance obligations (**article 40**) or the law applicable to the name of the minor (**article 25**).

290. It should also be pointed out that this provision absolutely does not render inoperative the scope of application of important cooperation instruments in this field, such as, for example, the Hague Convention on the Civil Aspects of International Child Abduction, of 25 October of 1980, which applies to a dozen countries of the OHADAC zone.[386] This Convention, which is critical in the fight against cross-border illegal transfers, has an essentially cooperative content, which does not prejudice either international jurisdiction or, what we are interested in now, nor the applicable law, both of which are aspects that must continue to be governed by private international law. Moreover, it should be pointed out that the solutions provided by the Law are specifically in conformity with the provisions of the Convention. For example, the Convention leaves it to the law of the habitual residence, immediately prior to the move, to determine the existence of a custodial right regarding the minor attributed solely or jointly to both parents or to any competent entity.

Article 39. *Protection of adults without legal capacity*. 1. The conditions and the effects of the measures for the protection of adults without legal capacity shall be governed by the law of the habitual residence of the person without legal capacity.

2. Caribbean law shall apply for provisionally adopting urgent measures for the protection of the person or the property of the person without legal capacity.

291. The international protection of adults without legal capacity is one of the more important challenges of modern society,[387] in which the progressive increase in life expectancy leads to the growth of a segment of the population, euphemistically called "senior citizens" and a new group that is beginning be referred to as "persons of advanced age", with special needs and also with a particular vulnerability: adults with neurological conditions – Alzheimer's disease, senile dementia– which prevents them from managing their person and property, a pervasiveness of

[385] *Vid. supra*, the commentaries on **arts. 32 and 33**.

[386] Costa Rica, Mexico, Panama, Venezuela, Bahamas, Belize, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, Saint Kitts & Nevis, Trinidad and Tobago.

[387] *Vid*. A. Muñoz Fernández, *La protección del adulto en el Derecho internacional privado*, Cizur Menor, Thomson–Aranzadi, 2009.

drop-in centres for senior citizens in residential accommodation, adults who make provisions for these situations decide to take measures to be adopted if they become disabled, etc. Article 39 of the Law establishes that the law applicable to the protection of adults without legal capacity, including the cases, as well as any others, in which the adult is not currently able to manage their person or their property by themselves and, due to this, requires some supplementary measures.[388]

The scope of application of the rule is particularly wide, since it encompasses a potential plurality of situations and very different types of measures. Starting with the determination of the incapacity of the adult or their specific disability, it then covers the introduction of a protection regime or institution: for submitting the person without legal capacity to the temporary or permanent protection of a public authority; the establishment of a guardianship, curatorship, extension of the parental authority or equivalent institutions; the determination of the obligations incumbent on any physical or legal person entrusted with the protection of the person or property of the person without legal capacity (inventory taking, presentation of accounts, etc.); placement of the person without legal capacity in a public or private institution or any establishment where their interests are sufficiently protected; the arrangements for the management of the property of the person without legal capacity; the sole authorisation or authorisations regarding the adoption of specific measures within a more permanent institution (judicial authorisation for the sale of real estate property, for the change of establishment where the adult without legal capacity is currently staying, the move to another State, etc.).

292. In this area, the existence, duration, modification and extinction of the powers of representation granted by an adult (either through an agreement or by a unilateral act) is particularly important as soon as this adult is no longer able to look after their person or property. The so-called preventive powers of attorney or the powers of attorney effective after death remain under the purview of article 39,[389] in the same way that so-called "living wills"[390] in which an adult draws up their will regarding the maintenance or withdrawal of medication or palliative care if, due to a serious illness, they are inhibited from freely adopting decisions about their own life. These powers of attorney will obviously also have to submit their contractual aspects to the law that will be applicable to them in accordance with the rules of this Law.[391]

293. On the contrary, all of the aspects governed by their own applicable law and which could conflict with the protection of the person without legal capacity are excluded from the scope of application of the present provisions. This is the case of

[388] CONC.: Art. 3085 (Cc Quebec); art. 43 of the Italian PIL Act.

[389] *Vid*., from the strict perspective of private international law, M. Revillard, "La convention de La Haye sur la protection internationale des adultes et la pratique du mandat inaptitude", *Le droit international privé: esprit et méthodes, Mélanges en l'honneur de Paul Lagarde*, Paris, Dalloz, 2005, pp. 725 *et seq*.

[390] *Vid*. D. Rodríguez–Arias Vailhen, *Una muerte razonable: testamento vital y eutanasia*, Bilbao, Desclée de Brouwer, D. L. 2005.

[391] *Vid. infra*, the commentaries on **arts. 45 and 46** of the present Law.

the maintenance obligations,[392] the celebration, nullity, separation or dissolution of marriage or a non-marital union; the representation measures likely to be provided by the matrimonial regimes and other similar institutions; trusts and succession *mortis causa* (although in this case, for example the appointment of a tutor effected in the form of a disposition *mortis causa* would fall within the scope of application); the services provided to the person without legal capacity by the social security services and similar institutions or the general services provided regarding public health; the supervision and/or internment measures resulting from the commission of crimes or offences by an adult without legal capacity and any other measure intended to preserve public policy and could involve a measure of deprivation of the freedom of the person without legal capacity to dispose freely of their person or property.

294. The solution considered by article 39 of the Law in the face of a multiplicity of situations related to the protection of the adult without legal capacity is the law of their habitual residence. Unlike the solution related to the protection of minors, where the law primarily applicable is the law of the Caribbean authority that is seized and the law of the habitual residence only governs certain circumstances and for practical reasons (*v.gr*., parental responsibility), the protection of adults will be done by application of the law of the habitual residence, which is more stable and predictable than the *lex fori* (unless they coincide) and is better in conformity with the fact that it is the adult themselves who takes the measures regarding their future situation of incapacity.

Similarly to the solution regarding of protection of minors, the change of habitual residence also determines the change of the applicable law. The new law will determine both the protective measures to be adopted as well as the forms of execution of the measures adopted in accordance with the law of the previous habitual residence. In this way, although the law of the previous habitual residence determines the existence of a protective measure or if in accordance with this law, a specific protective measure was adopted (*v.gr*., placement of the adult without legal capacity under guardianship), it will be the law of the new habitual residence that will determine the conditions of the exercise of this measure, all the while attempting to achieve an accommodation between the provisions of the first law and those of the second law. Thus, for example, if the guardianship did not involve the necessary preparation of an inventory in accordance with the law of the habitual residence at the time of its establishment, but this is done by the new law of habitual residence, this inventory will have to be established, at least at the time in which any act of management of the estate of the adult without legal capacity has to be established. If the internment of the person without legal capacity required judicial authorisation in conformity with the law of the previous habitual residence and does not require this in accordance with the law of new habitual residence, this internment can be effected without this authorisation. It is a classic solution to the problem of the change of connecting factor which involves the successive application of two different laws starting with the recognition of the legitimately consolidated measures in accordance with the previous law.

[392] *Vid. infra*, the commentary on **art. 40** of the present Law.

295. The application of the law of the habitual residence of an adult without legal capacity does not hinder the application of Caribbean law for all of the provisional or urgent measures that have to be adopted for the protection of the person or property of the person without legal capacity, or the measures provided by Caribbean law that must be imperatively applied, whatever law is the applicable to the substantive aspects of the protection.[393] Also important in this regard is the provision contained in article **69.2** of this Law under which the Caribbean authorities can give effect to the imperative provisions of another State with which the legal relationship is closely connected. The international codification of private international law includes examples close to the ones we are advancing now,[394] although this eventuality is stricter in the Caribbean law, which refers exclusively to the imperative provisions which are described in the cited **article 69** of the present Law.

Article 40. ***Maintenance obligations*****. 1. The maintenance obligations shall be governed by the law of the State of the creditor's habitual residence. In the case of a change of habitual residence, the law of the State of the new habitual residence from the time of change shall apply.**

2. However, Caribbean law shall apply if the creditor is unable to obtain maintenance from the debtor in accordance with the law indicated in paragraph 1.

3. The law applicable to annulment of the marriage, separation of the spouses and divorce shall govern the maintenance obligations between the spouses or ex-spouses arising from these situations.

4. The application of the laws specified in the preceding paragraphs shall in any case take into account the debtor's capacity and the needs of the creditor.

296. As has repeatedly been highlighted in the course of the analysis of the specific solutions of the applicable law with regard to the person and family relationships,[395] the law applicable to the maintenance obligations is conceived as a special law regarding the relations and institutions in which it is possible to find their basis.[396] This circumstance can be explained both by historical reasons as well as by

[393] *Vid. infra*, the commentary on **art. 69** of the present Law.

[394] Art. 13 of the Convention of the Hague, of 13 January 2000, on the International Protection of Adults establishes the following general rule (which in the Convention is the application in the law of the forum): "in so far as the protection of the person or the property of the adult requires, they [the competent authorities] may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection".

[395] *Vid. supra*, **art. 31** (property relationships in marriage), **art. 32** (nullity of marriage), **art. 33** (divorce and legal separation), **art. 34** (non-matrimonial unions), **art. 38** (parental responsibility and protection of minors) and **art. 39** (Protection of adults without legal capacity).

[396] CONC.: Art. 46 of the Panamanian Code of PIL; art. 49 of the Swiss PIL Act; arts. 3094-3096 (Cc Quebec); arts. 74 to 76 of the Belgian Code of PIL; art. 45 of the Italian PIL Act; art. 63 of the Polish PIL Act; art. 37 of the Dominican draft law; arts. 28 to 31 of the Mexican draft law; art. 50 of

the specific circumstances in which maintenance is obtained by family members or relations. In principle, a situation of need, which justifies the maintenance obligations, merits particular attention regarding the determination of the applicable law which incorporates these substantive requirements, in which the conflict rule is not limited to identifying any applicable law, but which, as far as possible, identifies the applicable law that grants maintenance payments to the creditor who requests them, rather than an applicable law that does not provide it in the same situation.

From above-mentioned historical perspective, this substantive or material orientation in the choice of the applicable law has already been present in the international codification of private international law since 1956, through the first of the five international conventions that were developed in the Hague Conference on Private International Law, on matters covered by article 40 of the Law. Even then, the Convention on the Law Applicable to Maintenance Obligations in Respect of Children, of 24 October 1956, introduced a structurally similar solution to that of article 40 of the present Law now being analysed, making the application of the law of the maintenance creditor's habitual residence depend on whether this creditor can obtain maintenance in accordance with the same law. If this law of the habitual residence denies any maintenance to the creditor, it would cease to be applied and the law that would be designated by the national conflict rules of the authority seized would be applied instead. As can be appreciated, the determination of the applicable law is thus done in two stages, the second stage only being triggered if no maintenance is obtained.

This search for the law applicable to maintenance obligations, oriented and conditioned by the obtaining of maintenance – compared with not obtaining it – was shown a second time in the Hague Convention, of 2 October 1973, on the Law Applicable to Maintenance Obligations, in which the choice of applicable law is made by retaining the law of the maintenance creditor's habitual residence as a first stage, then the maintenance recipient's and maintenance provider's common national law – as the case may be – as a second stage, and finally the substantive law of the forum in the case where these two above-mentioned stages do not make it possible to obtain the maintenance requested.

Finally, the Protocol on the Law Applicable to Maintenance Obligations, concluded in The Hague on 23 November 2007, has reaffirmed the need to identify the applicable law through the search for a law favourable to the maintenance creditor, all the while distinguishing between different types of creditors.

297. Article 40 of the Law includes these substantive provisions in a simple manner, by stipulating two possible applicable laws: the law of the creditor's habitual residence or the law of the Caribbean forum as soon as the creditor cannot obtain maintenance in accordance with the first law. The law of the maintenance creditor's habitual residence is not only their personal law in accordance with the present Law, but it is the law that is best in conformity with the situations of real need. Indeed, the regulation on maintenance obligations will be adjusted, among

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the Bolivian draft law; art. 29 of the Uruguayan draft law; art. 35 of the Colombian draft law; Protocol of the Hague of 27 November 2007 on the Law Applicable to Maintenance Obligations.

other things, to the structure of the family and to the socioeconomic reality of the place where, precisely, the need arises, namely the creditor's habitual residence. As regards recourse to the law of the forum if the law of the habitual residence does not permit the creditor to obtain maintenance, it should be pointed out first and foremost that the law of the forum does not intervene as the "more favourable law" at all costs. The substantive choice of the pair of laws of the habitual residence of the creditor/law of the forum is only activated if the first law does not permit the creditor to obtain maintenance, but does not enshrine the application of the "more favourable law" to the creditor. In other words, although the Caribbean law of the forum is more favourable to the maintenance creditor, it is sufficient that the law of their habitual residence permits them to obtain maintenance to be the applicable law. On the other hand, it should be considered that the final provision of this article 40 of the Law introduces a substantive and potentially corrective solution in the application of the law governing the maintenance obligation (whatever this may be): the debtor's capacity and the creditor's need will be taken into consideration in any case, although this is not provided by the applicable law, we may add. This very much puts the idea of "more favourable law" to the creditor into perspective.

The change of connecting factor possibly resulting from a change of habitual residence is resolved through the application of the law of the new habitual residence from the time of the change. This is also a traditional solution based on the suitability of the law of the habitual residence for confronting the needs of resident persons. In this case, the consolidated solutions in accordance with the law of the previous habitual residence are not taken into account: for example, the debtor obliged by the previous law can cease to be so as a consequence of the provisions in the new law (and vice versa). In any case, in the event of a total loss of the right to obtain maintenance, the change of habitual residence will also allow for recourse to the Caribbean law of the forum.

298. The article contains a special rule for the cases of maintenance owed following marital crises. In these cases, in the same manner as the obligations related to the marriage are relaxed, the maintenance obligation can also take a different form. The obligations between generally adult persons, between whom there is no longer a family relationship (in cases of nullity or divorce), or if this has lost its intensity (in the case of separation of the spouses), will be governed by the law applicable to these situations, which, as a result, will entail a unity of applicable law. The judge or authority that decrees the nullity, separation or divorce will apply the same law that governs these situations to the possible effects on the maintenance of these. In this case, there is no substantive choice. The spouse or ex-spouse claiming to be the creditor will or will not be entitled to maintenance paid by the other spouse, depending on what these laws stipulate, without being able to invoke, where applicable, the Caribbean law of the forum, if these permit them to obtain maintenance. This paragraph does not take into account the situations *of de facto* separation of the spouses and, although it is obvious, it will only apply to the relations between them. The divorced spouse may remain a creditor, for example, of

their parents or even their children. The maintenance payments owed to the children will continue to be governed by paragraphs 1 and 2 of this article.[397]

299. The areas covered by the rule are those that traditionally constitute the idea of maintenance between family members: everything that is necessary for ensuring the upkeep, accommodation, clothing, education, medical attention, medicines and adequate life conditions to creditors for their age and health, etc. The applicable law will especially indicate if, to what extent, and from whom the creditor can claim maintenance; who has standing to institute maintenance proceedings, namely, who has capacity to act as the debtor; to what extent can the creditor claim maintenance if they are indispensable for the upkeep, accommodation and food in accordance with a certain standard of living; if they can be requested for periods in the past; the calculation basis always takes into account the provisions in the final paragraph of article 40 of the Law; the deadlines for filing an action for claiming maintenance and its nature; the situations in which it is possible to seek a review of the maintenance claim, both for the creditor and for the debtor; the subrogation of the payer concerning the debtor in the cases where the maintenance payments will be made by a third party, including if this is a public entity.

Excluded from the scope of application of the rule are the legal relationships on which the maintenance obligation will potentially be based. The determination, for example, of the family connection derived from the maintenance obligation is not governed by article 40 of the Law, but the corresponding *ad hoc* conflict rule: **article 29** regarding the validity of the marriage, **article 34** regarding the existence of relationship of cohabitation similar to the marital relationship, **article 35** regarding legal parentage, etc. Despite what one may think, the "extension" of the substantive orientation favourable to the maintenance creditor, which is articulated in paragraphs one and two of article 40 and, for example, prefers the law of the habitual residence or the law of the forum, depending on what law determines the existence of the legal parentage relationship on which the maintenance obligation is based, would create more problems than it would resolve. Indeed, it could concern a family relationship (existing or not), which could be (or not) connected to a claim for maintenance. The family relationship must exist or not and be the same regardless of the effect is derived from it and whatever law is applicable to that effect.

[397] *Vid*. on this option of applicable law S. Álvarez González, *Crisis matrimoniales internacionales y obligaciones alimenticias entre cónyuges*, Madrid, Civitas, 1996.

Section IV
Succession and gifts

Article 41. *Succession* mortis causa. 1. Succession mortis causa shall be governed by the law of the deceased person's domicile at the time of their death. Without prejudice to the provisions in the following paragraphs, this law shall apply to the entire succession, regardless of the nature of the property and the place where it is located.

2. Testators may choose to submit their entire succession to the law of their domicile or their nationality at the time of the choice. The choice must be made expressly in the form of a disposition of property upon death, or must be demonstrated beyond any doubt in the form of a disposition of this type.

3. Wills drawn up in conformity with the law of the deceased person's domicile at the time of being drawn up shall maintain their validity regardless of the law governing the succession. In any case, the reserved portion or other similar rights to which the deceased person's spouse or children might be entitled shall be governed, where applicable, by the law governing the succession in accordance with paragraphs 1 and 2 of the present article.

4. The agreements as to succession that affect only one succession and concluded in accordance with the law of the deceased person's domicile at the time of being drawn up shall maintain their validity regardless of the law governing the succession. The agreements as to succession that affect more than one succession shall be governed by the law of the domicile of any of the testators expressly chosen by all of them; if no law is chosen, they shall be governed by the law of the testators' common domicile at the time of the conclusion of the agreement; if there is no common domicile, they shall be governed by their common national law and if there is no common national law, the shall be governed by the law most closely connected to the agreement, taking into account all of the circumstances.

In all events, the reserved portion and other similar rights to which deceased person's spouse or children might be entitled shall be governed, where necessary, by the law governing the succession in accordance with paragraphs 1 and 2 of the present article.

5. The partition of the estate shall be governed by the law applicable to the succession, unless the heirs of the estate have designated by common accord the law of the place of the opening of succession or the law of the place in which most of the succession property is located.

300. Article 41 of the Law addresses the law applicable to the substantive aspects of succession *mortis causa*. The complexity of this matter has always been based on the main models that divide comparative law between those which advo-

cate a uniform solution for the entire succession (monist or uniform model) and those which advocate a different solution for succession of movable property and immovable property (dualist or *scission-based* model).[398][399] The uniform solution, in turn, establishes an alternative between the deceased's national law and the law of their domicile or habitual residence localised at the time of their death. The dualist model tends to apply the *lex rei sitae* to the succession of real estate property and a personal law, generally the law of the deceased person's last domicile, to the succession of movable property (*v.gr*., France, Belgium or United Kingdom). This second option is based on the potential acceptance of various estate possessions submitted to various systems. It is definitively based on the splitting up of a single estate. Furthermore, it should be noted that none of the two main systems or models opts for a material or substantive orientation in the choice of the law. The conflict rules on which they are based are neutral. The law of the place where a real estate property is located will determine its succession regime, whatever this may be; and the same applies to the law of the deceased's last domicile or the deceased's national law at the time of their death. In other words, the materialisation of the conflict rule is not necessary regarding the identification of the law governing international succession. The determination of the law applicable to succession *mortis causa* is not animated by the search for a law that will grant more rights to the surviving spouse, or to the children, or which will grant greater freedom of disposition to the deceased, or which greatly restricts this for the benefit of the forced heirs, etc. All of these substantive or material issues and any others of a similar nature have been excluded from the conflict rule, which opts for the law applicable to the succession.

301. This picture is reflected in article 41 of the Law which, on the one hand, opts for a uniform model in the regulation of succession *mortis causa* and, on the other hand, ensures continuity by not opting for a material or substantive orientation in the determination of the applicable law. Furthermore, by implementing the monist or uniform solution, the present Law opts for the determining factor of the deceased's last domicile. It is a modern and complete provision that is unique in the comparative law of the Caribbean.

The option for a single law that governs the entire succession, which is provided by article 41.1, second sentence, has certain advantages regarding the option for a subdivision model; the most obvious advantage is the possibility for the deceased to plan their succession easily under the purview of a single law, without having to undertake very complex calculation work, and efforts to adapt to all of the laws involved (which will also include the owner of real estate properties located in various countries), which, per se, entails taking into account different limitations

[398] CONC.: Art. 57 of the Panamanian Code of PIL; arts. 90 *et seq*. of the Swiss PIL Act; arts. 3098-3101 (Cc Quebec); arts. 78 *et seq*. of the Belgian Code of PIL; art. 46 of the Italian PIL Act; arts. 28 and 29 of the Austrian PIL Act; art. 64 of the Polish PIL Act; art. 38 of the Dominican draft law; arts. 76 to 81 of the Mexican draft law; art. 83 of the Bolivian draft law; art. 30 of the Uruguayan draft law; art. 40 of the Colombian draft law.

[399] *Vid*. J. Héron, *Le morcellement des successions internationales*, Paris, Económica, 1999; F. Boulanger, *Droit international des successions. Nouvelles approches comparatives et jurisprudentielles*, Paris, Económica, 2004.

placed on their freedom to draw up a will, on various causes of disinheritance, etc. The option for the uniform model is also the one which has governed the international codification of private international law in recent years and the solution adopted in Europe.[400] The work of the Hague Conference is particularly significant for, while its delegates are from countries with very different legal cultures, which have opted for a dualist or scission-based system in the law applicable to succession, was rapidly agreed to opt for a uniform solution without any problems.[401]

For this monist or uniform option – the principle of unity and universality of succession – the law of the deceased person's last domicile is an appropriate law. It is also the law adopted by the two most complete and modern international instruments in the area.[402] This is explained by the fact that the idea that the domicile is precisely the place where the deceased's centre of life and, more importantly, the centre of their patrimonial interests was located, that is to sat the place where they probably have most of their estate.

Of course, the reality is not always like that, and the rule of article 41.2 of the Law introduces a further clear element of modernisation of the law applicable to succession *mortis causa*: the so-called *professio iuris* or possibility that the deceased person may choose the law applicable to their entire succession.[403] The introduction of this possibility of choice of law is justified, first and foremost, in the importance of the autonomy of the will with regard to succession. The idea that the deceased person's will – demonstrated through a will or agreement as to succession – is the law of succession remains widespread both in civil law as well as in common law systems. The rule only projects the importance of the autonomy of the will beyond merely self-regulating autonomy; it will cause it to become a genuine "autonomy of conflict" as reflected, on the other hand, in other solutions provided by the Law for resolving matters related to persons and their families.[404] However, the possibility to submit to a law to determine its succession cannot be absolutely free; the laws likely to be chosen must have a sufficient connection with the deceased, which is the case of the law of their domicile and the law of their nationality at the time of the choice. This delimitation of laws offers the deceased a sufficiently attractive wide range of choice permitting them to be able to organise their succession in a coherent manner in accordance with a law that is closely connected to them and, above all, predictable. It eliminates any uncertainty regarding their

[400] This is the option chosen by the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, as well as the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[401] *Vid*. the illustrative debates on that matter in the Acts of the Conference: the Hague Conference, *Proceedings of the Sixteenth Session (1988), tome II, Succession to estates - applicable law*, The Hague, Editions SDU, 1991.

[402] Those instruments are the aforementioned Convention and Regulation. However, it should be precised that nominally they refer to the habitual residence and not the domicile as the connecting factor.

[403] This possibility is thoroughly described in the monograph by J.M. Fontanellas Morell, *El professio iuris sucesoria*, Madrid, Marcial Pons, 2010.

[404] *Vid*. *supra*, **art. 25** regarding names and surnames, **art. 31**, regarding property relationships in marriage, and **art. 33** regarding divorce and legal separation.

domicile at the time of their death and assures them that their will (to the maximum extent permitted by the chosen law, and its subsequent amendments) will be valid beyond their death. If the deceased has more than one nationality, they may submit their succession to the law of any one of the nationalities held at the time of making the choice. On the other hand, the same essence of the autonomy of unilateral conflict of laws rules enshrined by the present article means that the *professio iuris* favourable to a law may be revoked at any time afterwards (the law of succession will then be the law of their last domicile) or replaced by another law: for example, the deceased can submit their succession to the law of their current domicile and, subsequently, decide to submit this to the law of their nationality.

An important aspect in relation to this *professio iuris* is the possibility for it to be either express or tacit. Undoubtedly, the express choice should be recommended in order to eliminate any conflict regarding the applicable law. However, one cannot ignore that on many occasions the deceased has a clear intention to submit their succession to a particular law, whose typical institutions, including specific articles, are cited or reproduced in their will. If such terms are unequivocally connected to one of the potentially eligible laws, this choice of law of succession will have to be considered. In any case, this choice must be made in the form of a disposition of property upon death, both in its first version as well as in its subsequent developments (revocation, amendment)[405].

302. Paragraph three of this article 41 introduces a special rule for the cases in anticipation of succession by drawing up a will. It provides a response to the situation, which is not so uncommon, in which the will is drawn up under the law of the "current" domicile, which turns out not to be the law of the deceased's last domicile, which will be law governing the succession. This change of connecting factor can lead to the radical invalidity of wills, which would not take into account at all the law of succession, simply because the testator was not aware of it. The rule of article 41.3 of the Law tries to preserve as far as possible the estate planning undertaken in accordance with the law of the domicile, by conserving its validity within the limits of the reserved portion or other similar rights to which spouses and children may be entitled. These rights will be determined by the law governing the succession, the law of the deceased's domicile at the time of death or the law chosen by virtue of article 41.2 of the Law. Obviously, in this second case, the logic is that the will is already draw up in accordance with the chosen law and the problem raised by the paragraph in question is not even raised. Indeed, one of the great virtues presented by the *professio iuris* is precisely that it avoids this potential change of applicable law.

In any case, if the factual situation of article 41.3 of the Law exists, the will drawn up in accordance with a closely connected law, the law of the deceased's "current" domicile, will continue to be valid but will be likely to be corrected by the reserved portion only as regards the children and the spouse and not by any other reserved portion further away from the deceased. It is, once again, a constraint imposed on the deceased's will and, ultimately, a way of ensuring that a

[405] *Vid*. *infra* the commentary on **art. 42** of the present Law.

change of law, such as that set out in the present provision, does not excessively limit the deceased person's freedom. Indeed, it is important not to lose sight of the fact that the deceased person has already respected the reserved portion of the law of their domicile at the time of drawing up their will and, as a result, it does not appear appropriate to submit this to a "second filter".

303. The provision regarding agreements as to succession reflects a similar complexity in the other legislations where they are recognised. The agreements as to succession, which concern only one succession, opt for a solution similar to the one provided for wills. The agreements maintain their validity provided that they are in conformity with the law of the deceased's domicile at the time of the conclusion of the agreement (*v.gr*., an agreement between a father and a child that the child renounces their rights of succession in exchange for a present benefit). In the cases of agreements concerning more than one succession (*v.gr*., an agreement between two spouses who reciprocally designate each other as heirs) the solution is more complex. If the agreement as to succession must be governed by a single law, this law should be chosen from among the laws potentially involved: once again, the Law opts, first and foremost, to permit the interested parties to choose from among the different laws of their domicile in the event that they do not have a common domicile. In the absence of such agreement, it will be precisely the law of the common domicile that will govern the validity and legal regime of the agreement (in most cases, this will be the applicable law); if there is no common domicile, the other personal law will come into play, that is to say the common nationality. Taking into account the configuration of the agreements as to succession and the fact that they are frequently concluded between persons belonging to the same family, it is not uncommon for the agreement to be submitted to the law of the nationality (*v.gr*., parents and children of the same nationality but domiciled in different countries). Finally, if the situation is scattered over an extremely wide geographical area – and the parties to the agreement have not taken care to choose the law applicable to the agreement – the law governing the agreement as to succession will be the law most closely connected to the agreement (not to the parties to the agreement, although clearly these are also relevant).

Two important aspects should be taken into account in this regard: firstly, the law governing the validity and legal regime of the agreement as to succession may be different from the law of succession and the latter, as in the case of wills, will continue to be the law that will determine the extent of the spouses' and the children's reserved portion. Secondly, due to this possible dissociation between the law applicable to the agreement as to succession and the law of succession, it must be noted that the autonomy of the will which permits the parties to the agreement to choose the law of the domicile of either one of them may not be confused with the *professio iuris* enshrined in article 41.2 of the Law. The latter is unilateral, essentially alterable by the will of the deceased and determines the law of succession. The former is bilateral, not alterable by the will of one of the parties to the agreement, and limited to the validity of the agreement: it does not determine the law of succession. Nonetheless, in a well-planned succession, the law applicable to the agreement and the law of succession may coincide through the combination of the possibilities provided by paragraphs 2 and 4 of article 41.

304. Article 41 of the Law concludes with a new rule, which relaxes the classical solution of the application of the law of succession to estate partition operations. This solution this time once again introduces the autonomy of the will, not of the deceased person, but of the parties with a real interest in the succession: the parties with any right of succession of any kind, either under a will or no will at all or formally agreed. These parties can undertake the partition in accordance with the provisions by the law of succession (law of the deceased person's last domicile or the law chosen by it through the exercise of *professio iuris*) or indeed by virtue of the law that they will decide to choose between the law where the succession is opened and the law of the country where most of the hereditary property is located.

305. Furthermore, it should be pointed out that the law of succession will apply to the causes, the time and the place of opening of the succession; the determination of the heirs, legatees or other beneficiaries, of their respective shares and of the obligations that may have been imposed by the deceased, as well as the determination of any other right of succession, including the rights of succession of the spouse or the surviving partner; the capacity to inherit; the causes of disinheritance and disqualification by conduct; the transfer of assets, rights and obligations making up the succession to the heirs and, where applicable, to the legatees, including the conditions and effects of accepting or waiving the succession or legacy; the powers of the heirs, the executors of the wills and other administrators of the succession; responsibility for the debts and charges under the succession; the disposable part of the estate, the reserved portions and the other restrictions on the freedom to dispose of property upon death, including the claims that might be brought against the estate or against the heirs or other beneficiaries by the relatives of the deceased; any obligation to restore, collate or account for lifetime gifts or donations by the deceased; and sharing the inheritance taking into account the provisions of the last paragraph of the article.

Article 42. *Form of testamentary dispositions*. Testamentary dispositions shall be valid in terms of form if they are in conformity with the provisions of the law of the place where the disposition is made by the testator, or by the law of deceased person's domicile at the time when the disposition is made or at the time of the death, or by the deceased person's national law at the time when the disposition is made or at the time of the death.

306. The law applicable to the form of the testamentary dispositions has always been presided over by one objective: the *favor validitatis* or the determination of the more favourable law to the formal validity of the disposition.[406] Obviously, the

[406] CONC.: Art. 93 of the Swiss PIL Act; art. 84 of the Belgian Code of PIL; art. 48 of the Italian PIL Act; art. 66 of the Polish PIL Act; art. 39 of the Dominican draft law, art. 85 of the Bolivian draft law; art. 31 of the Uruguayan draft law; art. 42 of the Colombian draft law.

objective regarding the form of testamentary dispositions is not to deprive heirs of their legal rights. In general, the form and circumstances of the legal acts have long since been submitted to an alternative *in favorem* rule, at least between the law governing the substance of the case and the law of the place where the act was concluded.[407] However, this objective so far has reached its high point concerning succession: the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, of 5 October 1961, reliably attests to this.[408]

Article 42 of the Law offers as many as five different potential laws that are called on to evaluate alternatively the formal validity of a disposition of property *mortis causa*. It is sufficient for the disposition to be formally valid for one of the laws involved for the validity to be affirmed regardless whether or not this is the case for the others.

307. The rule is applied both to the validity of the testamentary dispositions granted for the first time as well as to their revocation or amendment. In this case, the pure and simple application of the rule merely displaces in time the connecting factors that it describes: they must be taken into account at the time of the revocation, amendment, etc. However, taking into account its objective, the rule adopted does not rule out the possibility that an amendment or revocation of testamentary disposition will be considered formally valid if it is compatible with the law pursuant to which the original disposition was valid. If, for example, – disregarding other possible laws, for explanation purposes only – a will was formally valid pursuant to the law of the place where it was drawn up by the testator, and is then revoked in another place, the revocation would be formally valid if it complies with the formal requirements of this second place, or of the place where the will is drawn up by the testator. It is a logical extension of the same principle of *favor validitatis* which governs article 42.

Likewise, the rule is applied to any type of disposition *mortis causa*, any kind of will –including the cases where two persons draw up two wills in the same act –, of any kind of agreement as to succession and, as has been indicated, the declarations of choice of law in the terms prescribed by **article 41** (*professio iuris*), as well as any kind of act by which both the testamentary disposition as well as the *professio iuris* are revoked or modified.

Article 43. *Succession of the State*. If the law applicable to the succession does not attribute the succession to the State, in the case where there are no heirs, the succession property located in the Caribbean shall become the property of the Caribbean State.

[407] Vid. M. Requejo Isidro, La ley local y la forma de los actos en Derecho internacional privado español, Madrid, Eurolex, 1998, in which this principle is explained from a historical and comparative law perspective.

[408] This Convention binds more than forty States of the international community, including the countries of the OHADAC zone Antigua and Barbuda and Grenada.

308. The attribution of succession property to the State or other public legal bodies connected to it or dependent on it, or to territorial entities with their own autonomy within the State is a classical problem and requires a specific response in order to avoid any interference that may result in a concurrent claim of two States regarding the same property or, on the contrary, to equally concurrent abandonment or neglect between two States regarding the property or certain properties of the deceased.[409] This results from the different ideas about the role of the State in the succession: while some legal systems consider the State to be heir of last resort, other legal systems depart from this categorisation of succession and consider that the State can seize vacant property in its territory based on a right of public appropriation. In this scenario, if, for example, the law of succession is the law of a State that does not consider itself to be "heir" but attributes to itself a mere right of appropriation regarding the property located in its territory, the other properties located in the territory of a different State may find themselves in a situation of *bona vacantia* if the law of the place in which the property is located genuinely recognises the State's right to inherit property. The first State does not claim the property located outside of its territory, for it is not entitled to do so and the second State does not claim the property located in their territory for the same reason. The opposite situation is less problematic: if the State whose law governs the succession is considered to be the heir of the deceased's entire property for that purpose, it will claim this property wherever this is located; the truth is that this claim will only be effective if the other countries in which the deceased's property is located do not object, either because they also recognise that right, or because even if they consider themselves to have supreme authority regarding this property, they apply the law of succession in its entirety and assume the capacity of heir of the foreign State.[410]

309. This somewhat orthodox approach strictly based on conflict of law principles leads to a more considerate treatment of the States authorised to inherit property pursuant to the laws than those that present merely a preferential right of appropriation of the property located in their territories. In particular, it leaves unresolved the problems of property not claimed by any of the laws in the first of the examples proposed: does any kind of prerogative exist regarding these or are they indeed integrated into a generic case of *res nullius* subject to the occupancy rules of the *lex rei sitae*? Article 43 of the Law offers a direct and tangible response to this question which, on the one hand, complies with the provisions of the law of succession in their entirety,[411] and on the other hand, resolves the possible problem of

[409] Art. 49 of the Italian PIL Act; art. 41 of the Dominican draft law; art. 88 of the Bolivian draft law.

[410] *Vid*. the classical example of *Re Maldonado (deceased); State of Spain v Treasury Solicitor.Court of Appeal*, [1954] P 223, [1953] 2 All ER 1579, [1954] 2 WLR 64.

[411] Other possibilities can be imagined: the recent art. 33 of Regulation (UE) 650/2012 is clearly in favour of appropriation and public interest outside the law of succession, indicating that: "To the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own

negative conflict, namely the absence of a claim to recover property located in the Caribbean, by attributing this property directly to the State where it is located. In summary, if the law of succession considers the State to be heir, it inherits; if not, the property of the estate located in the Caribbean passes directly to become the property of the Caribbean State.[412] Regarding properties located in other countries, obviously, the present Law does not specify any provision.

Article 44. *Gifts*. 1. Gifts shall be governed by the law of the donor's domicile at the time when the gift was made.

2. Notwithstanding the provisions in the preceding paragraph, the donor may submit this to the law of their nationality by express declaration at the same time as making the gift.

3. The gift shall be formally valid if it is considered as such by the law that governs its content or by the law of the State where it was made.

310. This rule refers to the law governing gifts and this requires initial qualification work of the institution, which is not excessively complex, because comparative law tends to identify, more or less uniformly, the two key elements of this transaction: their gratuitous nature and the effect of impoverishment of the donor and corresponding enrichment of the donee.[413]

From a more systematic perspective, one of the traditional problems that is raised regarding the determination of the law applicable to gifts in private international law, in addition that it their particular conceptualisation, is to consider that they involve both an act related to the individual sphere or person of the individual, or indeed a strictly legal or contractual act through which the personal facet or dimension would give way to the economic aspect.[414][415] Both the systematic positioning

law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole". The allusion made to the "disposition of property upon death" as well as to the "natural person" by the law of succession. That is not the option that the Venezuelan PIL Act opted for either. Its art. 36 advocates the use of the law of appropriation of the State of Venezuela rather than other possible foreign heir States. *Vid*. T. B. de Maekelt, *Ley venezolana de Derecho internacional privado: tres años de su vigencia*, *op. cit*., pp. 90–91, which echoes the critics made on the lack of international harmony that its solution offers.

[412] *Vid*. this same solution in art. 49 of the Italian PIL Act and in art. 40 of the Dominican draft law; *vid*. as well art. 113 of the Panamanian PIL Act.

[413] "Gifts *inter vivos* is an act by which a person transfers, gratuitously and irrevocably, part of their property to a person who accepts it" (art. 1433 of the Colombia Civil Code). "A deed of gift allows a person, at the expense of their assets, to gratuitously transfer the ownership of a property to another person who accepts it" (art. 371 of the Cuban Civil Code). "A gift is a deed by which a person gratuitously transfers a property or another right of ownership to another person who accepts it" (art. 1.431 of the Venezuelan Civil Code).

[414] CONC.: Art. 56 of the Italian PIL Act; art. 41 of the Dominican project; art. 66 of the Mexican draft model of PIL; art. 28 of the Colombian draft law.

[415] *Vid*. P. Jiménez Blanco, "El Derecho aplicable a las donaciones", *Revista Española de Derecho Internacional*, 1997, pp. 63–89.

of article 44 of the Law as well as the particular solutions it proposes for the identification of the applicable law (donor's personal law and possibility of unilateral choice) prefer the personalist dimension of the law applicable to the gift.

The other big question, which is increasingly common in view of the degree of specialisation of the solutions of private international law and the proliferation of a multitude of conflict rules derived from it for governing at times intrinsically connected aspects, is the delimitation between the law governing gifts generally, and the law governing other matters, such as, in particular, the patrimonial effects of marriage and succession. In this sense, there is a classical requirement to determine if the gifts *mortis causa* are governed by the law governing the succession or by the law governing the gifts;[416] and the same is the case with the so-called gifts between spouses:[417] are they submitted to the law governing the gifts or to the law governing the patrimonial effects between the spouses?

In the case of gifts *mortis causa*, they will be included in the scope of application of this article or under article 44 of the Law, according to whether the typical effect of the gift (impoverishment of the donee and enrichment of the donor) essentially depends on the death of the donor occurring prior to that of the donee, or if their death is simply the motive or the condition for making gift immediately effective. In the first case, it will be the law of succession that will be the applicable law and in the second case it will be the law governing the succession.[418] Gifts between spouses are not connected with any specific objective of contribution to the maintenance of the marital property cannot escape from the scope of application of the present provision, although, if the law governing the effects of the marriage considers them inextricably linked to this maintenance, they might be included within its scope.[419]

In the same vein also arises the problem of qualification of the so-called remuneratory gifts (made for the benefit of the donee or in consideration of their merits), namely the gifts that also impose an obligation on the donee, or the gifts that do not really constitute a gratuitous act, but which comprise a mixed act, with a gratuitous part and another onerous part. In all of these cases, the key characterisation is the solution resulting from the triple condition mentioned: gratuitousness, impoverishment and enrichment. In this way, it will sometimes be able to create a split between, for example, the law applicable to the gift for the gratuitous act, and the law applicable to onerous acts for the onerous part.

[416] In some cases, the qualification derived from civil law is unambiguous. Art. 943 of the Civil Code of Guatemala: "Gifts *mortis causa* are governed by the same testamentary dispositions that govern legacy". Art. 1393 of the Costa Rican Civil Code: "Gifts to be effective after death shall be considered as last will and are wholly governed by the provisions governing wills".

[417] Art. 1842 of the Colombian Civil Code: "Gifts made by a spouse to the other before their marriage and granted for this purpose and gifts made by a third party to either spouse before or after their marriage and granted for this purpose are generally called '*donation propter nuptias'* (gift on account of marriage)".

[418] P. Jiménez Blanco, *loc. cit.*, p. 77.

[419] *Ibid*., p. 74.

