

# **PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW: A RELATIONSHIP CHALLENGED BY INTERNATIONAL AND SUPRANATIONAL LAW**

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*In loving memory of Tatiana B. de Maekelt*

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## **I. Introduction: A Classical Comparative Paradigm for a Classical PIL**

Private International Law (PIL) and Comparative Law have for many years been seen as a couple.<sup>1</sup> More precisely, we could say without hesitation that the shared view has always been that of a very harmonious couple, one of those couples in which the interests and the goals of each party are exactly complementary. Perhaps we could discuss the relevance of such a characterisation and, in particular, the substantial differences of character of the members of that couple and the promiscuity of one of them. I prefer, however, to leave that discussion for another time and focus my contribution only on the fact that the traditional conception of Comparative Law is not suited for the current PIL. Comparative Law is a necessary, essential tool for the functioning of PIL. This is far from a new assumption. The best conflicts scholars since at least Samuel Livermore and Joseph Story have based their theories on it,<sup>2</sup> and the comparative approach is still present in the most remarkable General Courses of The Hague Academy.<sup>3</sup> We have all been instructed how to use comparative methodology in the fields of applicable law, jurisdiction,

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<sup>1</sup> FAUVARQUE-COSSON B., 'Comparative Law and Conflicts of Laws: Allies or Enemies? New Perspectives on an Old Couple', in: *Am. J. Comp. L.* 2001, p. 413 *et seq.*; ID., 'Droit international privé et droit comparé: brève histoire d'un couple à l'heure de l'Europe', in: *Liber amicorum Hélène Gaudemet-Tallon*, Paris 2008, p. 43 *et seq.*

<sup>2</sup> JUENGER F.K., *Choice of Law and Multistate Justice*, special ed., Ardsley 2005, at 29-31.

<sup>3</sup> Such as those of Pierre LALIVE, Alfred E. VON OVERBECK, Friedrich K. JUENGER, Georges A.L. DROZ, Erik JAYME, Arthur T. VON MEHREN, Bernard AUDIT...

enforcement of foreign decisions and co-operation between authorities; that is to say, in all of the fields considered today as the components of PIL.

The problem, however, is that PIL has deeply changed in recent years and, in the current context, the ordinary use of comparative methodology in our field seems to be clearly unsatisfactory. The basic idea of my present contribution is that, given the changes that have occurred in PIL, the use of comparative law in relation to it must also change. Comparative law is now more essential than ever, however it requires a more comprehensive and dynamic approach.

To develop this basic idea, I firstly tackle some of the most significant characteristics of current PIL, namely, those which are transforming the discipline (II and III). Secondly, I seek to answer the question of how comparative methodology should change in order to cope with this 'new' PIL (IV). Thirdly, and most importantly, I address the need for a broad comparative approach to the teaching (and learning) of PIL (V), which is the very core of my contribution. I then conclude my essay with a few, hopefully useful, final remarks.

## **II. Reasons for and Consequences of PIL Changes**

The present mutation of PIL is the result of several factors. All of them are related, although in different ways and to different extents, to two fundamental phenomena: the processes of internationalisation and integration / supra-nationalisation which affect all aspects studied by human sciences. Among the relevant factors, I wish to mention only a few that are particularly pertinent. To underline some examples related to these factors (chosen on a mostly random basis amongst many possible others) it might be useful, beyond the main purpose of this essay, to evaluate once more the limited – though still necessary – role of classical conflict of laws method.

### **A. Technological Development**

#### ***1. e-Registries for Security Interests***

A significant area in which it is easy to realize the impact of technology is the implementation of electronic registries for security interests. The changes do not only concern the shift to electronic devices rather than paper, but also regarding remote access in real time to registries. These changes have generated answers that were not in the catalogue of classic conflict answers, and, more than this, which put conflict mechanisms in a corner that is visited only as last resource.

- (ex. 1): The 2001 UNIDROIT / ICAO Convention on International Interests in Mobile Equipment, better known as the Cape Town Convention, and its Protocol on Aeronautic Equipment, which already have 32 and 29 contracting

parties respectively,<sup>4</sup> owe their success to the creation of a single universal registry for all possible security interests on this kind of goods.<sup>5</sup> Under the Convention, formalities for the constitution of an interest are easy to fulfil; access to the registry and the consultations by ‘any person’ are equally easy. In this context it is not strange that the role of rules of choice of law is limited by the Convention. On the one hand, strictly speaking, the confessed will of the Convention is that choice of law rules do not apply to ‘[q]uestions concerning matters governed by this Convention which are not expressly settled in it’ without first exhausting all the possibilities offered by the ‘general principles on which it is based’. On the other hand, the Convention does not designate a concrete applicable law but merely calls for the application of the forum PIL, which means that the applicable law depends on the rules of jurisdiction. Being a Convention that regulates parties’ relationships of a certain economic power, party autonomy is the basic general rule and the particular rule for the designation of the court to adjudicate. Certainly, the overwhelming logic of this option, and its correlatively quick acceptance by diverse states from Cuba to the United States, is astonishing if compared with the dogma of exclusive jurisdiction over several matters which still reigns all over the world.

- (ex. 2): In the Americas, the Inter-American Specialized Conference on PIL (CIDIP) adopted the Model Law on Security Interests in 2002,<sup>6</sup> which has since been taken as a model by Peru and Guatemala.<sup>7</sup> Recently, the CIDIP VII (I)<sup>8</sup> has adopted the Model Rules for the Registry, a set of common directives for setting up and regulating access to electronic registries, which complete the frame-

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<sup>4</sup> Parties, not ‘states’, since one of those is the EU (see Art. 48(2) of the Convention and Art. XXVII of the Protocol), which means 26 out of its 27 member states (because of the particular status of Denmark).

<sup>5</sup> See GOODE R., ‘The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing’, in: *Unif. L. Rev.* 2002, p. 3 *et seq.* (‘The international interest is a unique creation; so too is the International Registry’); CUMMING R.C.C., ‘The International Registry for Interests in Aircraft: An Overview of its Structure’, in: *7/8 DeCITA 2007*, p. 133 *et seq.* Goods referred to by the Convention and its respective Protocols are individualized and of high value (airframes, aircraft engines and helicopters; railway rolling stock; and space assets).

<sup>6</sup> See KOZOLCHYK B. / WILSON J., ‘The Organization of American States’ Model Inter-American Law on Secured Transactions’, [www.natlaw.com/hndocs/artoasmlbkjw.pdf](http://www.natlaw.com/hndocs/artoasmlbkjw.pdf); WILSON J. / GUTIÉRREZ M.R., ‘Implementación y operación de la Ley Modelo interamericana sobre garantías mobiliarias de la Organización de los Estados Americanos’, in: *7/8 DeCITA 2007*, p. 182 *et seq.*

<sup>7</sup> Also Mexico has modified its security system in accordance with the Model Law but the successive Mexican reforms on this matter were more a requirement of the economic integration process with the United States and Canada rather than a consequence of the Model Law. See SÁNCHEZ CORDERO, J., ‘Las garantías mobiliarias mexicanas. Las zozobras mexicanas’, in: *Homenaje Rodolfo Cruz Miramontes*, t. II, México 2008, p. 455 *et seq.*

<sup>8</sup> The expression ‘CIDIP VII (I)’ is used because, for the first time, the Organization of American States has decided to divide the conference by convoking a meeting for the topic of electronic registries (Washington, DC, 7-9 October 2009) and another meeting for the topic of consumer protection in the international arena (Brasília, 2010).

work supplied by the Model Law.<sup>9</sup> The change of perspective proposed by both instruments is quite radical since they tend to organize for the future an interconnected system of registries in which securities will be ordered by debtor's name, accessible from remote jurisdictions. With a harmonized securities system, a single registration model, and a set of standardized forms, the place for traditional conflict solutions (even for traditional conflict problems!) should be rather small.

## 2. *e-Contracts*

Another topic related to technological development is that of the form of contract, in particular shifting from the real to the virtual. National, international and supra-national lawmakers are coming up with new rules to cope with new situations. It goes without saying that increased use of electronic means of communication to celebrate a contract does not deprive the existing rules, whether substantive or conflict-related, of their usefulness. Moreover, situations such as the determination of the domicile of a company are equally problematic irrespective of whether that company contracts by traditional or modern means. Nevertheless, since e-commerce has become an important part of international transactions, several aspects of international contract law need to be dealt with.<sup>10</sup>

- (ex. 1): Thus, for example, UNCITRAL has adopted two model laws on e-commerce and e-signatures, and the Convention on the Use of Electronic Communications in International Contracts (2005)<sup>11</sup> – not yet in force.

- (ex. 2): In 2006, UNCITRAL amended the very successful 1985 Model Law on International Commercial Arbitration in order to introduce two options related to the form requirement for arbitration agreements, also adopting a recommendation to take the same into account when applying the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. As to the former, the original idea was to introduce a rule to deal with the use of electronic means to conclude an arbitration agreement. However, the rule prepared by the Working Group on arbitration and conciliation proved to be so tortuous – including the

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<sup>9</sup> OEA/Ser.K/XXI.7, CIDIP-VII/doc.3/09, 19 October 2009.

<sup>10</sup> See JAYME E., 'Le droit international privé du nouveau millénaire: la protection de la personne humaine face à la globalisation', in: 282 *Recueil des Cours* 2000, at 32-34; RODRÍGUEZ BENOT A., 'La influencia de la globalización en la elaboración, aplicación e interpretación del sistema de Derecho internacional privado: especial referencia al comercio electrónico y a la contratación internacional', in: CALVO CARAVACA A.-L. / BLANCO-MORALES LIMONES P. (eds.), *Globalización y Derecho*, Madrid 2003, p. 507 *et seq.*; VELÁZQUEZ GARDETA J.M., *La protección al consumidor online en el derecho internacional privado interamericano*, Asunción 2009, at 48-70.

<sup>11</sup> GABRIEL H.D., 'The United Nations Convention on the Use of Electronic Communications in International Contracts: An Overview and Analysis', in: *Unif. L. Rev.* 2006, p. 285 *et seq.*

oddity of an oral agreement which may be reputed as a written one<sup>12</sup> – that the Group ultimately adopted an optional second redaction that eliminates the written requirement. That is to say that the amendment needed to deal with new technologies has resulted in the total elimination of a requirement traditionally and broadly accepted and present in the widely applied 1958 New York Convention.<sup>13</sup>

- (ex. 3): Another amazing example is the revolution in consumer law, formerly a primarily domestic area and now an increasingly international one, largely due to the Internet and to mass tourism. Fundamental technological changes in communications and transport influence several traditional issues of PIL, such as the scope of party autonomy, the application of mandatory rules, and, more generally, the protection of parties with a limited bargaining power. All these issues have suffered from the multiplication and diversification of cases that occurs with globalisation. In fact, judges are learning consumer PIL as they struggle to solve real cases,<sup>14</sup> and lawmakers try to invent new answers to questions which vary every single day. It is useful to think about the prevalence of this topic in EU Law, where cases related to consumers are frequent.<sup>15</sup> More precisely, the EU is revising all its consumer *acquis* in order to achieve a complete harmonisation on this matter.<sup>16</sup> Even more interesting are the proposals submitted within the CIDIP, each of a different nature and scope,<sup>17</sup> in a striking example of the plural character of current PIL.

