WHAT'S NEW IN LATIN AMERICAN PRIVATE INTERNATIONAL LAW?

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I. Introduction

Private International Law ('PIL') is moving ahead in Latin America. This is reflected in several factors, namely the international and national codification of PIL, which remain strong in the current millennium. In addition, the internationalization of the Latin American economies is provoking an unusual number of conflict cases. In such a context, it can be appreciated that PIL is taking considerable space

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in postgraduate university studies. At the same time, publications either dedicated to, or dealing with, PIL have appeared. The growing interest in PIL includes a great interest in so called *Derecho del comercio internacional*, which in these countries deals with both International Business Law and International Trade Law. This interest is apparent in a number of books and articles published throughout Latin America (or elsewhere about Latin American PIL issues) in the last years. On the one hand, one can mention some journals entirely devoted to PIL issues, like *Revista Mexicana de Derecho Internacional Privado*, *Revista Uruguaya de Derecho Internacional Privado*, *derecho del comercio internacional – temas y actualidades* (*DeCITA*, published jointly in Argentina and Brazil), and other legal reviews exclusively dedicated to arbitration.[1] On the other hand, many other reviews, while not only dedicated to these matters, pay much attention to them.[2]

This essay deals mainly with current considerations on the international unification of PIL in America (II). I am also going to discuss, though more concisely, the national codification of PIL in some Latin American countries (III), and some trends in Latin American case law on PIL and in the writings of Latin American scholars (IV).

II. Unification and Harmonization

A. Current Stage of Inter-American Codification

The codification process, initiated in 1975 by the Inter-American Specialized Conference of Private International Law (CIDIP) of the Organization of American States (OAS), underwent fundamental changes during its sixth edition in 2002.[3] Indeed, the CIDIP VI (2002) changed courses, moving the codification of Inter-American PIL towards privatization, commercialization, the use of soft-law tech-

[1] *Revista Brasileira de Arbitragem*, *Revista Iberoamericana de Arbitraje* (Peru), *Revista Latinoamericana de Mediación y Arbitraje* (México), *Revista de Arbitragem e Mediação* (Brazil), etc.

[2] For instance, in Argentina, *Revista de Derecho Comercial y de las Obligaciones*, *Revista de Derecho Privado y Comunitario*, *Revista de Derecho Internacional del MERCOSUR* (also published in Brazil), eldial.com, etc.

[3] PARRA-ARANGUREN G., 'Los trabajos de la Sexta Conferencia Especializada Interamericana sobre Derecho Internacional Privado', in: *Liber Amicorum en homenaje al Profesor Dr. Didier Opertti Badán*, Montevideo 2005, pp. 443-468; SEQUEIROS J.L., 'La Sexta Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP VI)', in: *Rev. Mex. DIP* 2002, pp. 9-30; FERNÁNDEZ ARROYO D.P. / KLEINHEISTERKAMP J., 'The VIth Inter-American Specialized Conference on Private International Law (CIDIP VI): A New Step towards Inter-American Legal Integration', in: this *Yearbook* 2002, pp. 237-255 (with references to basic literature on CIDIP in note 1).

niques, and the harmonization of substantive, rather than conflicts, law.[4] The modification of every parameter of this process allows one to imagine a 'new paradigm', so that the whole codification process is thereby conceived in another way.[5] In my opinion, some changes – such as the use of a plurality of methodologies – should be welcomed, while other changes – such as the privatization or the commercialization of the process – need to be moderated. Thus I cannot but agree with the way in which the OAS has set forth the tasks for the CIDIP VII, since these opinions seem well reflected therein.

I must once again insist on the inter-American – and, consequently, not just Latin American – character of the modern process of PIL codification developed by the OAS. To be sure, this process has contained a strong Latin American component since its very inception. Latin American States have taken most of the initiative and, with a few exceptions (two ratifications by the United States, four by Belize, one by Antigua and Barbuda and two adhesions by Spain), they alone have ratified inter-American conventions. Nevertheless, since the CIDIP V, the inter-American character of this process has been growing. Canada and the United States have become more active and, at the same time, some Latin American countries, which used to be principal actors in the regional process of codification, have become less active.

In its first thirty years, the CIDIP has produced twenty-one conventions, two protocols, one model law and one uniform document. Twenty conventions and the two protocols are in force, while the Inter-American Model Law on Security Interests (CIDIP VI, 2002) has already been adopted, with some modifications, by Peru.[6] The subject of the only failed convention – carriage of goods by road, in the CIDIP IV, 1989 – has been reprised with a different approach, that of a uniform document, in 2002. Although the last conventions were approved in 1994 (CIDIP V), ratifications continue. Since 1995, more than fifty instruments of ratification have been deposited at the OAS headquarters.[7] Nevertheless, the relevance

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[4] FERNÁNDEZ ARROYO D.P. / KLEINHEISTERKAMP J. (previous note), pp. 238-243 and 253-254.

[5] FERNÁNDEZ ARROYO D.P., 'La CIDIP VI: ¿cambio de paradigma en la codificación interamericana de derecho internacional privado?', in: *XXIX Curso de derecho internacional del CJI -2002-* (also in: *Derecho internacional privado interamericano. Evolución y perspectivas*, 2nd ed., Mexico 2003, pp. 103-111). See the influence of these ideas in VÁZQUEZ C.M., 'Regionalism versus Globalism: A View from the Americas', in: *Unif. L. Rev.* 2003-1/2, pp. 68-70; VARGAS D.T., 'As CIDIPs em seu novo papel: um foro eclético de harmonização de direito conflitual e material', in: *XXXI Curso de derecho internacional del CJI -2004-*, p. 404; HERNÁNDEZ-BRETÓN E., 'Verdades, mitos y realidades del derecho internacional privado latinoamericano actual', in: *An. Español de Derecho Internacional Privado* 2004, p. 87.

[6] Security Act (*Ley de la garantía*) Nr 28677, of February 10, 2006, see: *El Peruano*, March 1, 2006, p. 313457 *et seq*.

[7] In 2005, El Salvador and Nicaragua ratified the Inter-American Convention on the International Traffic of Minors of CIDIP V (1994), and Peru ratified the Inter-American Convention on Support Obligations of CIDIP IV (1989).

of inter-American conventions does not only depend on the number of ratifications. The CIDIP conventions provoke a modernization of national PIL systems by other means. Reprisals of the CIDIP in national legislation are obvious.[8] Traces of inter-American solutions can be found in almost all statutes or drafts on PIL elaborated in Latin America during the last decades. The same can be said of the rules of PIL produced by the MERCOSUR. This 'indirect' reception of inter-American solutions is even more important than the 'direct' one, in countries that do not yet recognize the hierarchical superiority of international rules.[9] In addition, by means of 'indirect' reception, the rules of inter-American conventions become generally applicable, i.e., they apply not only to cases connected to member States. It is important to emphasize that the effect of modernization must also be understood in a strict sense, regarding the concrete content of several of these inter-American solutions.[10]

B. Latin American States between Universalism and Regionalism

It may be said that Latin American States have only a 'limited' participation in the elaboration of the PIL that is developed by international organizations with a 'universal' scope. This is even the case in the most universal one – the United Nations – where every Latin American State is a member and where Latin American delegations are usually well represented. In the United Nations Commission on International Trade Law (UNCITRAL), they are all periodically members and, in the periods when they are not, can largely participate as observers. Nevertheless, a brief look at the tasks carried out by UNCITRAL working groups shows that the participation of Latin American States is, with a few exceptions, not significant. In other organizations, namely in the Hague Conference on Private International Law and UNIDROIT, less than half of Latin American States are members. However, membership is not the main issue. Even though they are members of these organi-

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[8] MAEKELT T.B., 'La codificación interamericana desde la perspectiva de la codificación estatal de derecho internacional privado', in: FERNÁNDEZ ARROYO D.P. / MASTRANGELO F. (eds.), *El futuro de la codificación del derecho internacional privado en América. De la CIDIP VI a la CIDIP VII*, Córdoba 2005, pp. 34-40. As this author states (pp. 40-51), however, in the Venezuelan case the influence was reciprocal, since Inter-American conventions were strongly influenced by the Venezuelan draft of PIL of 1965. See also PARRA-ARANGUREN G., 'General Provisions and Family Law Matters in the Venezuelan 1998 Act of Private International Law', in: *International Conflicts of Laws for the Third Millennium. Essays in Honor of Friedrich K. Juenger*, Ardsley (NY) 2001, p. 98.

[9] See SAMTLEBEN J., 'Los resultados de la labor codificadora de la CIDIP desde la perspectiva europea', in: *España y la codificación internacional del derecho internacional privado*, Madrid 1993, p. 302.

[10] See, for instance, HERBERT R. / FRESNEDO DE AGUIRRE C., 'Flexibilización teleológica del derecho internacional privado latinoamericano', in: *Avances del derecho internacional privado en América Latina. Liber Amicorum Jürgen Samtleben* (KLEIN-HEISTERKAMP J. / LORENZO G., eds.), Montevideo 2002, pp. 55-76.

zations, most Latin American countries are often not represented. If Latin American governments think anything about international unification, they often realize that to send representatives to the number of meetings which take place every year in every organization is very expensive. Thus, what often happens is that most of the Latin American seats in these meetings are either empty or occupied by an official of the local embassy or consulate, who is generally an excellent professional but unfamiliar with the technical issues treated there. All this makes it very difficult for Latin American States to have any influence on the agenda of these organizations and on the drafting of texts elaborated by them.[11] Nevertheless, this does not mean that Latin American States refuse global unification. On the contrary, as far as they can, their representatives try to cooperate with the work of global organizations.[12] In addition, when a legal instrument adopted by these organizations is viewed as a useful tool for the improvement of the legal treatment of international private relationships, Latin American States, even those who are not member States, usually ratify or adhere to that instrument.

However, within the Inter-American space, OAS member states have no problems dealing with membership. All of them (with the well-known exception of Cuba) are at the same time CIDIP 'members,' i.e., they are entitled to participate in all the activities related to Inter-American PIL codification. That membership gives American States, in an egalitarian regime which includes full voting rights, the right to take part in the process from the beginning until the end. They are entitled to propose topics to be codified, to participate in the preliminary works, to discuss the terms of the concrete drafting of Inter-American legal instruments during the diplomatic conferences, and to adopt these instruments. In certain ways, Latin American states still seem to consider the CIDIP as a natural forum for the elaboration of a PIL with a regional scope, understanding this regional unification as a measure which contributes to global unification. Didier Opertti Badán has thus said: 'regionalism also has a place in globalization, if globalization is an inclusive issue rather than an exclusive one.'[13] This would not, of course, impede Latin American States from creating another forum to unify PIL, a true Latin American forum.

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[11] Due to its significance, one could mention, among many other examples, the presence of only two Latin American delegations in the work of the Hague Conference on the Private International Law of jurisdiction and judgments. See SIQUEIROS J.L., 'La cooperación judicial internacional. Expectativas para el siglo XXI', in: *Rev. Mex. DIP* (sp. issue) 2000, p. 152 and note 22.

[12] BORRÁS A., 'El cambio de los tiempos: los hispanoparlantes en la Conferencia de La Haya de Derecho Internacional Privado', in: *Liber Amicorum Opertti Badán* (note 3), pp. 79-95.