311. As already indicated, the response provided by article 44 of the Law is clearly personalist and relies to varying degrees on the personal laws of the donor: the law of their domicile will apply, unless they expressly opt for the law of their nationality (or the law of any of their nationalities if they possess various ones). These solutions are localised in time at the time of making the gift, which is expressly indicated in paragraph one and definitively ("by express declaration at the same time as making the gift") in paragraph two. This provision localised in time is a constraint on the legal dimension of the gift and means that, in the case where the choice of law will be made, it will no longer be able to be modified or revoked subsequently (for example, this can be done through the *professio iuris* of successions).

Paragraph three refers to a necessary rule applicable to the form of the gift which, following the *favor validitatis* derived from the law applicable to the formalities of the acts, is characterised by its scope: two potentially applicable laws, the *lex loci celebrationis* and the *lex causae*. The solution is more sober than the one that impinges on the form of the contractual obligations[420] for it marks this personal dimension, as already mentioned above.

312. The law designated by article 44 for governing the succession will apply to the requirements of specific capacities for being a donor as well as for being donee, in this case, with a special mention regarding the prohibitions or limitations for receiving gifts. There can be a derogation from this rule if such prohibitions or limitations are intrinsically connected to a different relationship, which justifies them: for example, in the case of gifts by which one disposes or seeks to dispose of the property of a child or a ward, the conditions imposed on whoever holds the parental authority, parental responsibility or other similar relationship, and the conditions imposed on the guardian are a directly consequence of the protection of the interests of the minor or the person without legal capacity and this will be the law governing all of these situations that will be applied.

The law governing the gift will not apply to the circumstances that can unfold in the context of the succession of the donor either. As underlined above,[421] the obligation to account for, take into account and possibly collate lifetime gifts or donations by the deceased is determined by the law of succession, even though this presents a significantly vague distinction regarding the determination of the effects of the gift.

Section V

Contractual obligations

[420] *Vid. infra* the commentary on **art. 51** of the present Law.
[421] *Vid. supra* the commentary on **art. 42** of the present Law.

Article 45. *Autonomy of the will.* 1. The contract shall be governed by the law chosen by the parties. The parties' agreement on this choice must be express or, in the absence of such agreement, the choice of law must be clearly deducible from the conduct of the parties and the clauses of the contract, considered as a whole. This choice of law may relate to all or merely one part of the contract.

The choice of a particular court by the parties does not necessarily imply the choice of the applicable law.

2. The parties may agree at any time that the contract, in whole or in part, is submitted to a different law to the one it is was governed by previously, regardless of whether the previous law was applicable by virtue of a previous choice of law or by virtue of a different provisions of the present Law. The change of the applicable law shall not affect the rights of third parties.

313. The power of the parties to an international contract to choose the legal system which will govern the contract constitutes a principle recognised in practically every system of private international law, known as "freedom of choice of law"[422]. This notion includes the parties' freedom to configure their private relations freely and under their own responsibility. However, the extent of the freedom of choice of law in the systems of private international law of Latin America and even the Caribbean continues to be a controversial topic due to the fact that in certain cases it is connected to the specific consideration of the common law model on this issue.[423]

[422] CONC.: Art. 116 of the Swiss PIL Act; art. 98 of the Belgian Code of PIL; art. 57 of the Italian PIL Act; arts. 37-37 of the Austrian PIL Act; art. 26 of the Polish PIL Act; art. 42 of the Dominican draft law; arts. 88 to 93 of the Mexican draft law; art. 63 of the Bolivian draft law; arts. 48 and 49 of the Uruguayan draft law; art. 52 of the Colombian draft law; the Inter-American Convention on the Law Applicable to International Contracts of 1994.

[423] In the Puerto Rican system, an obligatory reference is the case *Maryland Casualty Co.v. San Juan Racing Association, Inc.*, 8 D.P.R. 559 (1961) on a typical conflict of laws dispute regarding insurance contracts. The insurance policy had been issued in the main office of the insurer in Pennsylvania but had been approved by the local agent of the insurer in Puerto Rico, where the insurer was domiciled and the insured risk was located. The Supreme Court indicated that the insurance policy being approved on the island would allow to apply the Puerto Rican law if a rule was adopted, according to which the law applicable is the law of the place where the last act necessary for the contract to be effective was executed. *Id.* p. 564. However, precedents of the federal Supreme Court and State Courts of the United States convinced the Supreme Court to dismiss the "conceptualist theories of 'place of conclusion of contract'" and based itself, with broader criteria, on the application of Puerto Rican law. *Id*., pp. 562-566. At that point, U.S. law on conflict of laws departed from the rule *lex locicontractus* to move towards the "centre of gravity" approach, described by the court as the theory according to which "the law of State that has the most significant contacts with the object of the contract is the applicable law, as it is assumed that this State has the most interest in the matter that arises from said contract". *Id.* p. 565. However, the court also extensively discussed the position of Spanish authorities regarding standard-form contracts and concluded that "the theory supporting the application of the law of State which has more contacts, the closest relation with the contract [is justified] by the great interest it has to protect the interests of its citizens". *Id.* pp. 565-568 In addition, the court emphasised that the interest of the State is particularly important regarding standard-form contracts, in which the insured party generally has to accept what the insurance company offers. Regarding other federal cases of conflict of laws in contractual matters in which

The most important manifestation of private autonomy is the freedom of contract, which grants to parties the right to decide by themselves whether or not a contract must be concluded, and with whom it must be concluded (freedom to draw up contracts), and what content the contract must have (freedom of design). In addition to this, thirdly, is the freedom of form, that is to say, the absence of obligation to conclude a contract in writing or in any other form.

The freedom of choice of law grants to the parties to a contract the freedom of choice of the law. As a result, the parties can decide by themselves to what law they are going to submit the legal relationship existing between them.[424] This free choice of the law in the sphere of positive law is exclusively authorised in the law of each State, and in does not results automatically from a principle of personal freedom, regardless of the form in which it is designed; as a result, it is the conflict rules of the forum and not the parties which determine the connecting factors of the contract with a particular legal system.[425] That said, there is no doubt that the idea of the contract is consistent with the fact that it is the parties themselves who decide how they wish to defend and balance out their interests. Hence, the freedom of choice of law is not merely a prolongation of private autonomy, but the very expression of an idea of autonomy and freedom beyond the positive law.[426] The freedom of choice of law is essentially justified, on the one hand, in the obtainment of a high degree of legal certainty, secondly, in the reinforcement of the principle of equality so that the parties adapt to the law in cross-border relations and, finally, in the principle of predictability of the applicable legal system.[427]

314. The autonomy of the will is also the main criterion for determining the law applicable to this matter in the Inter-American Convention on the Law Applicable to International Contracts, of 17 March 1994, signed in Mexico DF on 17 March

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Puerto Rican law also applied in accordance with the doctrine *Erie-Klaxon, vid*. *American Eutectic Weld v.Rodríguez*, 480 F.2d 223 (1st Cir. 1973); *Lummus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915 (1st Cir. 1960); *Gemco Latinoamericana Inc. v. Seiko Time Corp*., 623 F. Supp. 912 (1985); *Fojo v. Americana Express Co.*, 554 F. Supp. 1199 (D.P.R. 1983); *Pan American Computer Corp. v. Data General Corp.*, 467 F. Supp. 969 (1979); *Mitsui & Co. v. Puerto Rico Water Resources*, 79 F.R.D. 72 (1978); *Southern Intern. Sales v.Potter & Brumfield Div.*, 410 F. Supp. 1339 (1976); *Hernández v. Steamship Mut.Underwriting Ass'n Ltd.*, 388 F. Supp. 312 (1974), *González y Camejo v. Sun LifeAssurance Co. Of Canada*, 313 F. Supp. 1011 (D.P.R. 1970), *Beatty Caribbean, Inc. v.Viskase Sales Corp*., 2 F.Supp.2d 123 (D.P.R.2003) and *Puerto Rico Telephone Co., Inc.v. U.S. Phone Mnfgn. Corp*. 427 F.3d (1st Cir. 2005).

[424] This is reflected in particular in the legal instrument that constitutes the main reference on an international level in this matter, Regulation (EC) No 593/2008 of f 17 June 2008 on the law applicable to contractual obligations(Rome I) (DO L 177/6, 4.7.2008), that contains uniform rules on this matter within the European Union. It replaces the Rome Convention of 1980 on the law applicable to contractual obligations, which introduced modifications of a certain importance. These instruments have been a reference during the last years of codification of private international law of countries around the word. *Vid*. B. Ancel, "Autonomía conflictual y Derecho material del comercio internacional en los Convenios de Roma y de México", *AEDIPr*, t. II, 2002, pp. 35 *et seq*.

[425] K. Siehr, "Die Parteiautonomie im Internationalen Privatrecht", *Festschrift für Max Keller zum 65. Geburtstag*, Zurich, Schulthess, 1989, pp. 485 *et seq.*, esp. p. 486.

[426] S. Leible, "Außenhandel und Rechtssicherheit", *ZVglRWiss*, 97, 1998, pp. 286 *et seq*., esp. p. 289.

[427] S. Leible, "Comercio exterior y seguridad jurídica", *Revista del Derecho Comercial y de las Obligations*, nº 31, 1998, p. 397.

1994 in the Fifth Inter-American Specialised Conference on Private International Law (CIDIP-V). The Inter-American Convention was developed based on the experience of the Rome Convention of 1980, from which it deliberately distanced itself at least partially in some aspects, specifically in relation to the determination of the law applicable to the contract in the absence of the choice by the parties.[428] Although, conditioned by its limited acceptance, the Inter-American Convention has exercised much less influence than the Rome Convention on the legislators of other areas of the world, it is a compulsory reference point in America.

Indeed, the issue of the "international contract" was included for the first time in the agenda of the CIDIP-IV, which was implemented in 1989. The Conference established a series of basic criteria related to the applicable law concerning international contracts. After the discussion centred around the coexistence of a "regional" convention following the parameters of the Rome Convention of 1980 or the active and uniform participation of Latin American countries in the development of an instrument of universal unification adopted by an international body or in other initiatives, such as those put in practice by the Unidroit. Despite this absence of consensus, the Inter-American Legal Committee has adopted a regional solution and, in order to limit the focus to the issue of applicable law, has entrusted to the prestigious Mexican jurist, José Luis Siqueiros, the task of drawing up a preliminary draft bill of the Inter-American Convention on the Law Applicable to International Contracts, which was approved in 1991. Then the Inter-American Legal Committee, at the request of the Permanent Council, in 1993, drew up Draft Rules for the Regulation of International Legal Instruments, which was followed by a meeting of experts, concluded in the city of Tucson, Arizona, United States, in 1993. Here, the presence of the Professor F. Juenger of the University of California–Davis was decisive; and this presence justifies the distancing of the Mexico Convention from the Rome Convention, whose solutions were highly deficient in the opinion of the professor. In his opinion, the European authors, falling victim to the contemporary culture regarding the conflict of laws, was based on a vague principle (application of the law of the State with which the contract is "more closely connected"), which was completely unsatisfactory. As a result, the scales tipped in favour of the convenience of transferring to the judge, in the absence of choice by the parties, the task of locating the legal system more closely connected with the contract, enabling them to resolve the issue of applicable law on a case-by-case basis. The result was a new draft of the Convention on the Law Applicable to International Contracts, which was submitted as main working document to the deliberations of CIDIP-V, and which as a result gave rise to the Mexico Convention of 1994. However, the success of the Convention lies in its acceptance by the

[428] *Vid*. H.S. Burman, "International Conflict of Laws, The 1994 Inter–American Convention on the Law Applicable to International Contracts, and Trends for the 1990s", *Vanderb. J. Transn. L*., 28 (1995), p. 367; A. Gebele, *Die Konvention von México. Eine Perspektive für die Reform des Europäischen Schuldvertragsübereinkommens*, Birkenau, 2002; R. Herbert, "La Convención Interamericana sobre derecho aplicable a los contratos internacionales", *Rev. Urug. Der. Int. Priv*., nº 1, 1994, p. 1; F.K. Juenger, "The Inter–American Convention on the Law Applicable to International Contracts. Some Highlights and Comparison", *Am. J. Comp. L*., vol. 42, 1994, pp. 381 *et seq.*; L. Pereznieto Castro, "Introducción a la Convención interamericana a sobre Derecho aplicable a los contratos internacionales", *Riv. dir. int. pr. proc*., vol. 30, 1994, pp. 765 *et seq.*; *id.*, "El negocio jurídico en el Derecho internacional privado en México", *AEDIPr*, t. VI, 2006, pp. 39-85.

States that have participated in its drafting. Undoubtedly, the Convention has had greater success in academic forums. It is sufficient to point out that only five States have signed it (Bolivia, Brazil, Mexico, Uruguay and Venezuela) and that only two of these ratified it (Mexico and Venezuela). Thus, the text is in force in two countries (for its entry into force, only two ratifications were required).

315. The present article follows articles 7 and 8 of the Mexico Convention. The choice of the applicable law by the parties is an instrument which provides certainty and predictability. It takes into account the interests of the parties, for example, by providing them with the possibility to choose the legal system that they consider most appropriate for the content of their contract, due to its neutral character or on account of being useful for unifying the different contractual regimes. The principle of autonomy of the will in the determination of the law of the contract – freedom of choice of law – is included in section 1 of article 45 of the Model Law. This rule, which is also in line with the content of the Rome I Regulation, establishes a very liberal system of conditions for the exercise of the freedom of choice of law. Thus, it makes it possible for the choice to be made expressly as well as tacitly. Significant indications for determining a possible tacit choice are – and indeed these will have to be evaluated in the light of all of the circumstances – repeated references to specific provisions of a single legal system included in the content of the contract, as well as, in the event of a dispute, that the application and the challenge appear to be exclusively based on the law of a particular country, since the choice of the law of the contract by the parties can be made at any time. By itself, the mere designation in the contract of the courts of a country as having jurisdiction for hearing the disputes arising from the contract does not imply a tacit choice of the law of that country, even though it is one of the factors that must be taken into account when determining if the choice of the law can be clearly deduced from the terms of the contract. Furthermore, article 45 does not require the legal system chosen to be connected with the legal relationship established by the contract.

316. With regard to the time of the choice of the applicable law, article 45 considers the possibility for the parties to choose the applicable law at a later – or earlier – time than the conclusion of the contract, as well as for them to modify the legal system designated. In any case, the modification of the applicable law cannot affect the rights of third parties.

Furthermore, article 45 permits the parties to make a partial choice of applicable law, since the law that is chosen can govern “all or merely one part of the contract”. For the partial choice to be possible, there must be a reference to the part of the contract that is separable from the remainder.

Article 46. *Determination of the applicable law in the absence of choice of law*. 1. If the parties have not chosen an applicable law, or if their choice is

invalid, the law applicable to the contract shall be determined by the following provisions:

i) the contract for the sale of goods shall be governed by the law of the country where the vendor has their habitual residence;

ii) the contract for the sale of property by auction shall be governed by the law of the country where the auction takes place, if this place can be determined;

iii) the contract for the performance of services shall be governed by the law of the country where the service provider has their habitual residence;

iv) the contract relating to a right *in rem* in real estate property or the lease of real estate property shall be governed by the law of the country where the real estate property is located;

v) the contract for distribution shall be governed by the law of the country where the distributor has their habitual residence;

vi) the franchise contract shall be governed by the law of the country where the franchisee has their habitual residence;

vii) the contract mainly relating to the exploitation of industrial or intellectual property rights shall be governed by the law of the country where the rights are exploited if these rights are related to a single country; if they are related to more than one country, the law of the habitual residence of the rights holder shall apply.

2. If the contract is different from the contracts enumerated in the preceding paragraph, the applicable law shall be the law of the country where the party which must provide the characteristic performance of the contract have their habitual residence.

3. If it is clearly deducible from all of the circumstances that the contract has manifestly closer connections with a country other than the country indicated in paragraphs 1 or 2, the law of this other country shall apply.

4. If the applicable law cannot be determined in accordance with paragraphs 1 or 2, the contract shall be governed by the law of the country with which it has closer connections.

317. This provision concerns the general regime for determining the law applicable to the contracts in the absence of a choice of law by the parties.[429] Only certain categories of contracts for which a special regime is provided remain on the fringes, as is the case of the consumer contracts and individual employment contracts. The content of its rules largely corresponds to the model of article 4 of the Rome I Regulation, at the time directly inspired by its equivalent, the Rome Convention of 1968, thus in the drafting of the Regulation, important changes were

[429] P. de Miguel Asensio, "La Ley aplicable en defecto de elección a los contratos internacionales: art. 4 del Convenio de Roma de 1980", *Revista Jurídica Española La Ley*, XVI, 1995, pp. 1–7.

introduced in order to try to overcome the principal difficulties observed in the application of the article of the Convention and eliminate doubts regarding the operation of the provisions.[430]

The basic principle for determining the applicable law is the so-called principle of proximity, which is based on the application of the law of the country with which the contract has the closer connections. It is a principle characterised by its flexibility, since it generally leaves a wide margin of discretion for determining to which the country the contract is connected, in light of the circumstances of each case. This flexibility can, however, hinder the realisation of the general objective of providing legal certainty. The concept of closer connections cannot be understood to refer to strictly geographical proximity: "residence of the parties", "place where the contract was concluded", "place where the contract was executed", "place where the property or the rights under the contract are located", "market affected by the contract". Each one of these connecting factors does not have any value in itself or general scope; its weight depends on the extent of the legal and economic connection that it has regarding a particular contract, which is why their influence varies, depending on the type of contract and its nature. The most important aspect is not the geographical situation, but the degree to which this connection corresponds to the requirements of economic efficiency, legal certainty and predictability for the parties concerning the economic and legal purpose of a particular contract. For example, the conclusion of a contract is an element to be taken into account in relation to the contracts with a consumer.[431]

318. Article 9 of the Inter-American Convention of Mexico corresponds to article 4 of the Rome I Regulation. Despite adopting the same starting point, the Inter-American Convention is based on a much more flexible focus than the European model regarding the determination of the country with which contract has closer connections – far from the prevalent focus in the countries of Latin America. The Mexico Convention opted not to establish any rules to specify the principle of proximity, limiting itself to provide that: "The court shall take into account the objective and subjective elements that are deducible from the contract for determining the law of the State with which it has closer connections. It will also take into account the general principles of international commercial law accepted by international bodies".

This formulation of the Inter-American Convention supports a critical assessment inasmuch as it facilitates the determination of the applicable law by the judges (for example, the UNIDROIT Principles do not comprise any rule on the determination of the law of the contract). The inclusion of this principle is the product of the acceptance of an approach opposed to the utilisation of the conflict of laws technique for determining the legal regime of international contracts. While paragraph 1 of this article provides for the use of the conflict of laws technique, by establishing the application of the law of the State with which the contract has the

[430] CONC.: Art. 117 of the Swiss PIL Act; art. 65 of the Bolivian draft law; art. 45 of the Uruguayan draft law; art. 53 of the Colombian draft law.

[431] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Cizur Menor (Navarra), Civitas–Tomson–Reuters, 2013, pp. 561 *et seq.*

closer connections, paragraph 2 (instead of providing criteria with a view to guiding the courts in the determination of the law of the contract) takes into consideration the usages of international trade in one phase (the phase related to the specification of the applicable national legal system) in which they have practically nothing to provide. It is important to distinguish, on the one hand, the fact that the (national) law of the contract has limited practical importance, including before the national courts, and that the international rules have growing importance in the substantive legal system of international contracts, and, on the other hand, the fact that this type of rules provide solutions when comes to determining the (national) law applicable to the contract in the absence of choice of law by the parties.

Compared to the model of the Inter-American Convention, article 4 of the Rome I Regulation, as demonstrated in particular by the innovations introduced in its paragraphs 1 and 3, has preferred to reinforce the search for legal certainty in application of the criterion of the closer connections, with the objective of favouring the uniform application of its rules in all of the member States and provide greater predictability to the legal system of international contracts.

319. Article 46 of the Model Law establishes in its paragraph 1 a list of the contractual types for which it specifies the applicable law in terms of the place of the habitual residence of one of the parties to the contract or the place in which the element considered to be the determining criterion of the contract is located. This option seeks to provide greater predictability in comparison with the system of the Rome Convention, whose paragraph 1 restricted itself to establishing as a general criterion that the applicable law is the law of the country with which the contract has closer connections.

If the contract whose law has to be determined belongs to one of the categories referred to it paragraph 1 of article 46, the country whose law will be applicable will in principle be determined precisely pursuant to the rules contained in that paragraph. For example, if this concerns a contract for the sale of goods, the applicable law will be the law of the country where the vendor has their habitual residence. To satisfy the function of providing legal certainty, article 46 incorporates a broad list of categories of contracts, which includes some categories not included in the Rome I Regulation, with the objective of providing a more elaborate and precise regime. This occurs in particular regarding the inclusion of a specific provision related to the contracts principally relating to the exploitation of industrial or intellectual property rights.

320. The characteristic performance needs to be made clear only for the contracts that are not included in the categories of paragraph 1 or for those no solution is provided since they combine elements of more than one of these categories. With regard to these contracts, paragraph 2 establishes that the applicable law will be the law of the country of the habitual residence of the party that has to carry out the characteristic performance of the contract. The technique of the characteristic performance refers to contracts for which the consideration of one of the parties to the contract consists exclusively in the payment of the price; in such cases, the characteristic performance will be the performance by which the payment is owed, for it

differs from other types of contract, for it determines the essence of the contract and is subject to a more elaborate regulation. The characteristic performance plays a smaller role than in the Rome Convention, since it is only needs to be determined if the contract is not included in any of the categories of contracts mentioned in paragraph 1.

Furthermore, paragraph 3 includes an exception or correction clause, by virtue of which the law included in paragraphs 1 or 2, that is to say stipulated for each type of contract included, or, in its absence, the law of the domicile of the characteristic supplier, will not apply if it becomes obvious from all of the circumstances that the contract has clearly closer connections with a country other than the one indicated in these paragraphs. In accordance with this rule, the principle of the very close connections has a corrective function in the application of the rules of paragraphs 1 and 2. In order to reinforce legal certainty in the determination of the applicable law, the escape clause, in line with article 4 of the Rome I Regulation, is drafted in such a way to make it clear that it must operate only in exceptional cases, due to the requirement that the closer connection must be obvious and clearly result from the contract.

321. Finally, paragraph 4 establishes a closeout solution, conceived only for the cases in which the contract cannot be classified as one of the types specified in paragraph 1 and, in addition, the country of the habitual residence of the party that has to carry out the characteristic performance cannot be determined. Certainly, at times, the determination of the characteristic performance can be impossible. The paradigmatic situations are those – such as the swap – where the contracting parties exchange identical services, without either one of them taking the legal form of remuneration.

In this type of situations, paragraph 4 provides that the applicable law must be determined depending on the criterion of proximity, and establishes that the applicable law will be the law of the country with which the contract has the closer connections. If this is not specified, it will be necessary to carry out a specific analysis of the circumstances of the case. The nature, content and design of the contract must be the point of departure in the search for the more closely connected country. The Preamble to the Rome I Regulation provides the required specifications that this country has to take into account for determining, among other things, if the contract has a closer connection with other contract or contracts.[432]

Article 47. *Employment contracts*. 1. The law applicable to individual employment contract shall be law chosen by the parties in conformity with article

[432] "In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts".

45, which shall only apply insofar as it does not diminish the standards of protection of the work provided by the applicable law established in conformity with the following paragraph.

2. Employment contracts shall be governed by the law of the country where the work is usually carried out, unless it is obvious from all of the circumstances that the contract has closer connections with another country.

3. If the place where the work is usually carried out cannot be determined, the applicable law shall be the law of the country that has closer connections with the contract.

322. The inclusion of specific rules relating to applicable law for individual employment contracts responds to the need to protect the worker as the weak party of this type of contractual relations. The article has a clearly protective purpose, by introducing significant substantive limitations to the possibility of choosing the applicable law.[433] This is not ruled out, but is only lawful to the extent that the law chosen, imposed by the employer as the strong party, will only be applicable if it is favourable to the worker. The formula used for obtaining the application of the law chosen, as the more favourable law to the worker, consists in predicting the application of the mandatory provisions for protection of the law that would be applicable in the absence of choice of law (paragraph 1). In this case, the concept of mandatory provisions for the protection of the worker includes the merely mandatory rules, which cannot be derogated by contract, and consequently the choice of a different law can only lead to a legal regime more favourable for the worker and never to a less favourable one. In this sense, it is worth recalling that the content of the collective agreements form an integral part of the law applicable to the individual employment contract.

By comparison, the more elaborate and influential model in this regard is found in the European Union in article 8 of the Rome I Regulation, which corresponds to article 6 of the Rome Convention of 1980.

Based on this model, article 48 applies the general regime for determining the law applicable to international contracts established in **articles 45 and 46** to individual employment contracts. The article's ultimate purpose is the protection of the worker, by introducing significant substantive limitations to the possibility of choosing the applicable law. This is not ruled out, but is only lawful to the extent that the law chosen, imposed by the employer as the strong party, will only be applicable if it is favourable to the worker. The formula used for obtaining the application of the law chosen, as the more favourable law to the worker, consists in predicting the application of the mandatory provisions for protection of the law that would be applicable in the absence of choice of law (**article 69**). As a result, the choice of a different law can only lead to a legal regime more favourable for the worker and never to a less favourable one. In this sense, it is worth recalling that

[433] CONC.: Art. 91 of the Panamanian Code of PIL; art. 121 of the Swiss PIL Act; art. 44 of the Austrian PIL Act; art. 3118 (Cc Quebec); art. 43 of the Dominican draft law; art. 72 of the Bolivian draft law; art. 50.6º of the Uruguayan draft law; art. 55 of the Colombian draft law.

the content of the collective agreements form an integral part of the law applicable to the individual employment contract.

The law designated in the absence of a choice of law has a twofold function. In itself, it designates the law applicable to the employment contract without choice of the applicable law. Indirectly, it determines the minimum protection framework of the worker which cannot be derogated by the rules established in the choice of the law.

323. The determination of the applicable law needs to distinguish between two hypothetical cases. In the first case, if the worker usually performs their work in a country, even if they have temporarily performed their work in a different place, the law of the place where the work is performed will apply. This place, therefore, is interpreted as the principal place of performance of the worker. Equivalence is achieved between jurisdiction and applicable law. Secondly, if the habitual place of performance is understood as the "destination" of the work performance, it cannot be determined. The connection can exist by taking into account the "origin" of the performance, namely, the place from where the worker has usually performed their work, as is the case of airline crews and other workers.[434]

324. Consequently, although article 47 admits the possibility of choice of the applicable law in individual employment contracts, it does this by imposing significant restrictions to this possibility. In particular, the law chosen by the parties will only apply to the extent that this does not diminish the standards of protection of the worker established in the law applicable in the absence of a choice of law.

It is a criterion which, in order to satisfy the substantive objective, namely to ensure adequate protection to workers, imposes the requirement to assess the content of two legal systems, in such a way that the law chosen by the parties will only be applicable if it is more favourable for the worker. Consequently, the rules on the determination of the law applicable in the absence of a choice of law are determining factors for the contracts referring to a legal system that establishes the minimum standard of protection favourable for the worker.

325. The rules on the determination of the applicable law in the absence of a choice of law are based on the distinction between two types of situations. In the cases in which it is necessary to identify a country in which the work is usually performed, it will be this element that is used for locating the relationship for the purpose of determining the applicable law. This criterion must be the main criterion in accordance with the principle of proximity. In conformity with paragraph 3, when the place where the work is traditionally performed cannot be determined, the law applicable will be the law of the country that has the closer connections with the contract.

[434] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Cizur Menor (Navarra), Civitas–Tomson–Reuters, 2013, pp. 578 *et seq*.

The place of performance of the work has is a pre-eminent connecting factor in this article, and consequently this must be interpreted broadly and in the light of all of the circumstances, which does not make it easier to determine the place of performance of the work, including when this is usually carried out in more than one place. In addition, an exception clause is incorporated, which leads to the application of other legal system if it emerges from all of the circumstances that the contract has closer connections with another country. Despite the objective of protection of the worker inherent to the special rule concerning individual employment contracts, the operation of the exception clause will be regardless of substantive requirements. Certainly, that clause is based on reasons of proximity, and consequently, this does not guarantee that its application leads to the application of the more favourable law for the worker.

326. As regards the interaction between the priority connection namely the habitual workplace and the exception clause, which provides for the application of the law of another country if it emerges from all of the circumstances that the contract has closer connections with this other country, it should be pointed out that unlike the exception clause included in the general provision on the law applicable to the contracts, the clause introduced in this article concerning individual employment contracts does not incorporate in its text the word "manifestly".

As was highlighted in the interpretation of the Rome I Regulation, this difference is connected with the fact that the rules on the employment contract were simultaneously inspired by the idea of proximity and the idea of protection of the worker, in such a way that there is no completely neutral conflict rule which fundamentally pursues an objective of predictability and legal certainty. Among the significant connecting factors that can be relevant for determining what country has the closer connection with the employment contract, and for specifying whether the exception clause must be operated, the country in which the worker pays the taxes on the income from their activity on behalf of another and in which they are registered for social security should be specified.

Article 48. ***Contracts concluded by consumers*****. 1. Contracts concluded between a consumer and a professional or contractor, who, by any means, direct their commercial activities towards the country of the consumer's habitual residence, and falling within the context of those activities, shall be bound by the following provisions.**

2. The choice of the law applicable to such contracts by the parties may not diminish the standards of protection of the consumer provided in the law of the consumer's habitual residence.

3. The law applicable to the contract in the absence of a choice of law in accordance with article 45, shall be the law of the country in which the consumer has their habitual residence.

4. The rules contained in the above paragraphs shall apply to insurance contracts.

327. For the consumer contracts which satisfy the conditions that determine the application of the special regime, article 48 is inspired by the model of article 6 of the Rome I Regulation. Thus, unlike the regime applicable to contracts in general, in accordance with paragraph 3, the law applicable in the absence of choice of law will be the law of the country in which the consumer has their habitual residence.[435] Furthermore, although it is admitted that the parties can choose the applicable law, this choice cannot diminish the protection provided to them by the mandatory rules of the country of the consumer's habitual residence.

The solution proposed corresponds to a model based on respect for the standard of protection of the regulation on consumer protection in the country of the consumer's domicile in international contracts, in which the consumers are captured in their domestic market. The increase in recourse to that criterion may be explained, among other things, for economic reasons. Indeed, it is traditionally considered that the consumers only occasionally act in an international transaction while the professionals usually do. It is thus logical that they should assume the costs related to the verification of the content of the foreign legislation. It has been stressed that, contrary to the idea traditionally defended by the industry, the solutions of private international law based on the application of the law of the consumer's domicile (whether or not combined with the possibility of choosing another country's law as the applicable law as long as this does not diminish the rights attributed to the consumer by the law of their domicile) are the solutions which contribute to a greater extent to the development or cross-border electronic trade.

328. The protective regime established by this rule only operates if the professional or the contractor carries out commercial or professional activities in the member State of the consumer's domicile, or if, by any means, directs their activities to this State and the contract was established in the framework of these activities. This paragraph is specifically intended to provide a response to the requirements of Internet commerce, but the interpretation of this rule, as demonstrated by the European practice, can be complex.

It follows from the text of the rule that the protective regime is applicable to the consumer contracts concluded through active websites that direct their activities to the State of the consumer's domicile to the extent that a contract has been concluded with this consumer through this site. On the other hand, it appears clear that the mere fact that the merchant's web pages are accessible from the State of the consumer's domicile is not sufficient, in the light of the present text, to guarantee the protection of the consumer.

[435] CONC.: Art. 95 of the Panamanian Code of PIL; art. 114 of the Swiss PIL Act; art. 3117 (Cc Quebec); art. 41 of the Austrian PIL Act; art. 44 of the Dominican draft law; art. 71 of the Bolivian draft law; art. 50.5º of the Uruguayan draft law; art. 56 of the Colombian draft law; art. 6 of Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

329. In the framework of article 48, including in the international consumer contracts to which the protective rule is applied, the parties are in principle free to choose the law of the contract, although the law chosen is only applied to the extent that its content does not deprive the consumer of the protection ensured by the mandatory provisions of the law of the country in which they have their habitual residence. Consequently, the possibility for the parties to choose any law as the law of the contract must be affirmed.

A complete exclusion of the freedom of choice of law for this type of contracts could prove to be counterproductive, since this would oblige professionals to pay renewed attention to the clauses of their contracts and the insertion – so frequent in practice – of a clause on the applicable law would not permit a homogenisation of the contracts. Indeed, this would not be valid even regarding the aspects that remain outside of the scope of the mandatory rules of protection of the consumers. Furthermore, the exclusion of the possibility of choosing the applicable law in practice could have a negative impact on the position of the consumer, since the law chosen in the context of the solution adopted here can only be operated to the extent that it provides a protection more favourable for the consumer.

Article 49. *Scope of the applicable law*. The law applicable to the contract pursuant to the provisions in the preceding article includes in particular:

i) their interpretation;

ii) the rights and the obligations of the parties;

iii) the performance of the obligations established by the contract and the consequences of non-performance of the contract, including assessment of injury to the extent that this may determine payment of compensation;

iv) the various ways of extinguishing obligations, and prescription and limitation of actions;

v) the consequences of nullity or invalidity of the contract;

vi) the acquisition and loss *inter partes* of a right *in rem* real in the terms of article 58.2.

330. This rule determines all of the matters governed by the law applicable to the contract and is inspired by the provisions of article 12 of the Rome I Regulation. A similar rule is found in article 14 of the Inter-American Convention on the Law Applicable to International Contracts, done in Mexico on 17 March 1994, in the framework of the Fifth Inter-American Specialised Conference on Private International Law (CIDIP-V), which basically reproduces the provisions in the rule on the

scope of application of the law of contract in the Rome Convention of 1980 on the law applicable to contractual obligations, a forerunner of the Rome I Regulation.[436]

First of all, it should be pointed out that three functions are assigned to the law applicable to the contract concerning the conflict rules. Specifically, these functions are firstly, to confer binding force to the agreement and stipulate the conditions for its existence; secondly, to establish the mandatory framework of the contract, within which the autonomy of the contracting parties operates; and thirdly to provide criteria for interpretation and the supplementary regime to the contract regarding matters not provided by the parties.

331. The law of the contract has a general application, in such a way that the enumeration of matters contained in this provision is not exhaustive but merely illustrative. The *lex contractus* governs:

i) The formation of the contract, its existence and its substantive validity, both at the level of breaches of consent (error, fraud, intimidation, simulation, etc.) as well as at other levels (unlawfulness of the subject matter, unlawfulness or inexistence of cause, etc.) and its nullity.

ii) The content of the contract, the obligations of each of the parties, the cases of non-fulfilment as well as their consequences, such as its possible termination, the regime of accidental elements, the effects of the contract. The article also provides that the execution of the obligations established by it, including the determination of damages, will be governed by the law of the contract and to do this it provides for the assessment of the loss to the extent that this will make it possible to determine the amount of damages. The law of the contract is the law that determines if the parties have fulfilled their obligations.

iii) The criteria for the interpretation of the contract, in addition to the supplementary regime in relation to the aspects not provided in the contract.

iv) The validity of the agreements concluded between the contractual parties (substantive autonomy), the ability to rescind contracts and the clauses or conditions that are considered null and void or deemed to be unwritten.

v) The amendment and termination of the contract, and the conditions of its novation. This article expressly specifies that it includes the prescription and forfeiture of claims. The specific provisions regarding form and incapacity are indicated at these two points in the following articles.

332. The present provisions are not extended to other issues that might be connected to the acquisition, transfer or extinction of rights *in rem*, even between the parties to the contract. As a consequence, matters relating to the transfer of property in a

[436] CONC.: Art. 96 of the Mexican draft law.

contract for sale will be determined in accordance with the law governing the rights *in rem*, established in our system based on the rules provided in **article 58.2** of the Law.

Article 50. *Incapacity*. In contracts concluded between persons who are in the Caribbean, natural persons who have legal capacity under Caribbean law may only invoke their legal incapacity resulting from the law of another country if, at the time of conclusion of the contract, the other party to the contract had known of such incapacity or had ignored it due to negligence on its part.

333. In international situations, the capacity to enter into contract is treated differently than the other provisions of the contract. Indeed, it must comply with the private international law rules on legal capacity, which reflects the traditional consideration of this question as a matter related to persons. Thus, for example, in comparative law, it should be pointed out that paragraph 2.a) of article 1 of the Rome I Regulation expressly provides that its rules on the law applicable to contracts shall not apply in relation to the legal capacity of natural persons to enter into a contract.

334. However, in order to protect the security of legal relationships, good faith and, in particular, the reasonable expectations of persons who enter into a contract in their own market with foreigners – or with persons residing abroad – who visit this market, a specific rule has been developed, which revises the general principle in certain circumstances. This specific rule is inspired by the provisions of article 13 of the Rome I Regulation, similar to those previously established in article 11 of the Rome Convention.

This article has been drafted to protect any person who has reasonably believed in good faith that they were concluding a contract with a natural person with legal capacity and who subsequently sees the validity of the contract challenged due to this natural person's lack of legal capacity based on a lack of legal capacity unknown in the legislation of the country where the contract has been concluded. This provision permits, when certain circumstances occur, that one of the contracting parties will be able to take advantage of the other party's apparent legal capacity if they have legal capacity according to the law of the place where the contract is concluded.

For this protection mechanism to operate, essentially two assumptions are required. Firstly, the contract must have been concluded between persons who are in the same country. Secondly, the application of the special rule requires the existence of disparities between the rules relating to legal capacity in the law of the country where the contract was concluded and the law applicable to legal capacity under the private international law of the forum.

Article 51. *Form*. 1. A contract concluded between parties in the same State shall be valid, as regards the form, if it fulfils the requirements established in the law that governs such contract according to the preceding articles or those laid down in the law of the State where it is concluded.

2. If the persons are in different States at the time of the conclusion of the contract, this shall be valid as regards the form if it fulfils the requirements established in the law that governs the contract or those provided by the law of the place where the offer or the acceptance is made.

335. Insofar as the formal requirements, as a prerequisite of validity of certain contracts, may vary from one legal system to another, the private international law systems have developed specific rules on the law applicable to the formal validity of the contracts, in order to facilitate international relations. To do this, these rules basically admit that the international contracts are valid as regards the form provided that they fulfil the requirements in this regard of the law of the contract or of any other legal system, typically of the place where the parties make their declarations of will to enter into a transaction, which will facilitate the monitoring of the fulfilment of such requirements.

336. In accordance with its first paragraph, when the contracting parties are in the same country, the contract will be valid as regards the form if it fulfils the requirements of the law that governs it as regards the substance or the law of the country in which the contract was concluded. The applicable law as regards the substance or the law of the contract must be understood as the law that will govern the contract if this was formally valid. In accordance with the objective of ensuring the formal validity of the contracts, in the case of contracts concluded between persons who are in different countries (for these purposes, if the contract is concluded through a representative, the relevant information is where they are when entering into the contract), the second paragraph considers it to be sufficient for it to be valid as regards the form that the contract fulfils the requirements of the law of any one of those countries, or of the law of the contract, or of the law of the country where any one of the parties had their residence at that time.

Section VI

Non-Contractual Obligations

Article 52. *General rule*. 1. The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law chosen by the perpetrator and the victim. The choice of the applicable law must be express or be evident from the circumstances of the case.

2. Failing that, the law of the country where the damage occurs shall apply, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur; however, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in the preceding paragraphs, the law of that other country shall apply.

337. The question of the law applicable to non-contractual obligations has been a greatly discussed topic and a cause of confrontation between the Romano-Germanic and *common law*[437] systems, which is why it is necessary to justify the option adopted in the present article: leaving aside the favourable theses for applying the *lex fori* to non-contractual civil liability in general,[438][439] and focusing on the problem of the law applicable to civil liability resulting from the offence, it has been considered, in this specific type of wrongful acts, that a significant connection exists between the penal and civil aspects, and, therefore, that the same law must be applied, the law of the forum, to both of them alike. This reasoning rests upon a conception of the wrongful civil act parallel to that of the wrongful penal act, where the element of apportionment of blame or moral reproach to the perpetrator

[437] In the Caribbean, the case *Viuda de Fornaris v. American Surety Company,* 93 D.P.R. 29 (1966) is an important case which affected the new Puerto Rican jurisprudential trend. It is similar to the case *Babcock v. Jackson*, 19 N.E.2d 279 (1963), ruled by a New York court, which marks the beginning of the "*revolution*" in conflict of laws in the United States. The case *Viuda de Fornaris* involved four Puerto Rican citizens who died on their trip back from Saint Thomas when the private plane they travelled on, piloted by its owner, crashed in the waters of Saint Thomas. The plane was registered in Puerto Rico and remained parked there regularly. During their legal action for so-called illegal murder, the defendants invoked the ten thousand dollar ceiling established by the law of Saint Thomas in compensation for illegal murder. Later, they pointed out that neither the Puerto Rican Civil Code nor its predecessor, the Spanish Civil Code, provided a rule of private international law on damages. The Supreme Court of Puerto Rico recognised that Spanish jurisprudence had adopted the rule *lex loci delicti* in order to resolve such conflicts. However, basing itself on the work of Spanish specialists, the Court explained that the adoption of this rule was based on the presumption – contested in this case – that the *locus delicti* was the "major point of connection" and that it is "in the greatest interest" of the State where the *delicti* occurred "that the illegal act is not committed, or if it is, that due compensation for damages be paid". *Viuda de Fornaris*, *ante*, p. 31. Given the various and predominant connections that Puerto Rico has with the case, this presumption was dismissed and it was concluded that the applicable law was the law of Puerto Rico.