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<sup>12</sup> LANDAU T., 'The Requirement of a Written Form for an Arbitration Agreement: When «Written» Means «Oral»', in: VAN DEN BERG A.J. (ed.), *International Commercial Arbitration: Important Contemporary Questions*, The Hague 2003, p. 19 *et seq.*

<sup>13</sup> Offering options to the states seems not to be the best solution to a model law. See, however, PERALES VISCASILLAS P., '¿Forma escrita del convenio arbitral?: nuevas disposiciones de la CNUDMI/UNCITRAL', in: 197 *Derecho de los Negocios* 2007, p. 5 *et seq.*

<sup>14</sup> Although some of those cases arise within the virtual world as in *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D.Penn. 2007). See VELÁZQUEZ GARDETA J.M., 'Protección real de derechos de propiedad intelectual en las plataformas virtuales (sobre algunas recientes decisiones judiciales que afectan a *Second Life*)', in: 10 *DeCITA* 2009, p. 223 *et seq.*

<sup>15</sup> See, recently, ECJ, C-180/06, 14 May 2009, *Ilse*.

<sup>16</sup> See *Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 final. This EU feature provokes doubts and criticism as it is reflected in WHILHELMSSON T., 'Full Harmonization of Consumer Contract Law?', in: *ZEUP* 2008-2, p. 225 *et seq.*, and REICH N., 'Die Stellung des Verbraucherrechts im «Gemeinsamen Referenzrahmen» und im «optionellen Instrument» – Trojanisches Pferd oder Kinderschreck?', in: *Liber amicorum Bernd Stauder*, Geneva 2006, at 364-369.

<sup>17</sup> Brazil has presented a Draft Convention on the Law Applicable to International Consumer Contracts and Transactions, whose last version (October 2009) is supported by Argentina and Paraguay; Canada has proposed a Model Law on Jurisdiction and Choice of Law to Consumer Contracts; and the United States (US) have submitted a Draft of Legislative Guidelines on Availability of Consumer Dispute Resolution and Redress for Consumers with three annexes that provide: a) a Model Law on Small Claims; b) Model Rules for Cross-border Arbitration; and c) a Model Law on Government Redress. See VELÁZQUEZ

### **3. e-Apostilles**

Among the instruments adopted by the Hague Conference on Private International Law in the field of international cooperation, the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) has become the most successful (with almost 100 contracting states) and perhaps the most useful. Since the necessity to provide authentic documents is present in every area of PIL, the practical relevance of this Convention is beyond comparison. What is noteworthy in the context of this essay is the increased utility of the Convention through the application of modern technologies. The Hague Conference and the National Notary Association have together created the e-Apostille Pilot Program (e-APP), aimed at implementing software for the issuance and use of e-Apostilles, on the one hand, and the operation of e-Registries of Apostilles on the other. Today, seven nation states, two North-American states and a Spanish region are participating in the e-APP.<sup>18</sup>

### **B. Increase in Cross-Border Traffic**

It has become commonplace in PIL to underline the amazing development of international relationships among physical and legal persons and the increased circulation of tangible and intangible goods in both the real and virtual worlds. Even if we limit our analysis to the real world, it is now common for a person to have links with states and communities other than those of their origin. Prominent scholars<sup>19</sup> have highlighted this situation and its legal consequences. Relationships have multiplied and are shaped under different forms and combinations.

#### **1. Movement of Human Beings – Impact on International Family Law**

The determination and inclination to move across borders is inherent to human nature. International mass migrations, including those premised on economic reasons, have always existed. The phenomenon has constituted a major social issue

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GARDETA J.M. (note 10) *passim*; FERNÁNDEZ ARROYO D.P., ‘Current Approaches Towards Harmonization of Consumer Private International Law in the Americas’, in: *I.C.L.Q.* 2009, p. 411 *et seq.*

<sup>18</sup> See <www.e-app.info>; CELIS AGUILAR M., ‘Primer Foro internacional sobre la notariación y las apostillas electrónicas’, in: *5/6 DeCITA* 2006, p. 261 *et seq.* Technology may also be very useful in the implementation of other conventions. See LORTIE PH., ‘The Development of Medium and Technology Neutral International Treaties in Support of Post-Convention Information Technology Systems’, in: this *Yearbook* 2008, p. 359 *et seq.*

<sup>19</sup> JAYME E. (note 10), p. 23 *et seq.*; OPERTTI BADÁN D., ‘El derecho internacional privado en tiempos de globalización’, in: *6 Rev. Uruguay DIPr* 2005, p. 15 *et seq.*; BASEDOW J., ‘Global Life, Local Law? – About the Globalisation of Law and Policy-Making’, in: *Liber amicorum Didier Operti Badán*, Montevideo 2005, p. 819 *et seq.*

since at least the 19<sup>th</sup> Century. Nonetheless, due to globalisation and some of its associated factors (such as free trade, international organisation of companies and technological advances in transport and communication), together with the obvious growth of world population, international migrations have known, during the last decades, dimensions never seen before.<sup>20</sup> Developed countries<sup>21</sup> seek to control migrations by means of physical and legal barriers,<sup>22</sup> but the strength of the migratory phenomenon render such efforts unlikely to achieve any real success. Not only has the number of people immigrating dramatically increased, but the speed and the heterogeneity have too. Not surprisingly, then, international migrations draw the attention of human sciences in general. From the perspective of PIL, key issues are the high level of mobility of populations and the constitution of multicultural societies which affect several matters, particularly family law.<sup>23</sup>

(ex. 1): In the first place, intensity of fluxes of people, in addition to cultural and social changes, has provoked the affirmation of party autonomy in domestic and international family law. Indeed, the right of the parties of a legal relationship to choose the judge and the law to solve their disputes, traditionally an issue studied within the field of contracts, has clearly crossed the borders of contract law to enter into succession law or other family related matters.<sup>24</sup> The old pretensions of states to follow their subjects with particular state family conceptions (nationality principle) or to submit all the inhabitants to their own law (domicile principle) can hardly function in the context of continuous movement of people. Therefore, besides the generalized use of the habitual residence connecting factor, legal systems increasingly offer a more significant role to party autonomy. The 1998 Venezuelan PIL Act expressly accepts choice of forum in disputes related to civil status or family relations, provided that the dispute has an 'effective link' with Venezuelan territory.<sup>25</sup> Within the EU, although in a more convoluted fashion, party autonomy is present in the Regulation 2201/2003 on jurisdiction and judgments on

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<sup>20</sup> According to the International Organization for Migrations, 'more and more people are on the move today than at any other point in human history' (<[www.iom.int/jahia/Jahia/about-migration/lang/en](http://www.iom.int/jahia/Jahia/about-migration/lang/en)>).

<sup>21</sup> Including relatively developed countries, which means countries more developed than their neighbours.

<sup>22</sup> See, for example, PARROT K. / SANTULLI C., 'L'Union européenne contre les étrangers', in: *Rev. cr. dr. int. pr.* 2009, p. 205 *et seq.*

<sup>23</sup> See, in general, VAN LOON H., 'Vers un nouveau modèle de gouvernance multilatérale de la migration internationale. Réflexions à partir de certaines techniques de coopération développées au sein de la Conférence de La Haye', in: *Liber amicorum Hélène Gaudemet-Tallon*, Paris 2008, p. 419 *et seq.*, and, in the field of family law, BOELE-WOELKI K., 'What Comparative Family Law Should Entail?', in: BOELE-WOELKI K. (ed.), *Debates in Family Law Around the Globe at the Dawn of the 21<sup>st</sup> Century*, Antwerp *et al* 2009, in particular at 31-33.

<sup>24</sup> Of course, that assumption does not allow us to ignore that there still are excellent studies limited to this 'commercial' manifestation of party autonomy, as BRIGGS A., *Agreements on Jurisdiction and Choice of Law*, Oxford 2008.

<sup>25</sup> Article 42(2).



family matters, as well as in the future EU Regulation 'Rome III' on the law applicable to divorce.<sup>26</sup>

(ex. 2): In addition to the growing reliance on party autonomy, the relaxation of policies in family law should also be noted. Prohibition of divorce has disappeared in most jurisdictions. States whose legal systems have long granted divorces now offer more flexible procedures and less stringent formal requirements for recognition of marriages and divorces. Brazil, for example, has modified the Civil Procedure Code to allow, with certain requirements, divorces without judicial intervention.<sup>27</sup> Previously, Brazil's highest courts had recognized diverse types of non-judicial foreign divorces, decided by a royal decree (Denmark), by a religious court (Israel), and by an administrative decision (Japan).<sup>28</sup>

(ex. 3): Another significant point lies in the judicial and legislative answers that legal systems are giving to questions arising from cases involving intercultural families. Among the number of useful examples, it is particularly worth noting the 2003 Spanish Civil Code reform of Article 107 on the law applicable to divorce and nullity;<sup>29</sup> the decisions of the French *Cour de Cassation* (1<sup>st</sup> Civil Chamber) of 17 February 2004 on the matter of repudiation;<sup>30</sup> and, on the other bank of the Mediterranean Sea, the 1998 Tunisian PIL Code that has substituted domicile for nationality as a jurisdiction ground,<sup>31</sup> even for family disputes (such as capacity, marriage, and divorce).<sup>32</sup>

## **2. *Transfer of Companies Seat and Off-Shore Activities***

Companies, like human beings, have experienced the vertigo of worldwide mobility and ubiquity facilitated by globalisation. Ubiquity is due to the proliferation of multinational companies, and the seizing of the possibilities afforded by electronic means. Mobility can be perceived, almost daily, when newspapers carry

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<sup>26</sup> See CALVO CARAVACA A.-L. / CARRASCOSA GONZÁLEZ J., 'La Ley aplicable al divorcio en Europa: el futuro Reglamento Roma III', 1 *Cuadernos de derecho transnacional* 2009, <<http://kusan.uc3m.es/CIAN/index.php/CDT/article/view/525>>.