[13] OPERTTI BADÁN D., 'Palabras introductorias', in: FERNÁNDEZ ARROYO D.P. / MASTRANGELO F., eds. (note 8), p. 19. See also the 'Declaration of Cordoba' (issued by professors from South America assembled in Cordoba, Argentina, on December 18, 2003), available at <http://www.oas.org>: 'We declare (…) that the Americas, a pioneering continent in international efforts to harmonize and standardize private international law, has the historic duty to maintain this tradition, by cultivating a constructive dialogue with other codification forums in the world.'

The external dimension of Inter-American PIL codification can be seen from a different perspective. Concretely, what is the prevailing opinion about the CIDIP process outside America? On the one hand, UNCITRAL, UNIDROIT, and the Hague Conference pay attention to the CIDIP proceedings. There is a certain dialogue between these organizations and the OAS, which deals with PIL codification. To mention only current facts, it cannot be a surprise that the UNCITRAL Working Group VI, dedicated to security interests, has had on its table the Inter-American Model Law on Security Interests of 2002, in its debates to achieve a Legislative Guide on this matter.[14] Similarly, the proceedings on maintenance obligations of the Hague Conference have an eye on the Inter-American Convention on Support Obligations.[15] The Hague Conference has also issued a specific document on the relationship between American instruments on PIL and the Hague Convention on the Exclusive Choice of Courts Agreements.[16] On the other hand, Inter-American unification increasingly arouses the interest of non-American scholars. Thus, in one of the most significant works on conflict laws of the last years, published as a General Course of the Collected Courses of the Hague Academy of International Law, the activities of the CIDIP are analyzed – and criticized – in detail.[17] Another French author has recently proposed to take into account the 1994 Inter-American Convention on the Law Applicable to International Contracts (better known as the Mexico City Convention) in the current reform process of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which is to transform it into an EU instrument.[18] In Spain, an author closely linked to Latin America has proposed that the Spanish Government adhere to the Inter-

[14] Cf. BUXBAUM H.L., 'Unification of the Law Governing Secured Transactions: Progress and Prospects of Reform', in: *Unif. L. Rev.* 2003, pp. 333-334. See <http://www.uncitral.org>.

[15] DUNCAN W., 'Jurisdiction to Make and Modify Maintenance Decisions – The Quest for Uniformity', in: *Intercontinental Cooperation Through Private International Law. Essays in Memory of Peter E. Nygh*, The Hague 2004, p. 93.

[16] Prel. Doc. No 31, June 2005, prepared by SCHULZ A., MURIÁ MUÑÓN A. and VILLANUEVA MEZA R.

[17] AUDIT B., 'Le droit international privé en quête d'universalité. Cours général' (2001), *Recueil des Cours* 2003, t. 305, pp. 98-104.

[18] BERAUDO J.-P., 'Faut-il avoir peur du contrat sans loi?', in: *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris 2005, pp. 106-110 (a similar opinion was already held more than a decade ago by the late Friedrich K. Juenger in JUENGER F.K., 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons', in: *Am. J. Comp. L.* 42 (1994), p. 381 *et seq.*). But cf. Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, of 15.12.2005, which authorizes the application of 'principles and rules of the substantive law of contract recognised internationally or in the Community' (Art. 3.2), but only if chosen by the parties.

American Conventions on the International Return of Children (CIDIP IV, 1989), and on International Traffic in Minors (CIDIP V, 1994).[19]

C. Sub-Regional Developments

Not only universalism and inter-Americanism have an influence on Latin American unification and on the very notion of Latin-American PIL. On the contrary, within the limits of Latin America, another relevant phenomenon also affects the unification of PIL. It is the economic integration process that is now developing at a sub-regional scale. In Latin America, there are currently three sub-regional processes of inter-State integration. From the South to the North, we have first MERCOSUR (Southern Common Market), created in 1991 by Argentina, Brazil, Paraguay and Uruguay, which are full members of this system. Secondly, we find CAN (Andean Community of Nations), with the membership of Bolivia, Colombia, Ecuador, Peru and Venezuela. All of these countries (plus Chile) have an associative relationship with MERCOSUR, and Venezuela became a full member of MERCOSUR in December 2005. Finally, there is SICA (Central-America Integration System), which is formed by Belize, Costa Rica, El Salvador, Guatemala and Honduras. Mexico is linked with many countries by means of free trade treaties, even though the most important one is that with Canada and the United States (North American Free Trade Agreement, NAFTA), that is to say, a non-Latin American economic integration system.

This sub-regional structure does not reflect the real picture. There are several reasons to affirm this. Firstly, attention must be paid to the membership of all American States (including Cuba) in the World Trade Organization, which has transformed a great part of the world into a true free trade area. This fact is important, as the material scope of the WTO agreements becomes broader (from goods to services and from services to intellectual property). In consequence, any process of regional economic integration has a minimum threshold of usefulness.[20] At the same time, the WTO system has a different kind of influence on the regional and sub-regional integration systems.[21] Besides, the existence of the Latin American Association of Integration (ALADI), which, in spite of certain critiques, imposes

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[19] MIRALLES SANGRO P.P., 'Balance de la actuación que desarrolla la CIDIP en materia de protección internacional de menores: regionalismo *versus* universalismo', in: *Liber Amicorum Opertti Badán* (note 3), pp. 408-409. Spain has already adhered to Inter-American Conventions on Letters Rogatory (CIDIP I, 1975) and on Proof and Information on Foreign Law (CIDIP II, 1979).

[20] See Art. XXIV GATT 1994 and the Understanding on its interpretation, to be found at <http://www.wto.org>.

[21] One of these influences is a confusion about dispute resolution systems. See FERNÁNDEZ ARROYO D.P. / DREYZIN DE KLOR A., 'O Brasil frente à institucionalização e ao direito do MERCOSUL', in: *O Direito Internacional e o Direito Brasileiro. Homenagem a José Francisco Rezek*, Ijuí 2004, pp. 350-352.

some exigencies on its member States, is still significant.[22] Another fact worthy of note is that some countries are not included in the sub-regional scheme,[23] while others have links with more than one sub-regional system.[24] Furthermore, it is too early to know whether the new South American Community of Nations, created in Cuzco on December 8, 2004, will have any success.[25] Last but not least, another free trade trend may be found in a number of treaties, which regulate different aspects of international commerce between States of the Americas or between them and non-American States.[26]

Sub-regional systems work as well as the member States do. It is very difficult for developed systems to emerge from undeveloped countries. This means that all these processes go forward or back, depending on different factors.[27] Nevertheless, in spite of their relative weakness, there is a progressive legal harmonization, which is constant, though heterogeneous. In the field of PIL, MERCOSUR is the system that has experienced the biggest legal production. Indeed, since Art. 1 of the Asunción Treaty (the MERCOSUR legal founding text) obliged the member

[22] They are Cuba, Mexico, and all South American countries except Guyana and Suriname.

[23] Cuba is a member state of the ALADI but not of any sub-regional system; Chile is an associated member of the MERCOSUR but is not a full member; the same is true of the Dominican Republic in relation to the SICA.

[24] Belize is a member state of both CARICOM and SICA; CAN states are 'associated' with the MERCOSUR (see O'KEEFE T.A., 'The Andean Community-MERCOSUR Free Trade Agreement', in: *DeCITA* 5 (2006) (forthcoming) and Venezuela – as was stated – is now in a process to obtain full membership.

[25] The twelve South American states are part of this project, i.e., the four of the MERCOSUR, the five of the CAN, Chile, Guyana, and Suriname. It will require time to know whether this sub-continental project has a future. See DREYZIN DE KLOR, A., 'La creación de la unión sudamericana de naciones: ¿un nuevo bloque de integración?', in: *DeCITA* 3 (2005), pp. 634-639.

[26] The net is truly impressive as well as of a great complexity. Besides free trade treaties of various scopes, there is a diverse range of commercial agreements. Among them, the most significant are agreements relating to the protection of foreign investments. The dimensions of the issue become apparent in the cases of Chile and Mexico. Chile, in addition to its association with MERCOSUR, has signed free trade treaties with Canada, the United States, Mexico, Costa Rica, Nicaragua, El Salvador, Honduras, and Guatemala – within America -, and with the European Union, the European Free Trade Association, and Korea. México, besides NAFTA and its treaty with Chile, has signed free trade treaties with Bolivia, Costa Rica, Nicaragua, and others with Colombia and Venezuela, on the one hand, and with El Salvador, Guatemala and Honduras, on the other hand (plus an additional economic agreement with Uruguay). Outside America, Mexico has signed treaties with the European Union, the European Free Trade Association, Israel, and Japan.

[27] See FERNÁNDEZ ARROYO D.P. / DREYZIN DE KLOR A., 'Avances y fracasos de los esquemas subregionales latinoamericanos. El caso del MERCOSUR', in: *elDial.com* 8 (March 2005). On the imagination necessary to go further in SICA, see HERDOCIA SACASA M., 'La integración centroamericana: una tercera vía', in: *Curso de derecho internacional CJI -2004-*, pp. 163-193.

States 'to harmonize their laws in the appropriate areas to reach the strengthening of the integration process,' MERCOSUR authorities have decided that one of these areas is PIL.[28]

Thus, at the very beginning of the integration process, they adopted the Las Leñas Protocol on Co-operation and Jurisdictional Assistance in Civil, Commercial, Labor, and Administrative Matters of 1992, in order to regulate the international legal co-operation between the Contracting States.[29] In 1994, MERCOSUR adopted two new PIL conventions, the Buenos Aires Protocol on International Jurisdiction in Contractual Matters[30] and the Protocol on Preventive Measures.[31] Two new conventions were agreed in 1996: the San Luis Protocol on Civil Liability in Traffic Accidents,[32] including jurisdiction and choice of law rules, and the Santa María Protocol on International Jurisdiction in Consumer Relationships.[33] In 1997, MERCOSUR elaborated two 'complementary agreements', respectively to the Las Leñas Protocol and to the Protocol on Preventive Measures, containing the formal requirements for the application of these Protocols. In 1998, two identical Arbitration Agreements were concluded; one between the MERCOSUR States,[34] the other between MERCOSUR, Bolivia and Chile. In 2000, two identical Agreements on the Free Access to Justice and Judicial Assistance were also adopted.[35] Finally, in 2002, on the one hand, the Las Leñas Protocol was modified and another 'mirror' Protocol was agreed to extend the Las Leñas system to Bolivia and Chile; on the other hand, two identical Agreements (one between the member States and the other between them and Bolivia and Chile) on Jurisdiction over International Cargo Transport Contracts were reached.[36]

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[28] See generally DREYZIN DE KLOR A., *El MERCOSUR. Generador de una nueva fuente de derecho internacional privado*, Buenos Aires 1997, p. 250 *et seq*.; SAMTLEBEN J., 'Das Internationale Prozess- und Privatrecht des MERCOSUR. Ein Überblick', in: *RabelsZ* 1999, pp. 7-10. In addition to conventions on strict PIL matters, MERCOSUR has also elaborated several conventions on co-operation in criminal matters.

[29] In force in the four Member States. See DREYZIN DE KLOR A. (note 28), pp. 266-280; SAMTLEBEN J. (note 28), pp. 13-27.

[30] In force in the four Member States. See FELDSTEIN DE CÁRDENAS S., *Jurisdicción internacional en materia contractual*, Buenos Aires 1995, pp. 31-98.