[438] CONC.: Arts. 132 and 133 of the Swiss PIL Act; art. 99 of the Belgian Code of PIL; art. 62 of the Italian PIL Act; art. 33 of the Polish PIL Act; art. 49 of the Dominican draft law; arts. 99 *et seq.* of the Mexican draft law; art. 73 of the Bolivian draft law; art. 52 of the Uruguayan draft law; art. 62 of the Colombian draft law.

[439] At the time, H. Mazeaud had claimed that the French rules on liability in tort, delict or quasi-delict were *lois de police*, in the sense of art. 3.1 of the French Civil Code and that, as a result, it was necessary for French Courts to always have jurisdiction ("Conflits des lois et compétence internationale dans le domaine de la responsabilité civile délictuelle et quasi–délictuelle", *Rev. crit. dr. int. pr.*, 1934, pp. 382–385).

would be decisive.[440] Consequently, a complete parallelism between the special application of penal and civil rules cannot be generally assumed, even if these are applied by the same jurisdiction:[441] the connection between the civil action and the penal action is exclusively procedural, but by no means does this imply a change in the nature of the civil action and, therefore, the application of a different law depending on whether the civil action is brought in isolation or together with a penal action would not be justified.

Different conventions applicable to certain wrongful acts exist: some of these belong to uniform substantive law and others contain bilateral conflict rules. The paradigm in this area is the Hague Conventions of 4 May 1971, on the Law Applicable to Traffic Accidents, and of 2 October 1973, on the Law Applicable to Products Liability. The countries in the OHADAC area have not adhered to these instruments, which justifies the relevance of the establishment of an *ad hoc* rule.

338. In line with the more advanced codifications, regarding non-contractual obligations, the parties are given the possibility of choosing the applicable law. The expansion of the freedom of choice of law in this area corresponds to the fact that, at the substantive level, non-contractual liability is typically based on the freedom of disposition of the parties. Also from the jurisdictional perspective, the parties are free to choose the competent court in this matter. In view of the significance of the freedom of choice at the substantive level and the significance of the freedom of choice of law as a mechanism for providing predictability and legal certainty to the private international relationships, it is undoubtedly justified to configure the freedom of choice as the main criterion for determining the applicable law.

In principle, the provision does not set limits concerning the law to be chosen, since it does not require that the choice must refer to the *lex fori* or to a legal system with which the non-contractual obligation is in some way connected. The parties are therefore free to choose the law of any country as applicable. With regard to the agreement of choice of the applicable law, the rule is limited to establishing that the choice must be express or result with reasonable certainty from the circumstances of the case.

339. Despite being configured as the main connecting factor, it is clear that, in the area of non-contractual obligations, freedom of choice of law has much less practical significance than in the area of contractual obligations, in which the existence, typically, of a previous agreement between the parties, which underlies their relationship, makes it easier for the interested parties to be able to reach an agreement concerning the law applicable to this agreement at the outset.

The admission of freedom of choice of law takes place in the scope of non-contractual obligations with certain additional limits, such as the exclusion of certain matters from freedom of choice of law, as is the case of the law applicable to

[440] *Cf.* O. Kahn–Freund, "Delictual Liability and the Conflict of Laws", *Recueil des Cours*, 1968–II, pp. 20–22.

[441] G. Beitzke, "Les obligations délictuelles en droit international privé", *Recueil des Cours*, t. 115, 1965–II, pp. 73–75).

liability resulting from acts of unfair competition, acts restricting competition and the breach of intellectual property rights. These are areas of the legal system in which the connecting factors used, the principle of the effects in the market and the *lex loci protectionis* rule are imperative, given the objectives that they pursue, the characteristics of the object being regulated and the public or collective interests involved.

340. In the absence of choice of the applicable law by the parties and each time it involves a situation not in accordance with any of the rules related to specific matters, the law applicable to a non-contractual obligation resulting from a harmful event is determined in accordance with the provisions in paragraphs 2 and 3, substantially inspired by article 4 of the Rome II Regulation, which contains the harmonised regulations in this area in the EU. In particular, paragraph 2 establishes what may be called the "general rule". These are rules that respond to a previously well-defined guideline and structure, in the sense that they are based on the duality between the rule and its exception. It consists of three paragraphs: the first establishes as a basic criterion the application of the *lex loci damni*; the second introduces a differentiated treatment for the situations in which the parties have a common habitual residence; and the third contains an exception clause based on the criterion of the closer connections, which opens up the possibility of applying a law other than that designated in paragraphs 1 and 2.

In the absence of a common habitual residence, since paragraph 2 prevails when the person liable and the party sustaining loss or damage reside in the same country, the applicable laws is the law "of the country where the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur". This connecting factor aims to determine precisely the applicable law, on the one hand, in the cases in which there is a dissociation between the place of origin or the place or places where the conduct or the event which causes the damage occurs and the place where the damage occurs, and on the other hand, in the cases in which the direct damage is accompanied by other indirect or resulting damage.

341. Concerning the *lex loci damni* rule, the criterion of the common habitual residence prevails, since this is the applicable connecting factor when the person claimed to be liable and the person who has sustained damage have their habitual residence in the same country at the time when the damage occurs. In practice, this rule may facilitate above all the application of law of the forum in situations occurring abroad which involve various residents of the forum.

Both the law of the place where the damage occurred as well as that of the common habitual residence may be replaced by that of another country when the requirements for the operation of the correction clause of its paragraph 3 are met, in particular, when it is clear from all the circumstances that the tort/delict has manifestly closer connections with another different country. It is an exception clause, which introduces flexibility based on the principle of proximity, even though it is worded, in line with the content of the Rome II Regulation, in such a manner that

gives rise to the exceptional nature of this possibility, by requiring that the connections are “manifestly” closer, which implies that the greater connection with another legal system has to be evident. The wording of the rule highlights the exceptional nature of this mechanism.

Article 53. ***Liability for damage caused by defective products*****. 1. The law applicable to a non-contractual obligation arising out of damage caused by a product shall be:**

i) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country;

ii) failing that, the law of the country in which the product was acquired, if the product was marketed in that country;

iii) failing that, the law of the country in which the damage occurred, if the product was marketed in that country;

iv) failing that, the law of the country in which the liable party's premises are located.

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in the preceding paragraph, the law of that other country shall be applied.

342. This provision incorporates a specific legal arrangement relating to the law applicable to liability for defective products, in line with the international experience which recommends specialisation in this area, as particularly illustrated in the Hague Convention on the Law Applicable to Products Liability, of 2 October 1973, drawn up in the framework of the Hague Conference, as well as article 5 of the Rome II Regulation.[442]

343. The system adopted is based on the establishment of a cascading series of connecting factors combined with an exception clause based on the criterion of proximity. In addition, it should be stressed that prior to the successive connections provided in this rule, the law chosen by the parties in accordance with **article 52.1** will preferably be applied.

In the absence of a choice of the applicable law by the parties, article 53 firstly leads to the application of the law of the country where the person who has sustained damage had their habitual residence at the time when the damage occurred, if the product was marketed in that country. If this is not the case, the law of the country in which the product was acquired will be applied, if the product was marketed in this country. Failing that, the law of the country where the damage occurred will be applied, if the product was marketed in that country. Finally, failing that, the article provides for the application of the law of the country where the liable party's premises are located.

[442] Art. 3128 (Cc Quebec).

344. Finally, paragraph 2 includes a correction clause, under which, if it is clear from all the circumstances that the harmful event has manifestly closer connections with a country other than that indicated in the rules of paragraph 1, the law of this other country will apply.

Article 54. ***Unfair competition and acts restricting free competition*****. 1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.**

2. The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

3. The acts of unfair competition that affect exclusively the interests of a specific competitor shall be governed by the general rule of article 52.

4. It shall only be possible to choose the applicable law in accordance with article 52.1 in relation to the economic consequences for the parties arising out of these non-contractual obligations.

345. These provisions are based on the application of the so-called criterion of the effects on acts of competition and, in particular, on non-contractual liability arising out of this, which has been linked to the appearance of specific rules on the applicable law for the practices of unfair competition and acts restricting competition, which are different from the general rule on the law applicable to non-contractual obligations, which clarifies what is the law applicable to these cases, as particularly reflected in article 6 of the Rome II Regulation.

This evolution corresponds to the function of the legislation on unfair competition and on acts restricting competition, which is different from that which characterises the entire non-contractual civil liability, focusing on individual reparation for damage sustained. Concerning unfair competition, the protection of the collective interests of the market participants (including consumers) as well as the general interests in a unitary planning and in its good functioning are key factors.[443]

346. Therefore, the market constitutes a determining element for identifying the country whose legislation on unfair competition and on acts restricting competition is applicable. The application of the law of the market in which the competitors act for attracting clients is appropriate for the expectations of any persons who have sustained damage, whilst guaranteeing the equal treatment between the economic agents of each market. The basic principles of the criterion of effects in the market include the principle of seamless protection of the consumers in the national market

[443] CONC.: Arts. 136 and 137 of the Swiss PIL Act.

as well as the guarantee of equal conditions of competition in that market, which is related to what has traditionally been assigned an imperative nature.

Under article 54 of this Model Law, similar to the solution reached in the framework of the EU in article 6 Rome II Regulation, the law applicable to a non-contractual obligation resulting from an act of unfair competition is that of the country in whose territory the competitive relations or the collective interests of the consumers are or may be affected. In the same vein, the law applicable to a non-contractual obligation resulting from a restriction of the competition will be the law of the country where the market is or may be affected.

347. The law applicable to unfair competition and to acts restricting competition governs the cases and consequences of illegal competitive practices. The law of the affected market generally determines if an illegal competitive practice exists and what are its consequences. It includes: unlawful practices; the cases of liability and their extent; the determination of the liable persons; the causes of exoneration, limitation and extinction of liability; the existence and evaluation of compensable damage; as well as the classes of actions that may be brought against the acts of unfair competition and illegal advertising and the cases in which they are brought.

When the dispute concerns the breach of regulations of unfair competition principally intended to protect the position of the competitors (acts of defamation, imitation, exploitation of the reputation of another, and inducement of breach of contract), the relevant market tends to be the one in which the competitors' interests come into conflict, typically the market in which the products or services were advertised or marketed through the unfair practices. Also, when the unfair practices fundamentally affect the general interest in the correct functioning of the market (as in the cases of discrimination or sales at a loss) this must be specified with a focus on the market towards which the competing practices in question are oriented.

348. Paragraph 3 introduces a specific treatment with regard to the law applicable to acts of unfair competition that exclusively affect one competitor's interests in particular, considering that in those cases the essential aspect of the conduct is its impact on the relations between the parties involved and especially on the position of the person who has sustained damage. Acts of unfair competition not oriented towards the market but focusing on one competitor's domestic sphere are typically acts in breach of secrecy and inducement of breach of contract, including the acts of disruption of a rival company through the unlawful recruitment of their workers. The special rule provides that in these cases the criterion of effects will not be applied but the general regulation on the law applicable to non-contractual obligations. The applicable law will be the law of the place where the damage occurred, even though if the person liable and victim have their residence in the same country the applicable law will be that of their common habitual residence, and in addition, the law of another country with which the situation is manifestly more connected may be applied.

In addition, the proposed solution, deviating from the solution adopted in the framework of the Rome II Regulation, affirms in its paragraph 4 the possibility that

in these cases the freedom of choice of law operates with regard to the consequences on the property between the parties, based on the provisions in **article 52.1**.

Article 55. *Environmental damage*. The liability for environmental damage shall be governed, at the choice of the victim, by the law of the place in which the damage occurred or of the place in which the event giving rise to the damage occurred.

349. This provision contains a particular rule on the law applicable to non-contractual obligation resulting from environmental damage, inspired by the rule on the matter of the Rome II Regulation, which constitutes a very advanced model in this area. By environmental damage in the Rome II Regulation, according to recital 24 of its preamble, should be understood as meaning the adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or prejudice to the variability to the biodiversity for the benefit of another natural resource or the public, or prejudice to the impairment among living organisms.

350. The specific rule aims to favour the victim, providing them with the authority to opt for the legal system that is more favourable to them in the typical cases of cross-border contamination, where there is dissociation between the place of origin and the place of the damage.

Towards this end, the rule provides that the applicable law will in principle be that of the place in which the damage occurred (in accordance with the general criterion of **article 52.2**), but the person who claims the compensation for the damage is given the possibility to base their claims on the law of the country in which the event giving rise to the damage occurred. This criterion determines that anyone who is established in a country with an inferior level of environmental protection and contaminates in nearby countries with higher standards of protection may be held liable based on this.

Section VI

Non-contractual obligations

Article 56. *Infringement of intellectual property rights*. 1. The law applicable to the non-contractual obligation resulting from an infringement of an intellectual property right, including industrial property rights, shall be the law of the country for which the protection is sought.

2. It shall only be possible to choose the applicable law in accordance with article 52 in relation to the economic consequences resulting from these non-contractual obligations for the parties.

351. Among the common characteristics of industrial and intellectual property rights, their territorial nature has historically and particularly been the determining factor of the law applicable to these rights. The intangible nature of these properties, which permit their simultaneous utilisation in different places, together with their territorial nature, justify the use of the specific criteria for determining the applicable law. These criteria do not have to be consistent with those used with regard to tangible property or those used for non-contractual obligations in general. Due to the limited territorial scope of industrial and intellectual property rights, they may only be infringed by activities carried out in the corresponding territory where they benefit from protection or directed at the same territory, since the exclusive position attributed by them only relates to the territory of the State (or the supranational entity) that grants it or whose legislation establishes that specific right.

These essential traits of the internationally accepted industrial and intellectual property rights are determining factors for the *lex loci protectionis* criterion, which is common to practically all of the States for determining the law applicable to the protection of registered industrial property rights. The different private international law systems tend to coincide in that the law applicable to the protection of these rights is the law of the territory for which the protection is sought, although the formulation of the conflict rule in this area is sometimes merely unilateral or lacking in precision, in particular in its apparent reference to the country "in which the protection is sought" or by the absence of a specific rule on the law applicable to the protection of the industrial and intellectual property rights. The criterion of the law of the country where the protection is sought has been welcomed concerning industrial and intellectual property in the majority of modern private international law legislations, whilst it is also accepted in systems that do not have a specific conflict rule regarding the infringement of such rights in their legislation.

352. The multilateral formulation of article 56.1 makes it clear that the law on the protection does not necessarily coincide with the *lex fori*, insofar as the courts of the forum are competent to judge the infringement of foreign intellectual property rights. By applying in each case the law of the country for which the protection is sought, the conflict rule leads to the application of the legislations of all those countries, when an action relates to the breach of rights in a plurality of countries. This circumstance is related to the territoriality and characteristic independence of these rights.

In keeping with the structure of the legal text, the intent and purpose of this rule is limited, since it relates to non-contractual obligations resulting from the infringement of an intellectual property right. Indeed, the other aspects of the regime of these rights are excluded, but are covered by **article 61**, which governs the law applicable to all other aspects of intellectual property rights, also providing that they will be are governed by the law of the country for which the protection is sought.

353. The rationale behind the *lex loci protectionis* rule determines that in the area of protection of intellectual and industrial property the connecting factor in principle has a mandatory nature and the possibility that the parties choose the applicable law is excluded. It is not controversial, for example, that for determining what exclusive rights are protected, what their content is and what activities constitute infringing acts, the *lex loci protectionis* must be applied in all cases, without the parties being able to designate a different legal system as applicable. Notwithstanding the above, the tendency to favour the freedom of choice of law in the scope of non-contractual obligations has been attached, in certain countries, to the recognition of a certain scope of the freedom of choice of law concerning the infringement of intellectual and industrial property rights. From the comparative perspective, article 110 paragraph 2 of the Swiss Private International Law Act of 1987 represented a significant innovation in this respect, which has been developed subsequently in Belgian and Dutch legislation.

In line with the solution adopted in relation with the law applicable to non-contractual obligations resulting from acts of unfair competition and acts restricting free competition, paragraph 2 considers the possibility that the freedom of choice of law operates in these cases, but only with regard to the economic consequences for the parties of the infringement of rights. The rationale for admitting the freedom of choice is that it is an appropriate instrument – although with limited practical relevance – for providing legal certainty to this type of disputes and, within those limits, corresponds to the power of freedom of disposition enjoyed by the parties at the substantive level without undermining the general interests present in the regulation of this area or the requirements derived from the national treatment principle. As a consequence, it follows from the provisions in **article 61** that the *lex loci protectionis* maintains its character as an unrepealable mandatory conflict rule for the parties with regard to the existence and all other aspects related to the protection of industrial and intellectual property rights, their duration, validity, ownership, content, etc. Only the *lex loci protectionis* determines, in particular, whether or not the infringement has taken place. It is an approach which is coherent with the rationale of the *lex loci protectionis* rule and the interests involved in this area of the legislation.

Article 57. *Scope of the applicable law*. The law applicable to non-contractual obligations shall govern in particular:

i) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

ii) the grounds for exemption from liability, any limitation of liability and any division of liability;

iii) the existence, the nature and the assessment of damage or the remedy claimed;

iv) the measures for ensuring the prevention or termination of injury or damage or to ensure the provision of compensation;

v) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

vi) persons entitled to compensation for damage sustained personally;

vii) liability for the acts of another person;

viii) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

354. This rule determines all of the matters governed by the law governing non-contractual obligations under the conflict rules established in this Section VI. The enumeration of matters that it incorporates is not intended to be exhaustive, as is clearly reflected by the inclusion beforehand of the expression "in particular".

The enumeration is of great importance for the definition of the scope of the conflict rules of this section with other rules on applicable law contained in the Model Law on related matters.[444] For example, it is a key factor for defining the scope of the rule of **article 56** on the infringement of intellectual property rights with regard to the rule on intellectual property rights established in **article 61**, relating to Section VII on Property.

355. A provision of this kind is well known in the most advance instruments in the area of non-contractual obligations. As precedents, article 8 of the Convention on the Law Applicable to Traffic Accidents of 4 May 1971 and article 8 of the Convention on the Law Applicable to Products Liability of 2 October 1973, developed in the framework of the Hague Conference on Private International Law may be cited. Another precedent of a similar rule is found in article 15 of the Rome II Regulation on the Law Applicable to Non-Contractual Obligations, which consolidates this matter in the European Union.

356. The initial criterion is that the all of the questions within the regime of non-contractual obligations will be determined by the conflict rules of the present section. Despite the merely indicative nature of the list, it has been decided to include a comprehensive account that favours the didactic value of the rule and its meaning as a reference for the person who will apply it.

Among the questions which form the nucleus of the matters regulated by the law applicable to contractual obligations are matters related to the determination of whether or not liability exists, to what extent, and to what persons it is imputable. It explains that the rule makes express reference to the basis and scope of the liability, as well as to the determination of the persons liable – for their own acts or for the acts of another person – and to the possible extent or limitations of liability.

[444] CONC.: Art. 142 of the Swiss PIL Act; art. 53 of the Uruguayan draft law.

357. Another set of issues included are those related to the consequences resulting from the existence of liability, such as the measures for ensuring the termination of injury or damage and the provision of compensation, in particular those concerning injury and damage or compensation, which include persons entitled to compensation, which may be a determining factor for bringing actions for compensation and whether such rights may be transferred.

Finally, by providing that the manner in which obligations may be extinguished, as well as the prescription and limitation rules, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation, it is clear that these questions must be categorised as substantive matters and not procedural matters, so that they are determined by the law applicable to non-contractual obligations and not necessarily by the law of the forum as the law applicable to the proceedings.

Section VII

Property

Article 58. *Possession and rights* in rem. 1. The possession, ownership and other rights in rem in movable and immovable property, as well as well as their publication, shall be governed by the law of the State where the property is located.

2. The same law shall govern the acquisition, alteration and loss of possession, ownership and other rights *in rem*, except in respect of matters of succession and in cases in which the attribution of a right *in rem* depends on a family relationship or a contract. It shall be understood that the place where the property is located shall be that where the property subject to the right is located at the time when the act giving rise to these legal effects occurs.

358. The present provisions have two clearly separate paragraphs. The first establishes the conflict rule and its basic scope of application. The second paragraph establishes that the scope of application of the regulation comprises all other matters that must be considered to belong to rights *in rem*, whilst providing solutions for defining the conflict rules governing other related matters, such as contractual, inheritance or family[445] matters. In addition, the second paragraph provides a specific rule related to the connecting point in order to provide a response to the problem of the so-called "change of connecting factor", which is particularly important in relation to the rights *in rem* in movable property.

[445] CONC.: Art. 99 of the Swiss PIL Act; art. 3097 (Cc Quebec); art. 87 of the Belgian Code of PIL; art. 31 of the Austrian PIL Act; art. 41 of the Polish PIL Act; art. 55 of the Dominican draft law; art. 54 of the Bolivian draft law; art. 39 of the Uruguayan draft law; art. 49 of the Colombian draft law.

359. In the comparative view, the adoption of the *lex rei sitae* rule as the conflict rule in the area of rights *in rem* in tangible property, both immovable as well as movable, is almost universal. In the case of immovable property, this conflict rule corresponds to the existence of a particular interest of the State related to the concept of territorial sovereignty of the State in relation with its resources and, in particular, its immovable property. In addition, it favours the *forum ius* correlation in this area, in which the provision of exclusive competences at the jurisdictional level is typical. The application of the same rule to movable properties benefits from economic efficiency criteria and is particularly important in relation with the performance of its organising role of the market.

In accordance with paragraph one, the *lex rei sitae* rule governs what rights *in rem* may be created in a property, as well as their effects vis-à-vis third parties, including their publication, which is typically a condition of effectiveness of the right *in rem* vis-à-vis third parties.

While the *lex rei sitae* governs the acquisition, alteration and loss of the various rights *in rem*, the second paragraph specifies that this is not the case when such circumstances result from a succession – insofar as it must be determined in accordance with the rules on the law applicable to successions – or in the cases in which the attribution of a right *in rem* will depend on a family relationship or a contract, or situations which will be regulated by the conflict rules applicable in those matters.

360. The final part of the second paragraph incorporates a regulation on clarification of the connecting factor of the place where the property is located for addressing the cases of change of connecting factor, which is particularly important in relation with the regime of the rights *in rem* in movable property. It will be understood that the place where the property is located is that in which the property subject to the right is located at the time when the act giving rise to these legal effects occurs. This criterion favours the ability to predict of anyone who participates in a transaction and corresponds to the organising function of the market of the *lex rei sitae* connection, facilitating a security of international relations.

Article 59. *Rights* in rem *in property in transit.* The rights in rem in property in transit shall be governed by the law of the place of their destination.

361. The particular position of property that is in transit, including property intended for export, justifies that the place where the property is located is not in this case an acceptable criterion for determining the applicable law.[446] The legal concept of "transit" does not have anything to do with the physical movement of the property, but with the fact that it is en route, although occasionally it is detained for

[446] CONC.: Art. 101 of the Swiss PIL Act; art. 88 of the Belgian Code of PIL; art. 56 of the Dominican draft law; art. 57 of the Bolivian draft law; art. 40.1 of the Uruguayan draft law.

technical reasons in a store, port or railway station. When the parties create or assign rights *in rem* in property that finds itself in such situations, the application of the place where the property is physically located is an arbitrary and unpredictable response for the parties, who often are not even in a position to determine the place where the property is located. In such case, the majority of the systems opt for the application of a fictitious *lex rei sitae*, just like in the case of the means of transport, which aims to specify the law where the legal expectations of the parties are actually located.

Therefore, the formulation of specific rules regarding the creation, assignment or extinction of rights *in rem* in such property, which tend to be based either on the place of origin or on the place of destination of the property in transit is well known in the different private international law systems. This criterion facilitates an early application of the law of the place of destination with regard to the rights *in rem* created in relation with those properties.

Article 60. *Rights* in rem *in means of transport.* The rights in rem in automobiles, trains, aircraft or ships shall be governed by the law of the country of their flag, number plate or registration.

362. The characteristic mobility of the means of transport determines that the place of their location is also not an appropriate criterion for determining the applicable law in these cases. Therefore, as an exception to the general *lex rei sitae* criterion, this rule establishes that the rights *in rem* in automobiles, trains, aircraft or ships are governed by the law of the country of its flag, number plate or registration. It is a predictable and stable criterion for determining the applicable legal system.[447]

Article 61. *Intellectual property rights.* Intellectual property rights, including industrial property rights, shall be governed by the law of the country for which protection is sought.

363. This rule requires that the regime of intellectual property rights is determined in respect of each State according to its own legislation, in an imperative way, which is why recourse to the freedom of choice is excluded. It is the same criterion established by **article 56** with regard to the law applicable to non-

[447] CON.: Art. 107 of the Swiss PIL Act; art. 89 of the Belgian Code of PIL; art. 43 of the Polish PIL Act; art. 57 of the Dominican draft law.

contractual obligations resulting from an infringement of an intellectual property right, including industrial property rights.[448]

The regime applicable to the intellectual property rights under this rule is projected onto the organisation of all of the matters related to the regime of such rights in the cross-border situations not covered by **article 56**. Among these matters are the following: requirements that determine whether a creation is subject to protection (in particular, the degree of originality required) or whether an industrial or property right may be granted; determination of the authorship and ownership of the rights; property subject to intellectual property rights; category of works in which a creation is included; content, duration and limits of the (moral and property) rights comprising the intellectual and industrial property (determining factors of the acts constituting the infringement); as well as certain basic elements of the system of assignment of such rights.

364. Widespread recourse to the *lex loci protectionis* in comparative law is connected, as has been made quite clear, with certain basic characteristics of the industrial and intellectual property rights present in the treaties that contain the nucleus of the international regulation of these rights both in the context of the WIPO as well as the WTO, in particular the Paris Convention, the Berne Convention and the TRIPS Agreement.

365. The presence in this Law of two rules concerning applicable law in the scope of the intellectual property rights results in a certain fragmentation, but the element of complexity that it introduces in the system is watered down due to the criterion for determining the applicable law being the same in both conflict rules.

The connection of the *lex loci protectionis* criterion with territoriality as one of the basic characteristics of industrial and intellectual property rights, as well as with the importance of these rights in the organisation of the market and in the design of the national policies on innovation, consumers protection and culture of each country, has traditionally corresponded with the imperative and absolute nature of the conflict rule in industrial and intellectual property matters. Consequently, the scope recognised to the freedom of choice in **article 56.2** is not extended to the matters regulated in **article 60**.

Article 62. *Rights in book entry securities*. The rights *in rem* in book entry securities shall be governed by the law of the State where the principal account is situated. For this purpose, the principal account is understood to be that in which the corresponding entries are made.

[448] CONC.: Art. 110 of the Swiss PIL Act; arts. 93 and 94 of the Belgian Code of PIL; art. 34 of the Austrian PIL Act; arts. 46 and 47 of the Polish PIL Act; art. 58 of the Dominican draft law; art. 59 of the Bolivian draft law; art. 64 of the Colombian draft law.

366. This provision incorporates a specific regulation for determining the law applicable to the rights *in rem* created in securities represented by means of book entries. The existence of specific rules concerning the applicable law in this area is of particular importance from the perspective of legal certainty and responds to the need to establish specific criteria for crystallisation of the general *lex rei sitae* rule concerning guarantees relating to book entries.[449]

Precisely, with the objective of clarifying in what country the property is located as a determining element of the law applicable to the existence and effectiveness vis-à-vis third parties of the rights *in rem*, a solution based on a criterion that enjoys significant acceptance at the international level for determining the law applicable to the rights of the holder of a securities account has been imposed in the more advanced legal systems, the so-called PRIMA (*place of the relevant intermediary approach*) rule, in which the situation of the agent in which the corresponding entries are made is a key factor.

367. At the international level, this rule is consistent with the criterion adopted in the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, of 5 July 2006, laid down in the framework of the Hague Conference on Private International Law, as well as with the rules in the framework of the European Union contained in Directive 2002/47/EC of the European Parliament and of the Council, of 6 June 2002, on Financial Collateral Arrangements.

Chapter II

Rules for application

Article 63. ***Determination of the foreign law*****. 1. Caribbean courts and authorities shall apply *ex officio* the conflict rules of the present Title or those inserted in the international treaties to which the Caribbean is party.**

2. The courts and authorities shall apply the law designated by the conflict rules referred to in the preceding paragraph. For this purpose, the judge may utilise:

i) the instruments indicated by international conventions;

ii) the opinions of experts of the country whose law is sought to be applied;

iii) the opinions of specialised institutions of comparative law;

iv) any other document showing the content, the validity and the application to the specific case of this law.

3. If, including with the cooperation of the parties, the judge cannot manage to establish the foreign law designated, the applicable law shall be determined

[449] CONC.: Art. 91 of the Belgian Code of PIL.

through other relationship criteria possibly provided for the same regulatory hypothesis. Failing that, Caribbean law shall be applied.

368. The conflict rules contained in the **Section I, Chapter I of the Title III** of the Model Law and in the international treaties to which the Caribbean is party are considered obligatory and imperative, applicable *ex officio* by the interpreter.[450]

All of this material uses as a benchmark a basic premise: the conflict rule is obligatory for the judge, since it forms part of the substantive law of the forum, who, in turn, has to apply the foreign substantive rule it relates to, since the mandate of that provision is imperative for him. To do otherwise would be to attribute a dual nature to the conflict rules: an imperative nature when they designate the law of the forum and merely an optional nature (*fakultatives kollissionsrecht*) in the cases that refer to a foreign law.[451] In such situation, if the judge of the forum does not apply *ex officio* the conflict rule of its system, he would leave the determination of the law applicable to the simple will of the parties or their incompetence or bad faith, which would be equivalent to an excessive interpretation of the function of the will of the parties in private international law, above all in matters regulated imperatively.[452] In addition, the voluntary configuration of the conflict rules, contrary to the basic principle of fairness, will lead us to the absurd situation that identical cases would be resolved in a different manner in a same State, including by a same court, depending on whether the parties had or had not urged, in good or bad faith, the application of applicable foreign law.

The wording of paragraph 1 of the present article, by determining the *ex officio* application of the conflict rules of the forum, has the undoubted technical advantage of not leaving the application of the conflict rule of the legal system of the forum at the mercy of the parties, or one of the parties, wishing or not wishing to invoke the foreign law at their convenience. The *ius cogens* nature of the conflict rules is established and, consequently, if the judge, when examining the facts assumed by the rule, is aware of the existence of an element of foreignness is obliged to apply it even through it designates a foreign substantive law.

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[450] CONC.: Arts. 167, 168 and 169 of the Panamanian PIL Act; art. 16 of the Swiss PIL Act; art. 14 of the Italian PIL Act; art. 281.2º LEC (Spain); art. 244 of the Civil, Administrative, Labour and Economic Procedure Act of Cuba; art. 3 of the Austrian PIL Act; art. 10 of the Polish PIL Act; art. 59 of the Dominican draft law; art. 11 of the Argentinian draft law; arts. 4 and 5 of the Mexican draft law; arts. 2, 145 and 146 of the Bolivian draft law; art. 2 of the Uruguayan draft law; art. 2 of the Colombian draft law.

[451] *Vid*. A. Flessner, "Fakultatives Kollisionsrecht", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 34, 1970, pp. 547–584; F. Sturm, "Facultatives Kollisionrecht: Notwendigkeit und Grenzen", *Festschrift fur K. Zweigert*, Tubinga, J. C. B. Mohr, 1981, pp. 329–351; K. Zweigert, "Zur Armut des Internationalen Privatrecht an Sozialen Werten", *Rabels Z.*, vol. 37, 1973, pp. 434–452.

[452] J. A. Carrillo Salcedo, "¿Alegaciones de Derecho extranjero por las partes o aplicación de oficio por el Juez español de la norma de conflicto española?", *Revista Española de Derecho Internacional*, vol. XIV, 1961, pp. 585–601.

The option of the Model Law is in accordance with comparative law,[453] with the Bustamante Code, whose article 408 obliges judges to apply "*ex officio*", where applicable, the laws of other countries, and in accordance with the provisions in the Inter-American Convention on General Rules of Private International Law of 1979 (article 2).

369. Two procedural matters indirectly compromise, however, the imperativeness of the conflict rule[454] provided in paragraph 1 of this provision:

i) It may occur the parties do not make clear, or even hide, the element of foreignness that justifies the application of the conflict rule. In such an event, the principle of congruence of the judgement together with the principle of party disposition or free disposition would prevent the judge from exercising the authority to investigate and establish these elements of event. However, if the judge considers *ex officio* that foreign elements exist which may interfere in the clarity and precision of the causes of action submitted, he must give notice of this at the start of proceedings.

ii) If a dispositive procedural regime of foreign law is maintained, the imperative nature of the conflict rule may be may be affected, since if the foreign law is not submitted or proved by the parties. In its absence, the Caribbean law must be applied (paragraph 3). A similar solution may imply *de facto* that the imperative nature of the conflict rule is such only when it relates to the law of the forum. Thus, if the conflict rule points to a foreign law, the procedural rules must permit the distinct possibility of choice between the foreign law and the law of the forum.[455]

On the merits of the cause of action for a dispositive interpretation of the conflict rules, a general commitment to the *lex fori*[456] has been inferred, as has been ex-

[453] *Vid.* art. 59 of the Dominican draft law, which includes a text identical to the commented article. In Europe *vid*. art. 16 of the Swiss PIL Act of 1987 and the commentaries of B. Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987*, 2nd ed, Basel, Helbing & Lichtenhahn, 1997, pp. 42–50; art. 14 of the Italian PIL Act of 1995 and the commentaries of N. Boschiero, in *Legge 31 maggio 1995, N. 218, Riforma del sistema italiano di diritto internanazionale privato* (a cura di S. Batiatti), Milan, Cedam, 1996, pp. 1035–1043; art. 60 of the Venezuelan PIL Act: "Foreign Law shall be applied *ex officio*. The parties may bring information related to the applicable foreign Law and the Courts and authorities may issue orders tending to better knowledge thereof". J.L. Bonnemaison W., "La aplicación del Derecho extranjero", *Ley DIPr de 6 de agosto de 1998. Libro homenaje a Gonzalo Parra Aranguren*, vol. II, Caracas, Supreme Court of Justice, 2001, pp. 205–210. *Vid*. Judgement of the Supreme Court of Justice, Civil Appeal Chamber, 16 January 1985, case *Gonçalves Rodríguez / Transportes Aéreos Portugueses (TAP)*, Ramírez & Garay, vol. 90, first quarter 1985, pp. 465–473.

[454] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Madrid, Civitas–Thomson–Reuters, 2013, pp. 138–139.

[455] J. C. Fernández Rozas, "Art. 12.6º", *Comentarios al Código civil y Compilaciones forales*, t. I., vol. 2º, 2nd ed., Madrid, Edersa, 1995, pp. 973–1082.

[456] The *Bisbal* case, ruled by the French Court of Cassation, is a classical example of this last alternative. In its judgment of 12 May 1959, the Court rejected the appeal against a judgment by which a legal separation between Spanish spouses became a divorce in accordance with French law. The wife claimed the unjustified *ex officio* application of the foreign law (Spanish law), applicable

plained by French court rulings in the *Bisbal* case. Under this, the conflict rule acquires a different nature and scope whether the connecting factor leads to the application of the law of the forum or of a foreign law. The conflict rule is obligatory if it submits the solution of the specific case to the law of the forum, while it conserves a merely dispositive nature if it chooses the foreign law. The "*legeforismo*" of this solution finds a difficult rational explanation. If the legislator provides for the application of a foreign law to a specific factual case there is no doubt that it does so by considering it to be more adequate; to think that that the most just solution coincides with the application of the law of the forum is justified only in the if it turns out to be less expensive, easier to understand for the judge and possibly favourable to the interest of the litigants; a similar position absolutely omits the interests of third parties, of international commerce, and the State's own interests in maintaining the conception of the justice and the international harmony of solutions.

370. The second paragraph of the provision relates to the so-called "consequence of the conflict rule" and may be summarised in a choice: application by the judge or the authority of the law of the forum or of a foreign law. Although, in principle, both options appear set out on an equal footing, the process of the practical application of the conflict rule leads to a maximisation of the possibilities of application of the law of the forum. Even so, the fact that the localisation devolves upon the law of the forum does not mean that the treatment of the private international situation is going to be exactly the same as though it were a domestic situation. As provided by **article 64**, the interpreter must apply the *lex fori* in accordance with the particular circumstances introduced by the international element.

The application of the foreign law in the forum assumes the final phase of the method of attribution and implies that the realisation of the draft regulation contained in the conflict rule has not been distorted. However, such application forces us to face a fundamental contradiction between the system of the forum and the foreign system, since both are legal systems with a different procedural treatment. The *iura novit curia* principle does not operate, in principle, for the foreign law. However, the foreign law also does not have the procedural consideration of a simple fact, at least in all scenarios. The facts, once proved, continue to be facts. However, the duly established foreign law is elevated to the level of authentic law, which is going to be applied by the judge for resolving the dispute. In summary, the foreign law has a particular procedural consideration, as it is a *tertium genus* between the law and the facts. This nature must be guaranteed in the proceedings, through which its procedural treatment has to have particular characteristics, at times being likened to the procedural condition of the facts and, on other occasions,

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with regard to French conflict rule which was in effect at the time. The Spanish law of the time prohibited divorce. The French court declared that "the French rules of conflict of laws, at least when determining the application of foreign law, do not have a character of public policy, in that it falls to the party to demand its application, and the trial judges cannot be blamed for not applying foreign law on their own motion but French law, which is to govern all private law relations" (*Rev. crit. dr. int. pr*., 1960, pp. 62 *et seq.* and the note of H. Batiffol; *Journ. dr. int*., 1960, pp. 810 *et seq.* and the note of Sialelli; B. Ancel and Y. Lequette, *Grands arrêts de la jurisprudence française de droit international privé*, 5th ed., Paris, Dalloz, 2006, pp. 284 *et seq.*).

to the national legal rules. Paragraph 2 of the present article confirms this procedurally hybrid nature of the foreign law, since it relates to the necessity of proof of the foreign law, which is a clear symptom that it is not a mere fact, but an authentic source of law, although "also" they must be proved.

Undoubtedly, the singularity of the localisation process is due to the possibility that it opens to applying a foreign law. This possibility is common to the generality of the legal systems, but it should be noted that:

i) Although the majority of the conflict rules of **Section I, of Chapter I of Title III** of the Model Law use the term "law", the reference is not confined to the "law" in the formal sense, but to the legal system or legislation in the general sense. The conflict rule relates to the foreign law, including all the sources of the same (Constitution, law, regulations, customs, etc.), this regulatory block having to be interpreted, as provided by **article 64**, as will be done by the judges of the State of this legal system.

ii) With reference to **article 65** of the Model Law (*vid. infra*), there is no special limitation to the application of the rules of a foreign system, according to their "public" or "private" nature. The referral operated by the conflict rule relates to the foreign law that has to govern the litigious private situation, regardless of its character and possible nature. In practice, the application of the foreign substantive rules of public law has genuine importance in this area of patrimonial rights of international contracts, submitting to certain state interventionism. At this point, the problem is focused on the application of the imperative provisions or rules of economic public policy of the foreign legal system, a problem which will be analysed in the framework of the regime of contractual obligations.

iii) The application of the foreign law *stricto sensu* must be differentiated from other cases which involve "taking it into account" as mere information, as a mere determining or conditioning fact of the application of the private international law rules of the forum.[457]

371. The right of the parties to claim foreign law, that is inserted into the present provision and which is confirmed in article **64.1**, does not prevent the judge from actively participating in the investigation and application of the foreign law. However, it is convenient to analyse whether the judge's own knowledge concerning the foreign law may replace the burden of proof of the same by the parties and, including, its invocation.[458] It is possible that, in the face of the indifference of the parties, the judge interposes his own private knowledge concerning the foreign law, and for

[457] L. García Gutiérrez, "El 'doble escalón' del Derecho internacional privado: sobre la toma en consideración de otro ordenamiento jurídico en la interpretación del Derecho material aplicable", *Pacis artes. Obra homenaje al profesor J. D. González Campos*, Madrid, Eurolex, 2004, pp. 1547–1561.