<sup>27</sup> Act No 11441, 4 January 2007.

<sup>28</sup> ARAUJO N. DE, *Direito Internacional Privado: teoria e prática brasileira*, 3rd ed., Rio de Janeiro 2007, at 299 and note 595.

<sup>29</sup> CALVO CARAVACA A.-L. / CARRASCOSA GONZÁLEZ J., 'El divorcio internacional y el nuevo artículo 107.2 del Código Civil', *La Ley* 2004-3, p. 1745 *et seq.*

<sup>30</sup> *Rev. cr. dr. int. pr.* 2004, p. 423 *et seq.*, note HAMMJE P.

<sup>31</sup> HACHEM M.E.A., 'Le Code tunisien de droit international privé', *Rev. cr. dr. int. pr.* 1999, at 230-231 ('le législateur est revenu à une position raisonnable, trouvant dans le droit comparé la mesure de la répartition des compétences, des exigences du contrôle des décisions étrangères et de la protection des autres souverains').

<sup>32</sup> On the opposition amongst conservative scholars and judges, see GHAZOUANI M., 'Nationalité et compétence judiciaire', in: *Le Code tunisien de droit international privé deux ans après*, Tunis 2003, p. 13 *et seq.*

news about companies that decide to transfer their seat and/or activities from one country to another. This occurs, most frequently, in the context of the reorganisation of multinational company operations.

(ex. 1): It is well known that within the integrated market of the EU a real revolution has taken place with regard to the free movement of services and freedom of establishment. Confronted with these fundamental freedoms, states have lost part of their control over companies incorporated or acting in their territory.<sup>33</sup> The traditional PIL on companies had to reopen the old discussion about the appropriated connecting factor for company issues.<sup>34</sup> Notwithstanding its relevance, this problem (as with many other problems related to the EU) is simply an internal situation of a quasi-federal organisation that has a unified, though incomplete, PIL. The law-making power of the states is so reduced that the intra-community company cases increasingly resemble domestic cases, and a case connecting Spain with Romania is not dramatically different to a case linking Catalonia with Extremadura.

(ex. 2): Outside (and across) the borders of the EU, litigation on company issues is also reaching a considerable intensity; cases sometimes deal with fully operating companies, sometimes at the time of their financial difficulties.<sup>35</sup> Furthermore, the internationalisation of the activities of companies has required a hard legislative work from the UNCITRAL,<sup>36</sup> as well as innovative proposals to adapt classical conflicts methodology to the specificities of current problems.<sup>37</sup>

### 3. *Free Movement of Cultural Goods*

Another interesting yet totally different topic related to the current increase in cross-border traffic is the free movement of cultural objects, with its particular

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<sup>33</sup> See for instance, the obligation laid upon the member states to register the subsidiary of a company incorporated in another member state although the main activities are generated on its territory: ECJ, C-212/97, 9 March 1999, *Centros*; to recognize a company not incorporated in their country as a national company if its activities are generated in its territory: ECJ, C-208/00, 5 November 2002, *Überseering*; or the prohibition for a member state to apply specific rules to a subsidiary of a *pseudo* foreign company: ECJ, C-167/01, 30 September 2003, *Inspire Art*.

<sup>34</sup> See the cases cited in the previous footnote and also ECJ, C-210/06, 16 December 2008, *Cartesio*.

<sup>35</sup> During recent years, for example, several cases about Uruguayan companies in Argentina have presented often mixed problems and solutions on company and insolvency law. See, among many others Commercial National Court of Appeals, Chamber D, 13 April 2000, *Proberan*, in: *La Ley* 2001-B, p. 101 *et seq.*; Chamber A, 18 April 2006, *Boskoop*, in: *7/8 DeCITA* 2007, p. 504 *et seq.*

<sup>36</sup> See MORÁN BOVIO D., 'Secuencia de los trabajos sobre insolvencia en UNCITRAL', in: *11 DeCITA* 2009, p. 61 *et seq.*

<sup>37</sup> See D'AVOUT L., 'Sentido y alcance de la *lex fori concursus*', in: *11 DeCITA* 2009, p. 38 *et seq.*

conflicts of interests and particular legislative and non-legislative answers. Unlike movements of people and legal entities, which are general phenomena with a variety of consequences, the international movement of cultural goods represents quite a specific matter. Beyond their high value and unique character, cultural goods are in the middle of a confluence of various interests conditioning the adoption of appropriated rules to solve problems related to them. Those interests, as has been correctly pointed out,<sup>38</sup> do not belong solely to the individuals and institutions having direct connections with cultural goods (such as artists, owners, *mécènes*, collectors, galleries, museums, auction houses) but also with the general public and the states to whom the goods belong. In the context of such a diverse and difficult panorama, judicial and legal solutions are not always the best ones.

(ex. 1): Thus, several decisions of North-American courts, including one of the US Supreme Court,<sup>39</sup> related to the dispute between Mrs. *María Altmann* and *Austria* about several Gustav Klimt's master pieces shown at the Belvedere Museum of Vienna, have accepted their jurisdiction notwithstanding the fact that neither the defendant nor the goods were located in the United States.<sup>40</sup>

(ex. 2): However, where cultural objects have been stolen or illegally exported, the 1995 UNIDROIT Convention,<sup>41</sup> in force in 30 states spanning all continents, establishes as a ground of jurisdiction the *forum rei sitae*, but allows the intervention of another court only if such intervention is provided by the *lex fori* or by a party agreement. This is a more flexible and appropriate solution.<sup>42</sup>

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<sup>38</sup> JAYME E., 'Globalisation in Art Law: Clash of Interests and International Tendencies', in: 38 *Vanderbilt J. Trans. L.* 2005, p. 928 *et seq.*

<sup>39</sup> *Republic of Austria v. Altmann*, 2004 WL 1238028 (US). See JAYME E., 'Ein internationaler Gerichtsstand für Rechtsstreitigkeiten um Kunstwerke. Lücken im europäischen Zuständigkeitssystem', in: *Festschrift Reinhard Mußnug*, Heidelberg 2005, at 523-524.

<sup>40</sup> For the Federal Court of the Ninth Circuit, by sending its brochures to the United States, the Museum had been 'doing business' in that country. See *Altmann v. Republic of Austria*, 317 F.3d 954, 970 (9<sup>th</sup> Cir. 2002). Critic, JAYME E. (previous note) at 524.

<sup>41</sup> LALIVE P., 'Une avancée du droit international: la Convention de Rome d'UNIDROIT sur les biens culturels volés ou illicitement exportés', in: *Unif. L. Rev* 1996, p. 40 *et seq.*

<sup>42</sup> JAYME E. (note 39), at 524, says that the jurisdiction of the country of origin of cultural objects should be also admitted. The same author (note 38), at 943-944, also underlines the positive effects of techniques of non-binding character ('narrative norms') such as those adopted by the Washington Conference Principles on Nazi-Confiscated Art (see also *IPRax* 1999, at 284-285).

## C. Role of Human Rights in the Private Arena

### 1. Procedural Human Rights

Global trends in facilitating access to justice and protecting defendant's due process rights are increasingly visible regarding issues of jurisdiction, recognition of judgments, and cooperation of authorities.<sup>43</sup>

- In the field of jurisdiction to adjudicate:

(ex. 1): The *forum necessitatis*<sup>44</sup> rule has been generalized, notwithstanding some difficulties in its implementation in particular circumstances.<sup>45</sup> It is worth recalling that the essential purpose of the *forum necessitatis* is to give a supplementary argument to the courts in order to justify their intervention in cases in which they lack jurisdiction. The only aim of the rule is to facilitate the grant of the fundamental right of access to justice. In fact, the evolution of this ground of jurisdiction shows a trend to restrict its scope. In this vein, the Uruguayan Draft PIL Act introduces a list of requirements to authorize the application of the exception.

(ex. 2): The universal (or exceptional) humanitarian jurisdiction: *a*) as understood by the French *Cour de cassation* in 2006,<sup>46</sup> affirming French jurisdiction to decide on an apparent labour contract which was, in reality, a situation of slavery without a significant connection to France;<sup>47</sup> and *b*) as understood under the extensive application of the Alien Tort Statute of the United States, which has opened the way to hold private companies liable for violations of human rights.<sup>48</sup>

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<sup>43</sup> See, in general, KINSCH P., 'Droits de l'homme, droits fondamentaux et droit international privé', in: 318 *Recueil des Cours* 2005, p. 9 *et seq.*; FAUVARQUE-COSSON B., 'Droit comparé et droit international privé: la confrontation de deux logiques à travers l'exemple des droits fondamentaux', in: *R.I.D.C.* 2000, p. 797 *et seq.*

<sup>44</sup> Article 3 Swiss Federal PIL Act, Article 3, Article 11 Belgian PIL Code, Article 565 Mexican Federal Civil Procedure Code, Article 3136 Civil Code of Quebec, Article 2 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (CIDIP III), Article 56(8) Uruguayan Draft PIL Act (2009), etc.

<sup>45</sup> See *Tribunal fédéral suisse*, 1<sup>st</sup> Civil Chamber, 15 December 2005, and 2<sup>nd</sup> Civil Chamber, 22 May 2007; Canadian Supreme Court, 22 July 2005, *GreCon Dimter inc. c. J.R. Normand inc.*, 2005 CSC 46 (CanLII); and RÉTORNAZ V. / VOLDERS B., 'Le for de nécessité: tableau comparatif et évolutif', in: *Rev. cr. dr. int. pr.* 2008, p. 225 *et seq.*

<sup>46</sup> *Cour de cassation, Soc.*, 10 May 2006, *Épx Moukarim v. Isopehi*, *Juris-Data* n° 2006-033408; *JCP*, 2006, p. 1405 *et seq.*, note BOLLÉE.

<sup>47</sup> For this reason, some commentators have expressed their concern regarding the obvious misapplication of grounds of jurisdiction and conflict of law rules in this case. However, even if one can expect the court to rigorously apply rules of PIL, it is without doubt that if we had to choose between the correct application of the rules of the 1980 Rome Convention on the applicable law to contractual obligations and the pragmatic solution that has been taken in that case, we would opt for the latter.