[31] In force in the four Member States. See DREYZIN DE KLOR A. (note 28), pp. 303-305, 312-322.

[32] In force in the four Member States. See SAMTLEBEN J. (note 28), p. 50.

[33] Not yet in force. SAMTLEBEN J. (note 28), pp. 50-53.

[34] In force in Argentina, Brazil and Uruguay. See ALBORNOZ, J.R., 'El arbitraje en el derecho internacional privado y en el MERCOSUR (con especial referencia a los acuerdos de arbitraje de 23 de julio de 1998)', in: *An. AADI* 1999, pp. 51-91. On the massive presence of arbitration conventions, see KLEINHEISTERKAMP J., 'Conflict of Treaties on International Arbitration in the Southern Cone', in: *Liber Amicorum Jürgen Samtleben* (note 10), pp. 666-700.

[35] Not yet in force.

[36] None of the 'mirror' conventions is in force.

Fortunately, after such a codification fever, the representatives of MERCOSUR member States seem to have made a necessary pause in their legislative work. It is a good decision, taking into account both the technical flaws of conventions and the problems in the ratification process.[37] The only good reason to attempt such a comprehensive Merco-southern PIL codification was the particular Brazilian attitude towards the codification of American PIL, that began in the 19th century and was characterized by a complete aloofness towards what was done by its Southern Cone neighbors and a limited (more theoretical than practical) participation in the Pan-American codification work represented by the Bustamante Code of PIL of 1928. Therefore, when MERCOSUR member States started to work together, they found that a significant legal[38] integration already existed but did not apply to Brazil.[39] Consequently, upon the entry into force of the Asunción Treaty in 1991, the codifying process of the MERCOSUR PIL began to create a real, though fragmented, Merco-southern PIL. Nevertheless, since some of the rules of the MERCOSUR PIL were made according to the solutions of the CIDIP, the Brazilian authorities reasonably decided to shorten the proceedings and ratified fourteen inter-American conventions in a very short period of time (between 1994 and 1998). Instead of rewriting the CIDIP conventions for the sub-regional area, Brazil directly joined these inter-American conventions, getting involved not only with its integration partners but with other OAS States as well. Thus, from a State-based PIL system, Brazil quickly moved towards a partial, but progressive, 'internationalization'.[40] In this context, MERCOSUR lost its best reasons for the codification of PIL.

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[37] For other problems, see FERNÁNDEZ ARROYO D.P., 'La nueva configuración del derecho internacional privado del MERCOSUR: ocho respuestas contra la incertidumbre', *Jurídica* 1998, pp. 267-286. See also SAMTLEBEN J., 'Die Entwicklung des Internationalen Privat- und Prozessrechts im MERCOSUR', in: *IPRax* 2005, pp. 376-377; LIMA MARQUES C., 'Procédure civile internationale et MERCOSUR: pour un dialogue des règles universelles et régionales', in: *Unif. L. Rev.* 2003, pp. 465-484.

[38] Not only the Montevideo Treaties were in force in Argentina, Paraguay, and Uruguay. Besides, several inter-American conventions created within the process started by the OAS in 1975 were also in force in these countries.

[39] See SAMTLEBEN J., 'A codificação interamericana do direito internacional privado e o Brasil', in: CASELLA P.B. / DE ARAUJO N. (eds.), *Integração jurídica interamericana: as convenções interamericanas de direito internacional privado (CIDIPs) e o direito brasileiro*, 2nd ed., São Paulo 2003, pp. 25-45.

[40] The opening of the Brazilian order to international treaties that regulate different aspects of PIL also allowed the ratification of very important international conventions from 'universal' forums, such as the conventions on child kidnapping and adoption of the Hague Conference, the United Nations New York Convention on arbitration, or the UNIDROIT Convention on the recovery of cultural property. The return of Brazil to the Hague Conference in 2001 confirmed this attitude change. There is also another, much broader, consequence of the *mercosurização* of the Brazilian legal system. The fulfilment of the obligations assumed with the ratification of the Asunción Treaty and other rules of Merco-southern law, have created several problems for the courts (inferior and superior, provincial and federal), giving International Law a central place in the legal discussion. This is not a

At the other end of Latin America, we find Mexico and its various free trade treaties. Among them, as was mentioned above, the most important is the treaty which links Mexico with Canada and the United States, known as NAFTA. This treaty has deeply influenced Mexican international commerce and politics, and the very economic structure of Mexico as well. However, for this essay, what is important is to underline that, as a consequence of NAFTA, important changes have been made to the Mexican legal order. Indeed, with the development of NAFTA and the necessities of international commerce, matters as important as competition, energy or security interests are under the influence of the United States.[41] It is not a coincidence that the American Law Institute, the Uniform Law Center of Mexico, and UNIDROIT are working together to unify the law of obligations.[42] In a broader sense, it has been said that there is a presumption of harmony of laws within NAFTA.[43]

D. The CIDIP in the Context of Economic Integration and Free Commerce

In this complicated context, a North American initiative has appeared (strongly supported, among others, by the other NAFTA members), to constitute a sole 'hemispheric' free trade zone (Free Trade Area of the Americas, FTAA), with a

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capricious judgment. The number of professors of Public International Law, PIL, Integration Law, International Economic Law and International Relationships has grown exponentially in Brazil in the last years. This situation has a multiplying effect, shown by the overwhelming number of work done on these topics, as well as the many post-graduate studies on them. Many of these legal problems have arisen when the texts of MERCOSUR related to PIL were put into practice, particularly the Las Leñas Protocol of 1992 and the Protocol on Preventive Measures of 1994. See SECRETARÍA DEL MERCOSUR, *Primer informe sobre la aplicación del derecho del MERCOSUR por los tribunales nacionales (2003)*, Montevideo 2005, pp. 68-86; DREYZIN DE KLOR A., 'La aplicación judicial del derecho del MERCOSUR', in: *O novo direito internacional – estudos em homenagem a Erik Jayme* (LIMA MARQUES C. / DE ARAUJO N., eds.), Rio de Janeiro 2005, pp. 787-811.

[41] See PEREZNIETO CASTRO L., 'La codificación en México y la influencia del derecho estadounidense a través del Tratado de Libre Comercio de América del Norte', in: *Rev. Mex. DIP* 15 2004, pp. 225-235; and ID., 'El panorama del derecho internacional privado en materia comercial en México en los umbrales del siglo XXI', in: *Rev. Mex. DIP* (sp. sigue) 2000, pp. 174-178.

[42] PEREZNIETO CASTRO L., 'El futuro del derecho internacional privado en México', in: *Rev. Mex. DIP* 2005, p. 61.

[43] GLENN H.P., 'Conciliation of Laws in the NAFTA Countries', in: *Louisiana L. Rev.* 2000, pp. 1103-1112. According to this author, the presumption of harmony justifies the invocation of PIL rules only when they are claimed by one or both of the parties to the dispute; in other words, he proposes that the traditional principle of the obligatory application of PIL rules be forgotten.

broad material and geographical scope.[44] In general terms, it can be said that such an initiative would not offer an entirely new scenario, since, on the one hand, there is already a remarkable level of general liberalization and, on the other hand, the model proposed is already in force between the NAFTA member States and Chile, and is present as well in both the Treaty between the United States and the Central American States,[45] and that which the United States is negotiating with Colombia, Ecuador and Peru. This implies that, at least in one sense, there is already a FTAA, which is materially quite broad but geographically limited. The main problem is, without any doubt, the reluctance expressed – even though in a heterogeneous way – by some countries, namely Argentina, Brazil and Venezuela.[46] Of course, without these countries, the original North-American project could not be considered successful. The incorporation of Venezuela into MERCOSUR and some evolving political changes in South America make the future of the FTAA uncertain. This lack of agreement on the basics of international market rules is not exclusive to the Americas. More or less the same thing is occurring at a global level.[47] Another point to be taken into consideration is the rapid evolution towards a commercial, political and cultural integration between Cuba and Venezuela.[48] The current situation, therefore, seems to be very distant from that imagined some time ago, when the FTAA was taken for granted, to begin on the first day of 2005. Now, if the terms of negotiation do not change drastically,[49] it is unlikely that it will become anything more than the limping FTAA-light that already exists *de facto*.[50]

This being said, does the Nineties' boom of free commerce and its current vicissitudes have something to do with the CIDIP, its agenda and its future? In my

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[44] See OROPEZA GARCÍA A. (ed.), *ALCA – un debate sobre la integración*, México 2003.

[45] This Treaty was signed on August 5, 2004, between the United States and Costa Rica, Nicaragua, Honduras, El Salvador, Guatemala and the Dominican Republic.

[46] Paraguay and Uruguay, also MERCOSUR members, have shown, though with discretion, some disagreements with their fellow states on this issue.

[47] The results of the last two Ministerial Conferences of the WTO (Cancun 2003, and Hong Kong 2005) show the current tensions in this field.

[48] These countries have created the ALBA (Bolivarian Alternative for the Americas), and they are offering this model to other Latin American countries (<www.alternativabolivariana.org>). See ROMERO BALLENILLA O., 'Construyendo el ALCA', in: *DeCITA* 5 (2006) (forthcoming).

[49] Among the most difficult topics we find agricultural subsidies, market access for non-agricultural products, dumping, preferences given to domestic supplies and suppliers, dispute resolution on investments, and intellectual property.

[50] See CARRANZA M.E., 'MERCOSUR, the Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America', in: *Fordham Int'l L.J.* 2004, pp. 1029-1064. Apparently, the question is not so important from a North-American perspective. On the contrary, Latin America does not seem to be a priority nor an 'exclusivity' in the United States free trade offensive, as is shown by the free trade agreements that the United States have lately negotiated with Israel, Jordan, Singapore, Australia, Bahrain, and Morocco. Furthermore, the question does not seem so decisive to the United States.

opinion, this is so. The evolution of the inter-American codifying movement experienced during the last fifteen years could only have taken place in an atmosphere dominated by the strong belief in the rightness of commercial liberalization that, together with privatization and deregulation, form the tripod on which the neo-conservative ideas, very much in fashion during the 90's (mainly in Latin America), rest. There are many ways of corroborating this affirmation, but, due to their conclusive character, I will only refer to three closely related facts:

a) The main codifying motor of this period has been a private center, of which the principal objective is the development of 'free Inter-American commerce'. Its contribution was essential for the approval of texts on contracts (CIDIP V), security interests and guarantees and way-bills (CIDIP VI) and in the preparation of other texts on some related topics.

b) The manner in which the trans-border contamination topic was dealt with before and during the CIDIP VI,[51] and the radical contrast with the treatment given to commercial topics, clearly reflects (unless it is coincidence) the prevailing trend in ALCA[52] negotiations.

c) The logic used recently when organizing the agenda of the CIDIP clearly shows that the topics which 'demand attention' are the commercial ones. As a matter of fact, both the effective content of the CIDIP VI and the proposed agenda for its last plenary session[53] were overwhelmingly 'commercialist' (restated by the General Assembly in the resolution summoning the CIDIP VII[54]).