[458] F.J. Garcimartín Alférez, *Sobre la norma de conflicto y su aplicación procesal*, Madrid, Tecnos, 1994.

good reason, in some cases, the legal culture of the judge without any doubt permits him to acknowledge the content of the foreign law on certain points.[459]

It is not the intention of the provision that the judge can replace the proof of the foreign law through his own understanding. The foreign law must be proved and this proof falls, in principle, to the parties. The judge may take the initiative for gathering sufficient means of proof for confirming the content of the foreign law, regardless of whether or not he knows it, but cannot replace the necessary proof of the foreign law, which must be entered even to a minimal degree in the records, through his subjective knowledge of the foreign law. The factual consideration of the foreign law up to the time of its proof advises the existence in the procedure of minimal prima facie evidence as a constitutional guarantee, while it avoids a decision of the judge which may be arbitrary. Thus, among other alternatives,[460] the solution adopted in the Model Law is moving in the direction that the judicial function is carried out through collaboration between the judge and the parties. The interested parties must submit the foreign legislation that they consider to be applicable to the case, but if the judge acknowledges the content of the foreign law he must apply it.

372. Regarding the content of the proof of the foreign law, the present article requires that "the validity and the application of that law to the specific case". The degree of intensity of the proof will be the responsibility of the courts of justice in particular if the mere isolated citation of specific provisions is sufficient, or if a wider scope of documentary evidence is necessary. The principle of submission by the parties must lead to their logical consequences, not only strict means of proof, but also absolute certainty concerning the content of the foreign law.

If the parties do not invoke or demonstrate a complete passivity in the proof of the foreign law the most adequate option is that the judge must not underestimate the cause of action, but take the initiative in obtaining this documentary evidence. If the parties have the right to invoke and furnish proof of the foreign law, and in all cases should have the possibility to debate concerning this proof and its own application, this does not disregard the judge's obligation to apply *ex officio* the conflict rule and guarantee that the dispute is resolved in accordance with the foreign law in question[461]. In this case, the costs resulting from the proof will be imposed on the indifferent claimant in the corresponding order to pay costs, providing a sanction proportionate to their lack of initiative.

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[459] Art. 244 of the Civil, Administrative, Labour and Economic Procedure Act of Cuba: "Each party bears the burden of proof of the facts they assert and of the facts they oppose to those asserted by the other party, as well as the positivity of the foreign law whose application is claimed. Notorious or obvious facts will be considered without necessitating evidence".

[460] I. Zajtay, "Le traitement du droit étranger dans le procès civil. Étude de droit comparé", *Riv. dir. int. pr. Proc*., 1968, pp. 233–301; *id*., "Problemas fundamentales derivados de la aplicación del Derecho extranjero", *Bol. Mexicano de Derecho Comparado*, vol. XI, 1978, pp. 371–382.

[461] S. Álvarez González, "La aplicación judicial del Derecho extranjero bajo la lupa constitucional", *Revista Española de Derecho Internacional.*, vol. LIV, 2002/1, pp. 205–223.

373. Paragraph i), 2 of the present article permits the judge to have recourse to the international judicial assistance and in this sense he is obliged to refer to arts. 408 to 413 of the Bustamante Code of 1928 in the framework of its reduced scope of application and to the Inter-American Convention on Proof of and Information on Foreign Law, done in Montevideo on 8 May 1979, and whose States members, in addition to Spain, are Argentina, Colombia, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela. It is an international text produced in the CIDIP-II, which establishes a system of international cooperation between the States members for obtaining elements of proof and information concerning the law of each one of them. The said elements of proof will comprise "the text, validity, meaning and legal scope of their law" (article 2) and will be incorporated in some "suitable means" (article 3) such as: a) documentary proof, consisting of certified copies of legal texts together with an indication of their validity, or judicial precedents; b) expert testimony, consisting of opinions of attorney or experts on the matter; and c) the reports of the State of destination on the text, validity, meaning and scope of its law. The requests must contain a precise statement of the elements of proof being requested and will consign each one of the points that refer to the consultation, together with an indication of its meaning and scope, and a statement of the relevant facts for proper understanding thereof. The language of the request will be that of the requested State (article 5). This may be directed directly by the jurisdictional authorities or through the central authority of the requesting State to the corresponding central authority of the State requested, without any need of legalisation. The Central Authority of each State party shall receive the requests made by the authorities of its State and forward them to the Central Authority of the requested State (article 7).

374. In the absence of international cooperation, the means admitted by the legislation of the forum may be employed in furnishing proof of the foreign law. These include documentary proof and, in particular, expert evidence.

i) Documentary proof turns out to be the most operative, and the proof that provides greater guarantees. This proof is not admissible through private or general documents, legislative collections, doctrinal works, etc., but through public documents or acted on by a public official and may be introduced to the proceedings through certificates issued: a) by a state authority authorised to provide that information which tends to be registered to the Ministry of Justice; b) by diplomats or consuls of the State of the forum authorised in the State whose law must be applied; c) by diplomats or consuls of the country in question, authorised in the State of the forum. These certificates will be rapid and easy to obtain, but have the inconvenience that they will never be able to determine the scope and content of the foreign rule, but only its literal text and, possibly, its validity. Nonetheless, this inconvenience may remedied by requesting information from the foreign country in question or by using a mechanism of information certified by the mentioned state authority for such function. This proof may be sufficient by itself in many cases but when the content of the foreign rule does not require a special interpretation, it is easy for the existence of the regulations provided with documentary proof to be more than sufficient.

ii) The provision studied considers the possibility of determining the existence and validity of the foreign legislation through "the opinions of experts of the country whose law is sought to be applied". However, there should be no doubt that expert evidence must be the object of greater suspicion than documentary proof, due to the possible "impartiality" of some experts whose assistance is sought, but that the interested party generally remunerates. Therefore, every effort should be made to control the capacity and independence of the expert, and must also be extended to the free appointment of the expert by the judge, taking into account the guarantees of capacity and independence that he offers. Some other decisions demonstrate a greater flexibility however.

iii) Finally, documentary proof is admitted through "the opinions of specialised of comparative law institutions".

375. The tactical treatment for procedural purposes of the foreign law raises another important problem: if a party submits a foreign law as a fact and the other expressly admits the existence of this rule, without offering a different interpretation of it, does the Court have to take its existence for granted, by departing from the so-called constriction of the "admitted facts"? A positive response is not satisfactory. The judge may not construct his judgement from a purported foreign rule, merely because its existence is not contested by the party opposing the party that submits it. For that matter, in an extreme case, is the judge going not to apply a provision that he, through his private knowledge, knows in effect exists, only because the litigant had to prove and has not done so? The response to this conundrum depends on whether the *ex officio judicis* investigation is permitted or whether a more conservative position is followed in this area. If a party proves sufficiently the content, existence and validity of the foreign law, the other party, if it accepts it, is relieved of the proof; but, ultimately, it is required that the proof is furnished sufficiently by one of the parties, which is a contradiction. On the other hand, the acceptance of the doctrine of the established facts indeed permits that the parties violate the principles of regulation provided by the legislator in a conflict rule. The optimal solution is that the judge, facing the agreement of the parties on the content of the foreign law, asserts his own knowledge or the instructions that the legal system offers him for investigating *ex officio* the foreign law. It puts us in contact with the general matter of the judge's participation in the investigation of the foreign law, a real possibility in the Model Law.

376. Assuming the maxim of the *ex officio* inapplicability of the foreign law, it is necessary to investigate if any mechanism exists in which the judge is permitted to replace the error of submission of the foreign law or of the proof of its content. On this point, the proceedings for providing additional proof intended for the knowledge of the foreign laws are an power of the judge, and never an obligation; but, in addition, it appears that these measures, given their nature and location in the process, although highly advisable, are only justified if the parties have invoked the foreign law, but have not provided sufficient proof of it. Consequently, the submission by the parties of the foreign law it would always be necessary, and the

judge's activity would be reduced to supplementing or even replacing the necessary proof of that submission by the parties. Since the measures for providing additional proof may not become, given their nature, facts that have not been submitted by the parties, it is necessary to stress the restrictive nature that leads to this interpretation. Once the judge determines the applicability of a foreign law for governing the case, through the *ex officio* application of its conflict rules, he should be authorised to implement the mechanisms of proof of the same, regardless of whether or not the parties have submitted this.

377. In accordance with the principle of the imperative nature of the conflict rule, it appears at first view that the cause of action should be dismissed when the parties have not submitted or provided sufficient proof of the foreign law. Using this principle strictly, the party that does not submit or has not managed to provide proof of the foreign law will see his claim dismissed without any possibility of revisiting his claim based on the submission and correct proof the foreign law. A similar solution very possibly will be contrary to the principle of effective legal protection, which would oblige to interpret the system allowing to correct this result.

A dismissal of the claim based exclusively on the lack of submission and proof of the foreign law does not offer a response regarding the merits of the claim, but a disproportionate and arbitrary sanction for the procedural conduct of the parties, in view of its preventive consequences for obtaining a ruling as regards the merits. In all those cases in which the referral to the foreign law derives from a conflict rule arising from a convention, in which case the *ex officio* application is necessary for complying with the international obligation assumed; this is the actual wording of the convention-based rules that tend to require the application of the law designated with the sole exception of public policy.

378. The body of the application may find itself in a situation of being unable, substantively, to apply the foreign law. This impossibility, considered in paragraph three of the present article, is absolute if it is impossible to establish the connecting factor of a conflict rule, when the foreign legislation contains a loophole in the regulation of the case or indeed its content could not be determined or is overtly contrary to public policy, in the sense set out under the previous heading, concerning in this case a legal or moral impossibility, more than a substantive one. The impossibility may be partial if only rules related to partial aspects of the litigious situation are unknown or exempted, in which case the substantive impossibility of applying the foreign law is raised only in respect of those cases. The lack of proof of the foreign law does not in the same way imply a substantive impossibility, as it may depend on the will of the parties or the interpreter, although their consequences may coincide, as we will see, with those that produce the substantive impossibility of applying the foreign law.

In these cases the question is to determine what law must be applied in the event that the conflict rule of the forum designates a foreign law and it is impossible for this to be known by the judge, or, if you will, if we are dealing with a case of "substantive impossibility" in the application of the foreign law. When faced with this problem, there are hypothetically two solutions available to the judge. Firstly, to

dismiss the claim, purely and simply, which is the easiest solution, but which entails a procedural situation of no solution to the dispute and may give rise to evidently unjust consequences, not only putting in doubt the legal nature of the foreign law, but because an evident denial of justice occurs. Secondly, he is "obliged" to apply a different regulation. The question then consists of determining this. There are three responses to this question.

i) To find that this regulation must be determined by the judge himself based on the "general principles of law common to the systems in question" in the dispute.[462] There should be no doubt that this construction implies a potentiation of the comparative method, by insisting on the common aspects of the legal systems in question. However, despite the attractiveness of the approach, it is worth asking about its operability and, in that sense, what is easy to apply in arbitrations it is not the same for the national judge, who is limited by his own legal system.

ii) The application of the closest legal system. That is to say, in the case of substantive impossibility in the application of the foreign law claimed for the conflict rule, recourse would be had to a legal system of the same legal family, also based on comparative law. It is an interesting solution from the theoretical perspective, but is unreal from a practical point of view. It is certain that legal systems exist with a high degree of mimetism and reception with respect to others, nevertheless, to apply the proposed solution in these cases leads to a purely expedient result and to its possible arbitrariness and through the contradictory results to those that could arise.

iii) The application of the *lex fori*. This conception has been maintained from distinct positions. One talks, first and foremost, of a "presumption of identity" through which this thesis is directly related with the argument that we have just set out; but it is only operative in the Anglo-Saxon countries based on common law. There has also been a reference to the "general jurisdiction of the law of the forum".[463] Finally, the approach in support of the presumption of the residual jurisdiction of the law of the forum is most frequent; the conflict rule of the forum brings us back to the foreign substantive law, but, if this is lacking, it is the law of the forum itself that fills in the loophole with its own substantive rules.[464] This is the solution that is decisively adopted in paragraph 3, *in fine*, of the present article. Not surprisingly, the superiority of the law of the forum derives from elemental

[462] That is the solution reached by the arbitrator Lord Asquith of Bishopstone in the case of the *concesiones petrolíferas de Abu Dhabi Oil*, *Int'l Comp. L. Q.*, vol. I, 1952, p. 247. *Vid*. Ph.C. Jessup, *Transnational Law*, New Haven, Yale University Press, 1956, pp. 27 *et seq*.

[463] J. M. Bischoff, *La compétence du droit française dans le règlement des conflits de lois*, Paris, LGDJ, 1959. *Vid. supra* the case *Bisbal*.

[464] A. Ehrenzweiz, *Private International Law*, I, 2nd ed., Leyden, Sijthoff–Oceana, 1972, pp. 103–104.

practical reasons such as its certainty and, above all, the facilities for interpretation incumbent on the judge.[465]

Once this final solution is accepted, the judge must, however, have the certainty that the impossibility of information concerning the foreign law is not the result of mere negligence by the party or of a fraudulent attitude[466] and thus, it may utilise the appropriate steps. In other words, the application of the *lex fori* rule will only be feasible if all of the information media of the foreign law have been exhausted and, in addition a substantial relationship with the forum exists. And, in any case, as last resort, there are occasions in which it may be feasible to resort to a "third law" through the utilisation of subsidiary connecting factors deduced from the private international law system itself that we are applying.[467]

Article 64. *Interpretation*. 1. Caribbean judges and authorities shall be obliged to apply the foreign law as this would be done by the judges of the State whose law is applicable, without prejudice to the parties' right to submit and provide proof of the existence and content of the foreign law invoked.

2. The foreign law shall be applied according to its own criteria of interpretation and application in time.

379. When applying the foreign law, the judge of the forum must start from the premise of the integrity of that regulation.[468] In accordance with this provision, the judge must "dive" into the foreign legal system and apply it as if he were a judge of this country.[469] This implies that the foreign law must be applied by the judge of the forum in the context of the plurality of sources of that system and that this judge must, likewise, take into account the hierarchy of sources prevailing there (paragraph 1). Secondly, it is necessary to carry out an interpretation of the rule claimed in accordance with the criteria of the foreign system itself (paragraph 2).[470]

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[465] P. Gannagé, "L'égalité de traitement entre la loi du for et la loi étrangère dans les codifications nationales de droit international privé", *Annuaire de l'Institute de Droit International*., vol. 63, I, 1989, pp. 205–240, esp. p. 232.

[466] *Vid*. H. Batiffol, *Annuaire de l'Institut de Droit International*, vol. 63, I, 1989, p. 244.

[467] F.J. Garcimartín, *Sobre la norma de conflicto...*, *op. cit*., pp. 71–74.

[468] CONC.: Art. 13.1 of the Swiss PIL Act; art. 15 of the Italian PIL Act; art. 4 of the Austrian PIL Act; art. 60 of the Dominican draft law; art. 3 of the Mexican draft law; art. 3 of the Uruguayan draft law; art. 4 of the Colombian draft law.

[469] This issue arose concretely in international jurisprudence with the case concerning the *payment of various Serbian loans issued in France*. In its judgement of 12 July 1929, the Permanent Court of International Justice, once it has arrived at the conclusion that it was necessary to apply foreign law, asserted that "[...] there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force" (*PCIJ, serie A*, n^{os} 20–21, pp. 123–125.). *Vid*., as well, the judgement of the Court of Rome on 13 September 1954 (*Anglo–Iranian Oil Company c. SUPOR.*), *Rev. crit. dr. int. pr*., 1958, pp. 519 *et seq.* and the note of R. de Nova.

[470] Paragraph 2 of this article reproduces art. 15 of the Italian PIL Act of 1995 in its entirety. *Vid*. N. Boschiero, en *Legge 31 maggio 1995, N. 218, Riforma del sistema italiano di diritto internana-*

The integrity of the foreign law claimed includes, thirdly, the so-called referral *ad extra* where a State in which different legislative systems coexist is concerned (**article 70** of the Model Law).

The localisation continues to be the first rung of private international law. The conflict rule refers the regulation of an international case to the rules of a certain national law. However, at a second rung, these national substantive rules may not be applied without consideration of the internationality of the case. Its interpretation, applicability and operation must be modulated by taking into account how the international element impacts on the case. In summary, the second rung, the application of the substantive law of a certain State, requires reintroducing into the response the international element of the case.

380. The judge's powers may even achieve the same approach as the conditions of constitutional validity of the foreign law provided that, clearly, some constitutional review mechanism exists in the foreign legal system. In this case, the position of the judge of the forum is conditioned by the solution that is given to the question by the foreign law claimed, without the inexistence of a similar process in its legal system having an influence.[471] Pursuing this idea, a series of different situations should be addressed:

i) If a court or a political body of the foreign State whose law claims the conflict rule of the forum have pronounced with *erga omnes* validity on the constitutional legitimacy or the constitutional illegitimacy of the rule claimed, the judge of the forum must resolve in accordance with the criteria expressed by the foreign court or political body, the topic being subsumed in the general problem of the proof of foreign law, which will be addressed below. The ultimate reason of such asseveration rests, on the one hand, in that the legality of the rule claimed in the scope of his own legal system is a requirement prior to taking it into consideration[472] and, on the other hand, in the fact that if the foreign law has lost its legality it lacks imperative force in the State of origin, and, therefore, may not be applied by the judge of the forum.[473] In this manner, the judge of the forum must be limited to assuming to the full extent the result of the error by the foreign Constitutional Court which is pronounced concerning the constitutionality or unconstitutionality of the rule claimed.[474] This assumption does not result from the direct submission of the for-

zionale privato (a cura di S. Batiatti), Milan, Cedam, 1996, pp. 1043–1045. *Vid.* art. 3 of the Mexican draft law: "The foreign law shall be applied according to its own criteria of interpretation and application in time"; art. 60 of the Dominican draft law, which includes a text identical to the commented article. *Vid*., as well art. 14 of the Belgian Code of PIL of 2004.

[471] C. David, *La loi étrangère devant le juge du fond*, Paris, Dalloz, 1964, pp. 255 *et seq.*; R. M. G. de Moura Ramos, *Dereito internacional privado e Constituçâo. Introdução a uma análise das suas relações*, Coimbra, Coimbra Editora, 1980, pp. 242 *et seq*.

[472] G. Morelli, "Controllo di costitucionalitá di norme straniere", *Scritti di diritto internazionale in onore di Tomaso Perassi*, vol. II, Milan, Giuffrè, 1957, pp. 171–183, esp. pp. 171–174.

[473] H. Motulsky."L'office du juge et la loi étrangère", *Mélanges offerts à Jacques Maury*, vol. I, Paris, Dalloz & Sirey, 1960, p. 362.

[474] It was evidenced by the judgement of the *Tribunal de Grand Instance* of Dunkerke on 29 Novembre 1989, where a claim for maintenance was filed as a consequence of a separation of spouses. The Court admitted *ex oficio* its connection with a judgement of the Italian Constitutional Court that

eign court, but from the mandate itself contained in the conflict rule to apply the foreign law in its own context, as will be done by the authorities of the country in question. Naturally, in the application of the foreign rule declared constitutional will always enter the limit of not being contrary to the public policy of the forum.

ii) If the constitutional control proceedings of the law claimed by the rule of the conflict of the forum are still pending a solution, it should be possible to suspend the proceedings in the forum, although this is not possible sometimes in accordance with the procedural rules of the forum, each time that the judge is obliged to employ these rules in the verification when there are motives that justify the suspension. In any case, the situation of pendency existing in the foreign State must be relevant for the judge of the forum if the foreign decision can generally affect the legality of the controversial rule. This relevance clearly requires that there are open proceedings abroad concerning the constitutionality of this rule before the relevant competent constitutional body; and that the change of the challenged rule conditions the bodies that must apply it and, ultimately, the judge of the forum. The determining character for the judge is to ensure that he appreciates that in the foreign system the application of the controversial rule is suspended until the judgment on the constitutionality is finalised.[475]

iii) The majority of questions call for a nuance according to which the foreign law invoked "may be declared unconstitutional" in the foreign law, giving rise to the possibility that the Constitutional Court or similar body in this country will come to declare it as such: is the judge of the forum authorised to pronounce on the unconstitutionality of the provision, although this has not even been declared in the country from where it originates? The provision in question does not close this path which is directly related to the scope of the powers that the judge of the forum has at his disposal for exercising a control of the constitutionality.[476] In all cases, the mechanism of "immersion" in a foreign legal system implies that if, in a foreign constitutional system, it is understood that the challenged rule continues to maintain its validity as long as there is no express pronouncement by the constitutional body, this rule will continue producing all of its legal validity and connection to the judge of the forum.[477] Nevertheless, in certain constitutional systems, this solution is not so clear, which gives a certain degree of invalidity to the affected rule; in this case, the judge of the forum will have to take into consideration the foreign court rulings in this regard and act accordingly.

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declared to be unconstitutional the art. 18 of the Civil Code, which established the national law of the husband for personal relations between spouses of different nationality (*Journ. dr. int*. 1990, pp. 393 *et seq.* and the note of H. Gaudemet–Tallon).

[475] K. Siehr, "Diritto internazionale privato e diritto costituzionale", *II Foro italiano*, vol. XCVIII, 1975, pp. 7–16.

[476] R. Quadri, "Controllo sulla legittimá costituzionale delle norme straniere", *Dir. int.*, vol. XIII, 1959, pp. 31–35; F. Mosconi, "Norme Straniere e controllo di costitucionalitá e di legittimitá e di legittimitá internazionale", *Dir. int.*, vol. XIV, 1960, pp. 426–439; T. Ballarino, *Costituzione e Diritío internazionale privato*, Padua, Cedam, 1974; K. Lipstein, "Proof of Foreign Law: Scrutiny of its Constitutionality and Validity", *British. Yearb. Int'l L.*, vol. 42, 1967, pp. 265–270.

[477] S.M. Carbone, "Sul controllo di costituzionalitá della norma straniera richiamata", *Riv. dir. int. pr. proc*., vol. I, 1965, pp. 685–696, esp. pp. 690–691.

381. Paragraph 1 *in fine* of the provision establishes parties' protagonistic nature in the submission and proof of the foreign law by inserting the possibility that these "may submit and provide proof of the existence and content of the foreign law invoked". It thus opts for leaving the judge with a limited role (*vid. supra*, **article 63.2**) in the knowledge of the foreign law, which implies, on the one hand, a dispositive note, i.e., the impulse is up to the parties and their action conditions the subsequent mechanics of the proceedings and, on the other hand, that the specific determination of the foreign legislation, as well as its proof, are practiced through a collaboration between the judge and the parties. In summary, the obligation to determine or verify *ex officio* the content of the foreign law is binding on the judge (**article 63.1**), admitting the possible collaboration of the parties, either as a result of their own initiative, or at the request of the judge.

382. Part two of paragraph 2 of the present article makes reference to the so-called "transitional international conflict", i.e. the problem resulting from the modification in time of the substantive rules of the foreign law declared applicable by the conflict rule of the forum.[478] Two solutions have been indicated for resolving the transitional international conflicts.

i) A first solution would consist in applying the principles of transitional law of the *lex fori*, while considering that only the foreign substantive rules have a foreign nature by reason of their origin. A similar solution is not acceptable as it would imply a denaturalisation of the regulation claimed by the conflict rule of the forum.

ii) Thus, the option for the application of the transitional provisions of the foreign law must be selected, as has been done for the present article. There is no doubt that this option is the recourse more in accordance with the "principle of integrity" of the foreign substantive law and with a limited role attributed to the conflict rule of the forum, whose function concludes in the designation of the foreign law claimed, this being (the *lex causae*) the rule responsible for crystallising the substantive rule that has to be applied to the present case.

However, the application of the rules of transitional law of the *lex causae*, admitted as a general principle, will give way to the application of the transitional criteria of the *lex fori* when it is substantively impossible to determine the content of the transitional provisions of the foreign law, or indeed when they are liable to contradict the international public policy of the forum. This final possibility is particularly feasible if the foreign legislator has put in force retroactively applicable imperative substantive rules or provisions, liable to infringe certain individual rights or legal principles firmly rooted in the *lex fori*, i.e., with public policy value.

Another circumstance which, in general, may give rise to an exception to the principle of application of transitional provisions of the *lex causae*, is rooted in the mobility of the factual situation, in the dissociation of the case at a given time in

[478] P. Graulich, v°, "Conflit de lois dans le temps", *Encyclopédie Dalloz dr. int*., vol. I, Paris, 1968, pp. 504–516.

respect of the foreign law, a fact that may justify the inapplicability of the subsequent provisions of the *lex causae*, even if they determine their rules of transitional law.

A final, particularly important, special exception occurs in the area of contractual obligations. Through the so-called "incorporations by reference", and for economic reasons, for the sake of convenience or a greater degree of development of certain legal systems, the contracting parties may include in the contract a reference to certain rules of a national legal system or an international Convention, as long as they prevail at a particular time. In this manner, they incorporate this regulation "by reference", as if its text were a letter written by the contracting parties themselves. In these cases, the modification of the foreign law or, where applicable, of the convention regime, lacks any validity, since the parties do not proceed to designate the law applicable to the contract, but to "copy" the foreign rules or conventions existing at a given time, such as a simple agreement of wills between them. The said agreement that reflects the incorporations by reference will lose validity, like any other agreement, only if is contrary to the law that governs the contract.

Article 65. *Foreign public law*. The foreign law designated by the conflict rule shall be applied although it is contained in a provision of public law.

383. Although from widely divergent perspectives in classic private international law any intervention by public law has been systematically denied in all its areas, including those related to the applicable law. A similar construction is based on three main arguments. Firstly, the private law nature of the matters that are subject to regulation by the private international law would not permit entry into the forum to the foreign public law, since, otherwise, the national sovereignty would be seriously affected. Secondly, the rigorously territorial nature of this normative block, which, as a result, means that it is only able to be applied by the courts of the State in which it had originated; and finally, in considerations of public policy.[479] Based on these arguments, one finds evidence that private international law does not refer to all of the conflicts of international laws within the area, but exclusively to those arising between provisions of private law so that a strong doctrinal current, endorsed by numerous court rulings, proceeded to exclude the rules of public law.

The doctrinal evolution of these traditional positions has been long and bumpy. From the justification of a "timid" welcome of the foreign public law,[480] to the

[479] In addition, it is necessary to bear in mind the original approach of the Swedish jurist T. Gihl, from which he called "political laws" the laws which, as such, did not have application in the forum according to him (*cf.*"Lois politiques et droit international privé", *Recueil des Cours*, t. 83 (1953–II), pp. 163–254).

[480] P. Fedozzi, "De l'efficacité extraterritoriale des lois et des actes de droit public", *Recueil des Cours*, t. 27 (1929–II), pp. 149 *et seq.*; C. Freyria, "La notion de conflit de lois en droit public", *Travaux Com. fr. dr. int. pr. (1962–1964)*, Paris, Dalloz, 1965, pp. 103–119.

more emphatic admission,[481] the results of the scientific investigation in recent years have tried to provide a response to a characteristic phenomenon of contemporary society: interventionism of the State especially in economic life.[482] And, more importantly, the doctrinal polemic has not been sterile, but has encountered a significant projection in practice.[483] Currently, the position favourable to the application of the substantive foreign rules of public law is unanimous in the doctrine and apart from a few isolated positions[484] is reflected in the Resolution of the Institute of International Law of Wiesbaden of 1975[485] and is included in article 6.1 of the Polish Private International Law Act. Although it is important to note that after the appearance of certain problems of applicable law that appear to involve foreign of public law rules, often a different problem is overlooked: the recognition in the forum of the foreign public acts, shifting the main focus of the question of the sector of the law applicable to the area of the recognition of acts.

384. The distinction between public law and private law, in the scope of the domestic law, has become blurred, to a large extent, lacking in the utility that it once had in the past.[486] If today this distinction only has an instrumental nature, it would be a mistake to preserve it, or even to intensify it, in private international law. This is the direction taken by the contemporary scientific doctrine and brought to the fore in the mentioned Resolution of the I.I.D. In accordance with this Resolution, it is an evident fact that in the scope of comparative law the distinction between public law and private law is tinged with a note of relativity and marked by its evolutionary nature, and the constant interpenetration of these two strands of the law is likewise evident, as a consequence of the changes in the facts and in the ideas through the interventionism of the State, especially in the regulation and in the protection of the interests of the individuals and in the management of the economy.

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[481] R. Quadri, "Leggi politiche e diritto internazionale privato", *Studi Critici*, vol. II, Milan, Giuffrè, 1958, pp. 363 *et seq.*; P. Lalive, "Sur l'application du droit public étranger", *Ann. suisse dr. int*., vol. XXVII, 1971, pp. 103–142; *id*., "Le droit public étranger et le droit international privé", *Travaux Com. fr. dr. int. pr. (1973–1975)*, Paris, Dalloz, 1977, pp. 215–245.

[482] A. Tuobiana, *Le domaine du droit du contrat en droit international privé*, Paris, Dalloz, 1972.

[483] That was evidenced by the judgement of Swiss Federal Supreme Court of 2 February 1954 (*Ammon c. Royal Dutch*, *Ann. Suisse dr. int*., vol. XII, 1955, p. 279 *et seq.*), which referred to the traditional postulate of non-applicable foreign public law, declaring that "the scope of this principle should be precised. Indeed, when enunciated in such a general manner, it does not sufficiently take into account the fact that the legal order of a State is a whole. Therefore, it is particularly necessary to examine its internal justification". This reasoning was echoed in the judgement of the German Federal Court of Justice of 17 December 1958 (*Völlert, B.G.H.Z*., 31, 367), since, after considering the traditional refusal to apply all public law, the Court proceeded to separate provisions composing it according to their purpose. In accordance with this decision, "the legal situation must [...] be appreciated differently whether a restriction of public law to the right to dispose is used to harmonise interests of private law worthy of protection or serves the economic or political interests of the States which imposed said restrictions. In this case, the public law provision, because of its different purpose, does not have an intrinsic link with the private obligation it affects".

[484] M.C. Feuillade, "Aplicación del Derecho público extranjero", *Prudentia Iuris*, nº 73, 2012, pp. 83–115.

[485] *Institut de Droit International, Annuaire*, Session de Wiesbaden, 1975, vol. 56, pp. 219–278.

[486] J.C. Fernández Rozas, *Tráfico jurídico externo y sistema de Derecho internacional privado*, Oviedo, ed. Gráficas Valdés, 1985, p. 40.

It is convenient to note, in addition, the traditional statement that public law has an exclusively territorial nature, since the distinction between public law and private law does not have any practical value. Unsurprisingly, apart from the unity of the legal system of each State, a reciprocal penetration of the rules of one group into the other is occurring more and more often. The reality of the matter indeed shows that if classical private international law denies the possibility of applying foreign public law, it has done so for very different reasons, among which the influx of the statutory provisions certainly stands out prominently. Today, the review is based on the growing interventionism of the State in matters traditionally of private law. But this is not the only justification of the application of the substantive foreign rules of public law. Currently, there is practical unanimity in affirming that one of the arguments of this opening is, without doubt, the growing cooperation between the States in the attainment of the interests of international commerce and the progressive impact of public law on private law.[487]

385. The CIDIP Conventions on applicable law are focused on the area of private law, even if some of them establish the possibility for the consideration of certain questions relevant to public law, it is true from the perspective of the proceedings.[488] In any case, from the reading of the CIDIP Convention on general rules of 1979, it may not be inferred that its provisions are drafted exclusively for responding to exclusive questions of private law.[489] Together with this reality it may not be ignored either that the question under discussion is expressly regulated in certain national systems[490] including, with the same drafting as the present article, in article 61 of the Model Law of Private International Law Act of the Dominican Republic of 2013.

386. It should be repeated that the application of the foreign rules of public law corresponding to the law designated by the conflict rule does not raise identical problems as the application of the foreign public law in the recognition of the validity of acts or decisions created or constituted abroad, a question which goes beyond the problem of the choice of the applicable law. There is no doubt that the substantive foreign rules of public law are often taken into consideration by the legal system of the forum in the choice of the applicable law. Thus, it occurs when determining the foreign nationality that is established as a connecting factor of a

[487] L. Trigueros, "Notas sobre los problemas de relación entre Derecho internacional privado y Derecho público", *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, Mexico, nº 14, 1982, pp. 213–222.

[488] *V.gr*. art. 16 of the CIDIP Convention on Letters Rogatory of 1975 establishes that "The States Parties to this Convention may declare that its provisions cover the execution of letter rogatory in criminal, labor, and 'contentious –administrative' cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States". The same provision is contained in art. 15 of the CIDIP Convention on the Taking of Evidence Abroad of 1975.

[489] V.C. García Moreno and C. Belair M., "Aplicación del Derecho público extranjero por el juez nacional", *Octavo Seminario de Derecho Internacional Privado*, Mexico, Unam, 1989, pp. 91–102, esp. 101.

[490] In accordance with art. 13.2º of the Swiss PIL Act of 1987: "The application of a foreign law is not precluded by the mere fact that a provision is considered to have a public law nature".

conflict rule. For its determination, it is necessary to take into account the law of the foreign nationality, which governs its attribution, acquisition, loss, etc. Apart from this case and of other similar cases, the "publification" of private law, especially in the area of contracts, raises the possibility of applying the laws on economic overriding mandatory rules of the legal system designated by the conflict rule, which, if they were not applied, would make a mockery of the determination of the applicable law in the area, in the majority of cases infringing the principle of integral application of the law designated by the conflict rule or the regulations provided for guaranteeing the security of the transaction. It is also possible to proceed to the application of such economic policy rules relating to a third State, as provided by **article 69** of the Model Law: "Caribbean courts may, where they consider it appropriate, give effect to the imperative provisions of another State closely connected with the legal relationship". For deciding whether it must give effect to these imperative provisions, their nature and object, as well as the consequences that are derived from their application or of their inapplicability shall be taken into account.

In practice, the application of the foreign substantive rules of public law has real significance in this patrimonial area of international contracts, submitting to a certain state interventionism. At this point, the problem is focused on the application of the imperative economic public policy provisions or rules of the foreign legal system, a problem which, as such, is considered by **article 69** of the Model Law. On the other hand, the application *ex officio* of the foreign law by the judge and the overcoming at the present time of the difficulty in access to the foreign law which lead to its full application also require the unofficial nature in the knowledge of the foreign public law.[491]

[491] A. Bucher and A. Bonomi, *Droit international privé*, Basilea, ed. Helbing & Lichtenhahn, 2001, p. 119.

Article 66. *Adaptation*. The various laws that may be competent for governing the different aspects of the same legal relationship shall be applied harmoniously, striving to achieve the objectives pursued by each of these legislations.

The possible difficulties caused by their simultaneous application shall be resolved by taking into account the requirements imposed by fairness in the specific case.

387. The adaptation[492] has for many decades been the paradigmatic exponent of some insufficiencies of the conflict rule method[493] and, at the same time, demonstrative of how the flexibility of the solution techniques contributes to an adequate response to the regulation of the private international transactions.[494] Unsurprisingly, it has been affirmed that the distance between the adaptation technique and the own technique of the substantive private international law rules is not particularly significant.[495]

Without doubt the most well-known regulation on adaptation is included in article 9 of the CIDIP Convention on General Rules of Private International Law of 1979. This provision was introduced at the proposal of the Venezuelan delegation in the CIDIP with a vocation of approximation to the Anglo–American systems, with the desire to overcome "unpredictable imbalances for resolving the problems of private international law" and such as "adequate response" to the criticisms against the utilisation of indirect regulations in this legal system.[496] The content of the said article 9 was inserted with slight modifications in article 14 IV of the Civil Code for the Federal District of Mexico (CCDF in Spanish)[497] and in article 7 of the Venezuelan Private International Law Act of 1998 with the sole qualification that the latter uses the term "laws" instead of "Acts". But apart from this coherence

[492] CONC.: Art. 10 of the Panamanian Code of PIL; art. 12 of the Argentinian draft Code of PIL; art. 5.f of the Mexican model Code of PIL; art. 62 of the Dominican draft law; art. 7 of the Bolivian draft law; art. 11 of the Uruguayan draft law.

[493] Ph. Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé*, Paris, Sirey, 1958, pp. 52–53.

[494] N. Bouza Vidal, *Problemas de adaptación en el Derecho internacional privado e interregional*, Madrid, Tecnos, 1977, p. 12.

[495] A.E. von Overbeck, "Les règles de droit international privé matériel", *De conflictu legum. Essays presented to R.D. Kollewijn / J. Offerhaus*, Leiden, Sijthoff, 1962, pp. 362–379, esp. p. 364.

[496] G. Parra Aranguren, "La Convención interamericana sobre normas generales de Derecho internacional privado (Montevideo, 1979)", *Anuario Jurídico Interamericano*, 1979, pp. 157–186, esp. p. 184.

[497] On the introduction process of this disposition in the Civil Code for the Federal District (CCDF in Spanish) in the 1988 reform and the role played by the Mexican Academy of Private International Law *vid*. the study by J.A. Vargas, "Conflictos de leyes en México: las nuevas normas introducidas por las reformas de 1988" (translation published in *The International Lawyer*, vol. 28, nº 3, 1994), *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, nº 26, 1996, pp. 619–656, esp. pp. 646–647; V.C. García Moreno, "Reforma de 1988 a la legislación mexicana en materia de Derecho internacional privado", *Libro homenaje a Haroldo Valladão. Temas de Derecho internacional privado*, Caracas, Universidad Central de Venezuela, 1997, pp. 187–212, esp. pp. 197–198.

of the domestic legislator of Venezuela, which is also present in the Mexican Draft Law of Private International Law, its favourable welcome in the eight other Latin American States parties to the Convention should be highlighted: Argentina, Brazil, Colombia, Ecuador, Guatemala, Paraguay, Peru and Uruguay.[498] In accordance with the said article 9,

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

The content of this text, which has come to be included among the greatest successes of Inter-American private international law,[499] advises a return to the classical question of this regulation, from an essentially originally Eurocentric perspective of the question, which takes into account to a great extent the doctrinal approaches realised in Latin America, with the object of indicating the possibilities of the rule in the regulation of the private international transactions of the OHADAC area.

388. The role of the conflict rule concludes with the localisation or determination of the foreign law applicable. The solution of the specific case, including the process of selection of the substantive rules of the foreign law that have to be applied in accordance with the categories of this regulation, is a question that does not concern the law of the forum, in the same way that occurs in the case of referral to a State with more than one system of law. For that reason, strictly speaking, the so-called "conflicts of qualifications" occur only in cases of inadequacy which entail the application of various conflict rules of the forum that refer to various substantive laws. In these cases, and particularly when proceeding to apply the *lex fori* and a foreign law at one time to the same litigious situation, it is possible to infer the decisive set of categories and the rules of application of the law of the Court which hears the case.

Unlike what happens in the resolution of the purely domestic relationships, in which the legal system of each State ensures the coherence of the institutions, this coherence is much more complex in the private international transactions, despite the increasingly more relevant action of the international conventions.[500]

The well-known technique in private international law called "adjustment" or "adaptation" indeed responds to the problem of the incompatibility of rules related

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[498] Art. 5.f of the Mexican model Code of Private International Law fully addresses the aforementioned general issues. *Vid.* L. Pereznieto Castro, "Anteproyecto de reformas al Código Civil para el Distrito Federal en materia de Derecho internacional privado", *Revista Mexicana de Justicia*, vol. V, nº 1, 1987, pp. 168 *et seq*. Regarding the Dominican Republic, the art. 62 of the preliminary draft law of PIL of 2013 included a text identical to the commented provision of the OHADAC Model Law.

[499] W. Goldschmidt, "Un logro americano en el campo convencional del Derecho internacional privado", *El Derecho* (Buenos Aires), nº 4763, 24 July 1979, p. 3, in which are indicated the advantages of the broad wording of this provision.

[500] J.C. Fernández Rozas, "Coordinación de ordenamientos jurídicos estatales y problemas de adaptación", *Revista Mexicana de Derecho Internacional Privado y Comparado*, nº 25, 2009, pp. 9–44.

to various categories and which must be applied simultaneously. This entails an operation of integration of rules of foreign law in the forum, either through an adequate interpretation of the substantive law or through an adaptation of the conflict rule so that it leads to a focused substantive law attuned, although both techniques incorporate common elements. It is a technique which, despite its abundant treatment in court rulings, has not had very extensive treatment in the regulations of private international law.

389. The broad heading of "techniques of adjustment or adaptation" generally encompasses diverse recourses which, in turn, hinge on different problems, whose definition has sparked a quite sterile conceptual discussion. It is appropriate to start with the distinction between the cases that give rise to the adaptation strictly speaking and other ones that specify the "substitution" or "transposition" of institutions, the latter underpinned in the "theory of equivalence"[501], which in private international law is also applicable to the problem of the "preliminary question"; i.e. when does a preliminary question regulated by a substantive law different to the law applicable to the principal question exist in the solution of the legal relationship.[502]

The substitution and the transposition possess a common element with the adaptation strictly speaking: they appear through the partial application of different substantive laws to the same case of the private international transactions.[503] But there is an essential difference due to their origin. In them the foreign institution that is sought to be taken into consideration must, in any case, have similar consequences to that of the forum both from the point of view of their background (homosexual union, polygamous marriage ...), as well as from their effects: it is a matter of verifying whether in the foreign law the relationship considered is liable to produce similar consequences to those requested before the judge of the forum. As may be observed, it comprises the application of two successively applicable laws. On the contrary, the adaptation occurs between competing and contemporary substantive rules. Understandably, the response to this question is essentially casuistic and is based on the guidelines for court rulings followed in each particular system of private international law.