<sup>48</sup> About this evolution, see TEUBNER G., 'The Anonymous Matrix: Human Rights Violations by «Private» Transnational Actors', in: 69 *Modern L. Rev.* 2006, p. 327 *et seq.*

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- In the field of recognition and enforcement of foreign decisions:

(ex. 3): It is worth stressing the consolidation of the procedural aspect of public policy as a barrier to the effects of foreign judgments. The ECJ has found good applications of this exception dealing with cases in which a decision had been taken violating defendant's right to be heard.<sup>49</sup> Latin-American courts go in the same direction.<sup>50</sup>

- In the field of cooperation of authorities:

(ex. 4): In a short period of time litigation of private issues before human rights courts has become a rather ordinary fact. This is true in several aspects of family law.<sup>51</sup> In fact, the European Court of Human Rights has become a truly specialized court in subjects such as child abduction.<sup>52</sup>

## **2. Freedom, Equality and Personal Dignity**

Further evidence of the relevance of the current role of the human rights is the dimension reached by concepts such as freedom, equality and personal dignity, which are affecting different areas of PIL and, in a very particular way, family law.

- The recognition of different models of family:

Traditional conceptions of family in several countries have experienced fundamental changes during recent decades.<sup>53</sup> The ground of all these changes has been the assumption of something evident: in contemporary societies, the way of articulating family relations varies. There is, then, a strong humanitarian component in the evolution of family law, which relies essentially on the progressive development of the right not to be discriminated against on sexual grounds. Needless to say that the feminist movement and secularisation of social life – together with the already mentioned mobility and its impact on family stability – played relevant roles which made this evolution possible. The recognition of same-sex

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See, recently, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), *cert. filed*, 78 USLW 3049 (8 July 2009)(NO. 09-34) (medical experimentation on children in Nigeria).

<sup>49</sup> ECJ, C-7/98, 28 March 2000, *Krombach*; C-394/07, 2 April 2009, *Gambazzi*.

<sup>50</sup> Venezuelan *Tribunal Supremo de Justicia*, Politic-Administrative Chamber, 13 June 2007, *Northstar Trade Finance v. Unopet*; Brazilian *Superior Tribunal de Justiça*, Special Court, 1 August 2006, SEC 879 / US, 2005/0035096-5.

<sup>51</sup> MUIR WATT H., 'Les modèles familiaux à l'épreuve de la mondialisation (aspects de droit international privé)', in: 45 *Arch. phil. dr.* 2001, p. 271 *et seq.*

<sup>52</sup> See ARONOVITZ A., 'May Private Claims be Advanced through the European Court of Human Rights? – A Study of Cross-Border Procedural Law Based on a Case of International Child Abduction', in: 37 *Israel Yearbook on Human Rights* 2007, p. 165 *et seq.* (dealing with ECHR, 27 July 2006, App. 7198/04, *Iosub Caras v. Romania*); and, more generally, BEAUMONT P., 'The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction', in: 335 *Recueil des Cours* 2008, p. 9 *et seq.*

<sup>53</sup> This trend has been especially remarkable in Europe and North America but it has impacted on all over the world.

marriage<sup>54</sup> and other types of same-sex unions and of transsexual rights as well, confirm the continuity of a trend which has served to revitalize old discussions about the so-called general part of conflicts of law.<sup>55</sup>

(ex. 1): In Spain, in addition to the introduction of same-sex marriage by Act 13/2005 of reform of the Civil Code, Act 3/2007 establishes the requirements for registering a change of sex. According to the Preamble of this Act, Spain seeks to join other European countries that have specific legislation giving legal certainty for trans-sexual persons with appropriate medical history. The Spanish Supreme Court has followed this comparative approach.<sup>56</sup> Article 1 of Act 3/2007 provides that only Spanish nationals, adults and with sufficient mental capacity, are able to demand his or her change of legal status. This Act carries out the elements to construe the *ordre public* notion in this matter. Nevertheless, before the enactment of this Act, Spanish case law protected trans-sexuality as an expression of the right to the free development of the personality (Article 10(1) of the Spanish Constitution). Hence, the General Direction of Registry and Notary – a kind of authoritative supervisor of activities related to all Spanish public registries – decided in 2005 that the law of Costa Rica, which avoided the legal change of the sex of a Costa Rican national in Spain, was contrary to the Spanish international *ordre public*.<sup>57</sup>

With other parameters and characteristics, some Muslim law countries have also made progress in order to reduce discrimination against women.<sup>58</sup> Nonetheless this modernisation does not seem to be sufficient in order to meet the European standards regarding the protection of human rights.<sup>59</sup>

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<sup>54</sup> Same-sex marriages are granted in Belgium, Canada, the Netherlands, Norway, South Africa, Spain, Sweden, and in five jurisdictions of the United States.

<sup>55</sup> See BOELE-WOELKI K. (ed.), *Legal recognition of same-sex couples in Europe*, Antwerpen 2003; GONZÁLEZ BEILFUSS C., *Parejas de hecho y matrimonios del mismo sexo en la Unión Europea*, Madrid 2004. In the United States, interstate public policy and even the sacrosanct full faith and credit clause have been put under scrutiny, and federal and state legislative answers ('defense of marriage' acts) have been adopted. See KOPPELMAN A., *Same Sex, Different States: When Same-Sex Marriages Cross State Lines*, Ann Arbor 2006.

<sup>56</sup> *Tribunal Supremo*, Civil Chamber, 17 September 2007 (making a comparative analysis of the legislation of the European countries as well as the case law of the ECHR on this matter).

<sup>57</sup> Resolution DGRN [3rd], 24 January 2005, in: *Rev. cr. dr. int. pr.* 2005, p. 621 *et seq.* and note SÁNCHEZ LORENZO. DGRN has also applied a kind of *renvoi in favorem* in matter of matrimonial capacity, accepting the *renvoi* to the Spanish law to support the *ius connubii* of a homosexual couple (see, in general, *Resolución-Circular DGRN*, 29 July 2005, in: *Rev. crit. dr. int. pr.* 2005, p. 855 *et seq.* and note QUIÑONES ESCÁMEZ).

<sup>58</sup> See FOBLETS M.-C. / LOUKILI M., 'Mariage et divorce dans le nouveau Code marocain de la famille: quelles implications pour les Marocains en Europe?', in: *Rev. cr. dr. int. pr.* 2006, p. 521 *et seq.*

<sup>59</sup> The French *Cour de Cassation*, 1<sup>st</sup> Civil Chamber, 4 November 2009, has issued two decisions about the Moroccan Family Code. In *Bouftila* the Court refuses the recognition of a unilateral divorce (*repudiation*) pronounced in Morocco on the ground of violation of French public policy because, even if it was issued under the court supervision required by the Code, it still infringes the principle of equality. However, in *Dahmouni*, the Court

- The rise of party autonomy:

The main foundation of the growing influence of party autonomy in commercial matters<sup>60</sup> has been the basic economic principle of efficiency, although freedom – as opposed to state control – is also often cited as its justification.<sup>61</sup> In contrast, in family matters, the arguments seem to be inverted: the obvious main foundations are freedom, equality and personal dignity, yet the extension of party autonomy in this area is demanded by obvious reasons of practicality,<sup>62</sup> provoking fairer and more efficient outcomes. This is blatant for topics such as the applicable law to the matrimonial property regime but should be no less obvious for the law applicable to the effects of marriage or divorce.

#### **D. Evolution of Signification of Traditional Legal Concepts**

There are several ways – all diverse yet equally challenging – to study both the applicability and the appropriateness of traditional legal concepts to current general international law.<sup>63</sup> In this essay, the only aim in that respect is to mention just a few examples of current PIL that evidence that, even if those concepts still have a role to play, their meaning is not and, in most cases, can no longer be the same that it used to be.

##### **1. Sovereignty**

The scope and role of modern sovereignty is a subject that worries internationalists. Issues such as economic integration, the weight of powerful multilateral organisations (namely the WTO, the WB, the IMF, or the different ‘G’ groups) and the rise of other actors in the theatre of international law, show that nowadays states’ power has – essentially as a result of their own decisions – diminished.<sup>64</sup>

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annulled the decision of the Court of Appeal which had failed to take into account the Moroccan Code to decide on the pecuniary consequences of the divorce (the Court of Appeal had made an *a priori* application of the *ordre public*).

<sup>60</sup> It has experienced a new universal expression with the adoption of the 2005 Hague Convention on Choice of Courts Agreements, an instrument so preoccupied by equilibrium that it has been criticized as lacking audacity. See KESSEDJIAN C., ‘La Convention de La Haye du 30 juin 2005 sur l’élection de for’, in: *Clunet* 2006, p. 813 *et seq.*; AUDIT B., ‘Observations sur la Convention de La Haye du 30 juin 2005 relative aux accords d’élection de for’, in: *Liber amicorum Hélène Gaudemet-Tallon*, Paris 2008, at 187-188.

<sup>61</sup> JAYME E., ‘Identité culturelle et intégration: le droit international privé postmoderne’, in: 251 *Recueil des Cours* 1995, at 147-148.

<sup>62</sup> See *supra* notes 24-26 and accompanying text.

<sup>63</sup> See, for example, DOMINGO OSLÉ R., *¿Qué es el derecho global?*, 5<sup>th</sup> ed. (1<sup>st</sup> Paraguayan ed.), Asunción 2009, at 116 *et seq.*

<sup>64</sup> VERHOEVEN J., ‘Considérations sur ce qui est commun. Cours général de droit international public (2002)’, in: 334 *Recueil des Cours* 2008, at 50-51 (stating that current

Traditionally, states define their own interests and the mechanisms for developing and protecting them. Sometimes these interests, typically of a public nature, impact private legal relationships. In the context of PIL, the interests of one state can be expressed through different means. Those interests can be enshrined in different categories of norms, such as the mandatory norms (the *lois de police*), or conflict of laws rules and conflict rules of jurisdiction which carry substantive values, and rules of exclusive and exorbitant jurisdiction. The concrete identification of this interest is often difficult and the mention of this particular interest usually means a plea for the application of local law or to ensure the jurisdiction of the judge of the *fora*.<sup>65</sup> Case law in the United States in matters relating to non-contractual liability is perhaps the most useful example.<sup>66</sup> At the same time, however, it becomes apparent that, for different reasons, there exists a long-life trend according to which states will limit the scope of all their manifestations of sovereignty within PIL, either by 'imposition' of their international commitments or by their unilateral will.

(ex. 1): With regard to the scope of public policy, it is noteworthy to mention: *a*) the remarkable Declaration of Uruguay about Article 5 of the Inter-American Convention on general rules of PIL (CIDIP II, 1979), underlining the exceptional character of application of public policy and restricting its scope of intervention;<sup>67</sup> *b*) the requirement of a connection with the forum (*Inlandsbeziehung, ordre public de proximité*), as in the decisions of the French *Cour de cassation* of 2004 about repudiation,<sup>68</sup> and *c*) the trend from national to transnational (or supranational) *ordre public*, as suggested by Pierre Lalive some decades ago, especially in the field of arbitration.<sup>69</sup>

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sovereignty does not allow anymore the accomplishment of [nationals] but that justified it); MENGOZZI P., 'Private International Law and the WTO Law', in: 292 *Recueil des Cours* 2001, at 263-268; MICHAELS R., 'Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?', in: 69 *RabelsZ* 2005, at 540-542; SHAN W. / SIMONS P. / SINGH D. (eds.), *Redefining Sovereignty in International Economic Law*, London 2008.