Considering the facts, could the codifying process be altered, changing its agenda and dynamics? In my opinion, this not only could, but must be done. I am sure a rebalancing will take place in the aforementioned sense, taking the various present interests into consideration in a more equitable and realistic way. In fact, this is what is happening in the preparation of the CIDIP VII. If this were not the case, taking into account the inveterate Latin-American predisposition towards international codification and the need for common legal answers, it could be expected that some States might try to find other, probably sub-regional, forums for their

[51] Critical towards the treatment given to this subject during the Conference, SIQUEIROS J.L., 'La Sexta Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP-VI)', in: *Rev. Mex. DIP* 2002, pp. 21-24.

[52] DEERE C., 'Greening Trade in the Americas: An Agenda for Moving Beyond the North-South Impasse', in: *JWT* 2004, pp. 137-151; see also, generally, DEERE C. / ESTY D. (eds.), *Greening the Americas: NAFTA's Lessons for Hemispheric Trade*, Cambridge (MA) 2002.

[53] Doc. OEA/Ser.K/XXI.6, CIDIP-VI/RES.1/02. At the last moment, two partially or entirely non-commercial topics were included (one on the 'international protection of adult persons whose personal faculties are insufficient' and the other on 'trans-border movements and migratory flows of persons') and the open character of the list was established.

[54] AG/RES 1923 (XXXIII-O/03).

negotiations regarding legal regulations, matching integration with codification. In addition, obviously, if what is done in the CIDIP does not address the interests and needs of the involved parties, those who were unsatisfied would look for another valid forum. The CIDIP has been the natural forum insofar as it is (among other things) the only continental legal organization. However, another one could be created with different characteristics and range.

E. Keys for the Future: Towards the CIDIP VII

As of now, the trends shown by the preliminary proceedings of the CIDIP VII authorize moderate optimism. If one looks at how the OAS is preparing the next CIDIP, all our prior concerns seem to have been taken into account.[55] In particular, the subjects selected for this Conference are justified and have received broad support. What we have said about the commercialization of the CIDIP should not be understood as a negative opinion on the presence of commercial topics in the CIDIP agenda. On the contrary, it seems apparent that these topics must be addressed. In fact, they have been on the agenda from the very beginning of the CIDIP, which, as early as 1975, approved in Panama City an Inter-American Convention on International Commercial Arbitration, now in force in eighteen States. Moreover, commercial topics will remain important if the FTAA does not succeed or if it merely becomes an FTAA-light.

Note what has happened in the organization of the next CIDIP. As is usual, less than a quarter of the States that are members of the OAS suggested topics when they were requested to do so by the OAS. The United States, on the basis of the previously mentioned list, proposed two topics related to electronic commerce: investment securities and electronic commercial registries. The same topics were reprised in the Chilean and Peruvian proposals. Brazil and Mexico referred to electronic commerce in general, though Mexico specifically mentioned consumer protection within this field. Canada and Uruguay focused on the treatment of jurisdiction in electronic contracts (Canada thinks this is the only important topic to be discussed in the CIDIP VII but Uruguay includes international jurisdiction in general and extra-contractual responsibility in trans-border pollution).[56]

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[55] See *The Present and Future of CIDIP* (CIDIP-VI, doc. 18/02), in: <http://www.oas.org/dil>.

[56] In the Canadian proposal, the habitual position of this country can easily be seen. It does not treat the topics that are in the agendas of universal forums of codification (or that are of universal vocation) within an inter-American framework. On the contrary, the Uruguayan letter states 'the pertinence of a regional codifying process'. See also FRESNEDO DE AGUIRRE C., 'Responsabilidad por hecho ilícito en el ámbito internacional con especial referencia a la responsabilidad civil por contaminación transfronteriza. Recientes desarrollos y perspectivas para la convención regional en la materia', in: *Liber Amicorum Opertti Badán* (note 3), pp. 208-215. Regarding the terms to be taken into account to analyze these positions, see FERNÁNDEZ ARROYO D.P., *Derecho internacional privado interamericano* (note 5), pp. 68-73.

Given these facts, the good will of the State representatives in the Permanent Council and the ability of the officials of the Department of International Legal Affairs[57] obtained what some scholars had been struggling towards for a long time,[58] that is a balanced agenda,[59] with a few feasible topics.[60] The United States accepted to set aside the investment securities issue.[61] The electronic registries issue was presented, very reasonably in my opinion, as a logical complement to the Model Law on security interests. The OAS' idea is to draft three Inter-American instruments on secured transaction registries: 1) a uniform registration form (as in Art. 1 UCC, the national financing statement) for use with the Model Law; 2) guidelines/regulations for movable property registries; and 3) guidelines/regulations for electronic registries. To date, however, the member States have not presented proposals for any of these instruments.

The other chosen topic – consumer protection – was not on the list drawn up by the CIDIP VI, but was the concern of many scholars[62]. There are various proposals on the subject: Mexico, Canada and Uruguay refer to protection within the specific framework of electronic commerce, Canada and Uruguay to the regulation of international jurisdiction; the Brazilian convention project is on applicable law and is not limited to electronic commerce;[63] the United States have suggested to

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[57] OAS had experienced a change of structure in 2004. In that reform, the old Subsecretariat of Legal Affairs became the Department of Legal Affairs and Services, which included a Bureau of Inter-American Law and Programs, heirs to the Department of International Law. But it was a short-lived reform. In 2005, with a new General Secretary, there has been a new modification of the structure. In the new scheme, there is a high level Department of International Legal Affairs.

[58] See FERNÁNDEZ ARROYO D.P., *Derecho internacional privado interamericano*, (note 5), pp. 98-99.

[59] See 'Declaration of Cordoba' (note 13): 'it is important that the thematic agenda for codification reflect the interests of the different countries and integration plans in the Americas in a balanced manner.'

[60] Doc. OEA/Ser G, CP/CAJP-2309/05. See WILSON J.M., 'Conferencias Especializadas Interamericanas sobre Derecho Internacional Privado. Informe sobre los preparativos para la CIDIP VII', in: *DeCITA* 3 (2005), pp. 569-575.

[61] The issues dealing with the law applicable to this topic were well managed by the Hague Conference (see GARCIMARTÍN ALFÉREZ F.J., 'La tenencia indirecta de valores. El convenio de La Haya sobre la ley aplicable a ciertos derechos sobre valores depositados en un intermediario', in: *DeCITA* 3 (2005), pp. 369-375), and UNIDROIT is making an important effort to establish a material regulation on the same subject (see EINSELLE D., 'The Book-Entry in a Securities Account: Linchpin of a Harmonised Legal Framework of Secuirities Held with an Intermediary', in: *Unif. L. Rev*. 2004, pp. 41-50).

[62] In the study carried out by the Inter-American Legal Committee composed of specialists from different countries, the topic was repeatedly mentioned. See 'CIDIP VII y etapas sucesivas', Doc. OEA/Ser. K/XXI.6, CIDIP-VI/doc.10/02.

[63] This is a proposal of Professor Claudia LIMA MARQUES, of the Federal University of Rio Grande do Sul, lately adopted as an 'official' document by the Brazilian Government. See her explanation in 'A insuficiente proteção do consumidor nas normas de PIL. Da necessidade de uma Convenção interamericana sobre a lei aplicável a alguns contratos e

make a model law to facilitate the refunding of consumers in international transactions.[64] Therefore, the protection of consumers is an open issue on the agenda as regards its material scope and the legislative technique to be used (convention or model law). The approval of more than one text or of a combination of techniques should not be dismissed.

No one can deny that this agenda includes useful and necessary topics, even if it is not to everyone's liking. From a certain point of view, it could be said that both topics are related to the exponential growth of international commerce, and although consumer protection in general is not considered to be typically commercial, it is obviously patrimonial and represents one of commerce's 'human' sides. We will later be able to see if this was a good decision, when the approved text or texts are incorporated into the laws of the OAS States. We can, as always, expect some surprises. As an example, we can mention what happened with the Convention on the Law Applicable to International Contracts, which is well known and thoroughly studied in other regions (mainly Europe). While it is apparently the principal achievement of the CIDIP V – it even received the monopoly of the host city's name – it has only been ratified by Mexico and Venezuela, while the other Convention approved in Mexico, regarding the not very appealing topic of trafficking in children, is in force in twelve States. So far, the Department of International Legal Affairs has implemented a careful working plan with steps[65] that, if carried out (which depends on the collaboration of the member States), will improve the results.

III. National Codifications of Private International Law

A. The Argentinean Draft of a Private International Law Code (2003)

For many years, there has been a movement towards a PIL codification in Argentina, which meets with general support among conflict scholars. Argentinean PIL rules are so isolated, heterogeneous, and, sometimes, contradictory, that projects

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relações de consumo', in: FERNÁNDEZ ARROYO D.P. / MASTRANGELO F. (eds.) (note 8), pp. 105-165 (with Spanish version of proposal).

[64] In its proposal, this country expressed that 'specifically, the U.S. proposes that the CIDIP focus on developing a model law on mechanisms for consumers to obtain monetary redress. There are many possible redress routes including judicial mechanisms such as small claims tribunals, administrative adjudication of small claims, and private, associational and governmental (or *parens patriae*) collective court actions. A model law could cover some or all of these options.' See: <http://www.oas.org/DIL/treaties_and_agreements.htm>).

[65] WILSON J.M., 'CIDIP VII: trabajos preparatorios para la Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado', in: *DeCITA* 5 (2006) (forthcoming).

arise quite often.[66] The last one was written under the auspices of the Justice Department. The draft was presented to the then Minister of Justice in 2003. More than two years later, the draft is still in Parliament, but no one can say what will come of it or even what its present status is. The Ministry of Justice has been trying to promote some discussion about the draft on its website.[67] The PIL Section of the Argentinean Association of International Law also arranged a discussion on the draft in a colloquium, which took place at the National University of Buenos Aires in May 2005.

In my opinion, the draft is a good starting point for a good act.[68] Although several draft provisions, and even its contents in general, may be criticized and, therefore, would need an in-depth revision, most solutions are both logical and consistent with the best Argentinean court decisions. To draw attention to some of these 'good' solutions, one could mention the following: a) the elimination of exorbitant grounds of jurisdiction; b) the introduction of a list limiting exclusive grounds of jurisdiction; c) the avoidance of the old *forum causae* as a general rule of jurisdiction;[69] d) the granting of protection to weak contractual parties; d) express recognition of party autonomy in the selection of both the forum and the applicable law; e) the avoidance of the effects of the kidnapping of minors on jurisdiction rules; f) the inclusion of a *lis pendens* rule; g) the acceptance of the application of general principles and usages to international contracts.

Nevertheless, one might underline some negative aspects of the draft. Without a doubt, the most important one is the absence of any rules on the recognition and enforcement of foreign decisions and, in general, the lack of any reference to international cooperation.[70] The decision not to regulate these sectors of PIL seems paradoxical in the drafting of a 'Code' of PIL. Constitutional reasons, namely the separation between federal and provincial law-making powers, however, have been invoked in this matter. The Argentinean Constitution does, indeed, reserve proce-

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[66] Based on the well-known 'Goldschmidt Project' of 1974 (see GOLDSCHMIDT W., *Derecho internacional privado – Derecho de la tolerancia*, 9th ed., Buenos Aires 2002, pp. 668-691), several projects have been presented, most of them in the last decade. See DREYZIN DE KLOR A., 'Los principales desarrollos dentro del derecho internacional privado en el próximo siglo en Argentina', in: *Rev. Mex. DIP* (sp. issue) 2000, pp. 74-76.