It has reasonably been proposed that the specific cases of transposition and substitution be treated jointly based on the said notion of "equivalence", whose rele-

[501] *Vid*. Ph. Malaurie, "L'équivalence en droit international privé", *Recueil Dalloz*, 1962, chronique, xxxvi, pp. 215–220. *Vid*. as well, M. Jorge, "La loi étrangère devant le juge du fond: Accord procédural et équivalence des lois", *Études en l'honneur de Mme. Collaço*, Coimbra, Almedina, vol. I, 2002, pp. 217 *et seq.*; H. Gaudemet–Tallon, "De nouvelles fonctions pour l'équivalence en droit international privé", *Le droit international privé: esprit et méthodes: mélanges en l'honneur de Paul Lagarde*, Paris, Dalloz, 2005, pp. 303–325; C. Engel, "L'utilité du concept d'équivalence en droit international privé", *Annales de Droit de Louvain*, vol. 66, 2006, pp. 55–95.

[502] E. Pecourt García, "Problemática de la cuestión preliminar en Derecho internacional privado", *Revista de Derecho Español y Americano*, nº 14, 1966, pp. 11–60, esp. p. 20.

[503] In Mexican jurisprudence, reference must be made to the old judgement of the Supreme Court of Justice of the Nation (SCJN in Spanish) of 25 July 1940, which argued that, although it is different from the institution of the *fideicomiso* regulated in Mexico, the institution of the Anglo-Saxon trust undoubtedly has a degree of equivalence (J.A. Silva, *Derecho internacional privado. Su recepción judicial en México*, Mexico, Porrúa, 1999, p. 192 and pp. 548–549, in which the judgement is reproduced).

vance is also projected into other areas of private international law with a distinct content and scope: with a focus on the conflict of laws, it is advisable to speak of "formal equivalence". In general terms, it is assumed to attribute effects in the forum to concepts and categories which, even if they differ technically compared to another legal system, in both systems they fulfil a similar or equivalent legal function in respect of the same institutions[504]; thus, it involves the presumption that regarding the same kind of legal question the various responses contained by the laws in question are equally acceptable from the point of view of material justice and, as such, there is no obstacle to its welcome by the legal system legal of the forum. Thus conceived, the equivalence strengthen the "neutral" nature of the conflict rule, in the sense that the designation of the applicable law is effected exclusively according to the inherent connections of the legal relationship, and rather than eliminating the conflict rule mechanism, reinforces it.[505] This solution may be considered valid since the legal rule, ultimately, is conditioned by a social reality and the equivalence highlights precisely what commonly exists in this reality, in the sphere of distinct systems, notwithstanding the apparent contradiction between the technical construction elements of the law. The solution to private international transactions cannot be achieved if any legal effect that uniquely concerns them could be regulated in accordance with the legal criteria that prevail in the forum.[506]

390. Greater complexity is offered by the solutions for the cases of adaptation strictly speaking. There are, in principle, three possible alternatives available to the judge for resolving the possible legislative contradiction existing between two foreign legal systems:

i) Application of the *lex civilis fori* for which the judge decidedly eliminates the disagreement between the foreign legal systems. A similar response is justified in the conflict rule systems in a principle connected with the application of the foreign law in the forum, which is nothing other than that, in the case of "impossible application" of a foreign system, the judge must give application to the *lex fori* under the so-called "residual competence"; and, it goes without saying, also finds justification in the *legeforistas* systems.[507] Besides this, sufficiently convincing arguments which justify the negative position based on a strict interpretation of the judicial function in private international law have also been offered. It is thus established that the judge does not have any power to implement a possible adaptation between the foreign substantive systems declared applicable by the conflict rules of the forum, or, from other perspective, to derogate from applying a conflict rule of the forum, for the benefit of another, submitting to the law designated by the latter all of the problems covered by the decision. Consequently, since the judicial function

[504] In France, judgement of the *Cour de Cassation (1er ch. civ.)*, 13 April 1999 (*Compagnie Royale belge*), *Rev. crit. dr. int. pr.*, 1999, pp. 698 *et seq.* and the note of B. Ancel and H. Muir–Watt; *Journ. dr. int.*, 2000, p. 315 *et seq.* and the note of B. Fauvarque–Cosson.

[505] *Cf.* B. Ancel and H. Muir–Watt, abovementioned note, pp. 700–701.

[506] *Cf.* A. Bucher and A. Bonomi, *Droit international privé*, 2nd ed., Basel, Helbing & Lichtenhahn, 2004, p. 146.

[507] A.A. Ehrenzweig, *Private International Law*, I, 2nd ed, Leyden, Sijhoff–Oceana, 1972, pp. 103–104.

consists of the application of the law and not its creation, the problem exceeds the legislator's mandate contained in the rules of their own system of private international law, unless an express rule of this system attributes to the judge express authority or mandate for carrying out the adaptation operation.

ii) To modify the application of the conflict rules of the forum, dispensing with one of the foreign systems so that the judge submits the entire case to one of them, excluding the other; *v.gr*., opting to consider that it is a problem of a matrimonial property regime or that it is strictly a problem of succession. More specifically, the judge considers one conflict rule and discards the other, opting to submit both questions to the same legal system, giving priority to one of the conflict rules and, in this manner, ensuring the coherence of the final regulation. But in this point the doctrine is not peaceable with a view to justifying the choice. A certain area gives priority to the first of the conflict rules which has operated in time (in this case the law related to the matrimonial property regime) or to choose exclusively the conflict rule that relates to the law ultimately applicable, since this is the current problem being heard by the judge (the rule related to the succession regime), following constructions related to the change of connecting factor.[508]

iii) To modify the applicable substantive laws by implementing adaptation efforts through a partial application by the judge of each one of the systems in conflict, granting certain effects attributed by each one of them; *v.gr*. before the surviving spouse / successions conflict, attributing the particular rights of the family property regime by a foreign law or system and the rights of succession in accordance with the other system, in order to have an adequate final result.[509]The judge may, in order to avoid such imbalances, seek an *ad hoc* solution, aligning the respective substantive laws in play, for example, through the adjustment of the rights received under both regulations.

With the present article, when problems of adaption occur, it is easy to modify the conflict rule or the successive or simultaneously applicable substantive rules, so that it can give rise to a harmonious and coherent regulation of international law.

[508] The judgement of the Spanish Supreme Court of 30 June 1960 did solve the issue that arose from the case *Tarabusi*, resorting to a stratagem according to which the foreign law claimed in matters of succession had not been proven, in order to apply the Spanish rules on matrimonial property; but although this was the *ratio decidendi* in the entire reasoning of the Court, a request to include all issues (matrimonial property and succession) to the rule of conflict in succession matters as legal order applicable in last resort. In the Spanish legal system, the art. 9.8 *in fine* of the Civil Code followed this path after its rewording contained in the Act 11/1990 of 15 October by submitting the succession rights of the surviving spouse to the same law which governs the economic effects of marriage. This is not the solution used by the whole Spanish doctrine, as it is criticized for being excessively inflexible and for not examining the details of particular cases.

[509] *V.gr*. in the case *Tarabusi / Tarabusi*, the widow was granted rights as matrimonial property regime and as succession, it being understood that the applicable system during marriage is that of community of acquisitions.

Article 67. *Exclusion of* renvoi. The foreign law designated by the conflict rule is understood to include its substantive law provisions, with exclusion of *renvoi* that its conflict rules may make to other law, including Caribbean law.

391. Among the other options that have punctuated the doctrinal history of private international law and which have been embodied in the different national systems and inserted in numerous international conventions, the provision opts for a radical solution.[510] This solution determines that the referral to the foreign law is understood to be made exclusively to the substantive law, with exclusion of the conflict rules of the foreign system. This principle runs counter to the technique known as "*renvoi*", which implies a referral to a foreign law through the conflict rule of the forum and the consideration or observation of the conflict rules of this foreign system. If these rules refer to the law of the forum, we will be faced with a case first-degree *renvoi* or return of the *renvoi*; if, on the contrary, it relates to a third law, it would be a second-degree *renvoi*.[511] Both options would be excluded from the provision.

The advantage of the *renvoi* is that it respects the foreign law to such a point that the judge intends to resolve the case such as if he were the judge of the country whose law has been declared applicable. He has to resolve the case in accordance with the other law, preferably his own, through the action of this institution. For its defenders, it is an instrument whose mission is to contribute in the search for the legislation that has to govern a certain private international situation, but in many cases far from fulfilling this mission, it may complicate the tasks of the judges and give rise to unpredictable and unjust solutions.

Nonetheless we are faced with a formalist technique that is hardly justified in the convenience or interest in facilitating a preferable application of the law of the forum, even when it has to betray the particular meaning of its conflict rules (*vid. supra*, **article 64**). If one wishes to apply the *lex fori* it is much more correct to use other techniques, such as *v.gr.* those contained in **article 69** and to express this preference frankly. If the response to the conflict rule of the forum already creates uncertainty at the time of the determination of the substantive law applicable that uncertainty is multiplied after the implementation of the foreign conflict rule. And in addition to this, the conflict rule of laws that implements the mechanism of the applicable law is a conflict rule of the forum and not a foreign conflict rule.[512] It should not seem odd that already in 1900 an institution of the prestige of the *Insti-*

[510] CONC.: Art. 14 of the Swiss PIL Act; art. 3080 (Cc Quebec); art. 13 of the Italian PIL Act; art. 6 of the Panamanian Code of PIL; art. 5 of the Austrian PIL Act; art. 10 of the Argentinian draft law; art. 63 of the Dominican draft law; art. 5 of the Bolivian draft law; art. 12 of the Uruguayan draft law; art. 6 of the Colombian draft law.

[511] Art. 21 of the Hague Convention of 19 October 1996 on protection of children is an exceptional case of second-degree *renvoi*, which only applies to the Dominican Republic within the OHADAC zone.

[512] R. Dávalos Fernández, "La aplicación del Derecho extranjero", *Revista Jurídica. Ministerio de Justicia*, Havana, nº 12, July / September, p. 32.

tut de Droit International already expressed in its meeting in Neuchâtel of 1900 that when the law of a State governs a conflict of laws concerning private law, it is desirable for it to designate the same provision that must be applied in each matter and not the foreign provision on the conflict in question.

392. In the modern legislations of private international law, particularly in the framework of the European Union,[513] the exclusion is express as is also the case in Latin America, in the CIDIP Convention on the Law Applicable to International Contracts of 1994, whose article 11 provides that "For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws"[514]. In many convention texts the application of the foreign substantive law is implicit, with exclusion of the rules of private international law, either because they refer to the "domestic law", or because they tend to provide that the application of the law designated by the conflict rules provided in the same "may be refused only if it is manifestly incompatible with public policy". *A sensu contrario*, it will not be possible to disapply the law designated by the Convention as a result of other functional correctives, such as the *renvoi*. Furthermore, the CIDIP Convention on General Rules of 1979 remains silent on the institution studied. Finally, it should be pointed out that there are already national legislations that exclude the *renvoi*. Such is the case of article 2048 of the Peruvian Civil Code or article 16 of the Belgian Code of Private International Law of 2004, "subject to special provisions such as those applicable to real estate successions (article 78.2) or legal persons (article 110)". The elimination of this institution may only be explained by the relevant role that has been conferred to the habitual residence.

Certainly in many countries of the OHADAC zone the inclination to maintain the technique of the *renvoi* is more a result of past habits, often based on old-fashioned doctrinal conceptions, than a choice for granting an adequate solution to the of the private international transaction relationships, guaranteeing legal certainty.[515] And, at this point, it is worth recalling that the Bustamante Code did not regulate the institution[516] that is now also being excluded.

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[513] This option was implemented with the Rome Convention on the law applicable to contractual obligations of 19 June 1980. Its art. 15 on exclusion of *renvoi* establishes the following: "The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law". Likewise, the following texts maintained the exclusion: Rome I Regulation on the law applicable to contractual obligations (art. 20), Rome II Regulation on the law applicable to non-contractual obligations (art. 24), the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (art. 12) and Rome III Regulation for divorce and legal separation (art. 11). In contrast, and although it is highly questionable, the European legislator incorporated the notion of *renvoi* in art. 34 of Regulation (EU) No 650/2012 in matters of succession.

[514] This Convention is in effect in Mexico and Venezuela.

[515] Interestingly enough, prior to the enactment of the Civil Code in effect (Law No. 59 de 1987), neither the Civil Code of 1889 nor the Code of Bustamante included provisions in that respect. Art. 19 of the Civil Code provides that "In the event of referral to a foreign law that, in turn, refers to the Cuban law, the latter shall be applied. Should the referral be to the law of another State, the *renvoi* shall be admissible insofar as the enforcement of the said law does not violate what is provided for under article 21. In this latter case, the Cuban law shall be applied". It follows from this wording

Article 68. *Public policy.* 1. The foreign law shall not be applied if its effects are manifestly incompatible with international public policy. This incompatibility shall be observed by taking into account the connection between the legal situation and the legal system of the forum and the seriousness of the effect that would be produced by the application of this law.

2. Once the incompatibility is admitted, the law indicated through other connecting factors possibly provided for the same conflict rule shall be applied and, if this is not possible, Caribbean law shall be applied.

3. For the purposes of the preceding paragraphs, international public policy shall be understood to be all of principles that inspire the Caribbean legal system and which reflect the values of the society at the time of being observed.

4. Caribbean public policy shall include the imperative provisions or principles which cannot be derogated by the will of the parties.

393. The rule includes in its paragraph 3 a definition of "public policy" in the broad sense, such as all of principles that inspire a legal system and which reflect the essential values present in the State of the forum at the time in which must be observed.[517]

With this drafting, there is a reference to the so-called "negative" dimension of public policy, the "positive" being considered in **article 69** of the Model Law. It is a "functional corrective" of the law claimed by the conflict rule, pursuant to which the application of this is avoided if it is observed that "its effects are manifestly incompatible with international public policy".

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that the Cuban system generally admits return of the *renvoi* to Cuban law with a categorical formula "shall be applied" instead of more ambiguous expressions such as "shall be taken into account" (art. 12.2 of the Spanish Civil Code). It also follows that the Cuban legislator could not turn away from the fascination of second-degree *renvoi*, a genuine relic of the past, although the admission of foreign law in this case shall not disturb public policy of the forum. According to art. 4 of the Venezuelan PIL Act "When the competent foreign law declares that the law of a third State is applicable, and this third State, in turn, declares its own competence, the domestic law of this third State shall be applicable. / When the foreign law declares that Venezuelan law is applicable, this law shall be applied. / In cases not provided for in the preceding paragraphs, the domestic law of the State which is declared competent pursuant to the Venezuelan conflicts rule shall be applicable".

[516] Bustamante was apparently an avowed enemy of the institution. *Vid*. J. Navarrete, *El reenvío en el Derecho internacional privado*, Santiago, Editorial Jurídica de Chile, 1969, p. 123; G. Parra Arangure, "El reenvío en el Derecho internacional privado venezolano", *Revista de la Facultad de Ciencias Jurídicas y Políticas de la Universidad Central de Venezuela*, nº 79, 1991, pp. 141–240, esp, pp. 144–145.

[517] CONC.: Art. 7 of the Panamanian Code of PIL; art. 17 of the Swiss PIL Act; art. 3081 (Cc Quebec); art. 16 of the Italian PIL Act; art. 21 of the Belgian PIL Act; art. 6 of the Austrian PIL Act; art. 7 of the Polish PIL Act; art. 12.3º Cc (Spain); art. 64 of the Venezuelan draft law; art. 14 of the Argentinian draft law; art. 6. b) of the Mexican draft law; art. 64 of the Dominican draft law; art. 11 of the Bolivian draft law; art. 5 of the Uruguayan draft law; art. 3 of the Colombian draft law.

From the procedural perspective, a negative dimension of public policy may also be encountered in the area of the recognition of decisions and acts constituted abroad, preventing their validity in the forum when they are manifestly contrary to the same.[518] In accordance with **article 74.1, i)** of the Model Law, foreign judgments will not be recognised "if the recognition is manifestly contrary to public policy".

394. The notion of public policy does not show an unequivocal nature in the sector of the applicable law itself. In parallel to the distinction between domestic public policy (broader and more operative in the domestic transaction situations) and international public policy (more reduced and specifically applicable to private international transaction relationships) the degree of action or intensity of this corrective varies according to the matter and the area of the law considered.

This distinction between domestic public policy and international public policy has been traditionally represented in the doctrine as a figure of two concentric circles, the inside circle corresponding to the international public policy, in such a way that the international public policy rule is inserted within domestic public policy but not vice versa. The space that is located on the edge of the circle provides a dispositive note in private international transactions, in that freedom of choice in domestic private transaction situations remains on the outside of the greater circumference. Against this classical interpretation, one division is currently being argued, which takes as a point of reference the inscription of international public policy in a circle that contains a part of domestic substantive law. This ultimately implies its overlapping with the notion of imperative rules (**article 69**); and, furthermore, it is vague, since the expression "international public policy" appears to indicate a reality rooted in requirements of the international community and not in the framework of "domestic public policy".

The graphic example of the concentric circles is operative from two points of view. Firstly, because there is nothing to prevent the circle referring to international public policy from containing absolutely imperative principles taken either from domestic substantive provisions or from international convention texts of application in the forum. Secondly, because the principles that are situated on the edge of the circle can be distinguished, in turn, both from the private international law's own imperative rules as well as from the exemption of international public policy that is inscribed in the first circle.

395. This provision aims to establish a limit or exception that the judge or authority of the forum must generally observe, regardless of the multilateral conflict rule that has determined the referral to the foreign legal system and regardless of the legal system of another State which, accordingly, was applicable to the case. The limit or exception, that the provision does not articulate absolutely, then refrains from using incisive terms such as "shall not apply in any case", preferring instead the expression "shall not be applied", which permits the game of the so-called "attenuated effect of public policy". This solution, with wide-ranging con-

[518] Nicaragua: judgement of 31 October 1977, *Boletín judicial*, p. 327.

tent in Europe,[519] is contained in article 21 of the Cuban Civil Code and article 15.II of the Civil Code for the Federal District of Mexico.[520] Venezuela also leans towards a restrictive position by providing in article 8 of its Private International Law Act of 1998 that the provisions of the foreign applicable law will be excluded "when their application produces results manifestly incompatible with the essential principles of Venezuelan public policy". Other countries of the OHADAC area such as Colombia, Nicaragua, the Dominican Republic[521] or Panama remain silent on this institution.

The provision relates to the final phase of the process of application of the conflict rule, once that it has been referred to a foreign legal system. And it contains the legal response to a specific question that may arise at this time before the Caribbean judge or authority: the possible contradiction of the provisions of this legal system with the "public policy" of the forum. The response essentially consists in not applying the foreign law which, otherwise, must serve as a basis for deciding on the claims of the parties.

396. From this special perspective, which requires the implementation of the method of attribution, public policy offers the following *characteristics* in the private international law of each national system:

i) *Exceptionality*. The foreign law claimed must imply a "manifest" contradiction with fundamental legal principles, and not a mere content reference. For that reason, the present article includes the expression "manifestly incompatible" following the model of the Private International Law Conventions issued by the Hague Conference[522] and of the CIDIP[523] which incorporate this clause for diluting the rigour of the rule. Ultimately, the foreign law has to imply a "manifest" contradiction with fundamental legal principles, and not, as has been indicated, a mere difference of content.

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[519] J.D. González Campos and J.C. Fernández Rozas, "Art. 12.3º", *Comentarios al Código civil y Compilaciones forales,* t. I, vol. 2, 2nd ed., Madrid, Edersa, 1995, pp. 894–926.

[520] Art. 6.b) of the draft model code of PIL provides that foreign law shall not be applied "When the provisions of foreign law or the result of their application are contrary to the fundamental principles or institutions of Mexican public policy. Nevertheless, this foreign law may be recognised to a lesser extent when it gives rise to the recognition of rights on maintenance and succession". Art. 21 of the Cuban Civil Code: "Foreign law shall not be applied insofar as its effects are contrary to the principles of the political, social and economic regime of the Republic of Cuba".

[521] Art. 64 of the Dominican draft law includes a formulation identical to the disposition commented.

[522] *V.gr.*, art. 11.1º of the Hague Convention of 2 October 1973 that provides that "The application of the law designated by this Convention may be refused only if it is manifestly incompatible with public policy ('ordre public')".

[523] According to art. 5 of the Inter-American Convention on General Rules of Private International Law of 1979, "The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (ordre public)". Within the OHADAC zone, the Convention has been signed by Colombia, Mexico and Venezuela.

ii) *Territoriality*. The public policy is characterised by territoriality; that is to say, the rejection of the foreign law operates only regarding the public policy of the forum. This is a notable point of difference in respect of the positive dimension of the public policy, in the sense of permitting the application of imperative rules of the *lex causae* or including the laws relating the third legal system.

iii) *Relativity*. The public policy is imbued with a note of relativity, which occurs both in time and space. This latter case implies that the intervention of the public policy largely depends on the proximity of the legal relationship discussed to the forum; to increased connection, greater public policy options.

iv) *Temporality*. As regards the impact of the time factor in the configuration of the public policy, the unanimous solution is that of its assessment by the judge at the present time; i.e. it must be in accordance with the "current status" of public policy.[524]

397. The reference to the "foreign law" is defined negatively, as opposed to the legal system of the forum. In this way, the "foreign law", as a general legal notion:

i) comprises all the rules that do not form part of the said legislation of the forum. The provision alludes to the legal system of a foreign State, whether it concerns the legally unified system or that of a State in which "more than one normative system [...] coexist" (*vid. infra*. **article 70** of the Model Law) which obviously excludes both the rules of the public international law, created by the consensus of the States, and, in principle, the rules of the so-called *lex mercatoria*, arising from usages and practices of private individuals in international commerce.

ii) does not take into account the status of the foreign law – constitutional rule, ordinary law or infralegal rule – as well as its civil, commercial , etc. nature, and although the provision relates to the foreign "law" and it appears to presuppose a written rule, its real scope is wider, since it should not be ignored that in certain legal systems the regulation of many matters is the work of the customary (unwritten) law and, in others, the statutory law coexists with judicially created law.

iii) may be considered from a more particular perspective since within any legal foreign legislation two groups of rules should be distinguished: the rules of private international law, with their particular function for the regulation of the conflicts of laws ("conflict rules") and, on the other hand, the larger group comprised of the other substantive, civil, commercial etc. rules, without prejudice to the possibility of also including the procedural rules, despite the fact that they are generally categorised as "adjectives". Of these two groups, it is the second group which is considered in the provision and, consequently, it is referred in particular to the foreign "substantive" law. They are rules in the foreign system that substantively govern the matter included in the case of the conflict rule of the forum – succes-

[524] *Vid*. M. de Ángulo Rodríguez, "Du moment auquel il faut se placer pour apprécier l'ordre public", *Rev. crit. dr. int. pr*., 1972, pp. 369–399.

sions, divorce, donations, etc. – with the exclusion of the private international law rules of this system (*vid. infra,* **article 67** of the Model Law).

iv) offers a complementary aspect since the negative consequence provided in the provision operates only if the Caribbean judge or authority has observed the existence of a contradiction – whose scope will then be specified – between the foreign substantive law and the public policy of the forum. This necessarily implies that not only a specific foreign legal system applicable for resolving the case has been determined in advance, but also that the validity, the substantive content and the interpretation of the substantive foreign law applicable have been established sufficiently, in accordance with the provision (*vid. supra,* **articles 63 and 64** of the Model Law). Thus, only if the Caribbean court or authority knows sufficiently the foreign law will it be able to subsequently observe a possible contradiction with the "public policy" of the forum.

398. The present article relates to the possible contradiction between the foreign substantive law and the public policy, a notion that constitutes a "vague legal concept" through which the difficulties for the interpreter arise when trying to define what this notion is all about. The interpretation will entail at least two operations. Firstly, it is necessary to clarify exactly what is the meaning of "public policy" in the legal system of the forum (i). Secondly, it is necessary to know how the observance of the two normative elements in question is carried out, for establishing whether or not the foreign law is contrary to the "public policy" and, therefore, implement its application to or inapplicability of the case (ii).

i) *The concept of public policy*. It is not the prerogative of the present article. The legislator also employs it in many other rules of the Caribbean legislation that belong to areas very different from that of the present Law. And, even if we limit ourselves to the private international law rules, the conclusion that is reached is the same, since in their different dimensions there are rules that also refer to the "public policy". Indeed, it is sufficient to observe that if the same expression, the "public policy", is widely employed by the national legislators, above all in the area of the administrative rules. Here, specifically, the concept is connected with the protection of a specific social situation, which is indispensable in any national community: order and public peace. For that reason, from a negative dimension, one alludes to the prevention and sanction of those acts or conducts liable to impair the public policy. Logically, we also find this dimension in the area of the penal rules. Under this meaning, the public policy expresses a particular situation of social peace and security in a national community. This situation or state of the society is what permits both the normal development of the coexistence and the human activities as well as the normal functioning of the institutions and the exercise of the rights by private individuals. But if it is taken into account that this situation of social peace and public security is considered a legal right or a legal value of particular importance for the national legal system itself, it should come as no surprise that it is the object of special protection through administrative and penal rules that prevent or sanction that conduct that may impair or disrupt this situation.

ii) *Public Policy in the normative sense.* From this perspective the "public policy" constitutes the ideal system of values, which inspires the entire legal system. If you will, it is all of the fundamental conceptions of the law that characterise a national community, at a certain time in history. However, if these legal values or fundamental conceptions of the law constitute the assumptions that inspire the entire legal system in a national community, the necessary consequence is its absolutely indispensable and inalienable nature for the legal system itself. And this characterisation leads to a further consequence, which is no less important: in its normative significance, the public policy not only has a positive function, as element inspiring the entirety of the system. Also, necessarily, it must perform an exclusionary or negative function: the function of preventing usage or custom and the acts or transactions of the private individuals, carried out in the exercise of their private autonomy, from being contrary to these fundamental legal values. In parallel, it aims to prevent them from being integrated into the national legal system and, therefore, the foreign rules, decisions or judgements – i.e. created outside of the legal system itself – that are incompatible with the principles or values of the legislation into which they have to be integrated can have legal validity.

399. The present article, as has been stated, requires a referral to the foreign law, declared applicable by a multilateral conflict rule of the forum (of those contained in **Section I, of Chapter I of Title III** of the Model Law) and its objective is to exclude the application of the foreign law that is contrary to public policy. This implies a negative or exclusionary function that is justified by the protection of the fundamental legal values of the legislation of the forum; and it is precisely through its negative or exclusionary significance that it may be considered to constitute the legal proceedings of purification of any foreign regulation that undermines these fundamental values, i.e., a security filter or valve placed in front of the foreign law. But it should be stressed that if this provision produces a principal effect, the "purification" of the foreign law, in light of the fundamental legal values of the legislation of the forum, thus ensuring its integrity and its internal coherence, it also indicates, in return, what is the further effect of this exclusion. Specifically, its second paragraph provides that once the incompatibility is admitted, "the law indicated through other connecting factors possibly provided for the same conflict rule shall be applied and, if this is not possible, the Caribbean law shall be applied".[525]

[525] *Vid*. art. 16 of the Italian PIL Act of 1995 and the commentaries of B. Boschiero, en *Legge 31 maggio 1995, N. 218, Riforma del sistema italiano di diritto internanazionale privato* (a cura di S. Batiatti), Milan, Cedam, 1996, pp. 1046–1062; *vid*. as well art. 21.3º of the Belgian Code of PIL of 2004.

Article 69. *Mandatory rules*. 1. The provisions of Chapter I of the present Title shall not restrict the application of the rules whose observance the Caribbean considers essential for the protection of its public interests, such as its political, social or economic organisation, up to the point of requiring their application to any situation comprised within their scope of application.

2. Caribbean courts may, where they consider it appropriate, give effect to the mandatory rules of another State closely connected with the legal relationship.

400. The so-called "positive aspect" of public policy is confounded with the so-called mandatory substantive rules, which is used, together with other arguments (national security, national economy, etc.) as the rationale behind the use of national substantive rules in a situation of private international transactions.[526] They are so-called public policy rules, in the sense of domestic law rules of necessary application regardless of what foreign elements might exist in the case to be regulated, which are governed autonomously in paragraph 1 of the present provision to the mandatory rules of the forum[527] and in paragraph 2 to the foreign mandatory rules[528].

Although operating exclusively in the ambit of the "conflict of laws" or of the determination of the law applicable to private international transaction situations, the question arises as to the relationships of the general public policy clause of **article 68** of the Model Law with other rules of a national private international law system which, due to being intended also for the protection of fundamental values of their own legal order, are imperatively applicable to these situations by the judge of the forum, regardless of the law governing the act or contract of the private individuals; that is to say the so-called "rules of necessary implementation", "rules of immediate implementation" or "mandatory substantive rules". Within the distinct dimensions offered by the public policy in private international law, reference should be made now to two very specific ones: on the one hand, their use, together with other arguments (national security, national economy, etc.), as the rationale behind the application of national substantive rules to a relationship of private international transactions; on the other hand, and more commonly, the notion of public policy is used as a functional corrective of the method of attribution (**article 68** of the Model Law). However, this distinction, which appears so clear, is not so in

[526] CONC.: Arts. 18 and 19 of the Swiss PIL Act; art. 3079 (Cc Quebec); art. 17 of the Italian PIL Act; art. 20 of the Belgian PIL Act; art. 8.2º of the Polish PIL Act; art. 15 of the Argentinian draft law; art. 13 of the Bolivian draft law; art. 6 of the Uruguayan draft law.

[527] *Vid*. art. 17 of the Italian PIL Act of 1995 and the commentaries of N. Boschiero, en *Legge 31 maggio 1995, N. 218, Riforma del sistema italiano di diritto internanazionale privato* (a cura di S. Batiatti), Milan, Cedam, 1996, pp. 1062–1072.

[528] Arts. 18 and 19 of the Swiss PIL Act of 1987 are along the same lines. *Vid*. B. Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987*, 2nd ed, Basel, Helbing & Lichtenhahn, 1997, pp. 36–50. *Vid*., as well, art. 20 of the Belgian Code of PIL of 2004.

the national court rulings so that it has been considered convenient to include an autonomous article dedicated to the first of these dimensions.

Of course, the general clause of **article 68** operates only once the referral to the foreign law has been made in accordance with the provisions of a Caribbean multilateral conflict rule. In this manner, the rule that includes this general clause is exclusively connected with these multilateral conflict rules; it is considered by the doctrine that the intervention of the "public policy" is a possible corrective of the "functioning" of those rules within the process of application by the judge or authority of the forum. In exchange, the mandatory substantive rules for the private international transaction relationships provided in each national private international law system will have to be directly applied by the judge of this system, regardless of the legal system that governs the situation, and, therefore, regardless of the law designated by a multilateral conflict rule.

401. From the currents focusing on the so-called "methodological pluralism", in recent years one has insisted on the revitalisation of the role of the forum and on the insufficiencies of conflict rule method. It is evident that, at the present time, the protection of the "internal order" is one of the duties that the States must comply with as a matter of priority, including in the very interest of the "international order"[529] and it should not be ignored that in all the national systems and, more specifically, in the area related to the law of the family or in the law of contracts, a certain type of rules exist which are imposed regardless of a possible national law or a law designated by the parties.

This type of rules is qualified by the doctrine with the expression "mandatory substantive rules" or, more extensively, "substantive rules of mandatory application to private international transactions". This concept constitutes an all-encompassing notion, which usually affects or relates to provisions of private law and of a highly public nature, and which reflects, more than the own content or function of the rule, its effect or scope: the circumvention of the conflict rule.

We are faced with a series of provisions of the law of the forum, both of public law as well as of private law, whose interest for the state-owned company is too relevant to compete with the foreign laws. As a consequence, their scope of application is determined, fundamentally taking into account the objective which they pursue, and their application tends to be categorised as "immediate" or "necessary", because they operate, in principle, outside of the process of attribution. What is important in these rules is not the degree of leeway or prohibition that they contain, but the element of national organisation that they reflect. This organisation must be affected as a result of the intrusiveness of the foreign law and this justifies

[529] *Vid*. P. Francescakis, "Quelques précisions sur des lois d'application immédiate et ses relations avec les règles des conflits des lois", *Rev. crit. dr. int. pr*., 1966, pp. 1–18; *id.*, "Lois d'application immédiate et règles de conflit", *Riv. dir. int. pr. proc*., 1967, pp. 691–698.

that their application is "normal", that is to say, that it does not present as an exception to the application of the foreign rules.[530]

402. With regard to such circumstances, it is necessary to define the species or subspecies that are induced from all of substantive rules of the forum of mandatory application to cases of private international transactions:[531]

i) Firstly, reference should be made to the so-called "police and security laws" and "public policy laws" that respond to the need for a uniform treatment both of domestic and international situations connected with the territory of the forum. The mandatory nature of these rules is underpinned by the satisfaction of collective interests which explain the nature of public law of the provisions categorised as such: penal law, procedural law, economic law, etc. The growing interventionism of the State in matters traditionally subject to the private law through their connection with the protection of individual interests has given rise to a functional extension of the scope of action of the overriding mandatory rules, whose paradigm is the wide sphere of action today offered by so-called "economic public policy". This means that, in such varied areas as certain conditions of employment contracts or the law of competition, the public policy rules are community provisions, whose objective is rooted in an intracommunity interest.

ii) Secondly, not of all the mandatory substantive rules enjoy the same degree of mandatoriness. Their force, determining their direct application, depends on the degree of connection of the case with the forum. If the connection of the case with the Caribbean territory is minimal, in such a way that the possible application of a foreign law is not liable to jeopardise the public interest which underpins the substantive rule of the forum, it lacks a vocation to be applied to the cases of private international transactions. In other words, a teleological interpretation of the rule leads to its inapplicability. However, this requirement of connection with the forum cannot be extended to all mandatory substantive rules. It normally acts in relation with the overriding mandatory rules or economic public policy rules. It is absurd to seek to apply the rules of protection of the Caribbean market (maximum prices, competition regulations, protection of industrial property) to international cases that do not produce effects in the Caribbean market. However, we can say that absolutely mandatory substantive rules exist, i.e. whose application cannot depend on the degree of connection of the case with the forum. It is those rules that guarantee respect for the fundamental rights contained in the Constitution. A Caribbean judge may not pronounce a judgment based on provisions contrary to the gender equality, religious freedom or the protection of minors, to state only three examples.

iii) Finally, the distinction between absolutely and relatively substantive mandatory rules should be emphasised. The mandatory nature of the latter is rooted in the

[530] P.A. De Miguel Asensio, "Derecho imperativo y relaciones privadas internacionales", *Homenaje a Don Antonio Hernández Gil*, vol. III, Madrid, Centro de Estudios Ramón Areces, 2001, pp. 2857–2882.

[531] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Madrid, Civitas–Thomson–Reuters, 2013, pp. 134–136.

obtaining of a substantive result favourable to certain persons or situations (consumers, workers, minors...). Their application is only justified then if the foreign law designated by the conflict rule is not as or more favourable to the achievement of this objective than the Caribbean law.

403. The interventionism of the State in matters traditionally subject to private law through their connection with the protection of the individual interests has given rise to an functional extension of the scope of application of the overriding mandatory rules, a circumstance that has contributed to blur the profiles of the distinction between overriding mandatory rules, mandatory substantive rules and public policy in general.

In this context is necessary to refer to the so-called "economic public policy", a concept which, from a positive point of view, characterises a large part of the mandatory substantive rules. This principle has great quantitative and qualitative importance and, in the international framework, is generally translated into a defence mechanism of the national market conditions and the entire national economy. The content of the competition law, of the general terms and conditions of contracts, of consumption or of the bankruptcy situations in the domestic law, may fill the content of this notion, permitting the circumvention of the foreign law which admits certain practices, rights or contractual clauses that affect the market conditions of the State of the forum.

By definition, the economic public policy requires, in order to act, a certain spatial connection of the case with the legislation of the forum, since it would not make any sense to use it if the application of the foreign law does not produce toxic effects in the domestic market.

404. Paragraph 1 of the provision considers the application of the mandatory rules of the *lex fori*. It cannot be ignored that the rules of intervention of the forum tend to contain a criterion of spatial application, which is more or less express, that reflects a certain voluntary restraint in its application, reduced to the cases impacting on the interests of the market or the economic policy of the State where the court hearing the case is based. On the other hand, the mandatory rules are not necessarily rules of national law, since they can emanate from other national systems or proceed from a regional economic integration mechanism in areas such as free competition or the rules of protection (of the insured party, the worker, the consumer regarding abusive clauses, etc.), whose consideration, in view of their scope of application is not only feasible but obligatory.

Taking into account this situation, paragraph 2 of the present article seeks to obtain an effective decision in other States, diluting the factor of relativity that introduces the variety of conflicting regulations according to the forum in which the dispute is taking place, respecting the requirements and the interests of the States and their intervention policies in the contractual matter. Its direct antecedent is article 11.2 of the CIDIP Convention on the Law Applicable to International Contracts of 1994 according to which, "It shall be up to the forum to decide when it applies

the mandatory provisions of the law of another State with which the contract has close ties".

This paragraph takes into account situations of direct or mandatory substantive regulatory rules in third countries (that is to say, rules not relating to the forum nor the law of the contract designated by the conflict rule), since the close connection that they have with the situation and the force of their interest in making it effective. In this way, a uniform and thus effective solution is obtained, respectful of the legislative policies interests and objectives that are attainable.[532]

The possibility to apply the mandatory rules of a third State must take into account the nature and object of such provisions, as well as the predictable consequences of their application or non-application. In the decision to apply the mandatory rules of third States it is fundamental to identify the underlying degree of protection or public interest of the mandatory rule, since its application should only be done when that value or objective is recognised as legitimate in the judge's own legal system: protection of the consumer, free competition, environment... On the other hand, the application of rules of intervention that overturn the values expressed in international economic law or in the law of the forum is not admissible, a fact which tends to be relatively habitual if this concerns rules of economic retaliation or which strictly pursue the economic safeguarding or protection of the State to which they belong.[533] It is more difficult to determine precisely what consequences of the application must be considered by the judge. Certainly, the consequences on the contracting parties cannot have an absolute importance, given that the application of these rules is based on a public interest that justifies the limitation to the freedom of choice.

Article 70. ***Legal orders with more than one system of law*****. 1. If more than one normative system with territorial or personal jurisdiction coexist in the legal system of the State designated by the normative provisions of the present law, the applicable law shall be determined in accordance with the criteria used by that legal system.**

2. If such criteria cannot be identified, the normative system with the closest connection to the specific case shall apply.

[532] The application of mandatory rules of third States is addressed as a possibility in the Rome Regulation (art. 9), which has, however, proceeded to a more significant restriction than its predecessor, the Rome Convention, by circumscribing this application to the laws of the country of enforcement. This leaves out some relevant cases which may require the application, for instance, of the law of the market affected by antitrust measures or the laws of the country of origin of an illegally exported cultural property. This restriction attempted to save the situation created by art. 7.1 of the more generous Rome Convention, subject to reservations by Germany, Ireland, Luxemburg, Portugal and the United Kingdom. In particular, the aim was to include the United Kingdom in the Rome I Regulation.

[533] *V.gr*., Torricelli Act or Helms Burton Act in the United States.

405. The States with more than one system of law are characterised by the existence, within their legal system, of a plurality of laws or legislations liable to regulate the same situation and consequently generate domestic conflicts of laws.[534] Such conflicts may occur, in the first instance, in the federal States (United States, Australia, Canada, Mexico, Switzerland, Yugoslavia, etc.), but also are particular to unitary States with a certain degree of legal decentralisation (United Kingdom or Spain). Likewise, regardless of the territorial organisation of the State, systems with more than one system of law *ratione personae* may exist, as a result of the distinct legislations applicable due to the religious, ethnic or tribal status of the subject (Greece, Algeria, Morocco, Sudan, Egypt, Tunisia, Indonesia, India, Pakistan, Syria, Iraq, Jordan, Libya, Lebanon, etc.). In all these cases, the referral of a conflict rule of the forum to the law of a State with more than one system of law raises a problem of application consisting in determining, within this State, which specific substantive law, among the different ones that coexist, must be applied. It is the problem known as "referral to a system with more than one system of law".

This problem must be differentiated, however, from the solution of the domestic conflicts of laws in the framework of legal relationships that do not go beyond the borders of a State, that is to say that do not have an international nature. The problem of the referral to a system with more than one system of law refers solely to the problem raised in the case of international conflicts of laws, in which the referral of the conflict rule of the forum designates the application of the law of a State with more than one system of law. This problem, thus, as well as its solution, must not be confused with the particular problems and solutions of the domestic conflicts of laws and that operate outside of the problem of the referral to a system with more than one system of law, as much as its solution can be circumstantially identical.