<sup>65</sup> PATAUT E., *Principe de souveraineté et conflits de juridictions*, Paris 1999.

<sup>66</sup> See the Annual Choice of Law Survey presented by SYMEONIDES S. on the *Am. J. Comp. L.* See also ID., 'The American Choice-of-Law Revolution in the Courts: Today and Tomorrow', in: 298 *Recueil des Cours* 2003, at 361-369.

<sup>67</sup> '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'. See, in the same vein, Colombian Supreme Court, 6 April 2004, *Prodeco Productos de Colombia*. There are also manifestations in Africa. Thus in *Patel v. Bank of Baroda* [2001] 1 E.A. 189, a Kenyan court applies 'current public policy doctrine' (the law had changed). See OPPONG R.F., 'A Decade of Private International Law in African Courts 1997-2007 (Part II)', in: this *Yearbook* 2008, at 373.

<sup>68</sup> See *supra* note 30.

<sup>69</sup> LALIVE P., 'Ordre public transnational (ou réellement international) et arbitrage international', in: *Rev. arb.* 1986, p. 326 *et seq.*, and 'L'ordre public transnational et l'arbitre international', in: *Liber Fausto Pocar*, t. II, Milano 2009, p. 599 *et seq.*; CHEDLY L., *Arbi-*



(ex. 2): Decline of improper (exorbitant) grounds of jurisdiction, which are increasingly rejected by courts and progressively by lawmakers as well,<sup>70</sup> as shown by: *a*) Article 3 of the European Regulation 44/2001 and the 1988/2007 Lugano Convention; *b*) Article 18 of the 1999 Preliminary Draft Hague Convention on jurisdiction and judgments; *c*) §2 2004 ALI / UNIDROIT Principles on Transnational Civil Procedure.

## **2. Territorialism**

The notion of territorialism, on which a large part of the structure of PIL – in particular the aspects related to jurisdiction – has been built, has recently been reconsidered. One is forced to notice that the link of some legal relationships with the territory is not important because they take place in virtual space.<sup>71</sup> As a result, typical concepts of territorialism, such as domicile, the place of celebration of the contract or the location of the damage, in a great number of cases, lose their traditional usefulness.<sup>72</sup> Even if we consider relationships which are totally created within the real world, their high level of internationality, together with the sharing of sovereignty, both characteristics typical of present era, undermine well established dogmas.<sup>73</sup>

(ex.): The increasing relevance of the cooperation of authorities as an essential component of PIL is offering new methods to resolve international conflicts as, for instance, the direct judicial communication model, implemented with success by the Hague Conference in the matter of child abduction and now envisaged in early discussions about a global instrument on information of foreign law.<sup>74</sup>

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*trage commerciale internationale et ordre public transnational*, Tunis 2002; GAILLARD E., 'Aspects philosophiques du droit de l'arbitrage international', in: 329 *Recueil des Cours* 2007, at 116 (citing Swiss Federal Tribunal, 8 March 2006, *Bull. ASA* 2006, at 529).

<sup>70</sup> FERNÁNDEZ ARROYO D.P., 'Compétence exclusive et compétence exorbitante dans les relations privées internationales', in: 323 *Recueil des Cours* 2006, at 160-168.

<sup>71</sup> GROSSFELD B., 'Global Accounting: Where Internet Meets Geography', in: 48 *AJCL* 2000, at 305-306.

<sup>72</sup> MICHAELS R., 'Territorial Jurisdiction after Territoriality', in: SLOT P.J. / BULTERMAN M. (eds.), *Globalisation and Jurisdiction*, Leiden 2004, p. 105 *et seq.* One may realize that the situation is new but not the idea by reading MANN F.A., 'The Doctrine of Jurisdiction in International Law', in: 111 *Recueil des Cours* 1964, at 23-40.

<sup>73</sup> BUXBAUM H.L., 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict', in: *Am. J. Comp. L.* 2009, p. 631 *et seq.*; CUNIBERTI G., 'Le principe de territorialité des voies d'exécution', in: *Clunet* 2008, p. 963 *et seq.*; D'AVOUT L., 'Que reste-t-il du principe de territorialité des faits juridiques? (une mise en perspective du système Rome II)', in: *Recueil Dalloz* 2009, p. 1629 *et seq.*; ID. (note 37) at 38 *et seq.*

<sup>74</sup> Two meetings of experts were held in February 2007 and October 2008. See Hague Conference Prel. Doc. No 11A, 11B, and 11C of March 2009. To say the truth, experts have expressed fears about this possibility. See. Prel. Doc. 21A of March 2007.

### 3. *Jurisdictional Power*

The amazing success of arbitration goes hand-in-hand with the universal trend to restrict judicial intervention in arbitral procedure.<sup>75</sup> Actually this restriction is a major trend in the universal regulation developed by UNCITRAL, and will be reflected in the revision of the UNCITRAL Rules that should be achieved in 2010. Several states throughout the world are following this way as they are convinced that limiting the power of judicial courts is one of the main tools to create a friendly atmosphere for business, as well as to attract arbitration business in itself. Even further is the tendency to restrict judicial intervention in such sensitive matters as foreign investments.<sup>76</sup>

(ex. 1): As a clear example of national legislation aimed at attracting arbitration, one might mention the new Peruvian Arbitration Act of 2008.<sup>77</sup>

(ex. 2): The proof of the resignation of state jurisdictional power relating to investment law is the interplay of ICSID Convention and the treaties which have rendered the Washington Convention alive, especially the bilateral investment treaties (BIT). Perhaps the main symbol of this is Article 54 of ICSID Convention eliminating the *exequatur* for the enforcement of ICSID awards.<sup>78</sup>

Other phenomena, like the trend towards a kind of flexibility of the judicial jurisdiction and the reduction of the scope of the *exequatur*, points to a certain shift from a concept of the jurisdiction as a 'power' to a concept of the jurisdiction as a 'function'.<sup>79</sup> This trend is quite contradictory within the EU. Indeed, we find, on the one hand, the progressive elimination of the *exequatur* requirement in general and a timid recognition of *forum non conveniens* in Brussels 2bis Regulation, and, on the other hand, the survival of abusive grounds of jurisdiction and the inconsistent case law of the European Court of Justice.<sup>80</sup> However, the trend from a political to a technical control of foreign judgments and awards is really universal.

(ex. 3): In Brazil, since the (more professional) *Superior Tribunal de Justiça* assumed competence in matters of recognition and enforcement of foreign

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<sup>75</sup> At the same time, it is but a part of a large phenomenon: the privatisation of the regulatory functions of the states. See MUIR WATT H., 'Économie de la justice et arbitrage international (réflexions sur la gouvernance privée dans la globalisation)', in: *Revue de l'arbitrage* 2008-3, p. 389 *et seq.*

<sup>76</sup> SANDS PH., *Lawless World. Making and Breaking Global Rules*, London 2006, at 117-142.

<sup>77</sup> CANTUARIAS SALAVERRY F. / CAIVANO R., 'La Nueva Ley de Arbitraje Peruana: Un nuevo salto a la modernidad', in: *7 Revista Peruana de Arbitraje* 2008, p. 3 *et seq.*

<sup>78</sup> On recent reactions against this resignation in some Latin-American countries and its consequences, see GAILLARD E., 'Tendencias anti-arbitraje en América Latina', in: *9 DeCITA* 2008, p. 311 *et seq.*

<sup>79</sup> Shift suggested by T. PFEIFFER about 15 years ago in *Internationale Zuständigkeit und prozessuale Gerechtigkeit*, Frankfurt 1995, at 201-204.

<sup>80</sup> FERNÁNDEZ ARROYO D.P. (note 70) at 192-213.

awards, formerly executed by the (rather political) *Supremo Tribunal Federal*, case law has become more favourable to recognition.<sup>81</sup>

### **III. Elements of Current PIL**

All the examples mentioned above show that current PIL has a profile quite different to the one that it had some years ago. This new profile might be summarized by addressing three basic questions related to the content, the authors and the methods of current PIL.

#### **A. What Is PIL Now?**

During the last two decades, two major trends have developed:

##### **1. Decline of PIL Focused on Choice of Law**

The decline of the importance of applicable law issues has a direct link with the exponential increase of cases of PIL or, in other words, the jump from an academic PIL to a 'real' PIL.<sup>82</sup> Many reasons explain this phenomenon. First, the observation of the evolution of the regulation relating to applicable law issues since last decades shows that old divergent solutions pertaining to the 'general part' of PIL have given way to more homogenous new solutions and in some cases, have been partially amended by way of unification of substantive issues. Hence, a significant part of the fears (but not all) sparked by the historical discussion between nationality and domicile as connecting factors for personal relationship, has lost their importance with the generalisation of the habitual residence as a connecting factor. Substantive unification efforts such as the Vienna Convention on the Inter-

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<sup>81</sup> GAMA L., 'Metamorfose (do bem): teoria e prática da homologação de sentenças arbitrais estrangeiras no Superior Tribunal de Justiça', in: XVII *Rev. Direito Assoc. Procuradores do Novo Estado do Rio de Janeiro* 2006, p. 133 *et seq.*

<sup>82</sup> AUDIT B., 'Le droit international privé en quête d'universalité. Cours général (2001)', in: 305 *Recueil des Cours* 2003, at 478 ('*la situation a changé du tout au tout avec le développement véritable des relations privées internationales au cours du XX<sup>e</sup> siècle, jusqu'à mettre aujourd'hui au premier plan les questions liées à l'administration par les juridictions des États de la justice internationale de droit privé*'). At the same time, another concomitant phenomenon is taking place. Growing internationalisation leads scholars traditionally devoted to mere domestic law to pay attention to international issues. In other words: as a consequence of the internationalisation of private law relationships, 'pure' private law is reducing its scope dealing with real cases. Not surprisingly, academic programs on commercial, civil, or procedural law now include topics such as UNIDROIT Principles, child abduction, or enforcement of foreign judgments.

national Sale of Goods (1980) or the UNIDROIT Principles on International Commercial Contracts (1994/2004) have also contributed to the lessened impact of the difficulties arising out of the usage of connecting factors such as the place of celebration or place of performance of the contract. In the mean time, many questions which were previously considered exclusively from the perspective of the determination of the applicable law are now treated from the perspective of cooperation of authorities. The evolution of the treatment of protection of minors by the Hague Conference throughout the last century is an obvious example.