[67] See <http://www.jus.gov.ar>.

[68] See FERNÁNDEZ ARROYO D.P., 'Notas acerca del tratamiento de la jurisdicción internacional en el Proyecto de un Código de derecho internacional privado para la República Argentina de 2003', in: *DeCITA* 4 (2005), pp. 445-468.

[69] *Forum causae* is an old ground of jurisdiction, according to which a state has jurisdiction whenever its law applies. While it could be justified as a subsidiary rule, it has no justification as a general rule. Nevertheless, it is the general rule – parallel to the defendant's domicile – in the Montevideo Treaties (Art. 56 of Montevideo Treaty of International Civil Law), which still have a strong influence in Argentina. This rule, of course, was written when rules of jurisdiction had not undergone the current evolution.

[70] See DREYZIN DE KLOR A., 'La ausencia de normas de reconocimiento y ejecución de sentencias en el Proyecto de Código de DIPr argentino', in: *DeCITA* 4 (2005), pp. 469-484; FERNÁNDEZ ARROYO D.P. (note 68), pp. 449-450.

dural issues for the provinces.[71] Nevertheless, this provincial power is neither unlimited nor has it impeded some 'procedural' rules from being included in federal codes in the past. As a common sense issue, the recognition and enforcement of foreign judgments should be regulated on the federal level.[72] In fact, there are already many international treaties on the subject in force in Argentina, which have been signed without any participation of the provinces. Furthermore, a federal character has been assigned to various PIL rules.[73] In any case, if political reasons – rather than legal ones – do not allow the inclusion of these matters in the Code of PIL, this last should be accompanied by some kind of model law on international legal cooperation, including rules on the recognition and enforcement of foreign decisions. Other negative aspects of the draft are the limitation of party autonomy to exclusively patrimonial cases, on the one hand, and the lack of coordination with Uruguayan authorities, which – as will be exposed in the next paragraph – were concurrently preparing their own project of a PIL Act, on the other hand.

B. The Uruguayan Draft of a Private International Law Act (2004)

In 2004, a draft of a PIL Act was also presented to the Parliament in Uruguay. This draft was prepared by a commission created and headed by Professor – and ex-Minister of Foreign Affairs – Didier Opertti Badán. One can but regret that Uruguay and Argentina, two countries with such a deep and broad legal integration, do not avail themselves of this opportunity to try to draft similar PIL Acts – if not a single one. Given that both texts are now in an impasse, it is perhaps not too late to reach some degree of harmonization between them. More than a century of legal integration should make such an attempt relevant. Nevertheless, there are several similar rules in both drafts, especially those that reflect solutions of either the Montevideo Treaties or the CIDIP Conventions.

The Uruguayan draft shows respect for legal traditions, especially the legacy of the Montevideo Treaties of 1889 and 1939/1940. For example, the already criticized notion of the *forum causae* as a general rule of jurisdiction[74] is kept in the draft. However, at the same time, it introduces a modern approach to several issues. Perhaps the most important is the introduction of party autonomy in contracts, which in Uruguay can be seen as a near revolution. Indeed, party autonomy has been, at least since 1940, the Uruguayan PIL taboo. The express prohibition of

[71] See Art. 75(12), 121, 125 and 126 of the Argentinean Constitution.

[72] See DREYZIN DE KLOR A. (note 70), pp. 481-483.

[73] See BOGGIANO A., *Derecho internacional público y privado y derecho del MERCOSUR – En la jurisprudencia de la Corte Suprema de la Nación Argentina*, t. I, Buenos Aires 1998, pp. 469-470. See also decisions of the Argentinean Supreme Court 'Eberth Clemens GmbH v. Buque Pavlo' (November 25, 1975, in: *Fallos* 293:455); 'Fernando Méndez Valles v. A.M. Pescio S.C.A.' (December 26, 1995, in: *Fallos* 318:2639); 'Calvo Gainza v. Corporación de Desarrollo de Tarija' (July 11, 1996, *La Ley* (1996-B), p. 305 *et seq*.).

[74] See note 69.

party autonomy in the Montevideo Treaty of 1940 was introduced at the same time into national legislation, as a rule of the Appendix (1941) to the Civil Code.[75] As long as the most influential and outstanding Uruguayan scholar, Quintín Alfonsín, rejected party autonomy, this attitude remained deeply rooted in the courts and scholarship. The strength of this view blocked the ratification of the Inter-American Convention on the Law Applicable to International Contracts of 1994 (CIDIP V) by the Parliament. In a similar way – and much more surprisingly –, it also blocked the ratification of the Buenos Aires Protocol on International Jurisdiction in Contractual Matters of 1994 for ten years, though it is now finally in force in all of the Merco-southern States. This ratification and that of other international texts, like the Vienna Sales Convention of 1980, on the one hand, and the Panama, New York, and MERCOSUR Conventions on Arbitration, on the other hand, weaken the arguments against party autonomy. Thus, for some scholars, even if Uruguay does not enact the PIL Act, nor ratify the Mexico Convention, party autonomy is already an overriding principle in the Uruguayan conflict system.[76] Nevertheless, one cannot say that there is unanimity among scholars.[77] Of course, the introduction of party autonomy is not the only modern item in the Uruguayan draft. Among others, it is important to remark that it includes a special rule regarding 'International Commercial Law', providing for the application of its own sources and, in particular, of every usage broadly known and regularly observed in commercial traffic.

C. Towards a Mexican Draft of a Private International Law Act

The winds of codification are also blowing in Mexico. The Mexican Academy of Private International and Comparative Law has taken the first steps to propose a comprehensive Act on the matter. Taking into account that this Academy has been, since its very foundation in 1968, behind all Mexican reforms of PIL, attention

[75] Both the 1940 version of the Montevideo Treaties and the Uruguayan Appendix were inspired by a Uruguayan scholar, A. Vargas Guillemette. See FRESNEDO DE AGUIRRE C., in: FERNÁNDEZ ARROYO D.P. (ed.), *Derecho internacional privado de los Estados del MERCOSUR*, Buenos Aires 2003, pp. 1018-1024.

[76] TALICE J. (a member of the drafting commission of the PIL Act), 'La autonomía de la voluntad como principio de rango superior en el derecho internacional privado uruguayo', in: *Liber Amicorum Opertti Badán* (note 3), pp. 527-562. In the same direction, FERNÁNDEZ ARROYO D.P., 'International Contract Rules in MERCOSUR: End of an Era or Trojan Horse?', in: *Essays in Honor of Friedrich K. Juenger* (note 8), pp. 168-172. In addition, in 2005, the Uruguayan Government presented to the OAS the 'Basis for a inter-American convention on international jurisdiction', where party autonomy in forum selection is expressly recognized.

[77] An eminent scholar, also a member of the drafting commission of the PIL Act, has recently reproduced her arguments against party autonomy, already firmly exposed fifteen years ago. FRESNEDO DE AGUIRRE C., 'La autonomía de la voluntad en la contratación internacional', in: *Curso de derecho internacional CJI -2004-*, pp. 323-390.

should be paid to its current plans.[78] In addition, the close link between the most relevant Academy members and the Mexican Foreign Relations Department has permitted them to play a significant role in determining relevant interests in the area of Mexican participation in the international unification of law. On this basis, early in 2005, the Academy created nine working groups and named a leader for each one. These working groups were related to an equal number of chapters to be found in the future Act. They were dedicated to: principles of PIL; persons and family; property; obligations; contracts; labor law; insolvency; titles; and procedural issues. The results of this work were discussed in the XXIXth Seminar of the Academy, which took place in Puebla from November 30 to December 3, 2005. In this meeting, a decision was made to separate the work into two bodies: on the one hand, a draft to reform Mexican federal PIL; on the other, a draft of a model law of PIL, containing reforms that the Mexican States should introduce into their own legislation. There is still a lot to do, as no homogenization of the drafts has yet been carried out.

D. Other Legislation

1. The Brazilian Reform of Exequatur (2004)

Among all Latin American countries, Brazil is perhaps that which is currently undergoing the deepest changes in general International Law. Contrary to other States of the region, in Brazil PIL has lived under the shadow of other disciplines for a long time, trapped in a double bind: a scientific one, in relation to the common trunk of Public International Law and an academic one, as the teaching of PIL was included in the syllabi of Civil Law.[79] This situation remained because most people had a 'publicist' conception of the object of PIL, and a conception that the contents of PIL should be limited to the question of the law applicable.[80] This way of considering PIL, traditional in some European countries until the 20th century, was the cause and consequence of its lack of scientific and academic independency. The fact that PIL has not had a central place in Brazilian law can be understood, as there has not been any legislative autonomy, the few rules on PIL being scattered all over the Brazilian legal system (Introductory Act to the Civil Code, Code of Civil Procedure, and Internal Regulation of the Supreme Federal Tribunal), and there were no international rules of PIL in force until recently.

Nevertheless, a normative framework, common to many countries of the region – mainly Latin American –, has been established thanks to the important number of CIDIP conventions that are now in force in Brazil. This has a quantitative importance. Many of the solutions contained in the CIDIP conventions signify (at least as they are received in Brazilian courts) a significant change in the way

[78] See PEREZNIETO CASTRO L. (note 42), p. 64.

[79] DE ARAUJO N., *Direito internacional privado*, Rio de Janeiro 2003, pp. 123-127.

[80] On these questions, see FERNÁNDEZ ARROYO D.P.(ed.) (note 75), pp. 42-58.

private international relationships are regulated.[81] Just to mention one, we must examine the methods introduced by the Inter-American Convention on Support Obligations of 1989, which in its Art. 13 states:

> 'Compliance with the above requirements shall be ascertained directly by the competent authority from which enforcement is sought, which shall proceed summarily, giving notice to the debtor and, where necessary, to the appropriate public agency and holding a hearing without reopening the merits.'

This makes a very relevant exception to the Brazilian legal tradition, which used to give sole control of the efficiency of foreign decisions to the highest court of its jurisdictional system.[82] This kind of solution, new to the Brazilian legal system, had not had repercussions on the national legislation until now.[83]

Nevertheless, an important though limited reform occurred in 2004, when competence for the recognition and enforcement of foreign judicial and arbitral decisions, and also for the execution of letters rogatory, was shifted from the Federal Supreme Court (STF, Brazilian highest court) to the Superior Court of Justice (STJ), by means of the *Emenda Constitucional* 45 of December 8, 2004.[84] The reform, which has been in force since January 2005, is apparently broader than it seems. According to some interpretations, the wording of Constitutional Amendment 45/2004 allows that some kinds of foreign judgments do not need *exequatur*.[85] It will take some time in order to discover whether the STJ will agree with these interpretations. Nonetheless, it is clear that there is a feeling of optimism about the future work of the STJ on the matter. In particular, most scholars think that, since the STJ is both more specialized and more progressive than the STF, its

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[81] See the articles included in CASELLA P.B. / DE ARAUJO, N., eds. (note 39).

[82] No other Merco-southern country has such a 'concentration' system. In Argentina, Paraguay, and Uruguay, indeed, competence for the recognition and enforcement of foreign decisions is given to judges of the first instance. DREYZIN DE KLOR A. and others, in: FERNÁNDEZ ARROYO D.P. (ed.) (note 75), pp. 475-502.