406. The legal solutions to the problem of the referral to a system with more than one system of law, in particular which relates to the option for a certain legislative technique, depends to a large extent on the type of conflict concerned. For these purposes, one tends to distinguish between inter-territorial and inter-local conflicts of laws and inter-personal conflicts of laws. In the inter-local conflicts of laws, the plurality of laws is based on the legal decentralisation of the State for territorial reasons (federal States, unitary but decentralised States or States which temporarily maintain a legal plurality motivated by a territorial change or annexation). In the personal conflicts of laws, the plurality of laws obeys the presence of distinct person-based legal systems, by reason of ethnicity, religious confession or tribal affiliation of the persons to whom the rule was directed.

Another classification of the cases of referral to a system with more than one system of law distinguishes between referral *ad extra* and *ad intra*.[535] The first case is the usual case and includes all the cases in which the conflict rule relates to a

[534] CONC.: Art. 18 of the Italian PIL Act; art. 3077 (Cc Quebec); art. 9 of the Polish PIL Act; art. 12.5 Cc (Spain); art. 65 of the Dominican draft law; art. 9 of the Argentinian draft law; art. 7 of the Mexican draft law; art. 3 of the Bolivian draft law.

[535] M.P. Andrés Sáenz de Santa María, "El art. 12.5º del C.c. y el problema de la remisión a un sistema plurilegislativo", *Revista General de Legislación y Jurisprudencia,* t. LXXVII, 1978, pp. 72 *et seq*.

system with more than one system of law, either foreign or the own system of the forum, and it is necessary to determine the particular law applicable within this. The special case special of the referral *ad intra* occurs as a result of a combination of the case of the referral to a system with more than one system of law and the operation of the *renvoi*. This is the case in which the conflict rule of the forum relates to a foreign law, whose conflict rule determines the jurisdiction of the legal system of the forum, this latter being a system with more than one system of law.

407. The different solutions that may be given to the referral to a system with more than one system of law have been analysed by the doctrine using a very varied terminology.[536] Basically, two systems are considered for solving the problem of the referral to a system with more than one system of law.

i) The direct referral makes it possible to use the connections of the conflict rule for identifying directly the local legislation applicable to the litigious case, presuming that the connection does not directly designate the law of one State, but the law of the specific territory of that State. This system has two limitations. Firstly, it is only operative when it concerns connections of a territorial nature (place where a property is located or of the conclusion of a contract, residence or domicile of the parties, etc.), which is unfeasible when the conflict rule contains a strictly personal connecting factor (*v.gr.*, the domicile or habitual residence), which facilitates the localisation of the territory of the case within the system with more than one system of law. Secondly, even if it concerns territorial connections, the method of direct referral is inappropriate in the case of referral to a person-based system with more than one system of law, in which case the application of the local domestic law is not appropriate or sufficient for resolving an inter-personal conflict of laws, whose origin is not found in the necessity of applying a distinct law by reason of the territory, but in the plurality of laws motivated by the distinct status of the subject.

ii) The indirect referral, on the other hand, provides a medium-term solution to the problem of the referral to a system with more than one system of law. Thus, if the conflict rule relates to a State with more than one system of law, the local or specific personal legislation that must be applied will be designated by this State's own domestic rules on conflicts. The assessment of the applicable law in this system implies a two-stage legal operation: firstly, the designation by the conflict rule of the forum of a State with more than one system of law; secondly, the consultation of the domestic rules on conflicts in this State for discovering the substantive law ultimately applicable.

408. This latter is the system pursued by the present article.[537] The indirect referral is introduced as a very appropriate solution for resolving the referral to a per-

[536] S.A. Sánchez Lorenzo, "Art. 12.5º", *Comentarios al Código civil y Compilaciones forales*, 2nd ed., Madrid, Edersa, 1995, pp. 943–973.

[537] It reproduces the art. 18 of the Italian PIL Act of 1995. *Vid*. G. Conetti, in *Legge 31 maggio 1995, N. 218, Riforma del sistema italiano di diritto internanazionale privato* (a cura di S. Batiatti),

son-based system with more than one system of law, as well as for the referral to a territory-based system with more than one system of law operated through the connection.

In the case when in the State with more than one system of law no express rules on the solution of domestic conflicts of laws exist, it is necessary to cover the gap based on subsidiary connections and the solution provided by the provision, continuing the solutions adopted in comparative law and in the convention-based law, consists in using a final connection with a general aim, the application of the law that has a closer connection with the case or the parties involved.[538]

The provision establishes a generally applicable system of indirect referral, with the already mentioned drawbacks if the system with more than one system of law claimed does not have express rules for resolving the domestic inter-local or inter-personal conflicts, or indeed its rules may not be applied in the absence of sufficient proof or because they lead to a result manifestly contrary to the objective or substantive result pursued by the conflict rule, when this is found to be substantially oriented. In such cases, it is necessary to arbitrate a subsidiary solution. The subsidiary application of the *lex fori* should be excluded, *a priori*, at least when this is possible, by virtue of the analogy, find an alternative solution that respects both the substantive criteria of the conflict rule system of the forum, as well as the integral application of the foreign substantive law.

The Model Law chooses the referral to a system with more than one system of law based on territory from a distinct connection to the nationality, which seems to be the simplest the solution in such cases, as the system of indirect referral may be perfectly substituted by a system of direct referral, since the territorial connections established in the present conflict rules would permit us to identify immediately the local law applicable within the foreign system. In these cases, the application by analogy of the connections directly appears the only reasonable solution, or at least one more reasonable than the alternative of having recourse indiscriminately to the *lex fori*, since the connection provided in the present conflict rules is presumed to designate the law that is considered most formally connected to the case with re-

Milan, Cedam, 1996, pp. 1072–1975. It is also included in art. 7 del of the Mexican model code of PIL and art. 65 of the preliminary draft on PIL of the Dominican Republic of 2013. *Vid.* as well art. 17 of the Belgian Code of PIL of 2004.

[538] Direct referral, as a technique for resolving the issue of referral to a system with more than one legal system, is addressed in the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, in the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability and in the Rome Convention of 19 June 1980 on the law applicable to contractual obligations. The system of direct referral is perfectly appropriate to the property nature of the subject matter, as it excludes the possibility of inter-personal conflicts, restricting itself, obviously, to the possibility of referral to a system with more than one legal system divided on a territorial basis. The indirect referral technique is used, on the other hand, in art. 16 of the Convention on the Law Applicable to Maintenance Obligations, concluded in the Hague on 2 October 1973, which provides that "Where the law of a State, having in matters of maintenance obligations two or more systems of law of territorial or personal application, must be taken into consideration - as may be the case if a reference is made to the law of the habitual residence of the creditor or the debtor or to the law of common nationality, reference shall be made to the system designated by the rules in force in that State or, if there are no such rules, to the system with which the persons concerned are most closely connected".

gard to criteria of proximity, or more apt for regulating it based on a substantive criterion.

Article 71. *Acquired rights*. The legal situations validly created in a State in accordance with all the laws with which it has a connection at the time of their creation shall be recognised in the Caribbean, provided that they are not contrary to the principles of its public policy.

409. The questions specific to the applicable law generally arise in the scope of the birth, exercise and extinction of the rights. However, when facing the question of the acquired rights the perspective changes since it arises at a subsequent stage, and more than a problem of applicable law, it is one related to the scope of extraterritorial validity of these rights, specifically, to its validity in States other than where these rights were constituted.[539] The realisation of justice in the scope of the international legal transaction has traditionally justified their recognition provided that two circumstances occur: applicable law and extraterritorial validity. In the first case, the right must be acquired in accordance with the law designated by the conflict rule of the forum; and, in the second case, this right must have already been generated in accordance with this law.[540] Such recognition, however, finds certain exceptions, among which are the inexistence of the institution that has produced such rights in the country in which they are invoked and that these are contrary to the public policy. It is also pointed out as a ground for exception that the rights have been acquired abroad in violation of the law, that is to say in violation of the foreign law, which again is contrary to the public policy of the forum.[541]

The institution studied is relevant when it is admitted that a right may be validly acquired in accordance with a legislation other than the one normally applicable or indeed, when the *lex fori* has constructed a special conflict rule with the sole purpose of facilitating the recognition of rights acquired abroad. Thus conceived, it may be used as a basis for admitting an exception to the functioning of the conflict rules of the forum. In other words, the admission of the legal situations, once they have been validly created in a State in accordance with its laws, is justified in that the rights thus created do not have to be diminished or ignored due to the fact that, according to the transnational movement of these situations, these are submitted to a legal system of a State other than the one whose legislation prevailed at the time of its birth. This is intended to guarantee the continuity of these legal situations in space.

410. The spatial element that characterises the exception of public policy is combined with the temporal element in the treatment of the rights acquired. Theoretically, the situations already consolidated within the sphere of a foreign system, which are the result of the immediate effect of the said legislation, do not show the

[539] CONC.: Art. 13 of the Argentinian draft law; art. 9 of the Uruguayan draft law.

[540] H. Somerville Seen, *Uniformidad del derecho internacional privado convencional americano*, Santiago, Editorial Jurídica de Chile, 1965, pp. 170 *et seq*.

[541] A. Ferrer Correia, "La doctrine des droits acquis dans un système de règles de conflit bilatérales", *Multitudo legum ius unum: Festschrift für Wilhelm Wengler zu seinem 65*, vol. II, Berlin, Inter Recht, 1973, pp. 285–320.

same vulnerability to the exception of public policy (**article 68**) as those situations which, although originating under the rule of the foreign law, continue deploying their effects when they come in contact with the forum. The legal relationships that do not have a durable nature, that is to say which are consolidated in a time span (transfer of ownership, validity of the act of adoption, etc.) tend to avoid the exception of public policy for reasons of both a technical and functional nature. And this circumvention operates both from a formal perspective, given that at the time of being consolidated there was no spatial connection with the forum, as well as at the functional level, because a different solution would be contrary to the desirable minimum legal certainty in the international order.

It should not be forgotten, however, that the presumed retroactive nature of the public policy with regard to the rights acquired has served to articulate for part of the doctrine a solution to the "change of connecting factor" favourable to the application of the last law. In this respect, the private international comparative law has offered particularly illustrative historical examples of a retroactive application of the public policy to the detriment of the rights acquired. Although it is advisable therefore to avoid a corrective application in respect of those rights acquired under a foreign legal order, which, at the time of being consolidated, did not have a sufficient connection with the legal system of the forum. This does not preclude placing the exception of public policy before those effects derived from this legal relationship which continue deploying their effects in time and are likely to enter into contact with the system of the forum, violating the principles that inform the international public policy.

411. Originating in the British case-law at the beginning of the nineteenth century, it is not frequent to find a response to the question under discussion in the national systems of the OHADAC area, with the exception of the Private International Law Act of Venezuela[542] or the Mexican Civil Code[543], but it has been incorpo-

[542] Art. 5 of the Venezuelan PIL Act provides that "Legal situations created in accordance with a foreign law determining its own jurisdiction under internationally admissible criteria shall be effective in the Republic, provided that they are not in contradiction with Venezuelan rules of conflict, that the Venezuelan law does not claim exclusive jurisdiction over the subject-matter, or that they are not clearly incompatible with the essential principles of Venezuelan public policy".

[543] Art. 13.I of the Civil Code for the Federal District in common matters, and for all the Republic of Mexico in federal matters provides that: "The legal situations validly created within the bodies of the Republic or in a foreign State in accordance with its law shall be recognised". For L. Pereznieto, the word "validly" is a term in accordance with which the judge of the forum, after referring to foreign law, has to decide whether or not the situation was created in accordance with foreign law. Still according to L. Pereznieto, the judge's scope for determining its possible validity must be sought in case-law, which gives the definitive answer (*Derecho internacional privado. Parte general*, 8th ed., Mexico, Oxford University Press, 2008, pp. 289–290). *Vid*., as well, V. García Moreno, "Reforma de 1988 a la legislación mexicana en materia de Derecho internacional privado", *Temas de Derecho Internacional Privado. Libro Homenaje a Haroldo Vallãdao*, Caracas, Facultad de Ciencias Jurídicas y Políticas. Universidad Central de Venezuela, 1997, pp. 194 *et seq*. In the decision of 12 June 2001, 1.3º.C.262C in civil matters as regards the Direct Appeal 389, the third collegiate court of the first circuit established that for a legal act to be valid and produce legal effects in Mexico, it has to be analysed in accordance with the law of the place where it was drawn up. Basing its decision on section I of art. 13 of the federal civil code, the court established that for the legal situations validly created to have legal effects in Mexico, it was essential to analyse this section I

rated into other systems[544] and into the Inter-American codification as it is considered that it is essential not only for the flexibilisation of the conflict rule method, but also for the achievement of its objectives.

i) Initially, the Bustamante Code dealt with this question by establishing in its article 8 that "The rights acquired under the regulations of this Code have full extraterritorial validity in the States contracting parties, unless a rule of international public policy precludes any of its effects or consequences". Therefore, the recognition of the rights acquired under a foreign law constitutes the rule and its exception relates to those cases where such admission could flagrantly violate fundamental principles of the legal system of the contracting State involved. Numerous critics have been critical of a similar approach, and it should be pointed out that it excludes the recognition in accordance with the competent legislation if through this the international public policy established by the substantive law of the forum is infringed, thus closing off all of the difficulties that could arise from the rights acquired.[545]

ii) Not without extensive debate, article 7 of the CIDIP Convention on general rules of 1979 was drafted in the following form "Juridical relationships validly established in a State Party in accordance with all the laws with which they have a connection at the time of their establishment shall be recognised in the other States Parties, provided that they are not contrary to the principles of their public policy (public order)". This drafting supposes an evident improvement of the text of article 8 of the Bustamante Code by recognising the rights acquired in accordance with all the competent "laws". This constitutes a more liberal interpretation, which is more adequate to the objectives of private international law. This rule additionally had the virtue of substituting the controversial expression "rights acquired", by that of "legal situations validly created", this objective being wider by encompassing a broader range of different situations than the rights strictly speaking. Its content is made without undermining the interests of the forum, which are regarded as the express inclusion of two exceptions: that the situations have a connection at the time of their creation with the legal system where they have been constituted and that it is not contrary to the principles of its public policy.[546]

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along with section V of the same article ("Except in the cases provided for in the aforementioned sections, the legal effects of acts and contracts shall be governed by the law of the place in which they are to be executed, unless the parties validly designated another applicable law."). Indeed, whether or not the act which produced said situations is valid in accordance with this foreign law has to be studied.

[544] *V.gr*. art. 2050 of the Peruvian Civil Code; art. 7 of the Austrian Federal PIL Act of 15 June 1978. Art. 66 of the Dominican draft law includes a text identical to the article commented.

[545] J. Samtleben, *Derecho internacional privado en América latina. Teoría y práctica del Código Bustamante*, vol. I, *Parte General*, Buenos Aires, Depalma, 1983, p. 205.

[546] In Venezuela, a worker sued for the difference in payment for the services he provided in Argentina, Guatemala and Venezuela and his claim was the subject of judgement No. 1633 of 14 December of 2004, and later of the declaratory judgement of 9 August 2005 of the chamber of social cassation of the Supreme Court of Justice, which considered that the worker was to be indemnified in accordance with the legislation of each of these countries, on the basis of art. 7 of the CIDIP Convention on General Rules of 1979. Case *Enrique Emilio Álvarez Centeno vs Abbott Laborato-*

412. The present article brings together the requirements of conceptual and terminological precision indispensable for granting legal certainty. For that reason, it may be considered as an essential contribution to the process of convention-based unification of the private international law of the hemisphere.[547] Therefore, with similar purposes it incorporates the text of article 7 of the Convention of the CIDIP on General Rules of 1979. The solution adopted thus consists of applying the law declared competent by all the legal systems connected with the factual case. As may be observed, the terminology of the "rights acquired" has been superseded by the use of the term "validly created legal situations", originated though the need to include not only the legal acts but also any class of events that produce consequences in the world of the law. It is intended that in the future interpretations of the provision it can give rise to a negative effect for the normal functioning of the conflict rule through a possible rejection of the foreign law claimed.

TITLE IV

VALIDITY OF FOREIGN JUDGMENT AND PUBLIC DOCUMENTS

Chapter I

Recognition and enforcement of foreign judgments

Article 72. *Concept of judgment.* A judgment shall be understood to be any decision adopted by an equivalent court or authority of a State regardless of the denomination/name given to the proceeding from which it is derived, such as decree, ruling, order or writ of execution.

413. A wide and flexible definition of the word judgment is incorporated in order to make reference to the different categories of decisions likely to be recognised or enforced under the present provisions, which in principle include any decision on the merits of a case, both matrimonial sentences as well as decisions of any other type. Thus, instead of the term ruling, the term judgment is used, with a less precise legal meaning capable of encompassing disparate cases. In all cases, the definition must be combined with the existence of specific restrictions to the recognition and enforcement of some of those judgments, as well as with the circumstance that the extent of certain controls may be various according to the characteristics of the

ries, C.A y Otra, http://www.tsj.gov.ve/decisiones/scs/agosto/1099–090805.htm.30/08/2011. http//www.tsj.gov.ve.

[547] V.H. Guerra Hernández, "Derechos adquiridos". *Ley DIPr comentada*, t. I, Caracas, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas, 2005.pp. 232–233.

judgments. That same broad orientation is due to the use of the expression "court or equivalent authority", so that it comprises the decisions of any authority that is attributed jurisdictional functions in matters of private law.

414. The definition of judgment used for these purposes corresponds to the focus adopted in the more modern international reference instruments in this area. In this sense, a similar definition can be found in article 4 of the Convention of 2005 on Agreements of Choice of Court Agreements adopted in the framework of the Hague Conference on Private International Law, as well as in article 23 of the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 30 of October of 1999, draw up in the same institution. The criterion that inspires these rules is consistent with the prevailing content of the instruments on recognition and enforcement of rulings adopted in the European Union, already the Brussels Convention of 1968, whose more recent formulation is currently included in article 2.a) Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or Brussels I Regulation (recast).

On the contrary, the approach adopted differs in part from that inspired in the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 8 May 1979. In accordance with its article 1, the Convention permits that the States limit its application to the compensatory judgements involving property, whilst only providing that it can be applied to the judgments that end proceedings and the decisions of authorities which exercise some jurisdictional function when the States declare this when ratifying the Convention.

Article 73. ***Recognition and enforcement in general*****. 1. For a judgment to be recognised, it must produce in the State of origin the legal effect whose recognition is claimed in the requested.**

2. For a judgment to be enforced, it must be enforceable in the State of origin.

3. Recognition or the enforcement may be postponed or refused if the judgment is the subject of an ordinary review in the State of origin or if the time limit for seeking ordinary review has not expired.

4. When a foreign judgment includes parts that are severable from the remainder, one or more of them shall be likely to be recognised or enforced separately.

415. For harmonising the practical necessity of the recognition of foreign judgments with the formal principle of the jurisdictional sovereignty, historically different theories have been developed, such as the notion of comity or international courtesy, the principle of respect for the rights acquired as the basis of the recognition of foreign judgments or the incorporation of foreign law, through the integra-

tion of the foreign judgement in national law. Without prejudice to the greater or lesser basic goodness of these theories the recognition is due to a practical objective, that justifies the application of the foreign law, since if the principle of territorial sovereignty of the State were brought to its ultimate consequence, the possibility of enforcing or giving validity to judgments not issued by its courts would never arise, which would be contrary to the reality and would suppress the international legal transaction and the legal relationships between nationals of different countries.[548] This practical objective is what justifies the general basis not only of private international law in its entirety but, in particular, of the area of the recognition of foreign decisions.[549]

The foreign nature of the judgments must be understood in its exclusive sense referring to all decisions pronounced in the exercise of a jurisdictional power other than Caribbean; this concerns a national court or an international instance (*v.gr.*, an arbitral award proceeding from ICSID). There is no doubt of that each one of these cases leads to distinct recognition mechanisms. On the other hand, the term "foreign" judgment raises problems of definition in respect of the arbitral awards which, by their very nature, have a transnational nature, and open the possibility, without doubt with important consequences, of defining their foreign origin based on very disparate criteria, as we will have the opportunity to see. In summary, despite the term "foreign judgment", which is used for initially defining the object of recognition, it must be used with an exclusive sense; indeed, the analysis of the problem principally takes as its centre of attention the recognition of the decisions pronounced by jurisdictional bodies of a foreign State.

It is usual to identify the notions of "recognition", "exequatur" and "enforcement".[550] This raises two problems. On the one hand, if the exequatur is identified with the recognition of decisions, it is logical that it exclusively concerns the recognition of final judicial decisions pronounced in contentious proceedings, since the exequatur is the mechanism provided, in ordinary law, for recognising this type of decisions. On the other hand, if we bear in mind that this exequatur proceeding preferably rests on the objective of managing the enforceability of these decisions, it is understood that this is the effect that will capture the attention. All of this is of interest only if the specific meaning of each of the expressions concerned is demonstrated.

It should be emphasised that the substantive review is a principle antithetic to the function of the recognition, which is undermined by a process of "interiorisation" or "appropriation", and not of recognition, the latter being inspired in the postulate of international cooperation and in the optimisation of the continuity of the legal relationships in space. If, as a condition of recognition, the authority of origin has to be competent, the substance of the decision must not be reviewed. The circumvention of the substantive review implies converting the recognition into mere of

[548] Art. 179 of the Panamanian PIL Act; art. 954 LEC/19881 (Spain); art. 64 of the Italian PIL Act.

[549] R. Arenas García, "Relaciones entre cooperación de autoridades y reconocimiento", *AEDIPr*, t. 0, 2000, pp. 231–260.

[550] M. Requejo Isidro, "Sobre ejecución y execuátur", *Revista Jurídica Española La Ley*, 1999, 5, D–236, pp. 1898–1901.

formal control or homologation proceedings, which prevents the court from considering again the facts and recitals those of the foreign decision, limiting the causes of refusal to the specific conditions of the recognition.

416. Initially, the recognition consists in obtaining from the forum the constitutive, binding or res judicata, enforceable or registration effect of a foreign decision. Not all the final judicial decisions pronounced in contentious proceedings produce an enforceable effect, given that many of them have a purely constitutive nature, in particular, those referring to the modification, extinction or determination of the civil status, which do not require further enforcement proceedings. But the final judgments pronounced in contentious proceedings are also not the only ones capable of generating an enforceable, constitutive or registration effect. Arbitral awards, judicial settlements, acts of non-contentious, protective or provisional measures, or non-final judgments, other such decisions are likely to produce all or some of the effects cited and, consequently, to provoke a problem of recognition, as they do not have a final or contentious nature, or for not being, by nature, judgments.[551]

For the recognition in the forum of the res judicata, enforceable, constitutive or registration effects of each of these decisions, a series of mechanisms or types of recognition must be articulated. For the final judicial decisions pronounced in contentious proceedings, an exequatur proceeding is the usual mechanism, which, surely, can be extended to other types of decisions, but the said mechanism is not an enforcement proceeding; it not does it aim to grant enforceability to a foreign judgement. Through the exequatur proceeding: a) the foreign judgment is standardised as an enforcement title (declaration of enforceability), not enforced, as this would require a new proceeding before a different authority; and, b) only the recognition of the res judicata effect of a foreign decision can be sought without requiring enforcement, or it can be sought for the decision to be converted into a title with a view to its registration, which appears to indicate that the exequatur it is not exclusively a proceeding for granting enforceability to the foreign judgment either.

417. Recognition has the following missions:

i) To procure the *enforceability* in the forum of a foreign judgement, a characteristic effect of the compensatory judgments. For obtaining this effect, there are two fundamental alternatives: to request the enforcement proceeding directly, in which case the same body that decides on the enforcement is competent for deciding on the recognition, or rather, to request an autonomous exequatur proceeding, in which case the recognition is decided on beforehand, creating an enforcement title, which may be used subsequently in the normal enforcement proceeding.

ii) To procure, in the forum, the mandatory or *res judicata effect* of the foreign judgement, by virtue of which its content binds the jurisdictional authorities and

[551] J.C. Fernández Rozas and S.A. Sánchez Lorenzo, *Derecho internacional privado*, 7th ed., Madrid: Civitas–Tomson–Reuters, 2013, pp. 1293 *et seq*.

bodies of the forum and the principle of *non bis in idem* is triggered, a principle which prevents not only the initiation in the forum of new proceedings with identical parties, subject matter and cause, even as an incidental question in all types of proceedings.

iii) To obtain the *registration effect* of the foreign judgments pour their entry in registers. The foreign judgment can comply with the formalities for registration in official registers.

The foreign judgment, like any other foreign public document, may have evidential value apart from the recognition, if it fulfils legalisation and translation requirements.[552] As a public document, the foreign judgment may be used as an element of proof in open proceedings in the forum, although the evidential value in no case covers the operative part of the judgment, but only the elements of fact considered to have been proved. It permits the recognition of the evidential value of a judgment, even when the res judicata, enforceable or constitutive effect of the same cannot be obtained, for not meeting one of the conditions required for its recognition. That the foreign decision, as a public document, serves as an element of proof concerning the facts clarified in it is obviously not a problem. However, this excludes the res judicata effect and the enforceable effect from the foreign decision. In other words, the evidential value of the public document that serves as substratum of the foreign judgment permits only its utilisation as means of proof of the related facts. The operative part of the judgment may not, consequently, be used for recognising its res judicata, enforceable or constitutive effects. However, among the evidential value of the foreign judgment, one must recognise incidentally the res judicata or constitutive effect of the judgment in question.

418. The fundamental block in the area of the recognition relates to the foreign judicial decisions pronounced in contentious proceedings and in the area of private law. Usually, the question is limited to the recognition of "final judgments". In general in the national systems it is required that the judgments be final as a condition for their recognition in contentious proceedings, although there are notable exceptions, as we will see. In general, the regulatory legal proceeding of the matter under discussion is included in bilateral international treaties or in the domestic procedural legislation.

As the first option is practically absent in the countries of the OHADAC area, it is necessary to address these shortcomings in the present Model Law.

419. The recognition basically means making it possible that the procedural effects (especially, the res judicata and constitutive validity) of the decision also operate in the requested State, achieving its extraterritorial validity. There has been a significant doctrinal debate about under what legal system the scope of the effects of the recognised decision is determined: that of the State of origin (theory of

[552] A. Borrás Rodríguez, "Eficacia ejecutiva internacional de los títulos extrajudiciales", *Anales de la Academia Matritense del Notariado*, nº 42, 2004, pp. 29–54.

scope), that of the requested State (theory of equivalence), or a combination of both (theory of accumulation). At the current time, with the tendency to temper the approaches, the debate has lost intensity and part of its significance, which is manifested above all in relation with the limits of the res judicata.

In relation with the scope of the recognition, the fundamental question regards the limits within which the scope of the effects of the judgment within the State of origin. To be enforceable, the judgment must also be enforceable in the legal system of origin.

The establishment of a domestic source of regulation and its adaptation to the current requirements, in a way that guarantees the coordination with the undertakings assumed in the framework of international cooperation, must bear in mind the specific conditions and objectives of the present Law, far removed from the specific context to which the convention-based regimes respond.

420. Paragraphs 2 and 3 of this rule reflect how a model has been opted for in which the recognition and enforcement is not generally limited to the judgment decisions, although the possibility of refusal is considered if the judgment has been subject to an ordinary appeal in the State of origin or if the period for filing it has not expired.

The final character makes reference to the notion of res judicata in the formal sense, i.e. the impossibility to lodge an appeal against the judgement within a same proceeding. Once this limit is established, it is up to the foreign procedural law to determine how and subject to what conditions a decision is not susceptible to further contestation or appeal in the same proceeding. The cases that produce the formal res judicata effect in the Caribbean legal system must not be used by analogy. The proof of the finality of the decision is obtained through the enforcement title or public document indicating that the judgment is final. This proof must be brought by whoever requires the recognition, or through the certification or acknowledgement of the Court that has pronounced the judgment. Likewise, the analysis of the questions of recognition is limited to matters of private law, and consequently with a functional assessment of the content of the private international law it is circumscribed to the legal–private civil and commercial relationships.

421. It is an approach that facilitates advances in the regulation of the system applicable to certain categories of judgments and acts, in respect of which a very restrictive criterion predominates in some legal systems. Thus, it occurs in relation with the judgments relevant to the scope of the non-contentious, the treatment of the cross-border validity of the provisional measures, the enforceable public documents and judicial transactions.

The systematic rejection of the validity of the provisional measures is not appropriate in light of the interests that, at least in specific situations, justify the cross-border validity of such judgments. The mere substitution of the requirement of finality by the requirement that the judgment is not susceptible to recourse to the ordinary courts makes possible the validity of the provisional measures that satisfy that requirement. The systematic rejection of provisional measures damages highly

relevant interests, in particular, in the case of measures adopted in the framework of matrimonial proceedings – as happens in respect of the custody of children or maintenance obligations –, whilst it makes it impossible to value adequately the convenience of facilitating the validity of the provisional or protective measures granted by the court that hears the principal matter.

422. The paragraph 4 proclaims a principle that enjoys wide acceptance in the comparative view, by establishing that the separable parts of a foreign judgment will be likely to be recognised or enforced. Similar provisions are found, among other instruments, in article 15 of the Hague Convention of 2005 on Choice of Court Agreements or in article 48 of the Convention of Lugano of 2007 Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Article 74. ***Causes of refusal of recognition and enforcement of judgments.*** **Foreign judgments shall not be recognised:**

i) if the recognition is manifestly contrary to public policy;

ii) if the document which instituted the proceedings or an equivalent document was not notified to the defendant in a regular manner and in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested;

iii) if they conflict with the provisions established in article 9 of the present Law or if the jurisdiction of the foreign court was not based on one of the grounds provided for in Chapter II of this Law or on an equivalent reasonable connection;

iv) if proceedings between the same parties and having the same cause of action are pending before a Caribbean court and those proceedings were the first to be instituted;

v) if they are irreconcilable with a judgment given between the same parties in the Caribbean.

vi) if they are irreconcilable with a judgment given in another State involving the same cause of action and between the same parties, provided that this judgment fulfils the conditions necessary for its recognition in the Caribbean and was adopted first or its recognition had already been declared in the Caribbean.

vii) if they do not fulfil the conditions required in the country in which they were given to be considered as authentic and which the Caribbean laws require for their validity.

423. Possible grounds for refusal of the recognition and enforcement or, from a positive perspective, the controls to which the validity of a foreign ruling is subordinated are provided in an exhaustive manner in the text of the Law. As a consequence, recognition of the foreign judgment should not be refused for grounds other than those provided for in article 74. This implies that there should not be a substantive review of the foreign ruling, as well as that certain mechanisms traditionally existing in some legislation must be rejected, such as that of the control of the law applied by the court of origin or the reciprocity.[553]

The rejection of the reciprocity is based on its unsuitability for the basis of the system of recognition and enforcement concerning private law. Unlike what can occur in international legal cooperation in areas of public law, especially in penal matters, the use of reciprocity as a general criterion assumes a disproportionate and unreasonable impairment for the private interests, which are fundamental in the regulation of the extraterritorial validity of judgments in civil and commercial matters, which does not go against the national interests in question either, and does not appear to justify its possible value as a means of exerting pressure on the foreign authorities. It not only undermines the position of the private individuals affected, but is also manifestly contrary to the national interest in providing legal protection which ensures certainty, avoiding instable situations. In consequence, the use of reciprocity in the framework of the recognition and enforcement of decisions has been disappearing from the more advanced systems in this field.

424. Over the years, a certain consensus has developed at the international level about the conditions required for the recognition and enforcement of foreign judgments. An essential component of all the regimes for recognition is the control of public policy, whose content is related to the protection of the fundamental principles of the legal system of the requested State, through which typically it is closely connected with the respective constitutional systems.

In this area, public policy, which must be understood as an exceptional mechanism with restricted interpretation, operates to the extent that the specific effects claimed by the foreign judgment are totally incompatible with the essential principles and values of the legal system of the requested State. From here, the restrictive formulation of this requirement, in line with which a drafting of generalised use already exists in the more advanced international agreements and the national legislations in this matter excludes the recognition only when it is "manifestly contrary to public policy". A similar wording of this type of regulation is found, for example, in article 5.1 of the Hague Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 1973, and in article 23.2.d) of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996.

[553] CONC.: Art. 27 of the Swiss PIL Act; art. 25 of the Belgian PIL Act; art. 954 LEC/1881 (Spain); art. 139 of the Bolivian draft law.

425. The autonomy of the exequatur proceeding implies that only the exceptions that make reference to the enforceable conditions for the recognition can be opposed and not those arising from the action brought in the main proceedings conducted in the foreign legislation. This consequence of the autonomy of the proceeding does not mean that a possible control is radically excluded regarding the substance of the foreign decision. The said control of the decision is only excluded if, effectively, it is also excluded in the specific exceptions and conditions of the exequatur proceeding, an affirmation that it is not always possible to maintain. In other words, the specific conditions of the autonomous exequatur proceeding may imply a control as regards the substance.

In this setting, we should refer very succinctly to some questions arising from the proceeding for the recognition of foreign judgments:

i) *As regards the parties' rights of defence*. As a condition of the recognition, respect for the procedural guarantees and the parties' defence and the lawfulness of proceedings carried on abroad must be guaranteed. The justification of this is to guarantee the adversarial principle and the possibility that the defendant has been able to defend itself effectively in the proceeding opened abroad. This requirement is basically confined to the lawfulness and sufficiency of the notification of the claim; but, for that reason, all cases of guilty non-appearance in court, by strategy or for convenience, would be outside of the scope of the condition, consisting in the absence of the defendant in the originating proceeding due, not to a defect or unlawfulness in the location, but to the defendant own lack of interest.[554] The possibility must arise that, in certain cases, the default can be addressed through subsequent acts of the defendant which reveal their will to accept the judgment whose enforcement is concerned. The judicial origin of the foreign judgment, its contentious nature and, consequently, the enforceable and res judicata effects that the final judgment will entail the necessity of a control that guarantees the right to the effective judicial protection and to a proceeding with all of the defence guarantees.

ii) *Public policy*: The limit of public policy deals with the protection of fundamental social or economic values of the forum, at a specific moment in history. The timeliness of this corrective, just like in its operation regarding the foreign law, requires that it is used in accordance with the values existing at the time of the recognition, not at the time of pronouncing the foreign judgment.[555] In its economic aspect, the economic public policy may act to refuse recognition to foreign judgments related to industrial property, participation in companies, foreign currency payments, etc.

iii) *Control of the law applied by the judge of origin*: This condition consists in making the recognition conditional on the fact that the foreign court has applied the

[554] J.D. González Campos, "Reconocimiento y ejecución de decisiones judiciales extranjeras y respeto de los derechos humanos relativos al proceso", *Soberanía del Estado y Derecho internacional. Homenaje al Profesor Juan Antonio Carrillo Salcedo*, Seville, 2005, pp. 695–716.

[555] S. Álvarez González, "Orden público y reconocimiento de resoluciones extranjeras: límites a la valoración del juez nacional y orden público comunitario", *La Ley*, 2000, 6, D–179, pp. 2005–2009.

same law to the case as had been applied by the courts of the forum, at least that the final result coincides. The utilisation of this control has been welcomed to a certain extent in the laws or case-law in different systems but it is a summarily restrictive and distrustful condition, it appears not to be reconciled with the spirit of cooperation that prevails in the convention-based system of recognition.

iv) *Authenticity of the decision*: The proof of the authenticity of the foreign enforceable judgment presented for the recognition, and the fulfilment of the conditions of proof required regarding public documents to prevail in the Caribbean, constitute a prior condition which, as is obvious, operates regardless the regime for the recognition.

v) *Control of the international jurisdiction*: As such, the control is confined to the general jurisdiction of the foreign court that has pronounced the decision, i.e. to its jurisdiction for hearing a case of private international transactions, without achieving the control of the domestic jurisdiction of the court which, in particular, has pronounced the judgment subject to recognition. Lack of international jurisdiction of the judge of origin is crucially important in the evaluation of a possible voluntary contempt of court of the defendant, which would then be justified. This justification is based on the adequate protection of the procedural justice for the defendant; protection of the exclusive jurisdictions of the courts of the forum and in the specific nature of the recognition. The basis of the control advocates for its investigation *ex officio* or, at least, for an active participation by the judge of the exequatur against the silence of the parties in the proceeding.

vi) *Absence of conflict with a judicial decision or a proceeding pending in the requested State*. The recognition of a foreign judicial decision is not possible if, prior to the request for the exequatur, a final decision on the same case, with the same parties and identical cause of action, or which is simply incompatible with the foreign decision, already exists in the Caribbean. It is not strictly a matter of asserting the res judicata effect of the Caribbean decision, as this is an exception that has no place in the exequatur proceeding, which is a mere homologation proceeding. The raison d'être for this condition is none other than the maintaining of the balance of the domestic system and its coherence, vis-à-vis the plurality of solutions that may involve the sanction of a same event obtained before different jurisdictions. For that reason, it should be insisted that, for the conflict to exist, there is no requirement for an absolute identity of subject matter, parties and cause between both proceedings, but a simple substantive incompatibility. This exception to the recognition may also be implemented when a final judicial decision does not exist in the requested State, but a proceeding pending between the same parties does, with the cause of action as the proceeding that was resolved by the foreign judgment. In this case, the criterion of the temporal priority may have a certain importance.

vii) *Recognition of the constitutive effect of non-contentious acts.* Taking into consideration the basic distinction made in the preceding paragraph, the fundamental problem rests on the determination of the regime for recognition of the constitu-

tive effect of certain non-contentious acts. Supporters of a substantive evaluation of the intervention of the authority, integrated in the substantive rule, not only deny the need for the exequatur, but also the specific problem of recognition. In their opinion, the question is reduced to the determination of the law applicable to the constitution of the act, and their approach inherited from the criticisms of the doctrines of the rights acquired. The use of rules of applicable law does not mean that we are faced with a question of applicable law. These rules may likewise serve as rules for recognition. In fact, the utilisation of the rules of applicable law for resolving the effects of recognition is extensible in certain systems to the constitutive judgments, which in this way circumvent the normal mechanisms of exequatur. This alternative can simply be summarised in a concise manner: "I will recognise to the non-contentious acts the same effects that are recognised to that same institution by the competent legal system that is designated by the rule on applicable law". The rule on applicable law is used for locating the competent legal system that will have to serve as a reference for defining the effects of the act in question. The notion of "competent legal system" is, as such, is wider than that of "applicable law".[556]

426. In the operability of public policy in the framework of the recognition and enforcement of decisions the procedural dimension plays a key role, which basically requires ensuring that the guarantees, that form the essential content of the fundamental right to effective judicial protection or the right to due process, have been respected in the original proceedings. One has opted to continue the frequent tendency in the convention-based and comparative view of identifying this as an autonomous condition of the recognition (in respect of public policy). The requirement of lawfulness of the location of the defendant ensures that the parties have been notified of the start of the proceedings and have had sufficient time for preparing the defence of their interests, especially when they have not appeared before the court.

This requirement of recognition appears formed in a manner that is excluding its operability in the cases of guilty non-appearance in court or for mere convenience of the defendant in the original proceeding. The regime thus designated substantially coincides with that established in the majority of the convention-based regimes, both multilateral as well as bilateral, as illustrated, for example, in article 9.c.i) of the Hague Convention on Choice of Court Agreements of 2005.

427. A central part of the system established is the control of the jurisdiction of the court of origin. A reflection of the meaning of this control is the adoption in the American context of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, agreed in La Paz on 24 May 1984 in the framework of the CIDIP, although its content has significant shortcomings. It is not appropriate either in this aspect to take as a reference the system established in the European Union, in particular in the framework of the Brussels I Regulation, since this only deals with the reciprocal recognition of judicial decisions, i.e. between

[556] P.A. de Miguel Asensio, *Eficacia de las resoluciones extranjeras de jurisdicción voluntaria*, Madrid, Eurolex, 1997.

courts of States members, whose scope practically eliminates this control in the recognition and enforcement phase, as a consequence of the unification of the regulations of international jurisdiction of the States members and the significance of the principle of confidence in community law.

In this area, the comparative analysis of legislations shows the progressive improvement in the national legislations of the mere technique of the bilateralisation of the regulations of international jurisdiction established in the system of the forum, although significant differences in the national legislations and the international texts should be appreciated. One has opted for a manner which reflects the imperative criterion that the recognition may only be denied by the lack of jurisdiction of the foreign court when the exclusive jurisdiction of the courts of the State requested has been infringed, or the submission to these by the parties, and when no reasonably close connection exists between the dispute and the court that pronounces on the same.

428. The necessity of guaranteeing the coherence of the legal system of the requested State prevents a foreign judgment from being recognised when it is irreconcilable with the validity of a decision of the forum or foreign court previously recognised in the forum. It is a widely accepted criterion in the international agreements and the national legislations in this matter. Representative in this sense are article 9.f) and g) of the Hague Convention on Choice of Court Agreements of 2005, as well as article 34.3 and 4 of the Convention of Lugano of 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. Among the national legislations, the following should be noted by way of example: article 27.2 of the Swiss Private International Law Act of 1987, article 25.5 of the Belgian Private International Law Act of 2004, as well as in United States the section 4(c)(4) of the *Uniform Foreign – Country Money Judgments Recognition Act* of 2005.