There are also practical reasons for the shift of axiom in PIL. On one side, judges still continue to apply the *lex fori* in a large number of cases, which contributes towards diminishing the importance of applicable law issues. In several legal orders, this attitude is based on the consideration that foreign law is fact that parties have to invoke and prove. On the other side, since a lot of cases are limited to discussing jurisdictional issues, courts have more opportunities to discuss this matter. Finally, issues of efficiency and cooperation of authorities are often presented in an autonomous manner and are scarcely concerned with applicable law issues.

All these reasons justify why the determination of the applicable law is no longer at the core of PIL (and this is all the more true when applicable law issues are designed in an old conflictual fashion) and that this 'star' position is now occupied by aspects relating to the procedure and international cooperation, among which judicial jurisdiction has singularly grown in importance. A substantial part of the discussions of contemporaneous PIL deals with the best way to allocate international private disputes among the various dispute settlement mechanisms whilst ensuring the fundamental right of access to justice in its private international dimension.<sup>83</sup>

## 2. *Materialisation of PIL*

The 'materialisation' of PIL<sup>84</sup> is generated by several reasons associated with some typical phenomena of globalisation. Materialisation affects:

- not only commercial matters;
- not only issues related to choice of law; and,
- within choice of law sector, does not manifest only by substantive rules

but also by substantive connections.

(ex.): In the current CIDIP VII process,<sup>85</sup> the Brazilian proposal of a convention on applicable law to consumer transactions (now a joint proposal of Brazil,

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<sup>83</sup> This situation is clear not only in the case law, but it is also reflected in the agenda of the most important international organisations such as the Hague Conference. Even the very content of national PIL acts indicates the increasing presence of rules on procedure and international cooperation.

<sup>84</sup> See FERNÁNDEZ ARROYO D.P., *Derecho internacional privado (una mirada actual sobre sus elementos esenciales)*, Córdoba 1998, at 130-141.

<sup>85</sup> See *supra* note 17 and accompanying text.

Paraguay and Argentina) is a very good example of materialisation.<sup>86</sup> At first sight, the instrument is a classical conflict-of-laws convention. In fact its single goal is to establish which law applies to a certain kind of private international relationships. Nevertheless, a more detailed scrutiny shows that it is anything but classical, at least within the very context of rules on international consumer contracts. The key of the Brazilian draft is a combination between limited party autonomy on the one hand and the principle of the most favourable law for the consumer on the other hand.<sup>87</sup> Namely, parties may choose the law of the consumer's domicile, the law of the place of conclusion of the contract, the law of the place of performance, or the law of the provider's domicile or seat. For passive consumers (i.e. for contracts and transactions made while the consumer was in her or his country of domicile),<sup>88</sup> the chosen law shall apply to the extent that it is the most favourable to the consumer, compared with the other possible applicable laws. If there is no valid choice of law by the parties, the applicable law will be the law of the consumer's domicile (for passive consumers) or the law of the place of contracting (for active consumers).

## **B. Who Is Making PIL?**

### ***1. Increasing Role of Private Actors***

The method of elaboration of rules of PIL (and rules of law more generally) has deeply changed, mainly because of the sweeping transformation of the authors of such rules.<sup>89</sup> Indeed contrary to what happened decades ago, a substantial part of rules of PIL come today, whether directly or indirectly, from international sources. More specifically, the legislative power of states which take part in the European integration process has been replaced, to a large extent, by the power of a supranational institution to which states have voluntarily given their prerogatives. This

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<sup>86</sup> LIMA MARQUES C., 'Consumer Protection in Private International Law Rules: The Need for an Inter-American Convention on Law Applicable to Some Consumer Contracts and Consumer Transactions (CIDIP)', in: BOURGOIGNIE T. (ed.), *Regards croisés sur les enjeux contemporains du droit de la consommation*, Québec 2006, p. 145 *et seq.*

<sup>87</sup> A favourable opinion on this option can be found in JAYME E., *La vocation universelle du droit international privé – tendances actuelles*, speech given at the inauguration of the new building of The Hague Academy of International Law, 23 January 2007. See <[www.vredespaleis.nl/shownews.asp?ac=view&nws\\_id=109](http://www.vredespaleis.nl/shownews.asp?ac=view&nws_id=109)>.

<sup>88</sup> About the different treatment pursuant to this distinction within the European PIL, see LAGARDE P., 'Heurs et malheurs de la protection internationale du consommateur dans l'Union européenne', in: *Etudes Jacques Ghestin*, Paris 2001, p. 511 *et seq.*, and SINAY-CYTERMANN A., 'La protection de la partie faible en droit international privé' in: *Mélanges Paul Lagarde*, Paris 2005, p. 737 *et seq.*

<sup>89</sup> BASEDOW J. (note 19) at 823-833; OPERTTI BADÁN D. (note 19) at 20-25.

institution does not direct its activities and decisions pursuant to purely legal criteria but rather according to its own logic, pertaining to market freedom.<sup>90</sup>

An even more significant aspect of this assumption is the increasing role that private actors are assuming both in the elaboration of the rules (that is to say in national, international, and supranational codification) and in the application of the rules (which means privatisation of dispute settlement). Public international law scholars have been dealing with this subject and, although there is a vast range of opinions, most seem inclined to point out the permanence of the central – though not unique – role of states, especially in the law-making process.<sup>91</sup> This may be the truth for ‘pure’ public issues, if such a thing exists. Outside this ideal zone, however, that assumption would keep its meaning only from a general and rather formalistic point of view. In the field of international trade law and international business law, the role played by the private actor is very obvious.<sup>92</sup> Within the UNCITRAL working groups, for example, there is not only an active role of different kind of ‘observers’; in addition, a significant proportion of the state delegates comes from the private sector. Of course, this is neither a particularity of commercial issues nor an exclusive characteristic of UNCITRAL works. The activity of private interest groups, well known globally at the domestic level,<sup>93</sup> has a growing and generalized relevance in international legal codification in times of globalisation.<sup>94</sup>

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<sup>90</sup> JAYME E. (note 10) at 24-25 (*‘L’état des personnes est traité, par les règles communautaires, comme une marchandise’*); JESSURUN D’OLIVEIRA H.U., ‘The EU and a Metamorphosis of PIL’, in: *Essays Peter North*, Oxford 2002, p. 111 *et seq.*; GONZÁLEZ CAMPOS J.D., ‘La Cour de justice des Communautés européennes et le non-droit international privé’, in: *Festschrift Erik Jayme*, t. I, München 2004, p. 263 *et seq.*

<sup>91</sup> See GOWLAND-DEBBAS V., ‘Law-Making in a Globalized World’, in: *Cursos Euromediterráneos Bancaja de Derecho Internacional* 2004/2005, p. 505 *et seq.*; REISMAN W.M., ‘The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application’, in: WOLFRUM R. / RÖBEN V. (eds.), *Developments of International Law in Treaty Making*, Berlin *et al* 2005, at 22-24; but see BOISSON DE CHAZOURNES L., ‘Gouvernance et régulation au 21ème siècle: quelques propos iconoclastes’, in: BOISSON DE CHAZOURNES L. / MEHDI R. (eds.), *Une société internationale en mutation: quels acteurs pour une nouvelle gouvernance?*, Bruxelles 2005, at 24-29.

<sup>92</sup> MICHAELS R. (note 64) at 536 *et seq.* See also LOQUIN E. / RAVILLON L., ‘La volonté des opérateurs vecteur d’un droit mondialisé’, in: LOQUIN E. / KESSEDJIAN C. (eds.), *La mondialisation du droit*, Paris 2000, p. 91 *et seq.*

<sup>93</sup> See LAPOUSTERLE J., *L’influence des groupes de pression sur l’élaboration des normes*, Paris 2009 (showing the good and the bad influence of private sector on legal codification).

<sup>94</sup> Perhaps it is not so exaggerated to affirm that the failure of a Hague worldwide convention on jurisdiction and judgments was due, at least in part, to the crossed action of different groups of interests.

## **2. Universal Rules by National Legislators**

In many cases, the activity of international and supranational organisations constitutes a channel to export some national models. Whenever that happens a national law maker becomes a worldwide legislator. In that situation, two questions arise: does a 'common model' of PIL exist? And: should there be limits or conditions to the exportation of legal models? Of course, a good use of comparative law has much to do with both questions.<sup>95</sup>

Thus, the prevailing discourse on security interests of the last forty years deals with the feasibility and convenience of extending a national regime worldwide: specifically, that of the United States.<sup>96</sup> Therefore, essential characteristics of this model have been reproduced, point by point, by several delegations (including, for sure, that of the United States) during the elaboration of the Model Law of the OAS and of the Legislative Guide of the UNCITRAL; as a result, these texts that have emerged to be largely influenced by North-American solutions. The same had already occurred with respect to the 1993 Model Law of the European Bank for Reconstruction and Development. All these texts and, in particular, both mentioned model laws, are then 'rules of export' of a certain legal model. In fact, in the process of drafting these model laws there was no attempt to unify or harmonise different legal solutions, but rather a deliberate decision – of some states, supported by international banks – to spread a model which had successfully worked under particular economic and cultural conditions. The outcome of this kind of legal transplantation is not necessary bad – eventually it might frankly be good – although questions about the neutrality of international organisations of codification remain open.

### **C. How Is PIL Made?**

#### **1. 'Residualisation' of National PIL**

The progression of globalisation has given an extraordinary relevance to the international codification of PIL with regard to national rules. Different legal operations have contributed to that. Some have a general impact on legal systems: such is the case of constitutional reforms establishing the principle of monism. Others consist in the use of technical legal tools to produce the primacy of specific international

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<sup>95</sup> XANTHAKI H., 'Legal Transplants in Legislation: Defusing the Trap', in: *I.C.L.Q.* 2008, 659 *et seq.*

<sup>96</sup> See CUMING R.C.C., 'The Internationalization of Secured Financing Law: The Spreading Influence of the Concepts UCC, Article 9 and its Progeny', in: *Essays Roy Goode*, Oxford 1997, p. 499 *et seq.*; GOODE R., 'Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectorial, Global-Regional – An Overview', in: *Unif. L. Rev.* 2003, p. 341 *et seq.*; GARRO A.M., 'Harmonization of Personal Property Security Law: National, Regional and Global Initiatives', in: *Unif. L. Rev.* 2003, p. 357 *et seq.*

texts over domestic rules. One of these tools is the proliferation of conventions with 'universal' scope.<sup>97</sup>

At the same time, supranational PIL, like the PIL under construction in the EU, implies that PIL of the member states is becoming residual, especially due to the extension *ad extra* of European law-making power.<sup>98</sup> Governmental officers as well as conspicuous scholars often seem chocked by the difficulties that traditional national mechanisms encounter in attempting to survive in the context of such an expansive supranational law.<sup>99</sup> The EU recognizes that its law-making power in matter of PIL is subject to evolution<sup>100</sup> and certainly, despite the strength of Europeanization in this field, European PIL remains in a state that is less than totally uniform.<sup>101</sup>

In Latin America, the 1979 Inter-American Convention on General Rules of PIL<sup>102</sup> has helped to generalize a kind of 'PIL-monism' even in states that are most reluctant to the application of international law. The simple notion of its Article 1, according to which international rules of PIL shall prevail,<sup>103</sup> has even shown its usefulness within the particular scope of application of *Mercosouthern* PIL. Thus, in an interesting consultative opinion issued by the *Tribunal Permanente de*

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<sup>97</sup> See, recently, French *Cour de cassation*, 1st Civil Chamber, 12 November 2009, *Bitar Saddeki* (showing that the 1978 Hague Convention on Law Applicable to Matrimonial Property Regimes shall apply to a number of cases in spite of counting only with three contracting states).