[83] See the pessimism showed by DOLINGER J. / TIBÚRCIO C., 'O DIP no Brasil no século XXI', in: *Rev. Mex. DIP* (sp. issue) 2000, pp. 94-95 ('perspectives for the immediate future of the Brazilian PIL are not positive').

[84] *Diário Oficial da União* of December 31, 2004. The STJ has established the procedural rules for the exercise of this new competence in Resolution 9 of May 4, 2005. According to these rules, competence belongs concretely to the chief judge. Requirements for the recognition and enforcement of foreign decisions remain unaltered. On this reform, see the contribution of DE ARAUJO N. / DO VALLE MAGALHÃES MARQUES F., in this Volume, pp. 119-130.

[85] See CÂMARA A.F., 'A Emenda Constitucional 45/2004 e a homologação de sentença estrangeira: Primeras impressões', in: TIBURCIO C. / BARROSO L.R. (eds.), *O Direito Internacional Contemporâneo. Estudos em homenagem ao Professor Jacob Dolinger* Rio de Janeiro 2006, p. 7.

case law could improve international cooperation in Brazil.[86] Overall, the reform would have been even more important if the shift had not been from the STF to the STJ, but to the judges of first instance.[87]

The reform of exequatur is just one of the several changes occurring in Brazilian PIL. The Brazilian Civil Code of 2004 has not decisively affected the PIL system, since most PIL rules are contained in the Introductory Act (1942) to the Civil Code (LICC), which has remained untouched by the new Code. There have been several attempts to reform the LICC. The most important was the 1995 project, based on the preparatory draft by professors Coelho, Dolinger, França and Rodas. This project is likely to be taken into account in the near future, when the necessary reform of the Brazilian PIL system occurs. At this time, a commission designated by the Ministry of Justice is elaborating a preparatory draft of a comprehensive Act on International Legal Co-operation, which obviously includes the regulation of both letters rogatory and the recognition and enforcement of foreign judgments.[88]

2. The Chilean Marriage Act (2004)

In Chile, the most internationalized economy of Latin American still co-exists with the most nationalist PIL system. This paradox has many reasons, the most important being the strength of the tradition of territorialism.[89] In addition, an open mind on economic and commercial issues does not necessarily mean the same regarding some cultural traditions. In this context, it was only in 2004 that Chile enacted a

[86] See GAMA JR. L., 'La reconnaissance des sentences arbitrales étrangères au Brésil: évolutions récentes', in: *Bull. CCI*, 16/1 (2005), pp. 72-73 ('the STJ is better suited to civil and commercial matters than the Supreme Court (whose chief role is to ensure that the Federal Constitution is respected) and more progressive in its decision-making'). For a similar opinion, see DE ARAUJO N. / VARGAS D. / GAMA JR. L., 'Cooperação jurídica nos litígios internacionais. Cartas rogatórias no Brasil e no Protocolo de las Leñas', in: *DeCITA* 4 (2005), p. 495.

[87] See LOULA P., 'Breves reflexões sobre repercussão da Reforma do Judiciário (Emenda Constitucional nº 45/04) no Direito Internacional Privado', in: *Estudos em homenagem ao Professor Jacob Dolinger* (note 85), p. 793 ('it would have been a great service to the country, and helped to make its international relations easier').

[88] The preparatory draft covers all public and private law matters, including co-operation in criminal, administrative or tax law, besides co-operation in civil, labor, and commercial law. The drafting commission includes outstanding conflict scholars like Carmen Tibúrcio and Nadia de Araujo.

[89] See SAMTLEBEN J., 'Heirat und Scheidung im neuen chilenischen Ehegesetz', in: *StAZ* 2004, p. 288. Actually, territorialism has been underlined as a major Latin American PIL tradition, Chile being an example of 'absolute territorialism'. See PEREZNIETO L., 'La tradition territorialiste en droit international privé dans les pays de l'Amérique latine', in: *Recueil des Cours* 1985, t. 190, pp. 271-400.

Marriage Act, introducing divorce as a means to dissolve marriage.[90] What would have been a normal – though tardy – development, became a subject of studies for curious scholars, when trying to understand the PIL provisions of this Act.[91] As in other countries with similar family law traditions,[92] the reluctance to accept divorce as a spouses' right creates some restrictions and contradictions.[93] Thus, although Art. 83 of the Act allows the recognition of foreign divorces, it provides that divorces not decided by judicial authorities are against Chilean public policy, therefore avoiding the recognition of divorces declared, according to the applicable law, by other foreign authorities. Furthermore, the last paragraph of Art. 83 imposes a condition for the obtaining of a divorce abroad, which is that the spouses (it is unclear whether both or just one of them) have not been domiciled in Chile 'in any of the three years prior to the judgment', although Art. 55 allows spouses to divorce at any time upon a joint claim, provided that they have not lived together for more than a year. To be sure, the reasons for these complicated rules are found in traditions less rationalistic than territorialism or other types of legal thinking.

3. Foreign Companies in Argentina (2003/2005)

The economic troubles suffered by Argentina at the change of millennium have had a strong influence on legal regulations. Within the field of PIL, it might be interesting to mention that the Argentinean authorities' worry about the operation of foreign companies within the country.[94] The most significant among many political, legislative and judicial decisions are several resolutions issued by the *Inspección General de Justicia*, a section of the Ministry of Justice which controls the activity of companies in the City of Buenos Aires.[95] Despite the complexity of the

[90] *Ley de Matrimonio Civil* n. 19.947 of May 7, 2004, in: *Diario Oficial*, May 17, 2004.

[91] Arts. 80-84.

[92] Perhaps the best example is the Spanish marriage reform of 1981, which placed many procedural obstacles in the way of divorce. This harsh system was replaced by a rapid procedure in 2005.

[93] See SAMTLEBEN J. (note 89), pp 288-290.

[94] See also some exorbitant decisions on insolvency, like the decision of the Commercial National Court of Appeals, Chamber D, of April 13, 2000, 'Proberan International Corp. S.A. s/ped. Quiebra por: Braticevich, Jorge', in: *La Ley* (2001-B), p. 101 *et seq.*; FELDSTEIN DE CÁRDENAS S.L., *Colección de análisis jurisprudencial. Derecho internacional privado y derecho de la integración*, Buenos Aires 2003, pp. 438-447.

[95] Of special significance are Resolutions 7/2003 (*Boletín Oficial*, September 25, 2003), 8/2003 (*Boletín Oficial*, October 22, 2003), 12/2003 (*Boletín Oficial*, November 4, 2003), 2/2005 (*Boletín Oficial*, February 17, 2005), 3/2005 (*Boletín Oficial*, March 10, 2005), 4/2005 (*Boletín Oficial*, April 6, 2005), and 6/2005 (*Boletín Oficial*, May 31, 2005). See <http://www2.jus.gov.ar/minjus/ssjyal/IGJ/Inicial.htm>.

problem, it can be summarized in the following way:[96] a) Argentina has, besides the international conventions in force on the matter, a federal regulation on Company Law, which states the requirements foreign companies must meet in order to act in the country;[97] b) the *Inspección General de Justicia* has power to ensure the respect of Argentinean law, but lacks law-making power on the matter; c) nevertheless, based on legitimate public policy arguments – in particular, in order to fight against the fraudulent activities of off-shore companies –, the *Inspección* issues resolutions, which have a truly normative content; d) as a result, controversy has arisen regarding both the *Inspección*'s invasion of the Federal Parliament's law-making power,[98] and – more importantly – the consequences of the concrete rules contained in its resolutions. In this respect, most scholars claim the necessity of creating a better balance between legitimate policies and the necessary legal certainty about the law applicable to the activities of foreign companies.[99] A country so dependent upon foreign investments should not ignore these opinions. In the same field, it might be worth mentioning the new interest in the old discussion of Argentinean jurisdiction over foreign companies, because of the activities of their controlled companies or of their branches domiciled within the country.[100]

[96] See ALBORNOZ J.A. / ALL P.M., 'Actualidad y perspectivas del régimen de actuación de sociedades extranjeras en la Argentina', in: *DeCITA* 3 (2005), pp. 441-454.

[97] See NOODT TAQUELA M.B., in: FERNÁNDEZ ARROYO D.P. (ed.) (note 75), pp. 1332-1339. See also MANÓVIL R., 'Sociedades extranjeras en la Argentina: algunas cuestiones', *Liber Amicorum Jürgen Samtleben* (note 10), pp. 325-338.

[98] Similar administrative bodies, with jurisdiction over Argentinean provinces, have shown the same attitude. See ALBORNOZ J.R. / ALL P.M. (note 96), pp. 448-449 (about Resolution 321/2004 of the *Inspección General de Personas Jurídicas* of Santa Fe).

[99] Ibid., pp. 452-454; ERIZE L.A., 'Las sociedades extranjeras: nuevos requisitos para el ejercicio de los derechos de los inversores', in: *La Ley* (2003-F), p. 1131 *et seq.*; LÓPEZ TILLI A.M., 'Las sociedades extranjeras a la luz de las recientes resoluciones de la Inspección General de Justicia', in: *El Derecho* 2004), p. 969 *et seq*.

[100] Although it was based on exceptional reasons, it is relevant to cite, e.g., the decision of the Superior Court of Justice of Río Negro (highest provincial court) in 'Baldini, Omar Emilio y Zas, Ángela María s/ amparo-mandamus' (February 2, 2002), where the Court extends its jurisdiction 'to the economic group' which 'must be understood as including its parent company and its subsidiaries'. In other countries, this question has a concrete regulation. Thus, Art. 88 of the Brazilian Civil Procedure Code provides that foreign legal persons are domiciled in Brazil if they have in Brazil an agency, subsidiary, or branch. In these cases, the parent company is subjected to Brazilian jurisdiction, even if the case has no connection with agency, subsidiary, or branch activities, since Art. 88(I) provides that the defendant's domicile is a general ground of Brazilian jurisdiction.

IV. Some Current Trends in Latin American Courts and Scholarship

A. The Venezuelan Example

In 1998, Venezuela enacted an Act on Private International Law,[101] largely based on a draft written in 1963-1965 by three outstanding scholars, namely, Roberto Goldschmidt, Joaquín Sánchez Covisa, and Gonzalo Parra-Aranguren. The latter, together with another well-renowned internationalist, Tatiana B. de Maekelt, and other scholars, saw the opportunity to return to the former project and, with several updates and modifications, lead it to its legislative enactment in 1998.[102] The Venezuelan Act has been welcomed by both foreign academics and lawmakers for its great technical quality.[103] Nevertheless, it is perhaps more interesting to indicate that, in just a few years, a compact body of jurisprudence has been produced by the Venezuelan courts, especially by the highest one. Indeed, the Supreme Tribunal of Justice (especially its Political and Administrative Chamber) applies PIL Act provisions in a regular manner. Of course, some decisions can be criticized, as is possible for the decisions on PIL matters – which are particularly difficult – of any court in the world. In my opinion, however, more important than the contents of some decisions is the fact that the Act is known and applied by courts, and that Supreme Tribunal of Justice decisions can easily be consulted.[104] Although it is not simple to choose some decisions, one can point out some trends arising from case law. In particular, the general trends mentioned here below (party autonomy, reception of foreign law and decisions, and arbitration development) are present in Venezuelan case law, though not without problems. A concrete issue that I find relevant is the limitation of exclusive grounds of jurisdiction, according to some decisions and scholars.[105]

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[101] *Gaceta Oficial* Nr. 36.511 of August 6, 1998.