In addition, the present rule specifies as the limit to the recognition of foreign judgments the existence in the forum of a pending proceeding. In this respect, it should be understood that the unconditional prevalence of the pending proceeding in the forum on the decisions already pronounced abroad is not an appropriate and respectful solution of the interests in question. There are reasons for limiting the scope, as grounds for refusal of the recognition, of the existence of a proceeding handled in the requested State and which can give rise to a ruling irreconcilable with the foreign decision regarding the situations in which the proceeding was instituted in the requested State. This option is without doubt more adequate than a more restrictive criterion which would affirm the absolute prevalence of the proceedings handled in the requested State, which would facilitate the implementation of restrictive strategies to the recognition of judgments.

429. It should be noted that no other condition may be added to the present article. In particular, this article maintains the refusal to the control of the law applied in the original decision with which the rule is coherent with the role assigned to the control of the jurisdiction of the court of origin and with the autonomy between the

rules on recognition and those on the applicable law and the requirement of lack of fraud in the same.

Article 75. *Proceedings.* 1. The foreign judgments shall be recognised by operation of the law and without any special procedure being required. The recognition may be requested incidentally, by way of counterclaim, cross-claim, or of defence.

2. Without prejudice to the provisions of paragraph 1, any party interested may request to the competent authority to decide on the recognition or non-recognition of a foreign judgment. In this case, the recognition proceeding shall be that established by the procedural legislation for the exequatur.

3. For the exequatur proceeding, the courts of first instance shall have jurisdiction. The decision of the court of first instance shall be subject to appeal.

430. These rules are based on a clear differentiation between the recognition, declaration of enforceability and the phase of enforcement in the strict sense. The recognition makes reference to the validity in the requested State of the procedural effects of the foreign judgments. It is also possible that the foreign judgment has certain effects apart from the recognition, such as the evidential value or others connected to public registrations. On the other hand, it is possible that in the requested State the legal system the recognition of the judgment is a prerequisite for it to have certain effects regardless of the effects it has in the State of origin, in particular, to the extent that the recognition is required so that its registration entry can take place. When the enforceable validity of a ruling is sought to be asserted outside of the State of origin, it is necessary in all cases to obtain a declaration of enforceability (it can only be proceeded to the enforcement in the strict sense after obtaining this) through the exequatur proceeding.

431. In the comparative and international view, a marked tendency is observed not to subordinate the recognition of the foreign judgments to special or exequatur proceedings in all cases, unlike what occurs with regard to the declaration of enforceability, for which such proceedings are indeed considered necessary. The requirement for a special proceeding excludes the possibility of directly asserting the procedural validity of a foreign judgment before a Caribbean authority (in particular, by incidentally invoking its existence before the judicial authority that deals with a proceeding or by appearing directly before the agent of the register if an entry in the register based on the judgment is sought).

This solution greatly undermines the cross-border validity of the foreign judgments, by requiring in all cases a general declaration of recognition to be obtained through the proceeding established for obtaining the declaration of enforceability. However, an important qualitative difference exists between the cases in which an assertion of the enforceable validity of a foreign judgment is sought and the others in

which only the assertion of the recognition of its procedural validity, typically of the constitutive and res judicata validity is sought. That qualitative difference is based on the fact that if the assertion of the enforceable validity of a foreign decision is sought a special proceeding (exequatur) is required in all cases, in addition to the conditions that operate in the recognition, the enforceable validity of the judgment in the State of origin is also required as a prerequisite.

432. It becomes necessary not to generally require a special recognition proceeding, which then permits the so-called incidental recognition (of the constitutive or res judicata validity), as well as directly invoking the foreign judgment before the authorities (such as the agent of the register into which the entry is sought) of the State in which they are to be asserted. This requires, among other things, to evaluate not only the differences of the situations in which the enforcement (or a general declaration of recognition) is sought and which always requires the exequatur, as well as analysing the necessity of adapting the legal system to the increase of situations for which the recognition of the foreign decisions is relevant.

433. The admission of the automatic and incidental recognition does not exclude the affirmation of the opportunity of making reference to the necessity of a proceeding that makes it possible to obtain a general declaration of recognition. On certain occasions, despite automatic and incidental recognition being possible, there is an interest in obtaining a judicial declaration of recognition which is binding *erga omnes*, in a manner that a proceeding is necessary for processing that general declaration of recognition. In the regimes that admit the automatic recognition, it is common for the mechanism established for obtaining the declaration of enforceability also to operate for permitting the general declaration of recognition. This solution leads to assimilation between the general proceeding for recognition and the proceeding for declaration of enforceability.

434. The rule also pays attention to the determination of the competent bodies for hearing the proceeding for recognition (general declaration of recognition) and enforcement (declaration of enforceability) of the foreign judgments. Thus it is based on the principle that the applicable rules are procedural rules. In favour of the devolution of the jurisdiction and its attribution to the bodies that generally hear the cases at first instance it should be noted that this is the most current criterion in the international instruments that provides for this aspect, in addition to being a coherent solution with the expansion of the situations in which the cross-border validity of the judicial rulings is raised as a consequence of the increase of the private international legal transactions. Reasons of validity, rational adjustment to the necessities of the judicial organisation and the expectations of the parties to court proceedings advise the proposed solution.

Article 76. *Adoptions pronounced abroad*. Adoptions or similar institutions of foreign law whose effects for the parentage connection are not substantially equivalent to those established in Caribbean law shall not be recognised.

435. In the case of the adoptions, without prejudice to the application of the generally established causes of refusal of recognition, it is considered appropriate to establish an additional control. The verification of the equivalence of the adoption granted abroad with that provided in the legal system of the requested State assumes particular interest and complexity in relation with the recognition in this area, in particular when this State only considers full adoption, comparable to natural parentage, which generally produces the extinction of the legal connections between the adopter and the previous family and which by its essence is irrevocable.

So that the adoption granted abroad can be recognised as such, it is required that those same effects are produced in the legal system of origin. It is, therefore, a circumstance that gives particular meaning in relation with the limitation of the validity of the simple adoptions or not completely full ones, which are frequent in the comparative view, although with very different configurations. In this context, it is relevant to specify the legislation determining the effects of the adoption granted abroad (*v.gr.*, if it is a simple or full adoption), which seeks to be recognised in the other country.

436. The adoption is normally granted as a result of a national act that gives rise to the essential and direct effects of the legal situation created, determining its scope, which must be departed from when evaluating the validity in the Caribbean of the adoption granted abroad. The extension of effects implies taking as a point of departure the effect that the judgment produces in the country of origin: in relation with the scope of the constitutive validity, the law applied to the substance of the case by the organ of origin is the determining criterion. In principle, the rights and obligations of adoptee and adopter, the scope of the legal connections existing between the adopter and their former family, as well as their connection with the new family and the possible revocability of the adoption, are determined by the law applied to the granting of the adoption by the originating body in the decision that is concerned.

The recognition in the requested State as a full adoption may not take place if the effects of the adoption granted abroad do not correspond with those provided for the adoption in the legal system of the requested State. In all cases, the fact that the figure granted abroad whose effects do not correspond with the adoption regulated in the requested State cannot be recognised as a full adoption, does not exclude, however, the possibility that it is recognised with the effects that are specific to the State of origin.

437. In the States that are party to the Hague Convention of 1993 Protection of Children and Co-operation in Respect of Intercountry Adoption, adoptions will have to be in accordance with the preferable nature under the Convention. In ac-

cordance with its article 2, the Convention covers only adoptions which create a permanent parent-child relationship, whilst article 26 governs the effects that the recognition of the adoption has in the framework of the Convention, which must be connected with the important role that the authorities of the requested State play in the mechanism of cooperation to which it is subjected, in which an adoption can be declared to be in accordance with the Convention and which possibly benefit the regime of recognition established in the Convention.

Article 77. *Immunity from enforcement*. 1. In accordance with the rules of public international law on immunity from enforcement, the property and the assets that the foreign State has in the Caribbean territory may not be subject to coercive measures, unless the creditors demonstrate that they are connected with an activity of an exclusively economic nature. The public bodies and entities of a foreign State whose assets are connected with a relevant economic activity shall only benefit from the immunity from enforcement to the extent that they provide documentary proof that the debt was contracted for the account of this State for reasons related to the exercise of the national sovereignty.

2. The immunity from enforcement of the diplomatic agents authorised in the Caribbean shall be determined by the international treaties to which the Caribbean is party and, failing that, by the international custom.

3. The immunity from enforcement of the international organisations to which the Caribbean is party shall be defined by their constitutive treaties. The agents of these organisations shall enjoy immunity in the terms specified by these treaties.

438. The problem of immunity of the State in respect of the coercive measures adopted in relation with a proceeding before a court occurs in the majority of the cases after resolving the question relating to the jurisdiction of the court of the State of the forum over the foreign State, or if the submission of immunity has been rejected.[557] However, the immunity from enforcement also included interlocutory or preventive measures, i.e. that a court can impose, including before deciding whether or not it has jurisdiction, with regard to property *ad fundandam jurisdictionem*. The immunity from enforcement is therefore restricted to determining if, through the fact of being located in the State of the forum, certain property or assets of the foreign State will be able to be subjected to coercive measures ordered by a court of that State, such as embargos, attachments or enforcements. In practice, it has maybe greater importance than the own immunity of jurisdiction, both for the defendant State as well as for the private individual who has opted to bring a case before a domestic court. The first has a comprehensible interest in not losing control of its property, for example, the

[557] *Vid. supra*, commentary on **art. 7.**

accounts opened by its embassy or by its government in banks of the State of the forum, and the second, in turn, has the reasonable expectation, if it concerns proceedings in which no immunity of jurisdiction exists, that the court will adopt necessary measures so that a possible decision in its favour can be executed and produce tangible effects.

In effect, if the courts of a State have been declared to have jurisdiction for hearing a claim against a foreign State, it may occur, on the one hand, that the claimant requests that those protective coercive measures, such as embargo, be adopted against the property of this State. On the other hand, once the judgment in favour of a private individual is pronounced, the problem of knowing whether this judicial decision may be executed against the property of a foreign State is raised, i.e. if the foreign State possesses *immunity from enforcement* in both cases. For this, it should be noted that this immunity has followed a parallel evolution to that of the immunity from jurisdiction, by passing from the absolute to the relative; although it should be taken into account that this has occurred in a more restrictive manner than in the case of the immunity from jurisdiction.

439. In this the matter, one should refer to the system established by the Convention adopted by the G.A. in 2004 which stipulates as a basic rule the prohibition of any coercive measures against property of a foreign State, both pre-judgment (article18) and post-judgment (article19). Although in both cases certain exceptions are established: 1) when the foreign State has expressly consented to the taking of enforcement measures by international agreement or contract. 2) when property is reserved or affected for the satisfaction of the claim which is the object to that proceeding. In addition, it should be noted, regarding the post-judgment enforcement measures, that enforcement measures will be taken if the property is specifically in use by the State for other than non-commercial government purposes, is in the territory of the State of the forum and has a connection with the claim which is the object of that proceeding or with the entity against which the proceeding was directed (article 19 c). Supplementally, article 21 of the Convention specifies that the following categories will be considered as property in use or intended for use for other than non-commercial government purposes:

> "(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
>
> (b) property of a military character or used or intended for use in the performance of military functions;
>
> (c) property of the central bank or other monetary authority of the State;
>
> (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
>
> (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale."

With this regulation, the private individual is obliged to provide documentary proof that the property on which they seek the enforcement does not benefit from the immunity. But the enumeration of the cases in which a property of the State immunity. This is not excessive given that it is based on the information from international practice. And, on the other hand, it has the merit of resolving a question debated in the past, concerning the bank accounts of the external bodies of a foreign State.

Finally, in articles 22 to 24 of the Convention certain questions of a procedural nature in relation with jurisdictional immunities are regulated. Among these, on the one hand, it is indicated that in the absence of such a convention or special arrangement, all the procedural *notifications* of the courts of the forum related to the institution of a proceeding are not to be issued by the judge or court directly to the foreign State, but have to be sent "by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned". It should be understood that the notification is "deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs". Article 23 is supplemented, on the other hand, with rules with respect to the time limit for instituting a proceeding *in absentia* of the foreign State or for it to be able to appeal against the judgement pronounced.

Chapter II

Evidential value of foreign public documents

Article 78. *Foreign public documents.* 1. The foreign documents that have to be assigned evidential value by virtue of international treaties or agreements or special laws shall be deemed to be public documents.

2. If no international treaty or agreement or special laws are applicable, foreign documents shall be deemed to be public documents if they meet the following requirements:

i) they have been granted by a public authority or other authority authorised in the State of origin for that purpose;

ii) they contain the legalisation or apostille and the other requirements necessary for their authenticity in the Caribbean;

iii) their granting or preparation have met the necessary requirements in the country where they have been granted. If this grant or preparation has been undertaken by diplomatic or consular authority authorised in the Caribbean, the requirements of the law of the State that grants it competence must be observed;

iv) in the State of origin the documents make full proof of the signature and their content is provided.

3. If the foreign documents referred to in the preceding paragraphs of this article incorporate declarations of will, the existence of these is deemed to be established, but their validity shall be that determined by the Caribbean and foreign rules applicable to capacity, object and form of legal transactions.

440. If we allude to validity as evidence of the public documents, we are making reference to a complex reality.[558] Logically, we should distinguish, firstly, the authenticity or truthfulness of the public document itself, or, which is the same, its extrinsic evidential value. Secondly, and only once the authenticity of the document is resolved, we should proceed to evaluate its capacity for serving as proof of the existence of the legal act that has been embodied in this document, or, in other words, its intrinsic evidential value; if this evidential value is recognised, an additional question is raised in order to evaluate its evidential value in relation with other means of proof whatever these may be. Finally, once the proof of the act is provided, this is regardless of the recognition of its validity.

441. In general, this provision introduces a handling of the validity of foreign public documents in the receiving State by establishing a series of controls.[559] It has a wide-ranging content, since it is not confined to the foreign public documents granted in other nations, but also includes those granted in the receiving State by diplomatic or consular foreign authorities authorised. To put it another way, the foreignness of a public document will always be determined by the nationality of the authority that intervenes in its grant, an authority which, additionally, has to intervene perceptively in its issue.

One should distinguish between the evidential value of the document (its capacity for providing proof of the act that it contains) and, on the other hand, the validity of the act contained in this document (paragraph 3). Firstly, it is sufficient to meet the requirements provided in paragraph 2; secondly, in addition to all the conditions related to the validity of the act, the following conditions are enforceable: the capacity of the parties (**article 23**); validity of the link as regards the substance (*lex causae*), and validity of the link as regards the form. This distinction determines that the requirements and conditions that are going to be required for giving effects to the foreign documents in the receiving State are going to vary according to whether or not one wishes to give validity to the act they contain. In the first case, the fulfilment of the requirements related to the validity of this act will be necessary, while, in the second case, it will be sufficient to verify the lawfulness of the document, with a cumulative application of the laws of the State of origin and of the forum, and verify its evidential value in the State of origin. For that purpose, the present article is not limited to introducing the requirements for the validity of the foreign public documents in the procedural field, but also considers the extra-procedural field, particularly the validity for registration. This question must be considered with the relevant provisions of the receiving State in the area.

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[558] *Vid*., for all, P. Jiménez Blanco, "La eficacia probatoria de los documentos públicos extranjeros", *AEDIPr*, t. I, 2001, pp. 365-404.

[559] CONC.: Art. 172 of the Panamanian PIL Act; art. 73 of the Dominican draft law.

442. As has been indicated, any document delivered by a public authority is qualified as a public document. Nonetheless, paragraph 2.i) extends the intervention cases to any "other authority authorised in the State of origin for that purpose". This formulation intends to be respectful with the review of the own concept of "public authority", which, in certain cases, may involve significant identification problems. Thus, the debate on the legal position and the exercise of "public power" by the notaries caused in the area of European law is noteworthy. The diction provided by paragraph 2.i) of this article permits the inclusion in its scope of any type of authority that it is expressly authorised by the legislation of the State of origin for granting public documents, without taking into consideration the intervening party in the document as public authority or not.

443. The controls provided in paragraph 2, ii) in relation with the authenticity of the document (legalisation or, where applicable, apostille) are logically intended to verify the external lawfulness of the document: authorisation of the intervening authority and the capacity in which it is acting. And this lawfulness may be verified both *ex officio* as well as *ex parte*. The condition of authenticity par excellence is the legalisation of the document, a practice that tends to be diluted, and even be eliminated, through international cooperation. This act consists in the certification by a public servant of the authenticity of the signing of a public document granted by foreign authority, as well as the condition or capacity of the authority in question. With regard to the solutions provided in the international conventions it must be indicated that the tendency points to a suppression of all of the formal requirements, also managing to make disappear the process of the apostille, in a way that it is operated on the "trust" of the correction of the same.

Especially problematic in relation with the legalisation may be the question of the specific document that has to fulfil this requirement. In this sense, practice demonstrates that, on some occasions, the document whose validity is sought to be asserted in the receiving State is accompanied by a certificate issued by the authorities of the State of origin of the document (in which it is certified that the document fulfils the specifications and requirements provided in this law) and it is precisely this certificate (and not the original document) which appears legalised. The problem, evidently, consists in knowing whether this legalisation is sufficient. In effect, if it is sought by the legalisation that the external lawfulness of the document is authorised in relation to the authority that grants it, nothing will prevent an authority (established by the law of the State of origin) from authenticating it, provided that, subsequently, in turn, the capacity of the certificating foreign authority is authorised.

In any case, it is important to highlight that the absence of legalisation of a document, if it is required, does not determine by itself the complete invalidity of this, but solely that the same will have specific effects of the private documents or a weakened evidential value.

444. Out of all of the different international texts, a separate treatment is merited, through its scope, for the Hague Convention, of 5 October of 1961, which sup-

presses among the States party the requirement of legalisation of public documents and which has a quasi–universal scope.[560] The Convention is applied to all public documents that have been authorised in the territory of a contracting State and which must be presented in the territory of other contracting State, excluding the documents granted before diplomats and consular authorities and the administrative documents that refer directly to a commercial or customs operation.

The Hague Convention suppresses the requirement of diplomatic or consular legalisation of the public documents by placing an apostille or annotation in the public document, which will certify the authenticity of the origin of the public document. It must be taken into account that its content will never be certified. The "apostille" or sole legalisation, whose model is accompanied as annex to the Convention, must meet the formal and presentation requirements provided in the Convention, and it should be highlighted that it may be consigned solely in the language of the authority that sent it, although the title must be stated in French in all cases "*Apostille (Convention de la Haye du 5 octobre 1961*)". It should be recalled that the requirement of the apostille can be set aside if two States party have eliminated it through bilateral agreement.

445. The requirement provided in paragraph 2, iii) presupposes the fulfilment in the grant or preparation of the document of the requirements of the place of the grant. This condition assumes to verify, as a prerequisite for its validity, the intrinsic lawfulness of the document from the perspective of the fulfilment of the conditions established in the law of the State of origin. This referral to the law of the place of the grant, as a rule governing the lawfulness of the document, requires the prescriptive intervention of an authority in its summarised grant, which assumes, in turn, the operability of the *auctor regit actum* rule. The content of this regulation lies in the duty the public authority has to apply its own law at the time of formalising or documenting a certain act. Reasons of sovereignty, strictly speaking, have always justified this principle which is not opposed, in the regulation of the form of the acts, to the *locus regit actum* principle, since in the majority of cases, the national law of the public authority tends to coincide with the place of grant of the act.

Based on the connection between the public authority and the document that it grants, the connection between the law that attributes competence to this authority and the submission of this to the regulations that this law establishes also appears necessary, insofar as it establishes the conditions and requirements for granting documents. If both elements are considered, it is easily deducible that a connection based on the law of the authority as the law governing the document itself is suitable.

The law of the place of the grant is the option mainly followed in comparative law. The reasons are varied. On the one hand, the point of confluence in the *lex loci actum* of the document and the form of the acts must be considered: these have

[560] Within the OHADAC zone, Antigua and Barbuda, Barbados, Belize, Colombia, Costa Rica, Honduras, Mexico, Panama, Dominican Republic, Saint Kitts & Nevis, Saint Vincent & the Grenadines, Suriname, Trinidad and Tobago and Venezuela have signed this Convention.

traditionally been submitted to the *lex loci regit actum*,[561] and this law on many occasions requires the formalisation of these acts precisely in public documents. This confluence explains, therefore, the connection between the documents and the form of the acts. On the other hand, from a practical point of view, a difference between the application of the *lex loci* or the *auctor* rule will only exist if this concerns documents granted by diplomatic and consular authorities of a State authorised in another State. Paragraph 2, iii) also considers the case of the validity in the receiving State of the documents granted by foreign diplomatic or consular authorities authorised in the receiving State or in other country, based on the *auctor* rule, which continues to serve as a solution guideline.

In any case, the *auctor* rule only signifies that the law of the authority is that which establishes the framework and conditions of action of the authority, but one should not be able to deduce from this the obligation of an exclusive application of its substantive law. In this sense, we should think of cases in which the *auctor* rule permits the application of foreign laws for certain aspects related to the grant or preparation of the document.

446. The scope of application of paragraph 2, iii), applicable to the "lawfulness" or "validity" of the document, as necessary prerequisites for this being able to produce its effects, must be distinguished from the scope of the control that must be undertaken for verifying the lawfulness of the same. Certainly, for a document to be considered as "public" not only the intervention of a competent public authority acting in the course of their duties is required, but also that the document fulfils the requirements provided by the law of the State to which the acting authority belongs.[562] If this is so, the problem that immediately arises is the scope and procedure of control of the recognition on the "lawfulness" of these document that must be undertaken in the State: it should be known if the evidential value of a foreign public document is subordinated to a rigorous and exhaustive control of all the elements that, in pure form, grant to this document the capacity as public documents. Particularly, it is a question of controling the competence of the authority that authorises the document and the application of the formal requirements established by the law of this authority. With respect to the authority, this has to be a public authority (or one authorised as such in the State of origin), who has to act in the scope of its competence and functions and has to "authorise" the document, i.e. has to be the author of the document, not a mere legitimiser of signatures of a document granted by the parties. The remaining requirements that guarantee the formal validity of the document refer to the activity of the public authority and the specific modalities and procedures for the declarations of will or the facts to be authentic. If we follow a strict interpretation of the paragraph under discussion, the requirement of the fulfilment of all these extremes appears clear for the consideration of the document as a public document, such as necessary prerequisites not only for its "rein-

[561] *Vid.* M. Requejo Isidro, *Ley local y forma de los actos en el DIPr español*, Madrid, Eurolex, 1998, pp. 35 *et seq.*

[562] P. Gothot and D. Holleaux, *La Convención de Bruselas de 27 Septiembre 1968*, (translation by I. Pan Montojo), Paris, Júpiter, 1985, p. 229; J. Maseda Rodríguez, "El concepto de documento público: jurisdicción territorialmente competente para la ejecución en el marco del Convenio de Bruselas de 1968", *La Ley: Unión Europea*, 1999, nº 4829, pp. 1-6, p. 2.

forced" validity as evidence, but, and more rigorously, for whatever other of the effects of the document (registration, enforcement). The problem would exist in the real possibilities and the proceedings and specific manner of undertaking this control on the validity or formal nullity of the public document.

The finding of the lawfulness of the document in the State of origin leads us to having to analyse, in accordance with that law, whether the defect, omission or the unlawfulness observed is really a cause of formal nullity of the document in this State. In this sense, it may occur that the non-compliance by the authority with the regulations on competence at the time of the grant of the document is not a cause of nullity of the document in accordance with the law of the State of origin. The problem may lead also to cases in which a violation of the rules of international public law could be detected, on the extraterritorial exercise of their duties by notaries or consuls, without relying on authorisation or contrary to the provisions of the law of the State where it acts. In these cases, demonstrating a true violation of sovereignty of this State, the primacy of the international public law over the provisions in the law of the State of origin would have to be considered.

447. A different question is that once the controls provided in the paragraphs 2 i), ii) and iii) are fulfilled, the foreign public documents are equivalent to the public documents of the receiving State as they are covered by the "presumption of truthfulness", related to the facts that appear documented, and from which the special evidential value of the public documents is derived.[563] Such a privilege, which determines the validity of the document until it is challenged, is a direct consequence of the existence of a public document that has fulfilled required controls related to authorising the authenticity of the same and to authorise that the requirements established by the law of the State of origin so that it produces full evidential value in this State have been observed.

In this context, paragraph 2, iv) necessitates for the validity of the foreign documents in the receiving State that the requirements necessary in the State of origin are met so that the document "makes full proof of the signing and its content". The privileged position that the public documents have as means of proof requires the intervention of the authority in a certain capacity, in such a way that is not only limited to certifying the signatures of the persons that intervene in the act that is documented but that the evidential value of the public document in the authority is extended to the particular content of the instrument. It therefore departs from a notarial model based on the Latin system. As a consequence we can assume, firstly, the lawfulness of the document in the State of origin in the terms that have been indicated or, at least, an unlawfulness that does not affect its evidential value in accordance with that law; but also, secondly, a control of "equivalence" of the document, in a way that for it to provide "full proof" in the receiving State such condition has to be met in its State of origin. If the test of the equivalence is not fulfilled, this does not imply a rejection to the foreign documents, but a requalification of

[563] Therefore a distinction should be made between two concepts: the "presumption of authenticity" (regarding the authorship of the document) and the "presumption of veracity" (regarding the facts recounted); *vid.* Ch. Reithmann, in Ch. Reithmann and D. Martiny, *Internationales Vertragsrecht*, 5th ed., Colonia, Dr. Otto Schmidt, 1996, pp. 510-511).

these in the type of document that is better adapted to its original characteristics (*v.gr*., with evidential value of private documents).

A system of double control of the evidential value is introduced here: the first, in accordance with the law of the document (the law of the authority that has issued it) for verifying its scope in the State of origin; the second, in accordance with the law of the receiving State, to grant the document, in the place corresponding, the quality of documentary proof in accordance with this law. This double control produces, in turn, a double effect: positive, as the document authorised in the State of origin must have the same effect that would be had by an equivalent document authorised in the receiving State; negative, as the receiving State would not be justified in rejecting or restricting the evidential value of an equivalent document authorised in the State of origin.

The difficulties of the implementation of this control are alleviated depending on the type of document we are faced with, whether it limits to stating facts (affidavits) or incorporates declarations of will (deed of a contract) or legal acts or legal transaction (registration of matrimonial certificates). In these recent cases, more difficulties are presented for the control of equivalence given that the document is subject to a control of legality.

The determining factor at the time of evaluating the "full proof" in litigation is that, in accordance with the law of origin, the document has a hierarchically superior position within the means of proof (it cannot be weakened by other means, as occurs with the evidential value granted to witness evidence in the Anglo-Saxon system). In addition, the particular formulation and scope of the criterion of the "full proof" must bring us to think of a regime of proof appraised, not being submitted, therefore, at the free evaluation of the proof or evaluation together with the other evidential instruments.

448. An adequate comprehension of the scope of the present article requires separating two concepts which, although they are logically connected, are different and have a different regulation in private international law. On the one hand are the means of proof admitted for certifying the existence of a legal relationship and, on the other hand, is the evidential value of these means (that is to say their possibilities of weakening by other means of challenge within the proceedings). Of these two aspects, the present article only governs the second. In effect, when a document fulfils the requirements studied of paragraph 2 of the present article 78 that document may show full evidential value; however, to know if the document, as such, is an adequate means of proof of a certain legal act or transaction is a question that is outside of the scope of application of the provision mentioned. It must be determined then what is the law applicable to the means of proof and everything points to a "proceduralist" qualification of the means of proof, which involves the application of the *lex fori* for determining the admissible proof, except for specific scopes, for which the application of the *lex causae* (law governing the relationship) is defended if the means of proof provided in the *lex fori* weaken the prohibitions established by that law.

449. The contour of the evidential value of public documents, regarding the law of the document, serves to determine among the reported facts the ones that lose their evidential value through the questioning of the truthfulness of the document, and those which, despite being contained in the document, may be questioned through any other means of proof, without necessarily questioning the truthfulness of the document. In particular, aspects such as the fraud in a legal transaction documented enter into this area, as well as defects of consent in its formation or even the intrinsic truthfulness of the declarations of will made by the parties. In general, all these circumstances are outside of the scope of protection of the evidential value of public documents because what is referred to is the validity and effects of the act or transaction documented, a matter which, as is indicated in paragraph 3 of this article 78, will be submitted to its own governing law. As a result, if the law of the document extends the evidential value to elements such as the validity of the document or the legal relationship, and recognises to them a presumption of validity, this will not be taken into account. Thus, the public document may prove, for example, that the parties are appearing before the notary and make certain declarations of will with the intention to conclude a contract; in that case, the document does not serve to prove the particular validity of the contract, because this would require an agreement of genuine (not simulated) willingness and not violated (by error, deceit or intimidation). As indicated, the first point (the fact that the declarations of will had or had not been issued) will lose its validity if the truthfulness of the document is challenged; on the contrary, the second aspect (related to the very validity of a contract) will be verified when the requirements for the valid constitution of the same will be fulfilled, which is tantamount to saying that the legal qualifications made by the notary do not provide proof.

In relation to this, it must also be taken into account that the extent of the evidential value of the public document may vary when it does not contain declarations of will (specific to the act of disposal), but declarations of "science" (specific to testimonial documents or notarial acts: for example, a certificate of proof of life). The reference provided in paragraph 3 is only in relation with the "declarations of will", and must not be interpreted as a negation of evidential value of the facts documented by the notary, since he does not have any grounds for denying this evidential value in respect of foreign documents, logically, provided that in their State of origin, such documents also provide proof of these facts. The reason why the latter are not expressly provided in the said paragraph 3 is clearly distinguish, regarding the dispositive documents, the proof of the declarations of will from the very existence and validity of the legal transaction concerned. For this reason, it makes sense to mention only this type of documents, since the merely testimonial documents may only prove the said facts, but in no case will they raise a problem of validity of the legal transactions, by which the application of the rules on capacity, substance and form governing these will not be raised.

Article 79. *Translation.* Without prejudice to the provisions established in international conventions or special laws, any document drafted in a language

which is not an official language of the receiving State shall be accompanied by its translation.

A private translation may be submitted and, in this case, if any of the parties challenge it within five days following from the issuance, demonstrating that it does not consider it to be faithful and accurate and expressing the reasons for the discrepancy, the Clerk of the Court shall order, regarding the part concerned by the discrepancy, to undertake an official translation of the document, at the expense of whoever had presented it.

Nonetheless, if the official translation undertaken at the instance of the party is substantially identical to the private translation, the expenses arising from it shall be incurred at the expense of whoever has requested it.

450. This provision logically has an additional application in respect of the specific solutions that may arise out of international conventions. Likewise, considering the general scope of this Law on Private International Law, the regulation on translation of this article 79 must be understood without prejudice to the specific rules contained in sectoral laws. In particular, the requirement regarding registration may be relaxed if provided by the law, in those cases in which the agent of the register knows the language in which the document is drafted.

Likewise, it will be up to each specific sector to determine the consequences that the presentation of an untranslated document will have: if it supposes its rejection, the impact that it can have on the continuation of judicial proceedings and the possibilities and conditions of remedy in the absence of a translation.

451. Article 79 establishes the validity, as a general rule, of the private translation and an official translation will only be needed in the event of a challenge. This is intended to avoid the abusive utilisation, and with a purely delaying objective, of the challenges to private translations. For that reason, it is established that the expenses are recovered in the party that challenges in the event that the official translation is substantially identical to the private translation presented by the other party.

TITLE V

TRANSITIONAL AND FINAL PROVISIONS

Article 80. ***Application in time*****. 1. The present Law shall apply to all proceedings instituted after the date of its entry into force, without prejudice to the rights acquired.**

However, the legal facts that occurred or acts that were carried out prior to the date of entry into force of the present Law, but which continue to produce effects, shall be governed by the prior law for the period prior to this date and by the new law for the period afterwards.

2. The Caribbean judges or authorities that hear actions filed prior to the entry into force of the present Law shall continue to have jurisdiction even if this jurisdiction is not established in the present Law.

The actions rejected by the Caribbean judges or authorities due to a lack of jurisdiction prior to the entry into force of the present law may be filed again if the jurisdiction is established by this latter law, provided that the claim is likely to be invoked.

3. The requests for recognition and enforcement of foreign decisions that are pending prior to the entry into force of the present Law shall be governed by this latter law concerning the conditions for recognition and enforcement.

452. The application in time of the private international law rules requires a special emphasis. If the legal rules and, in particular, the rules specific to this legal system, are pronounced by the legislator for governing a future conduct, projecting certain values and interests, these rules must have a supplementary regulatory instrument which addresses the past facts or the situations of *facta pendentia*.[564]

The national private international law systems are characterised by the inexistence or insufficiency of these instruments (rules of transitional law) or by the projection onto the same of disputable values that, often, weaken the original purpose of the legal review that has been operated. The traditional transitional rules, comfortably located in the Civil Codes, may not provide a coherent response to these questions which do not have an exclusively substantive, but a procedural nature. It is well known that the traditional formulation of a rule on the non-retroactivity of the law, directed exclusively at the interpreter of the law, is based on declarative texts of personal rights. Undoubtedly, this regulation is formulated as a reaction to the injustices induced by laws and by judicial decisions with retroactive effects, as a corollary of the principle of legality and in favour of the citizen's right to legal

[564] CONC.: Art. 196of the Swiss PIL Act; arts. 126 y 127 of the Belgian Code of PIL; art. 72 of the Italian PIL Act; art. 3 of the Argentinian draft law.

certainty. What is more, the regulation claims to be subordinated to civil liberty and constitutes a postulate of intrinsic legal certainty for the exercise of trade. It is an approach intimately connected to the codifying phenomenon and responds to its basic objectives: stability and legal certainty. In other words, the non-retroactivity is a rigid, but comfortable, formula, which is representative of an era where the accent was placed on legal certainty; a formula that represents a factor of order and security whose very existence is a guarantee of the social order.[565] The driving force in this period gravitates around the idea that in a well-organised society all persons must carry out their legal activity in full awareness of their consequences. Hence, the law must not have retroactive effects, since this situation may generate uncertainty divorced from the reality of the matter.

At the current time, unjust situations which could arise in the regulation in its pure state[566] have been highlighted, as well as the failure of an aprioristic and general criterion with a vocation to resolve all the cases of intertemporal conflict that might be presented. To recognise the immediate application of the new law would always give rise to the problem of harmonising this application to relationships existing under of the prior law. It is, then, impossible to resolve the question of the retroactivity or non-retroactivity of the law from axiomatic criteria and, in any case, the analogous application of the transitional provisions of the Civil Codes to specific solutions does not appear to be an adequate solution; above all in an era of profound legislative changes. The general regulation of non-retroactivity has, therefore, a subsidiary nature that can only be used when the new law has not established anything concerning its retroactive nature.

453. For the reasons set out, from the point of view of the applicable law, which Title III of the present Law deals with, the non-retroactivity is tempered by two exceptions. Firstly, the respect for the rights acquired that are recognised in the Caribbean, with the appropriate limits in **article 71**. Secondly, when the controversial legal facts or acts that arose prior to the date of entry into force of the present Law, but continue to produce legal effects. In this case, the more equitable solution points to the application of the prior law for the period prior to this date and for the new law for the period afterwards.[567]

This solution is accepted by the majority of the national private international law systems, which are decidedly in favour of the solution using internal general rules on non-retroactivity of the laws, since there is no reason at all for deviating from this criterion; although there are more nuanced positions,[568] including from the per-

[565] *Cf.* P. Level, *Essai de systématisation sur les conflits des lois dans le temps*, Paris, 1959, LGDJ, p. 290.

[566] D. Donati, "II contenuto del principio della irretroattivitá della legge", *Riv. italiana per le Science Giuridice*, vol. LV, 1915, pp. 235–257 and 117–193.

[567] This is the phrasing of art. 196.2º of the Swiss PIL Act of 1987.

[568] Not all cases of succession in time of the rule of conflict can be solved by applying the same rules. A series of hypothesis can be drawn up: *a)* succession in time of legislative rules of conflict; *b)* succession in time of case-law or customary rules of conflict; *c)* rule of conflict in effect, modified by another case-law or customary rule; *d)* case-law or customary rules of conflict, modified by another subsequent legislative rule; *e)* legislative rule of conflict, modified by another rule comprised in an international treaty; f) succession in time of conventional rule of conflict. *Vid.* F. A.

spective of a specific system.[569] However, when a legislator decides to reform the rules of private international law, it must be highlighted to what extent this initiative would be diminished if it did not incorporate transitional rules that extend the new values to the situations constituted beforehand based on the specialisation of the matters regulated. Undoubtedly, the traditional regulation continues to be valid concerning contractual obligations. But other institutions require more specific solutions, above all in the scope of family law, which extends the legal conquests of a democratic society to prior situations (equality of the spouses and the children before the law, global market efficiency, etc.).

454. The intertemporal questions related to the application of the rules contained in title III of the present Law are produced when proceedings are initiated, based on certain fora of jurisdiction and a normative exchange occurs which affects these fora taking away from them the jurisdiction to the court that began to hear the case. Different channels may be used. On the one hand, a pure and simple transposition of the particular solutions of the succession of conflict rules may be carried out, based on a similarity between the points of connection and the fora of jurisdiction and the regulations of paragraph 1 of the rule under discussion. On the other hand, specifying the decisive time (a critical date) from which it is admitted that, if the jurisdiction of the courts exists, this jurisdiction must be extended to the time until the proceedings end, regardless of the legislation modification; this date considers the possibility that actions dismissed by the judges or authorities of the forum for lack of jurisdiction beforehand may be filed again if the jurisdiction is established by this latter law, provided that the claim is likely to be invoked.[570]

Reasons of procedural economy, together with the appreciation of the distinct nature of the rules of judicial and legislative competence, advise us to maintain this second position through the so-called principle of the *perpetuatio iurisdictionis*. In private international law, in the absence of a legal text, it has been generally admitted that the question must be resolved imperatively in accordance to the criterion expressed, through an extensive application of the imperative solutions at the level of the domestic jurisdiction, this result being justified in the irrevocable nature of the national jurisdiction.

455. In relation to the validity of foreign decisions included in Title IV, the impact of the time factor is especially intense.[571] This must be the solution of continuity that may exist between the time in which the foreign decision is produced and that in which the request for its fulfilment is made, mediating between both the entry into force of the present law. Hence, it is appropriate to consider that the re-

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Mann, "The Time Element in the Conflict of Law", *British Yearb.Int'l L.*, vol. XXXI, 1954, pp. 217–247; P. Roubier, *Le droit transitoire (Conflits de lois dans le temps),* 2nd ed., Paris, 1960, pp. 23–29.

[569] That is the solution Germany adopted, with the transitory provision included in the Reform Act of the *EGBGB* of 25 July 1986, *REDI*, vol. XL, 1988, pp. 326–327.

[570] P. Roubier, "De l'effet des lois nouvelles sur les procès en cours", *Mélanges offerts à Jacques Maury*, t. II, Paris, 1960, pp. 525 *et seq*.

[571] *Cf*. A. Remiro Brotóns, *Ejecución de sentencias extranjeras en España*, Madrid, Tecnos, 1974, pp. 65 *et seq*.

quests for recognition and enforcement of foreign decisions that are pending prior to the entry into force of the present Law are governed by this latter law as regards the conditions of recognition and enforcement.

Article 81. *Repealing provision*. All the prior provisions that regulate the subject matter of this Law and are contrary to it shall be repealed.

456. The repealing rules do not make reference to a certain conduct, but to the validity of the prior rules.[572] As is typical in private international laws, especially in those that have a vocation of global regulation, the present article includes a provision under which the applicability of the prior laws is limited in time, restricting their regulatory vocation although without annulling the applicability of the repealed rules, as is detailed in the transitional rules of **article 80.**

This provision is in favour of the mechanism of tacit repeal and respect for the existence of an incompatibility between the prior laws and the present Law, whether it is adopted completely or partially. It has the effect of limiting in time the validity of a rule, that is to say, suspending its application and regulatory capacity, although in all cases the provision grants a presumption of validity in respect of situations that occurred while it was in effect. The tacit repeal of a provision, as in the present case, does not constitute an omission on the part of the legislator but the choice, at the time of the creation of a new rule, to stop applying the prior rule if it cannot be reconciled with the recently approved rule. The option for an express repeal will imply a confrontation of the present Law with the rest of the legal system that has adopted it, which would require the legislator to undertake a manifestly wasteful efforts, since the legislative task must concentrate on the specific cases defined by the Parliament itself, with the object of providing the addressees of this laws with legal certainty and an adequate framework for the interpretation and application of the same.

[572] H. Kelsen, "Derogation", *Essays in Jurisprudence in Honor of Roscoe Pound*, Indianápolis, Bob Merrill Hill Co, 1962, pp. 339-355.