<sup>98</sup> See, in particular, the Opinion 1/03 of the ECJ, 7 February 2006 (about the revision of the Lugano Convention), and the Regulations 662/2009 and 664/2009 establishing procedures for the negotiation and conclusion of agreements between Member States and third countries in matters of PIL.

<sup>99</sup> HARTLEY T.C., 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws', in: *I.C.L.Q.* 2005, p. 813 *et seq.*; BRIGGS A., *The Conflict of Laws*, 2<sup>nd</sup> ed., Oxford 2008, at 33-35.

<sup>100</sup> See the 'Declaration lodged by the European Community under the Cape Town Convention at the time of the deposit of its instrument of accession in respect thereof', which reads: 'The exercise of the competence which the Member States have transferred to the Community pursuant to the Treaty establishing the European Community is, by its nature, liable to continuous development'.

<sup>101</sup> BORRÁS A., 'La falta de unificación del ámbito de aplicación del derecho internacional privado comunitario', in: *Homenaje a Victoria Abellán Honrubia*, t. II., Madrid *et al* 2009, p. 853 *et seq.* For a concrete example see GARRIGA G., 'Relationships between «Rome II» and Other International Instruments. A Commentary on Article 28 of the Rome II Regulation', in: this *Yearbook* 2007, at 143.

<sup>102</sup> See MAEKELT T.B. de, 'General Rules of Private International Law in the Americas', in: 177 *Recueil des Cours* 1982, p. 193 *et seq.*

<sup>103</sup> Article 1: 'Choice of the applicable rule of law governing facts connected with foreign law shall be subject to the provisions of this Convention and other bilateral or multilateral conventions that have been signed or may be signed in the future by the States Parties. In the absence of an international rule, the States Parties shall apply the conflict rules of their domestic law'.



*Revisión* of the MERCOSUR,<sup>104</sup> dealing with the application of the 1994 Protocol of Buenos Aires on Jurisdiction in Contractual Matters, the conclusive legal argument to decide that the forum selection choice made by the parties (according to Article 5 of the Protocol) had to be respected was based on the rule of the mentioned Inter-American Convention that international law shall prevail.<sup>105</sup> Thus, the applicability of the rules of PIL in force within the MERCOSUR is assured by a simple Inter-American rule irrespective of the difficulties of the MERCOSUR authorities in setting-up the character (supranational or intergovernmental) of the *Mercosouthern* legal system.

## 2. *Soft (PI) Law and Open Rules*

Other significant data about how PIL is currently elaborated lies in the rise of soft law and open rules. In this vein, the emergence of the following should be briefly mentioned:

- A PIL by soft law (based on model laws, guidelines, principles, etc.), which is the result of a deliberated decision of the international codification centres aimed at harmonising PIL in a broader and more acceptable fashion;

- A PIL *à la carte* (based on party autonomy), that has two levels: one 'individual' – dealing with specific PIL relationships – and another 'general' – the main expressions of which are the formation of a transnational legal order with its proper rules<sup>106</sup> and its proper mechanisms of dispute settlement;<sup>107</sup>

- A PIL of the courts (based on open rules, balancing standards, escape clauses, etc.), that implies a reaction against the negative results of the rigidity of the classical methodologies.

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<sup>104</sup> Even if this tribunal has been modelled by reference to the WTO Appellate Body, it also has the power to issue consultative opinions presented by the member states' highest courts related to the correct interpretation of *Mercosouthern* law. Surprisingly, those opinions lack binding effect.

<sup>105</sup> FERNÁNDEZ ARROYO D.P., 'Forum Selection Clauses within the Mercosouthern Law: the Hard Implementation of an Accepted Rule', in: *Unif. L. Rev.* 2008, p. 873 *et seq.*

<sup>106</sup> See FERNÁNDEZ ARROYO D.P., 'El derecho internacional privado en el inicio del siglo XXI', in: *Estudos em homenagem a Erik Jayme*, Rio de Janeiro 2005, at 115-117. A recent application may be found in MICHAELS R., 'Umdenken für die UNIDROIT-Prinzipien. Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrecht', in: *RabelsZ* 2009, p. 866 *et seq.* The 'general' level of this movement is so pushing that, according to some opinions (and quite paradoxically), there would be even a process of 'constitutionalisation' of transnational law. See RENNER M., 'Towards a Hierarchy of Norms in Transnational Law?', in: *JIA* 2009, p. 533 *et seq.* But see SYMEONIDES S., 'Party Autonomy and Private-Law Making in Private International Law: The *Lex Mercatoria* that isn't', in: *Essays Konstantinos D. Kerameus*, Athens 2009, p. 1397 *et seq.*

<sup>107</sup> GAILLARD E. (note 69) at 91-120; KAUFMANN-KOHLER G., 'La codificación y la normatividad del *soft law* en el arbitraje internacional', in: BASEDOW J. / FERNÁNDEZ ARROYO D.P. / MORENO RODRÍGUEZ J.A. (eds.), *¿Cómo se codifica hoy el derecho comercial internacional?*, Asunción 2010, p. 107 *et seq.*

#### IV. Searching for a Contemporary Comparative Paradigm for Current PIL

There is a traditional way of dealing with the relationship between PIL and comparative law. It consists of explaining the usefulness of comparative law for PIL, which is still conceived on a national basis and mostly dealing only with choice of law issues. Thus, one can easily find many academic works talking about the contribution of comparative law to the PIL. This traditional view continues to be useful and necessary in several ways, not to mention that it is far preferable to the ‘parochialism game’ precisely denounced by Friedrich K. Juenger.<sup>108</sup> The problem is that the traditional view is not complete and therefore partially outmoded. Consequently, as far as PIL is concerned, we should move forward from the classical view of the use of comparative method to another which takes into account the current reality of PIL.

In order to deal with the ‘new’ PIL described above, comparative law scholarship may adopt different attitudes, related to the obvious difference suggested by René David about 30 years ago: learning *and* comparative law, on the one hand, and learning *of* comparative law, on the other hand.<sup>109</sup> In the field of PIL, the former has clearly prevailed. Indeed, since the very origin of classic PIL, scholars with an interest in comparative law have been learning and writing by looking beyond the borders of their own countries. This attitude has served – and still serves – to provide a better understanding of the PIL in general, as well as, at least indirectly, improving the respective systems of PIL and their capacity to reach better solutions to concrete cases. Nevertheless, most of those ‘comparative sensitive’ scholars are still particularly focused on their own PIL systems. In fact, most of the leading books on PIL around the world are still authentic national products, paying attention to a large extent – if not exclusively – to domestic case law and bibliographies. The teaching of EU PIL by European scholars does not mean a change in this attitude, as far as the EU PIL is in fact the most important part of the PIL of each member state. The position that I maintain here is quite different and deals with René David’s second option: the generalisation of the teaching of comparative PIL, which requires a previously non-national way of thinking about

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<sup>108</sup> JUENGER F.K., ‘The Need for a Comparative Approach to Choice-of-Law Problems’, in: 73 *Tul. L. Rev.* 1999, at 1326-1327; REIMANN M., ‘Parochialism in American Conflicts of Laws’, in: *Am J. Comp. L.* 2001, p. 369 *et seq.* See also JAYME E. (note 61) at 128; VON MEHREN A.T., ‘The Contribution of Comparative Law to the Theory and Practice of Private International Law’, 26 *AJCL* 1977-1978, at 38-39; Cf. LOUSSOUARN Y., ‘La méthode comparative en droit international privé’, in: *General Reports to the 10th International Congress of Comparative Law*, Budapest 1981, at 129 (‘*toute solution satisfaisante procède d’un esprit d’ouverture vers les autres pays intéressés*’).

<sup>109</sup> DAVID R., ‘Enseignement et droit comparé’, in: ID., *Le droit comparé: droit d’hier, droits de demain*, Paris 1982, p. 62 *et seq.* See also GLENN H.P., ‘Teaching Comparative Law and Teaching Law Comparatively’, in: *Mélanges Maksymiliana Pazdana*, Krakow 2005, p. 951 *et seq.*

PIL. Obviously, the idea is not new. Ernst Rabel, an outstanding innovator of comparative studies<sup>110</sup> and a consumed PIL scholar, not only founded the idea but also implemented it more than half a century ago.<sup>111</sup> After him, other PIL comparativists have navigated in the same waters.<sup>112</sup> What is different now is not the idea, but the object to which we need to apply it: PIL.

#### **A. PIL and Comparative Law (Traditional View)**

The traditional view consists of taking comparative law as an assistant of PIL, and, generally speaking, of one's own national PIL. Most courses offered by universities and conflicts scholars still focus on domestic (national) PIL, keeping in mind the old assumption (present in most of major classical conflicts books) according to which PIL is international by the relationships it deals with, but national by its sources.<sup>113</sup> In the EU, the strength of the communitarisation of PIL compels conflicts scholars to realize the relativity of their own national systems. Actually, as I pointed out before, domestic PIL is becoming more and more residual within the EU context. Unfortunately, many scholars, even those with a tendency to be more open-minded, have replaced their national-centrism with a larger – and more realistic – but not necessarily better Euro-centrism.<sup>114</sup>

According to the classical comparative approach of PIL, the use of comparative methodology concentrated mainly on learning, making and applying PIL.<sup>115</sup> In respect of each one of these activities, several helpful examples should be mentioned.