[102] See *Ley de derecho internacional privado de 6 de agosto de 1988 (antecedentes, comentarios, jurisprudencia). Libro homenaje a Gonzalo Parra-Aranguren*, Caracas, TSJ, 2001; PARRA-ARANGUREN G. (note 8), pp. 97-108; MAEKELT T.B. / VILLARROEL I.E. / RESENDE C. (eds.), *Ley de Derecho Internacional Privado comentada*, Caracas 2005.

[103] Recently, a Bolivian author has proposed an Act on Private International Law for his country. The text he proposes takes, with just a few modifications, the Venezuelan Act as a model. See SALAZAR PAREDES F., in: <http://www.verbalegis.com.bo>, edition of June 2005.

[104] See <http://www.tsj.gov.ve>. This is almost a luxury in the Latin American context. On issues related to jurisdiction and the recognition and enforcement of foreign judgments, see PÉREZ Y., 'Regulaciones de derecho procesal civil internacional en la Ley de DIPr venezolana', in: *DeCITA* 4 (2005), pp. 739-761, with a number of citations of judicial decisions. See also the list of cases reproduced in *DeCITA* 4 (2005), pp. 811-817.

[105] See the decision of the Supreme Court of Justice, Political and Administrative Chamber, of September 29, 2004, 'María del Carmen Vaamonte de Torres v. Vicente Daniel Torres', and RODRÍGUEZ L.E., 'Algunas consideraciones sobre la jurisdicción inderogable y

B. Party Autonomy

The admission of party autonomy in private international relationships has always been a controversial issue in Latin American countries. This controversy is not easy to explain, especially if one remembers that the parties' right to choose the judge was already present in the 1928 Bustamante Code, in force in fifteen out of twenty Latin American States.[106] Although historical precedents are important, contemporary data is even more persuasive on this subject. Among these facts, perhaps the most conclusive is that all Latin American countries accept that parties can validly solve their disputes before arbitrators. Moreover, with the ratification, in 2002, by Brazil and the Dominican Republic, and, in 2003, by Nicaragua, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, this Convention is in force in all Latin American States. The Inter-American Convention on International Commercial Arbitration of 1975 (the 'Panama Convention') is also in force in all Latin American States, except the Caribbean States. In every arbitration regulation, arbitrators must apply the rules chosen by the contracting parties. Whenever a State has recognized the parties' option to 'evade' national courts by means of an arbitral agreement and to choose the applicable law for that arbitral litigation as well, it is difficult to understand the reason for denying similar options regarding litigation before foreign courts.[107]

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la jurisdicción exclusiva (tres niveles de la exclusividad)', in: *DeCITA* 4 (2005), pp. 147-173. But see PÉREZ Y. (note 104), p. 757. Compare, dealing with Art. 89 Brazilian Procedural Civil Code, the restrictions imposed by the decision of the Federal Supreme Court RE 90.961 (*DJU* October 10, 1985), and *Informativo* 272 (SEC-7.146); DE ARAUJO N. (note 79), pp. 212-215 and 270; SAMTLEBEN J., 'Brasilien', in: *Der Internationale Rechtsverkehr* (2003-IV), pp. 1023.8; DOLINGER J., 'Brazilian International Procedural Law', in: DOLINGER J. / ROSEN A. (ed.), *A Panorama of Brazilian Law*, Miami 1992, p. 358 *et seq*.

[106] The fact remains important, although in most of these countries, the applicability of the Bustamante Code is rather theoretical than real. SAMTLEBEN J., *Derecho internacional privado en América Latina. Teoría y práctica del Código Bustamante*, Buenos Aires 1983, *passim*; PARRA-ARANGUREN G., 'El Código Bustamante: su vigencia en América y su posible ratificación por España', in: *ID*., *Codificación del Derecho Internacional Privado en América*, vol. I, Caracas 1982, pp. 132-138, 173-179; concerning specifically to Brazil, DOLINGER J., 'The Bustamante Code and the Inter-American Conventions in the Brazilian System of Private International Law', in: *Liber Amicorum Jürgen Samtleben* (note 10), pp. 136, 142-143.

[107] For an articulate proposal of the constitutional basis of party autonomy in Brazilian law, see GAMA JR. L., 'Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: Uma leitura *constitucional* do artigo 9º da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável', in: *Estudos em homenagem ao Professor Jacob Dolinger* (note 85), pp. 609-610 (talking about this 'paradox' in Brazilian law); another favourable opinion of party autonomy in Brazil can be found in JACQUES D.C., 'A adoção do princípio da autonomia da vontade na contratação internacional pelos países do MERCOSUL', in: *Estudos em homenagem a Erik Jayme* (note 40), pp. 277-306.

Conversely, the Mexico City Convention of 1994 not only widely accepts the parties' freedom to choose the applicable law, but also allows decision-makers to take into account the *lex mercatoria*, both in determining the applicable law and 'in order to discharge the requirement of justice and equity in the particular case'.[108] It is true that this Convention is only in force in Mexico and Venezuela, but its principles are an influence on Latin American courts and scholars. Furthermore, in several countries this principle applies generally.[109]

In MERCOSUR, there is not only a regulation on arbitration.[110] The 1994 Buenos Aires Protocol on International Jurisdiction on Contract Matters is also now in force in all MERCOSUR member States. This is a singular and relevant fact. Paraguay, in 1995, and Brazil and Argentina, in 1996, had already ratified this Protocol.[111] But Uruguay needed ten years to accept that the Buenos Aires Protocol contained nothing but the logical legal principle that parties to a contract are entitled to choose the court before which they wish to litigate. It must be said that the Protocol excludes all matters one might consider 'difficult' in this respect.

Regarding matters other than commercial ones, Latin American legal tradition seems more restrictive. In the Argentinean and Uruguayan drafts, for example, party autonomy is reserved for patrimonial matters and contracts, respectively. In Venezuela, however, parties can select the court also in family disputes, though this selection requires an effective link between the case and the State.[112] The Venezuelan judges and courts decide when a link can be considered an effective one, either in order to take the case or to recognize foreign judgments. Thus, according to Supreme Court decisions, the following links, among others, could be consid-

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[108] See JUENGER F.K., 'Contract Choice of Law in the Americas', in: *Am. J. Comp. L.* 45 (1997), pp. 203-208.

[109] Art. 32 Venezuelan Act of PIL. See OCHOA MUÑOZ J., 'Aplicación de la *lex mercatoria*', in: MAEKELT T.B. / VILLARROEL I.E. / RESENDE C. (eds.) (note 102), pp. 805-832. Panamanian Supreme Court, First Civil Chamber, decision of February 27, 1996, 'Banco Exterior de los Andes y de España v. Banco Cafetero de Panamá', in: *Registro Judicial* (February 1996), pp. 160-178; BOUTIN L.G., '*Lex mercatoria*: fundamento y apreciación en el derecho internacional privado panameño', in: *Liber Amicorum Jürgen Samtleben* (note 10), pp. 287-300; KRONKE H., 'The Scope of Party Autonomy in Recent UNIDROIT Instruments and the Conflict of Laws in the MERCOSUR and the European Union', in: *Liber Amicorum Opertti Badán* (note 3), pp. 289-302.

[110] In addition to the New York and Panama Conventions, the Mercosouthern Member States concluded an Agreement on Arbitration in 1998, which is in force in Argentina, Brazil, and Uruguay. The same countries have ratified the identical Agreement concluded between Mercosouthern States and their associated States, Bolivia and Chile. Nevertheless, this Agreement is not in force, the ratification of at least one among the associated States being necessary.

[111] Argentina, Paraguay and Uruguay have also ratified the Vienna Convention on the Sale of Goods of 1980.

[112] See Art. 42(2) Venezuelan PIL Act and decision Nr. 2822 of the Supreme Court of Justice, Political and Administrative Chamber, of December 14, 2004, 'Giancarlo Salvatore Rosignoli v. María Karelya Martínez Alonso'.

ered effective: the claimant's domicile, place of marriage, former spouses' domicile, spouses' nationality, spouses' property, etc.[113]

C. Reception of Foreign Law and Decisions

American PIL tradition is rather open to the application of foreign law and to the recognition of the effects of foreign decisions. The influence of Savigny's and Mancini's legal thinking contributed to the equal consideration of *lex causae* and *lex fori*. As is well known, the former influenced the Montevideo Treaties of 1889 through its mentor, G. Ramírez;[114] the latter is especially taken into account in the Bustamante Code.[115] This tradition is followed by Art. 2 of the Inter-American Convention on the General Rules of Private International Law of 1979, in force in ten Latin American countries, which provides that:

> 'Judges and authorities of the State Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked.'[116]

The same principle is to be found in several Latin American rules and in the above-mentioned Argentinean and Uruguayan drafts. Of course, the presence of rules in codes and conventions does not guarantee their application to real cases. The classic conflict system has its own mechanisms to evade unwanted decisions or laws (the famous 'escape devices', so often criticized by F.K. Juenger).[117] Nevertheless, current practice in Latin American countries offers several examples of the fair recognition of foreign judgments as well as of the correct application of foreign law.[118]

In this context, on April 6, 2004, the highest Colombian court sent down an important decision on the scope of the *ordre public* exception raised against the

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[113] See PÉREZ Y. (note 104), pp. 754-756, and cases cited there.

[114] AGUIRRE RAMÍREZ G., 'Semblanza de Gonzalo Ramírez', in: *Liber Amicorum Opertti Badán* (note 3), pp. 54-60.

[115] SAMTLEBEN J. (note 106), pp. 191-231.

[116] See MAEKELT T.B., *Teoría general del derecho internacional privado*, Caracas 2005, pp. 257-280.

[117] Thus, compare Arts. 2051-2055 of the Peruvian Civil Code with decision 1387-98 of the Lima Superior Court, of June 30, 1998. SIERRALTA RÍOS A., 'La experiencia peruana sobre competencia jurisdiccional, aplicación de ley extranjera y reconocimiento de sentencias', in: *DeCITA* 4 (2005), pp. 679-681. For the recognition of judgments and awards, Peruvian practice seems to be quite open. ID., pp. 681-691.

[118] For example, see the correct application of 'updated' *ordre public* in a case dealing with a foreign divorce decreed before the entry into force of Argentinean Civil Marriage Act. Supreme Court of Justice, decision of November 12, 1996, 'S. J.V., s/ suc.', in: *La Ley* (1997-E), p. 1032 *et seq.*; FELDSTEIN DE CÁRDENAS S.L. (note 94), pp. 96-107.

enforcement in Colombia of a Portuguese judgment.[119] Rather than the decision on the case itself, what is significant is the doctrine of *ordre public* as expressed by the Supreme Court. Since the defendant argued that there was a contradiction between the foreign judgment and pertinent Colombian rules, the Court took the opportunity to emphasize that the *ordre public* exception cannot serve to avoid the effects of foreign judgments simply because the rules applied by the foreign court are different from those of the recognizing State. In other words, the Court confirmed that the law applied exception may not be used in order to counter the recognition of foreign judgments in Latin American countries. The main elements of the Colombian Supreme Court decision are as follows:[120] not all Colombian mandatory provisions must be applied, but only those which represent fundamental principles; the recognition of foreign judgments does not imply the revision of their merit; the notion of *ordre public* must be defined in reference to international principles, as a requirement of a globalized world; the *ordre public* notion must not be defensive, nor destructive, but dynamic, tolerant and constructive; [121] Colombian citizens should not use this subterfuge to escape the fulfillment of obligations assumed abroad.