OHADAC MODEL LAW ON PRIVATE INTERNATIONAL LAW

TITLE I*

Common provisions

Article 1. *Subject matter of the law.* 1. This law sets the rules governing private international relations in civil and commercial matters. It governs, in particular:

i) the scope and limits of Caribbean jurisdiction;

ii) the determination of the applicable law;

iii) the recognition and enforcement of foreign decisions.

2. Private relationships are termed international when they relate to more than one legal order via their constituent elements, corresponding to the person of their subjects, to their subject matter or to their creation.

Article 2. *Matters excluded.* The following are excluded from the scope of this law:

i) tax, customs and administrative matters;

ii) Social Security;

iii) commercial arbitration;

iv) bankruptcy and other analogous proceedings.

Article 3. *International treaties.* 1. The provisions of this law apply inasmuch as they are in accordance with the provisions of the international treaties to which the Caribbean is party. In the event of a conflict, the provisions of the treaties shall prevail.

2. For the construction of such treaties, their international character and their required uniform interpretation shall be taken into account.

Article 4. *Special laws.* The provisions of this law shall apply subject to any special laws regulating private international relationships. In the event of a conflict, the special laws shall prevail.

Article 5. *Determination of domicile and habitual residence*. 1. For the purposes of this law:

i) domicile shall be understood to mean the place of habitual residence;

ii) habitual residence shall be understood to mean:

a) the place where a natural person has his principal abode, even in the absence of any registration and independently of any residence or settlement permit. In order to determine that place, any circumstances of a personal, family and professional nature revealing durable connections to such a place shall, in particular, be taken into account;

b) the place where the company or entity has its registered office, central administration or main centre of business;

c) the place where the administration of a trust or the centre of its main interests is located.

2. No natural person can have two or more domiciles.

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* **General observation:** The term "Caribbean" of the present Law refers to the State and the relations with the State that decides to adopt the Model Law.

TITLE II

Scope and limits of Caribbean jurisdiction in civil and commercial matters

Chapter I

Scope of Caribbean jurisdiction

Article 6. *General scope of jurisdiction.* 1. The Caribbean courts have jurisdiction for proceedings initiated in Caribbean territory between Caribbean nationals, between foreigners, as well as between foreigners and Caribbean nationals, in accordance with the provisions of this law and of the international Treaties and agreements to which the Caribbean is party.

2. Foreigners have access to the Caribbean courts in the same manner as nationals and are entitled to effective judicial protection. No deposit or security, however called, may be required of a claimant or intervening party, whether on grounds of his foreign status or on account of his absence of domicile or residence in the territory.

3. Choice of forum agreements are licit when the dispute is international in nature. A dispute is international in nature when it includes an element of foreign status corresponding to those referred to in Article 1 §2.

Article 7. *Jurisdictional immunity.* 1. In accordance with the rules of international law, the jurisdictional immunity of foreign States and of their organs is an exception to Caribbean jurisdiction. In civil and commercial matters, the Caribbean courts define the scope of that immunity restrictively by including in it solely those disputes concerning acts implying the exercise of public authority (acts jure imperii).

2. The jurisdictional immunity in civil and commercial matters of diplomatic agents accredited in the Caribbean is defined by the international treaties and agreements to which the Caribbean is party.

3. The jurisdictional immunity in civil and commercial matters of the international organisations of which the Caribbean is a member is defined by the treaties constituting them. The agents of those organisations benefit from immunity in accordance with the terms set by those treaties.

Article 8. *Plea of arbitration*. 1. When a dispute covered by an arbitration agreement is submitted to a Caribbean court whereas the matter has already been referred to the arbitral tribunal, the Caribbean court shall state the claim to be inadmissible.

2. When a dispute covered by an arbitration agreement is submitted to a Caribbean court whereas the matter has not yet been referred to the arbitral tribunal, the Caribbean court shall state the claim to be inadmissible, unless the arbitration agreement is obviously null and void or obviously unenforceable.

Chapter II

Grounds of jurisdiction

Article 9. *Sole jurisdiction.* The Caribbean courts shall have sole jurisdiction for disputes whose subject matter is:

i) rights *in rem* in immovable property and tenancies of immovable property when the property is located in Caribbean territory;

ii) the formation, validity, nullity and dissolution of companies or entities whose domicile is located in Caribbean territory, as well as the validity of any agreements and decisions of their organs affecting their existence *erga omnes* and the rules governing their operation;

iii) the formation, validity, nullity and extinction, as well as the existence in relation to third parties, of trusts domiciled in Caribbean territory;

iv) the validity or nullity of entries in a Caribbean register;

v) the registration or validity of patents and other similar rights giving rise to a deposit or registration, when the deposit or registration was filed or made in the Caribbean;

vi) the recognition and enforcement in Caribbean territory of judicial decisions and arbitral awards handed down abroad;

vii) provisional and conservatory measures which must be enforced in the Caribbean;

viii) the determination of Caribbean nationality.

Article 10. *Voluntary extension of the scope of jurisdiction of the Caribbean courts.* 1. The scope of the general jurisdiction of the Caribbean courts shall be extended when such courts, or one of them, are expressly or tacitly designated by the parties, unless the dispute concerns one of the matters referred to in Articles 8 and 12, for which no derogation by agreement is permitted.

Voluntary extension for the matters referred to in paragraphs iv), v) and vi) of Article 14 is valid if:

i) it is based on a choice of forum agreement made after the difference arose; or if

ii) both contracting parties have their domicile in the Caribbean at the time that the agreement is made; or if

iii) the plaintiff is the consumer, employee, policyholder, insured, victim or beneficiary of the insurance policy.

2. The jurisdiction thus established extends to the matter of the validity of the choice of forum agreement, which must meet the conditions set forth in the next paragraph.

3. A choice of forum agreement is an agreement whereby the parties agree to submit to the Caribbean courts or to one of them certain or all of the differences arising or which may arise in the future in connection with a definite legal relationship, whether contractual or non-contractual in nature. Unless otherwise agreed, a choice of forum agreement establishes exclusive jurisdiction.

A choice of forum agreement shall be evidenced in writing. A written agreement is an agreement recorded in one and the same document signed by the parties, or resulting from an exchange of letters, faxes, telegrams, e-mails or any other methods of remote communication allowing the agreement to be evidenced and ensuring its storage and subsequent accessibility in electronic, optical or other mode.

An exchange of writings in claim and defence in the course of a lawsuit submitted to a Caribbean court constitutes a written agreement when the existence of the agreement is stated therein by one party and not contradicted by the other.

Article 11. *General jurisdiction based on the domicile of the defendant and specific jurisdiction.* 1. In disputes other than those referred to in Article 8 and failing voluntary extension in accordance with Article 9, the Caribbean courts have jurisdiction when the defendant is or is deemed to have his domicile in the Caribbean, without prejudice to the jurisdiction established in Articles 13 and 14.

2. In the event that there are several defendants, at least one of whom has his domicile in the Caribbean, the Caribbean courts have jurisdiction, provided that the claims are so closely connected that it is advisable to investigate and rule on them together.

Article 12. Derogatio fori. However, the jurisdiction of the Caribbean courts resulting from Article 11 may be excluded by a choice of forum agreement in favour of a foreign court or courts. In that case, the Caribbean courts shall stay the proceedings until the court to which the matter has been referred on the basis of choice of forum has declined jurisdiction.

Article 13. *Personal and family law.* Without prejudice to the jurisdiction established in the previous articles, the Caribbean courts have jurisdiction:

i) in the matter of declaration of absence or death, when the person concerned has had his last habitual residence in Caribbean territory; the Caribbean courts also have jurisdiction regarding a declaration of absence or death when the latter forms the subject matter of an issue collateral to the principal issue referred to them;

ii) in the matter of incapacity and of measures for the protection of the person or property of minors and adults lacking capacity, when the minor or adult lacking capacity has his domicile or habitual residence in the Caribbean;

iii) in the matter of measures for the protection of the person or property of adults, when the adult has his domicile or habitual residence in the Caribbean;

iv) in the matter of personal and property relations between spouses, of nullity of marriage, of divorce and legal separation, when the spouses both have their habitual residence in the Caribbean at the time of filing, or when

both have had their last common habitual residence in the Caribbean and when the claimant continues to reside in the Caribbean at the time of filing, likewise when both spouses are Caribbean nationals;

v) in the matter of filiation, when the child has his habitual residence in the Caribbean at the time of filing or when the claimant is Caribbean and has resided in the Caribbean for at least six months on the date of filing;

vi) in the matter of the formation of adoption, when the adoptee has his habitual residence in the Caribbean or shares common Caribbean citizenship with the adopter;

vii) in the matter of support, when the creditor has his habitual residence in Caribbean territory and when the claim for support is joined with a status action for which the Caribbean courts have jurisdiction.

Article 14. *Property law.* 1. Without prejudice to the jurisdiction established in the previous articles, the Caribbean courts have jurisdiction in the following matters:

i) contractual obligations arising or to be performed in the Caribbean;

ii) non-contractual obligations, when the damaging fact has occurred or could occur in Caribbean territory or when the author of the damage and the victim both have their residence in the Caribbean; the Caribbean courts having jurisdiction in criminal matters also have jurisdiction to rule on the civil liability for the damage resulting from the offence;

iii) disputes relating to the operation of a branch, agency or business establishment when located in Caribbean territory;

iv) contracts entered into by consumers when the consumer has his domicile in the Caribbean while the other party operates in the Caribbean or, by any means, directs the business activities within the framework of which the contract was made towards the Caribbean. In all other cases, the rule set out in paragraph i) above applies to the consumer contract;

v) insurance, when the insured, the policyholder, the injured party or the beneficiary of the insurance have their domicile in the Caribbean; the insurer may also be summoned before the Caribbean courts if the damage is suffered in Caribbean territory and if dealing with civil liability insurance or insurance relating to real estate, or, in the case of civil liability insurance, if the Caribbean courts have jurisdiction for the action initiated by the injured party against the insured pursuant to paragraph 2 of this article;

vi) actions relating to movable property, when the latter is located in Caribbean territory at the time of the claim;

vii) successions, when the deceased had his last domicile in the Caribbean or owned real estate in the Caribbean.

2. In the matter of employment contracts, employers may be sued before the Caribbean courts if the work is habitually performed in the Caribbean; or, if the work is not habitually performed in one and the same country, when the establishment having hired the worker is located in the Caribbean.

Article 15. *Forum of necessity*. 1. The Caribbean courts also have jurisdiction when it is established that the case has a connection with the Caribbean that is such that it can be usefully dealt with there and

i) that proceedings abroad are impossible in law or in fact, or

ii) that the decision resulting from proceedings conducted abroad would not be able to be recognised in the Caribbean.

2. When the claimant is domiciled in the Caribbean or is a Caribbean national, the useful connection condition is satisfied.

Article 16. *Provisional and conservatory measures*. The Caribbean courts also have jurisdiction for the purpose of ordering provisional or conservatory measures when the latter

i) concern persons or property located in Caribbean territory and must be enforced there, or

ii) are requested in connection with a difference pertaining to their jurisdiction.

Article 17. *Lack of jurisdiction of the Caribbean courts*. 1. The Caribbean courts do not have jurisdiction for cases not allotted to them by the provisions of this law, nor by those of the international Treaties and agreements to which the Caribbean is party.

2. When the defendant appears, the exception of lack of jurisdiction must be raised prior to any defence on the merits under pain of inadmissibility.

3. When the defendant does not appear, the Caribbean courts shall disclaim jurisdiction of their own motion.

4. Where a Caribbean court is seised of a claim which is principally concerned with a matter over which the courts of another State having adopted the present law have exclusive jurisdiction by virtue of Article 9, it shall declare of its own motion that it has no jurisdiction.

Article 18. Forum non conveniens. 1. The Caribbean courts may, upon a request by the defendant, decline jurisdiction due to facts occurring outside the Caribbean territory if:

i) it is useful to hear testimony when the witnesses reside abroad and when hearing such testimony abroad or the appearance of the witnesses before the Caribbean court would entail excessive expense for either party; or

ii) it is useful for the court to proceed to personal verifications to be carried out regarding disputed facts occurring abroad;

iii) the facts were committed abroad.

2. The Caribbean courts shall decline jurisdiction when the applicable law assumes that they have powers not granted them by Caribbean law, whose exercise would be called for in the case at hand.

Article 19. *Objection of* lis pendens. 1. When, prior to the referral of a case to the Caribbean court, another claim having the same subject matter and the same cause has been brought between the same parties before a court of another State, the Caribbean courts shall stay proceedings until the foreign court to which the case was first referred has ruled on its jurisdiction. If the foreign court to which the case was first referred states that it has jurisdiction on the basis of a ground of jurisdiction judged to be reasonable from the viewpoint of the rules governing the recognition and enforcement of foreign decisions, the Caribbean court to which the case was subsequently referred shall decline jurisdiction.

2. However, the objection of *lis pendens* of proceedings shall be rejected if the referral to the Caribbean court is based on the provisions of Article 9. The objection shall also be rejected if the referral to the Caribbean court is based on a choice of forum agreement which complies with Article 10 and under which the chosen forum has exclusive jurisdiction.

Article 20. *Exception of connexity*. When two claims are so closely related that it is advisable to investigate and judge them at the same time and if one of them is submitted to a foreign court and the other to a Caribbean court, the Caribbean court may, at the request of a party and aside from the cases of exclusive jurisdiction referred to in Articles 9 and 10, decline jurisdiction, provided that the foreign court has jurisdiction for the claims in question and that its law allows their joinder.

Article 21. *Internal allocation of jurisdiction*. When the Caribbean courts have jurisdiction under this law, jurisdiction ratione materiae and territorial jurisdiction shall be determined, if need be, by the relevant provisions of the code of civil procedure.

In the absence of provisions liable to found territorial jurisdiction, the latter shall be determined by transposing the grounds of international jurisdiction. When such a transposition does not make it possible to determine territorial jurisdiction, the claim shall be submitted to the court chosen by the claimant in compliance with the requirements of sound administration of justice and of procedural economy.

TITLE III

Determination of applicable law

Chapter I

Regulatory rules

Section I

Persons

Article 22. *Enjoyment and exercise of rights*. 1. The attribution and the end of legal personality are governed by Caribbean law.

2. The exercise of civil rights is governed by the law of the domicile.

Article 23. *Capacity and civil status*. 1. Notwithstanding the provisions of the present Law, the capacity and the civil status of natural persons are governed by the law of their domicile. Nonetheless, the special conditions of capacity prescribed by the law applicable to a particular legal relationship shall be governed by the law governing that legal relationship.

An exception is made for the cases of incapacity governed by article 50.

2. A change of domicile does not restrict the already acquired capacity.

Article 24. *Personality rights*. 1. The existence and the content of personality rights are governed by the law of the domicile of the person. However, personality rights resulting from a family or inheritance relationship are governed by the law applicable to that relationship.

2. The consequences of a violation of the rights indicated in the previous paragraph are governed by the law applicable to liability for wrongful acts.

Article 25. *Names and surnames*. 1. The names and surnames of persons are governed by the law of the domicile at the time of their birth.

However, at the time of the registration of the birth, the parents by mutual consent, or whichever of them has parental responsibility, may determine that the name and the surnames are governed by the national law of the person concerned.

2. In any event, the birth certificate of a person and the record thereof in the corresponding Caribbean registers is governed by Caribbean law.

Article 26. *Declaration of disappearance or death*. The declaration of disappearance or death is governed by the law of the State where the person had their domicile before their disappearance.

The provisional administration of the property of the missing person shall be governed by the law of the State in whose territory the absent person had their domicile and, if this cannot be determined, by Caribbean law.

Article 27. *Commercial Entities and Individual Limited Liability Companies*. 1. Commercial entities and individual limited liability companies are governed by the law in accordance with which they were incorporated.

2. The law applicable to commercial entities and individual limited liability companies comprises:

i) the existence, capacity and nature of the company;

ii) the name and the registered office;

iii) the incorporation, dissolution and liquidation;

iv) the composition, the powers and the functioning of the executive bodies;

v) the internal relationships between the members and the relationships between the members and the entity, as well as the corporate duties of the directors;

vi) the acquisition, loss and transfer of capacity as member;

vii) the rights and obligations corresponding to the shares or interests and their exercise;

viii) the liability of members and directors for infringement of company regulation or of the articles of association;

ix) the scope of the company's liability to third parties as a consequence of the action of its bodies.

Article 28. *Transfer of the registered office*. The transfer of the registered office of a commercial entity or an individual limited liability company from one State to another shall affect personality only in the terms permitted by the laws of those States. In the case of transfer of a registered office to the territory of another State, the company is governed by the law of that State from the

time of the said transfer.

Section II

Family relations

Article 29. *Celebration of marriage*. 1. Capacity for marriage shall be governed by the law of the domicile of each of the future spouses.

2. The requirements of matters of substance and of form of a marriage celebrated in the Caribbean shall be governed by Caribbean law.

3. A marriage celebrated abroad shall be deemed valid if it is in conformity with the law of the place of celebration or if it is recognised as such by the law of the domicile or of the nationality of either of the future spouses.

Article 30. *Personal relations between spouses*. Personal relations between spouses shall be governed by the law of the common matrimonial domicile immediately following the celebration of the marriage; in the absence of such domicile, by the law of the common nationality at the time of the celebration of the marriage and, failing this, by the law of the place of celebration of the marriage.

Article 31. *Property relationships in marriage*. 1. The property relationships between spouses shall be governed by any of the following laws, chosen by the spouses before the celebration of the marriage:

i) the law of the nationality of either of the spouses at the time of the designation;

ii) the law of the domicile of either of the spouses at the time of the designation;

iii) the law of the domicile of either of the spouses after the celebration of the marriage.

The choice of any of these laws must be express and stated in writing and relate to the totality of the conjugal property.

2. In the absence of such a choice, the property relationships between the spouses are governed by the law applicable to the personal relations in accordance with article 30 of the present Law.

3. The spouses may agree in writing during marriage to submit their matrimonial regime to the law of the domicile or of the nationality of either spouse.

This choice may not prejudice third party rights.

4. The law governing property relationships between spouses in accordance with the above paragraphs, whether chosen or not, shall be applicable as long as the spouses have not validly chosen a new law, regardless of the possible changes in nationality or domicile of either spouse.

Article 32. *Nullity of marriage*. Without prejudice to the other provisions of the present Law, the causes of nullity of marriage and its effects shall be governed by the law applicable to its celebration.

Article 33. *Divorce and legal separation*. 1. The spouses may agree in writing before or during the marriage to designate the law applicable to divorce and legal separation, provided that it is one of the following laws:

i) the law of the State in which the spouses have their common domicile at the time of the conclusion of the agreement;

ii) the law of the State of the last place of the conjugal domicile, provided that one of them still resides there at the time when the agreement is concluded;

iii) the law of the common nationality of the spouses at the time when the agreement is concluded.

2. In the absence of a choice, the law of the spouses' common domicile at the time of presentation of the petition shall apply; otherwise, the law of the last common conjugal domicile, provided that at least one of the spouses still resides there; otherwise, the Caribbean law.

3. Once the petition is filed, the spouses may decide that the conjugal separation or the divorce is governed by Caribbean law.

Article 34. *Non-matrimonial unions*. 1. The law of the place of the establishment of non-matrimonial unions registered or recognised by the competent authority shall govern the establishment and registration conditions,

the effects on the property of the union and the conditions for dissolution of the non-matrimonial union.

2. The cohabitants may agree in writing during the term of validity of the union to submit its property regime to the law of the domicile or of the nationality of either one of them.

This choice may not prejudice the rights of third parties.

3. Any effect of the union that does not have a specific solution attributed by the present law shall submit to the law of the habitual residence of the cohabitants.

Article 35. *Establishment of legal parentage.* 1. Legal parentage shall be governed by law of the child's habitual residence at the time of birth.

2. However, the law of the child's habitual residence at the time of an action to establish legal parentage shall apply if this is more favourable to the child.

3. The voluntary recognition of paternity or maternity shall be valid if it is in conformity with the law of the child's habitual residence at the time of birth or at the time of recognition, or with the law of the habitual residence or the law of the nationality of the person who carries out the recognition.

Article 36. *Adoption of minors***.** Caribbean law shall apply to the adoption of a minor granted by a Caribbean authority. However, the requirements related to the necessary consents and authorisations required by the national law or the law of the habitual residence of the adopter or child being adopted must be taken into account.

Article 37. *Adoption of legal adults.* The adoption of a legal adult shall be governed by the law of their domicile at the time of the granting.

Section III

Protection of persons without legal capacity and maintenance obligations

Article 38. *Parental responsibility and protection of minors*. 1. Parental responsibility or any other similar institution shall be governed by the law of the child's habitual residence.

2. The measures for the protection of the person or property of a minor shall be governed by Caribbean law. However, the competent authority may apply the law of the minor's habitual residence if this is more favourable to the best interests of the child.

3. Caribbean law shall apply for provisionally adopting urgent measures for the protection of the person or the property of the minor without legal capacity.

4. For the application of the laws mentioned in the preceding paragraphs, the best interests of the child must absolutely be taken into account.

Article 39. *Protection of adults without legal capacity*. 1. The conditions and the effects of the measures for the protection of adults without legal capacity shall be governed by the law of the habitual residence of the person without legal capacity.

2. Caribbean law shall apply for provisionally adopting urgent measures for the protection of the person or the property of the person without legal capacity.

Article 40. *Maintenance obligations*. 1. The maintenance obligations shall be governed by the law of the State of the creditor's habitual residence. In the case of a change of habitual residence, the law of the State of the new habitual residence from the time of change shall apply.

2. However, Caribbean law shall apply if the creditor is unable to obtain maintenance from the debtor in accordance with the law indicated in paragraph 1.

3. The law applicable to annulment of the marriage, separation of the spouses and divorce shall govern the maintenance obligations between the spouses or ex-spouses arising from these situations.

4. The application of the laws specified in the preceding paragraphs shall in any case

take into account the debtor's capacity and the needs of the creditor.

Section IV
Successions and gifts

Article 41. *Succession* mortis causa. 1. Succession mortis causa shall be governed by the law of the deceased person's domicile at the time of their death. Without prejudice to the provisions in the following paragraphs, this law shall apply to the entire succession, regardless of the nature of the property and the place where it is located.

2. Testators may choose to submit their entire succession to the law of their domicile or their nationality at the time of the choice. The choice must be made expressly in the form of a disposition of property upon death, or must be demonstrated beyond any doubt in the form of a disposition of this type.

3. Wills drawn up in conformity with the law of the deceased person's domicile at the time of being drawn up shall maintain their validity regardless of the law governing the succession. In any case, the reserved portion or other similar rights to which the deceased person's spouse or children might be entitled shall be governed, where applicable, by the law governing the succession in accordance with paragraphs 1 and 2 of the present article.

4. The agreements as to succession that affect only one succession and concluded in accordance with the law of the deceased person's domicile at the time of being drawn up shall maintain their validity regardless of the law governing the succession. The agreements as to succession that affect more than one succession shall be governed by the law of the domicile of any of the testators expressly chosen by all of them; if no law is chosen, they shall be governed by the law of the testators' common domicile at the time of the conclusion of the agreement; if there is no common domicile, they shall be governed by their common national law and if there is no common national law, the shall be governed by the law most closely connected to the agreement, taking into account all of the circumstances.

In all events, the reserved portion and other similar rights to which deceased person's spouse or children might be entitled shall be governed, where necessary, by the law governing the succession in accordance with paragraphs 1 and 2 of the present article.

5. The partition of the estate shall be governed by the law applicable to the succession, unless the heirs of the estate have designated by common accord the law of the place of the opening of succession or the law of the place in which most of the succession property is located.

Article 42. *Form of testamentary dispositions*. Testamentary dispositions shall be valid in terms of form if they are in conformity with the provisions of the law of the place where the disposition is made by the testator, or by the law of deceased person's domicile at the time when the disposition is made or at the time of the death, or by the deceased person's national law at the time when the disposition is made or at the time of the death.

Article 43. *Succession of the State*. If the law applicable to the succession does not attribute the succession to the State, in the case where there are no heirs, the succession property located in the Caribbean shall become the property of the Caribbean State.

Article 44. *Gifts*. 1. Gifts shall be governed by the law of the donor's domicile at the time when the gift was made.

2. Notwithstanding the provisions in the preceding paragraph, the donor may submit this to the law of their nationality by express declaration at the same time as making the gift.

3. The gift shall be formally valid if it is considered as such by the law that governs its content or by the law of the State where it was made.

Section V
Contractual obligations

Article 45. *Autonomy of the will.* 1. The contract shall be governed by the law chosen by the parties. The parties' agreement on this choice must be express or, in the absence of such agreement, the choice of law must be

clearly deducible from the conduct of the parties and the clauses of the contract, considered as a whole. This choice of law may relate to all or merely one part of the contract.

The choice of a particular court by the parties does not necessarily imply the choice of the applicable law.

2. The parties may agree at any time that the contract, in whole or in part, is submitted to a different law to the one it is was governed by previously, regardless of whether the previous law was applicable by virtue of a previous choice of law or by virtue of a different provisions of the present Law. The change of the applicable law shall not affect the rights of third parties.

Article 46. *Determination of the applicable law in the absence of choice of law*. 1. If the parties have not chosen an applicable law, or if their choice is invalid, the law applicable to the contract shall be determined by the following provisions:

i) the contract for the sale of goods shall be governed by the law of the country where the vendor has their habitual residence;

ii) the contract for the sale of property by auction shall be governed by the law of the country where the auction takes place, if this place can be determined;

iii) the contract for the performance of services shall be governed by the law of the country where the service provider has their habitual residence;

iv) the contract relating to a right *in rem* in real estate property or the lease of real estate property shall be governed by the law of the country where the real estate property is located;

v) the contract for distribution shall be governed by the law of the country where the distributor has their habitual residence;

vi) the franchise contract shall be governed by the law of the country where the franchisee has their habitual residence;

vii) the contract mainly relating to the exploitation of industrial or intellectual property rights shall be governed by the law of the country where the rights are exploited if these rights are related to a single country; if they are related to more than one country, the law of the habitual residence of the rights holder shall apply.

2. If the contract is different from the contracts enumerated in the preceding paragraph, the applicable law shall be the law of the country where the party which must provide the characteristic performance of the contract have their habitual residence.

3. If it is clearly deducible from all of the circumstances that the contract has manifestly closer connections with a country other than the country indicated in paragraphs 1 or 2, the law of this other country shall apply.

4. If the applicable law cannot be determined in accordance with paragraphs 1 or 2, the contract shall be governed by the law of the country with which it has closer connections.

Article 47. *Employment contracts*. 1. The law applicable to individual employment contract shall be law chosen by the parties in conformity with article 45, which shall only apply insofar as it does not diminish the standards of protection of the work provided by the applicable law established in conformity with the following paragraph.

2. Employment contracts shall be governed by the law of the country where the work is usually carried out, unless it is obvious from all of the circumstances that the contract has closer connections with another country.

3. If the place where the work is usually carried out cannot be determined, the applicable law shall be the law of the country that has closer connections with the contract.

Article 48. *Contracts concluded by consumers*. 1. Contracts concluded between a consumer and a professional or contractor, who, by any means, direct their commercial activities towards the country of the consumer's habitual residence, and falling within the context of those activities, shall be bound by the following provisions.

2. The choice of the law applicable to such contracts by the parties may not diminish the standards of protection of the consumer provided in the law of the consumer's habitual residence.

3. The law applicable to the contract in the absence of a choice of law in accordance with article 45, shall be the law of the country in which the consumer has their habitual residence.

4. The rules contained in the above paragraphs shall apply to insurance contracts.

Article 49. *Scope of the applicable law*. The law applicable to the contract pursuant to the provisions in the preceding article includes in particular:

i) their-interpretation;

ii) the rights and the obligations of the parties;

iii) the performance of the obligations established by the contract and the consequences of non-performance of the contract, including assessment of injury to the extent that this may determine payment of compensation;

iv) the various ways of extinguishing obligations, and prescription and limitation of actions;

v) the consequences of nullity or invalidity of the contract;

vi) the acquisition and loss *inter partes* of a right *in rem* real in the terms of article 58.2.

Article 50. *Incapacity*. In contracts concluded between persons who are in the Caribbean, natural persons who have legal capacity under Caribbean law may only invoke their legal incapacity resulting from the law of another country if, at the time of conclusion of the contract, the other party to the contract had known of such incapacity or had ignored it due to negligence on its part.

Article 51. ***Form.*** 1. A contract concluded between parties in the same State shall be valid, as regards the form, if it fulfils the requirements established in the law that governs such contract according to the preceding articles or those laid down in the law of the State where it is concluded.

2. If the persons are in different States at the time of the conclusion of the contract, this shall be valid as regards the form if it fulfils the requirements established in the law that governs the contract or those provided by the law of the place where the offer or the acceptance is made.

Section VI

Non-contractual obligations

Article 52. *General rule*. 1. The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law chosen by the perpetrator and the victim. The choice of the applicable law must be express or be evident from the circumstances of the case.

2. Failing that, the law of the country where the damage occurs shall apply, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur; however, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in the preceding paragraphs, the law of that other country shall apply.

Article 53. *Liability for damage caused by defective products*. 1. The law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

i) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country;

ii) failing that, the law of the country in which the product was acquired, if the product was marketed in that country;

iii) failing that, the law of the country in which the damage occurred, if the product was marketed in that country;

iv) failing that, the law of the country in which the liable party's premises are located.

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in the preceding

paragraph, the law of that other country shall be applied.

Article 54. *Unfair competition and acts restricting free competition*. 1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

3. The acts of unfair competition that affect exclusively the interests of a specific competitor shall be governed by the general rule of article 52.

4. It shall only be possible to choose the applicable law in accordance with article 52.1 in relation to the economic consequences for the parties arising out of these non-contractual obligations.

Article 55. *Environmental damage*. The liability for environmental damage shall be governed, at the choice of the victim, by the law of the place in which the damage occurred or of the place in which the event giving rise to the damage occurred.

Article 56. *Infringement of intellectual property rights*. 1. The law applicable to the non-contractual obligation resulting from an infringement of an intellectual property right, including industrial property rights, shall be the law of the country for which the protection is sought.

2. It shall only be possible to choose the applicable law in accordance with article 52 in relation to the economic consequences resulting from these non-contractual obligations for the parties.

Article 57. *Scope of the applicable law*. The law applicable to non-contractual obligations shall govern in particular:

i) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

ii) the grounds for exemption from liability, any limitation of liability and any division of liability;

iii) the existence, the nature and the assessment of damage or the remedy claimed;

iv) the measures for ensuring the prevention or termination of injury or damage or to ensure the provision of compensation;

v) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

vi) persons entitled to compensation for damage sustained personally;

vii) liability for the acts of another person;

viii) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Section VII
Property

Article 58. *Possession and rights* in rem. 1. The possession, ownership and other rights in rem in movable and immovable property, as well as well as their publication, shall be governed by the law of the State where the property is located.

2. The same law shall govern the acquisition, alteration and loss of possession, ownership and other rights *in rem*, except in respect of matters of succession and in cases in which the attribution of a right *in rem* depends on a family relationship or a contract. It shall be understood that the place where the property is located shall be that where the property subject to the right is located at the time when the act giving rise to these legal effects occurs.

Article 59. *Rights* in rem *in property in transit***.** The rights in rem in property in transit shall be governed by the law of the place of their destination.

Article 60. *Rights* in rem *in means of transport*. The rights in rem in automobiles, trains, aircraft or ships shall be governed by

the law of the country of their flag, number plate or registration.

Article 61. *Intellectual property rights.* Intellectual property rights, including industrial property rights, shall be governed by the law of the country for which protection is sought.

Article 62. *Rights in book entry securities***.** The rights *in rem* in book entry securities shall be governed by the law of the State where the principal account is situated. For this purpose, the principal account is understood to be that in which the corresponding entries are made.

Chapter II

Rules for application

Article 63. *Determination of the foreign law*. 1. Caribbean courts and authorities shall apply *ex officio* the conflict rules of the present Title or those inserted in the international treaties to which the Caribbean is party.

2. The courts and authorities shall apply the law designated by the conflict rules referred to in the preceding paragraph. For this purpose, the judge may utilise:

i) the instruments indicated by international conventions;

ii) the opinions of experts of the country whose law is sought to be applied;

iii) the opinions of specialised institutions of comparative law;

iv) any other document showing the content, the validity and the application to the specific case of this law.

3. If, including with the cooperation of the parties, the judge cannot manage to establish the foreign law designated, the applicable law shall be determined through other relationship criteria possibly provided for the same regulatory hypothesis. Failing that, Caribbean law shall be applied.

Article 64. *Interpretation*. 1. Caribbean judges and authorities shall be obliged to apply the foreign law as this would be done by the judges of the State whose law is applicable, without prejudice to the parties' right to submit and provide proof of the existence and content of the foreign law invoked.

2. The foreign law shall be applied according to its own criteria of interpretation and application in time.

Article 65. *Foreign public law*. The foreign law designated by the conflict rule shall be applied although it is contained in a provision of public law.

Article 66. *Adaptation*. The various laws that may be competent for governing the different aspects of the same legal relationship shall be applied harmoniously, striving to achieve the objectives pursued by each of these legislations.

The possible difficulties caused by their simultaneous application shall be resolved by taking into account the requirements imposed by fairness in the specific case.

Article 67. *Exclusion of* renvoi. The foreign law designated by the conflict rule is understood to include its substantive law provisions, with exclusion of *renvoi* that its conflict rules may make to other law, including Caribbean law.

Article 68. *Public policy.* 1. The foreign law shall not be applied if its effects are manifestly incompatible with international public policy. This incompatibility shall be observed by taking into account the connection between the legal situation and the legal system of the forum and the seriousness of the effect that would be produced by the application of this law.

2. Once the incompatibility is admitted, the law indicated through other connecting factors possibly provided for the same conflict rule shall be applied and, if this is not possible, Caribbean law shall be applied.

3. For the purposes of the preceding paragraphs, international public policy shall be understood to be all of principles that inspire the Caribbean legal system and which reflect the values of the society at the time of being observed.

4. Caribbean public policy shall include the imperative provisions or principles which cannot be derogated by the will of the parties.

Article 69. *Mandatory rules*. 1. The provisions of Chapter I of the present Title shall not restrict the application of the rules whose observance the Caribbean considers essential for the protection of its public interests, such as its political, social or economic organisation, up to the point of requiring their application to any situation comprised within their scope of application.

2. Caribbean courts may, where they consider it appropriate, give effect to the mandatory rules of another State closely connected with the legal relationship.

Article 70. *Legal orders with more than one system of law*. 1. If more than one normative system with territorial or personal jurisdiction coexist in the legal system of the State designated by the normative provisions of the present law, the applicable law shall be determined in accordance with the criteria used by that legal system.

2. If such criteria cannot be identified, the normative system with the closest connection to the specific case shall apply.

Article 71. *Acquired rights*. The legal situations validly created in a State in accordance with all the laws with which it has a connection at the time of their creation shall be recognised in the Caribbean, provided that they are not contrary to the principles of its public policy.

TITLE IV

Validity of foreign judgments and public documents

Chapter I

Recognition and enforcement of foreign judgments

Article 72. *Concept of judgment*. A judgment shall be understood to be any decision adopted by an equivalent court or authority of a State regardless of the denomination/name given to the proceeding from which it is derived, such as decree, ruling, order or writ of execution.

Article 73. *Recognition and enforcement in general*. 1. For a judgment to be recognised, it must produce in the State of origin the legal effect whose recognition is claimed in the requested.

2. For a judgment to be enforced, it must be enforceable in the State of origin.

3. Recognition or the enforcement may be postponed or refused if the judgment is the subject of an ordinary review in the State of origin or if the time limit for seeking ordinary review has not expired.

4. When a foreign judgment includes parts that are severable from the remainder, one or more of them shall be likely to be recognised or enforced separately.

Article 74. *Causes of refusal of recognition and enforcement of judgments*. Foreign judgments shall not be recognised:

i) if the recognition is manifestly contrary to public policy;

ii) if the document which instituted the proceedings or an equivalent document was not notified to the defendant in a regular manner and in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested;

iii) if they conflict with the provisions established in article 9 of the present Law or if the jurisdiction of the foreign court was not based on one of the grounds provided for in Chapter II of this Law or on an equivalent reasonable connection;

iv) if proceedings between the same parties and having the same cause of action are pending before a Caribbean court and those proceedings were the first to be instituted;

v) if they are irreconcilable with a judgment given between the same parties in the Caribbean.

vi) if they are irreconcilable with a judgment given in another State involving the same cause of action and between the same parties, provided that this judgment fulfils the conditions necessary for its recognition in the

Caribbean and was adopted first or its recognition had already been declared in the Caribbean.

vii) if they do not fulfil the conditions required in the country in which they were given to be considered as authentic and which the Caribbean laws require for their validity.

Article 75. *Proceedings.* 1. The foreign judgments shall be recognised by operation of the law and without any special procedure being required. The recognition may be requested incidentally, by way of counterclaim, cross-claim, or of defence.

2. Without prejudice to the provisions of paragraph 1, any party interested may request to the competent authority to decide on the recognition or non-recognition of a foreign judgment. In this case, the recognition proceeding shall be that established by the procedural legislation for the exequatur.

3. For the exequatur proceeding, the courts of first instance shall have jurisdiction. The decision of the court of first instance shall be subject to appeal.

Article 76. *Adoptions pronounced abroad*. Adoptions or similar institutions of foreign law whose effects for the parentage connection are not substantially equivalent to those established in Caribbean law shall not be recognised.

Article 77. *Immunity from enforcement*. 1. In accordance with the rules of public international law on immunity from enforcement, the property and the assets that the foreign State has in the Caribbean territory may not be subject to coercive measures, unless the creditors demonstrate that they are connected with an activity of an exclusively economic nature. The public bodies and entities of a foreign State whose assets are connected with a relevant economic activity shall only benefit from the immunity from enforcement to the extent that they provide documentary proof that the debt was contracted for the account of this State for reasons related to the exercise of the national sovereignty.

2. The immunity from enforcement of the diplomatic agents authorised in the Caribbean shall be determined by the international treaties to which the Caribbean is party and, failing that, by the international custom.

3. The immunity from enforcement of the international organisations to which the Caribbean is party shall be defined by their constitutive treaties. The agents of these organisations shall enjoy immunity in the terms specified by these treaties.

Chapter II

Evidential value of foreign public documents

Article 78. *Foreign public documents.* 1. The foreign documents that have to be assigned evidential value by virtue of international treaties or agreements or special laws shall be deemed to be public documents.

2. If no international treaty or agreement or special laws are applicable, foreign documents shall be deemed to be public documents if they meet the following requirements:

i) they have been granted by a public authority or other authority authorised in the State of origin for that purpose;

ii) they contain the legalisation or apostille and the other requirements necessary for their authenticity in the Caribbean;

iii) their granting or preparation have met the necessary requirements in the country where they have been granted. If this grant or preparation has been undertaken by diplomatic or consular authority authorised in the Caribbean, the requirements of the law of the State that grants it competence must be observed;

iv) in the State of origin the documents make full proof of the signature and their content is provided.

3. If the foreign documents referred to in the preceding paragraphs of this article incorporate declarations of will, the existence of these is deemed to be established, but their validity shall be that determined by the Caribbean and foreign rules applicable to capacity, object and form of legal transactions.

Article 79. *Translation.* Without prejudice to the provisions established in international

conventions or special laws, any document drafted in a language which is not an official language of the receiving State shall be accompanied by its translation.

A private translation may be submitted and, in this case, if any of the parties challenge it within five days following from the issuance, demonstrating that it does not consider it to be faithful and accurate and expressing the reasons for the discrepancy, the Clerk of the Court shall order, regarding the part concerned by the discrepancy, to undertake an official translation of the document, at the expense of whoever had presented it.

Nonetheless, if the official translation undertaken at the instance of the party is substantially identical to the private translation, the expenses arising from it shall be incurred at the expense of whoever has requested it.

TITLE V

Transitional and final provisions

Article 80. *Application in time*. 1. The present Law shall apply to all proceedings instituted after the date of its entry into force, without prejudice to the rights acquired.

However, the legal facts that occurred or acts that were carried out prior to the date of entry into force of the present Law, but which continue to produce effects, shall be governed by the prior law for the period prior to this date and by the new law for the period afterwards.

2. The Caribbean judges or authorities that hear actions filed prior to the entry into force of the present Law shall continue to have jurisdiction even if this jurisdiction is not established in the present Law.

The actions rejected by the Caribbean judges or authorities due to a lack of jurisdiction prior to the entry into force of the present law may be filed again if the jurisdiction is established by this latter law, provided that the claim is likely to be invoked.

3. The requests for recognition and enforcement of foreign decisions that are pending prior to the entry into force of the present Law shall be governed by this latter law concerning the conditions for recognition and enforcement.

Article 81. *Repealing provision*. All the prior provisions that regulate the subject matter of this Law and are contrary to it shall be repealed.