Uruguayan case law shows the same attitude, towards both foreign law and foreign decisions.[122] In Venezuela, the PIL Act of 1998 does not even mention public policy as a concrete ground for the refusal of recognition or enforcement of foreign judgments.[123] In Brazil, there is a certain optimism with respect to the above-mentioned changes in competence on the same matter[124]. However, no one could say that the Federal Supreme Court has been restrictive in the treatment of

[119] Case 'Prodeco Productos de Colombia, S.A.' See note by SILVA J.A., in: *Rev. Mex. DIP* 2005, pp. 81-84.

[120] As summarized by SILVA J.A., *ibid.*

[121] In the Declaration of Uruguay to the Inter-American Conventions of 1979 (CIDIP II) on the General Rules of Private International Law and on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, the following paragraph is included: 'in the opinion of Uruguay, the approved formula conveys an exceptional authorization to the various State Parties to declare in a non-discretionary and well-founded manner that the precepts of foreign law are inapplicable whenever these concretely and in a serious and open manner offend the standards and principles essential to the international public order on which each individual State bases its legal individuality.'

[122] See ARRIGHI P., 'Jurisprudencia uruguaya actual de DIPr, fallos de la Suprema Corte de Justicia; ejecución de sentencias extranjeras', in: *Rev. Urugaya DIP* 2001, p. 146 *et seq.*; VESCOVI E., 'El litigio judicial internacional en Uruguay', in: *DeCITA* 4 (2005), pp. 732-735.

[123] See MAEKELT T.B., 'Das neue venezolanische Gesetz über Internationales Privatrecht', in: *RabelsZ* 2000, p. 399; ID., 'Eficacia de las sentencias extranjeras en el sistema venezolano', in: *Liber Amicorum Jürgen Samtleben* (note 10), pp. 568-569.

[124] See *supra* note 84 and accompanying text.

foreign decisions.[125] For the moment, there have been some good signs since the transfer of competence, among others, in the application of the Inter-American Convention on the International Return of Children (CIDIP IV, 1989).[126]

D. Flux and Reflux of Arbitration

The concept of international commercial arbitration, as a reality that goes beyond legal and geographical borders – while believable from the arbitrators' perspective or in a purely theoretical dimension –, becomes a scarcely apparent truth when it comes to the perception of arbitration held by some national authorities and many judges and courts. Certainly, there are countries in which, though present in the legal systems, arbitration as a method of solving international commercial disputes has had to overcome serious cultural and even psychological obstacles. This was the case in the Latin American countries that have moved towards arbitration during the last years.[127] States send many signals about arbitration, but do not always proceed in the same direction. Obviously, time changes attitudes, but at the same

[125] DE ARAUJO N. / MARQUES F., 'Os requisitos para a homologação de sentença estrangeira: análise dos julgados do STF', in: *Estudos em homenagem a Erik Jayme*, (note 40), p. 238 ('the STF has shown tolerance').

[126] See the decision of the Chief-Judge of the Superior Court of Justice, of January 10, 2006 (available on the website <http://stj.gov.br>) which orders the return of a child, required by a Bolivian judge by means of a letter rogatory. Chief-Judge Vidigal expressly stated that nothing in this letter rogatory was contrary either to Brazilian public policy or to Brazilian sovereignty.

[127] Since 1989, fifteen Latin American States have renewed their arbitration law. See MONTILLA SERRANO F., 'Le traitement législatif de l'arbitrage en Amérique Latine (quelques réformes récentes)', in: *Revue de l'arbitrage* 2005, pp. 561-602; KLEINHEISTERKAMP J., *International Commercial Arbitration in Latin America. Regulation and Practice in the MERCOSUR and the Associated Countries*, Dobbs Ferry (NY) 2005; GRIGERA NAÓN H.A., 'Arbitration in Latin America: Overcoming Traditional Hostility (An Update)', in: *Univ. Miami Inter-Am. L. Rev.* 22 (1991), p. 203 *et seq.*; *id.*, 'Latin American Arbitration Culture and the ICC Arbitration System', in: FROMMEL S. / RIDER B.A.K. (eds.), London 1999, pp. 117-146; GONZALO QUIROGA M., 'Hacia la consolidación de una cultura arbitral en América Latina: la colaboración entre jueces y árbitros', in: *RCEA* 1999, pp. 339-350; BLACKABY N. / LINDSEY D. / SPINILLO A. (eds.), *International Arbitration in Latin America*, The Hague 2002; SAMTLEBEN J., 'Die Reform der Schiedgerichtsbarkeit in den Mitgliedstaaten der Andengemeinschaft', in: *IDR* 2004/4, pp. 159-172; MASON P.E., 'Sete chaves para a arbitragem na América Latina', in: *RAB* 2004, pp. 60-82; SILVA-ROMERO E., 'América Latina como sede de arbitrajes comerciales internacionales. La experiencia de la Corte Internacional de Arbitraje de la CCI', in: *DeCITA* 2 (2004), p. 17 (talking about the current relevance of Latin America in the arbitration world). This fact also has a correlate in the encouragement and development of alternative methods for the solution of disputes (ADR) in Latin America. See DROULERS D.C., 'Alternative Methods of Dispute Resolution in Latin America', in: *ICC Bull.*, Sp. Supp., 2001, pp. 51-61; FALCÃO H. / SÁNCHEZ F.J., in: BLACKABY N. / LINDSEY D. / SPINILLO A. (eds.) (this note), pp. 415-438.

time, these may contain obvious contradictions.[128] Two kinds of obstacles to arbitration remain: those based on traditional hostility towards arbitration in general, and those, less severe, of a technical character.[129]

In countries with a separation of powers, it is common that the judicial power does not follow the pace of the Legislative or the Executive. In some cases, it creates bolder solutions but, in general, it slows the developments achieved through the approval of new legal texts or the incorporation into international agreements. The paradigmatic example of this may be what happened in Brazil with the Arbitration Act of 1996, which was delayed for five long years in the Supreme Federal Court because of a long discussion of its constitutionality, caused by a request for the homologation of a decision issued in Spain.[130] The matter had to do with the constitutional regulation that guarantees access to the judicial courts.[131] Another kind of dichotomy, between national and international rules, on the one hand, and judicial practice related to arbitration, on the other hand, may be found in the experiences of other Latin American countries.[132] Without a doubt, this troubled situation is linked to the proliferation of arbitral controversies on investment issues (State contracts), a matter prone to attract political, rather than legal arguments.[133]

In spite of all these contradictions, it is interesting to confirm that in the 580 cases registered in the Arbitration Court of the ICC during 2003, 12,12% of the involved parties came from Latin America and the Caribbean. It is also astonishing that Argentina, Mexico and Brazil are among the twelve States that offer the most arbitrators within that Court.[134]

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[128] See GRIGERA NAÓN H.A., 'Arbitration and Latin America: Progress and Setbacks (2004 Freshfields Lecture)', in: *Arb. Int.* 2005-2, pp. 127-176.

[129] KLEINHEISTERKAMP J. (note 127), p. 465. Nevertheless, MONTILLA SERRANO F. (note 127), p. 600-602, does not find such hostility. For him, the problems are the heavy tradition of local procedural rules and the lawmakers' lack of experience of practical arbitration issues.

[130] Supreme Federal Court, *Sentença estrangeira contestada, Processo* n. 5.206/7.

[131] MURIEL M.A., 'A arbitragem frente ao judiciário brasileiro', in: *Revista Brasileira de Arbitragem* 2004, pp. 27-39.

[132] See URIBE-BERNATE C.L., 'La práctica del arbitraje internacional en Colombia', in: *Liber Amicorum Jürgen Samtleben* (note 10), pp. 701-718 (cf. specially p. 717: 'it is really worrying ... to realize that the traditional territorialism of judicial authorities is not avoidable by means of legislation or the ratification of international treaties'). Also, in Argentina, several recent decisions of the Supreme Court show some uncertainty about arbitration. Compare decision of November 5, 2002, 'Meller', with decision of June 1, 2004, 'Cartellone'. See CASELLA D.A., 'El control judicial de los laudos arbitrales en el derecho argentino', in: *DeCITA* 3 (2005), pp. 462-469.

[133] See FERNÁNDEZ ARROYO D.P., 'Los dilemas del Estado frente al arbitraje comercial internacional', in: *Revista Brasileira de Arbitragem* 2005, pp. 99-128.

[134] See '2003 Statistical Report', in: *ICC Bull*. 2004/1, pp. 7-16.

V. Conclusions

Since this essay is not exhaustive, it cannot be used as a basis for conclusive opinions. However, it may be a guide to current trends and to what can be expected of the foreseeable future. The present trends of PIL imply challenges, and many of them need a global response. In fact, the phenomena that take place within the internationalization framework (markets, law), the post-modern culture, the influence of human rights and the privatization of PIL,[135] contribute to a new PIL, different from that of some years ago. The clearest phenomenon could be that which shows that private legal relationships, related to two or more legal systems (that is to say those which are subject to PIL), are no longer an exception or something unusual. Therefore, the times in which systems could easily function with some unconnected rules are gone. In addition, the search for international solutions to international problems, so well imagined by jurists like Gonzalo Ramírez or Antonio Sánchez de Bustamante, is now more necessary than ever. It may have been an option in the past. Today it is a necessity.

Within this framework, the codification of international private relationships on a regional scale is still meaningful. If national PIL systems last, and they will in the foreseeable future, there must be some rules of engagement between the State and the world, considering the difficulties and the notorious heterogeneity in the ways States relate to the world. State integration, seen as an internal improvement of resources and an external strengthening (the EU is a paradigmatic example of this), brings a series of legal consequences that have singular repercussions on PIL. The exponential growth of international private relationships has increased the work of the international organizations, which are in charge of creating mechanisms to make these relationships work optimally. This task requires cooperation and dialogue between organizations of universal vocation and those that have a more defined and limited geographical range.

The OAS has played a key role in the American codification of PIL during the 30 years the CIDIP has been in force. Nowadays, it is suffering some pressure from the universal ambit (which better adapts to a legal reality marked by the globalizing trends) and from the sub-regional level (in which normative unification will tend to stand out, if the current processes evolve beyond the inter-governmental character, becoming more supra-national). Although the OAS' future as a codifying forum of PIL, able to give valid responses to all the member States, is questionable, the regional codification of PIL will continue. The OAS States will have to decide if the Organization can and must be the forum to develop such a codification. So far, this seems to be what the majority thinks. If the Organization continues in its role, it is essential to take into account that the law, the OAS and the problems have all changed in the last 20 or 30 years,[136] and that all interests must be

[135] About these trends in PIL, see FERNÁNDEZ ARROYO D.P. (ed.) (note 75), pp. 59-81.

[136] See the persuasive analysis of ARRIGHI J.M., 'Nuevos desarrollos del derecho interamericano', in: *Liber Amicorum Opertti Badán* (note 3), pp. 565-591.

represented in the selection of the topics to be addressed, in the processes of drafting legislative texts and, mainly, in their results. It is time for Latin-American countries to look to the future rather than to the past.