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<sup>110</sup> See RABEL E., 'Das Problem der Qualifikation', in: *RabelsZ* 1931, p. 241 *et seq.* See also ZWEIGERT K., 'Die dritte Schule im internationalen Privatrecht', in: *Festschrift für Leo Raape*, Hamburg 1948, p. 35 *et seq.*

<sup>111</sup> RABEL E., *The Conflict of Laws: A Comparative Study*, Ann Arbor 1945-1958.

<sup>112</sup> BATIFFOL H., 'Les rapports du droit comparé au droit international privé', *R.I.D.C.* 1970, p. 661 *et seq.*; LIPSTEIN K. (ed.), *Private International Law* (vol. III), in: DROBNIG U. (ed.) *Int. Enc. Comp. L.* 1971 *et seq.*; MAEKELT T.B. DE, 'Reflexiones sobre derecho comparado', in: *Libro homenaje Joaquín Sánchez Covisa*, Caracas 1975, p. 217 *et seq.*; VON MEHREN A.T. (note 107) p. 31 *et seq.*; SYMEONIDES S. (ed.), *Private international law at the end of the 20th century: progress or regress?*, The Hague *et al* 2000.

<sup>113</sup> When I arrived in Spain, twenty years ago, a pretended joke among scholars consisted of saying that the main difference between public international law and PIL is that the former is international but not law and the latter is law but not international. Both sentences of that 'joke' were already wrong then but they seem absurd today, especially the second one.

<sup>114</sup> That it is not only a matter of scholars but in particular of EU officials (see JAYME E. / KOHLER C., 'Europäisches Kollisionsrecht 2006: Eurozentrismus ohne Kodifikationsidee?', in: *IPRax* 2006, at 537-539). See, however, about 'old (bad) habits and new (silly) threats' of comparative law, MARKESINIS B. (in cooperation with FEDTKE J.), *Engaging with Foreign Law*, Oxford 2009, at 45 *et seq.*

<sup>115</sup> REIMANN M., 'Comparative Law and Private International Law', in: REIMANN M. / ZIMMERMANN R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, p. 1363

### 1. *Comparison of PIL Systems*

Comparison by scholars has been mainly focused on rather general issues.

- In the field of applicable law: Choice of law is the most traditional playing field for comparative PIL studies. Several topics have attracted the attention of scholars in this context, such as the options between rigid or flexible rules, rules or approaches, etc. Without any shadow of doubt, the climax of the comparison on applicable law was reached when the proposals of the so-called American conflicts revolution was well known by European scholars and therefore compared with European solutions.<sup>116</sup> Those comparative efforts seem old now. On the contrary, the comparison between the results of the use of conflict or substantial methodology in a concrete matter (micro-comparison) remains the centre of relevant discussions of choice of law.

- In the field of jurisdiction to adjudicate: There is a primary comparison with several variations on jurisdiction. It deals with the confrontation of rigid (mandatory) and flexible grounds of jurisdiction; in other words, of civil law and common law approaches to jurisdiction.<sup>117</sup>

### 2. *Making of PIL Rules*

Comparative methodology is unavoidable in essays related to law making. Indeed, regardless of the level of each concrete legislative work (domestic, federal or international), comparative law will always play an essential role in legal codification. Furthermore, within international codification, the use of comparative law also allows the creation of standard solutions and sets of complete regulations, either by hard or soft law. Conventions, model laws, legislative guides, principles, etc., even the less successful ones, often become the expression of the *status questionis* of the matter or, at least, are considered to be so.

A striking example of this, in the context of arbitration, is the combination of the 1958 New York Convention, the 1985/2006 UNCITRAL Model Law, and the 1976/[2010?] UNCITRAL Rules. They have mainly been elaborated under comparative premises and, having reached the rank of standards, no legislation on arbitration in the world is elaborated without paying attention to them. The UNIDROIT Principles on International Commercial Contracts seem to be taking a similar path.<sup>118</sup>

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*et seq.*, respectively speaks of comparative law as a method of study, as a foundation, and as a tool.

<sup>116</sup> Among many others, see VITTA E. *et al.*, in: 30 *Am. J. Comp. L.* 1982, p. 1 *et seq.*, and AUDIT B., 'Le caractère fonctionnel de la règle de conflit (sur la «crise» des conflits de lois)', in: 186 *Recueil des Cours* 1984-III, p. 219 *et seq.*

<sup>117</sup> See *infra* note 140.

<sup>118</sup> MICHAELS R. (note 106) at 885-887.

### **3. Interpretation and Application of PIL**

The list of examples of the possible use of comparative methodology in the resolution of real private international relationships is very long. To mention only some of the most evident, references might be made to: *a*) in general, the application of the *ordre public* exception to refuse either the application of a foreign law or the recognition of a foreign decision; and *b*) in particular, the application of some policy-oriented conflict rules<sup>119</sup> like those contained in Articles 6 and 7 of the 1989 Inter-American Convention on support obligations.<sup>120</sup>

## **B. PIL Faced to Globalisation and Regional Integration (Contemporary View)**

### **1. The Need for a Complementary Approach**

As mentioned previously, traditional use of comparative methodology will continue to be useful in learning, making and applying PIL. Usefulness, however, is not enough. It is necessary to take into account that current phenomena demand a complementary approach for comparative law,<sup>121</sup> as leading comparativists have pointed out.<sup>122</sup> The main considerations we need to bear in mind are, on the one hand, the transfer of law-making power from states to international and supranational organisations and, on the other hand, the transfer of a large part of legal regulation and dispute settlement from public to private actors. We ought to be aware of these trends and shifts in order to contribute to a better comprehension of PIL and to improve the quality of the resolution of private international legal disputes.

Economic integration as well as international legal codification have a strong impact on domestic legal systems. This is obviously true within the supranational framework of the EU, evidenced by the known phenomenon of the Europeanization of the law and its collateral effects like the EU membership of the

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<sup>119</sup> See JUENGER F.K. (note 2), at 189 ('Arguably, alternative reference rules that openly favour a predetermined substantive result best accord with the spirit of international cooperation').

<sup>120</sup> Article 6: 'Support obligations, as well as the definition of support creditor and debtor, shall be governed by whichever of the following laws the competent authority finds the most favourable to the creditor: That of the State of domicile or habitual residence of the creditor; That of the State of domicile or habitual residence of the debtor'.

<sup>121</sup> Actually, I am not advocating for a change – even less for a revolution – of traditional approach but just a broader and dynamic operation of it. After all, according to a great comparativist, traditions are not what they used to be. See GLENN H.P., *Legal Traditions of the World – Sustainable Diversity in Law*, 3<sup>rd</sup> ed., Oxford 2007, at 22 *et seq.* (talking about 'the changing presence of the past').

<sup>122</sup> BERMANN G.A., 'Le droit comparé et le droit international: alliés ou ennemis?', in: *RIDC* 2003, at 527-529; REIMANN M. (note 115) at 1388 *et seq.*

Hague Conference on Private International Law.<sup>123</sup> Nevertheless, it is different but no less true than what is happening in other corners of the world, despite the absence of a truly supranational structure. Thus, fifteen years of application of NAFTA have provoked a remarkable North-Americanisation (the US) of Mexican law.<sup>124</sup> Failure to realise this evolution impedes the understanding of legal systems and, as a consequence, their correct consideration either in law-making processes or in resolving real cases.

Once again, an example might illustrate these assumptions: one of the subjects of the next congress of the International Academy of Comparative Law, to be held in Washington DC in July 2010, is 'consumer protection in private international relationships', that is to say, PIL on consumer issues. The methodology of these congresses consists in the designation of a person for each topic who must write a general report on the basis of the inputs received from national reporters. It goes without saying that European national reporters do not have much 'national' matter to communicate on the subject, since substantive law and PIL on the issue of consumer protection are mostly European. If we now look at the Americas, we find that Latin American countries lack of special private international rules and special mechanisms dealing with consumer protection. However the Inter-American Specialized Conference on PIL is currently working on this subject and has several projects on the table. The Hague Conference, on the universal level, and the MERCOSUR, on a regional one, have also worked on consumer PIL. Consequently, the general reporter, in order to write an accurate comparative work, needs a combination of international, supranational and national reports, assuming that most national reporters would not have so many original things to talk about.

Even if one wished to rely on a classical approach, innovative analysis is called for when dealing with traditional PIL concepts. For instance, within the EU, whenever the exception of public policy is applied, we are talking about a 'double' *ordre public*, the *ordre public* of the member state and the *ordre public* of the EU;<sup>125</sup> the latter includes, if need be, the international instruments on human rights,

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<sup>123</sup> SCHULZ A., 'The Accession of the European Community to The Hague Conference on Private International Law', in: *I.C.L.Q.* 2007, p. 939 *et seq.*

<sup>124</sup> See the early contribution of ZAMORA S., 'The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement', in: *24 Law and Policy in International Business* 1993, at 391 *et seq.* See also GLENN H.P., 'Conciliation of Laws in the NAFTA Countries', in: *60 Louisiana L. Rev.* 2000, p. 1103 *et seq.* By the way, it is interesting that G.A. BERMAN (note 122) says that NAFTA does not contemplate interests of states parties in an equilibrated way because it was built only on international law foundations without adding a comparative law perspective (at 527).

<sup>125</sup> See ECJ, C-126/97, 1 June 1999, *Eco Swiss*, in particular paragraphs 39 and 41. See BASEDOW J., 'Recherches sur la formation de l'ordre public européen dans la jurisprudence', in: *Mélanges Paul Lagarde*, Paris 2005, p. 55 *et seq.* In fact, EU *ordre public* seems to be 'superseding' member states *ordre public*. Worried about this fact, STRUYCKEN T., 'L'ordre public de la Communauté européenne', in: *Liber amicorum Hélène Gaudemet-Tallon*, Paris 2008, p. 624 *et seq.*

namely the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>126</sup>

## **2. *Improving International Cooperation as the Main Goal of Comparative Law***

In addition to all that has been said, the classical approach was enough for a purely academic approach to PIL. However, dramatic growth in the number of PIL issues (commercial, economic, social and cultural affairs, which make PIL become 'real') and the fundamental changes that we have already mentioned, must have an impact on the use of comparative methodology when dealing with PIL. One way to show the evidence of that impact would be to accept that the main goal of comparative law in PIL should be to improve international cooperation in the broadest sense, rather than that which is often cited as the main goal of comparative law, i.e., the search for uniform universal solutions. Some years ago a well known comparative scholar asked himself if comparative law and international law were 'allies' or 'enemies'.<sup>127</sup> The answer was obvious: we can only talk about 'enemies' if we share the idea that the only relevant goal of comparative law is to achieve the unification of the law.<sup>128</sup> The consequence of this idea in our field would be that the unification of substantive law would entail the end of the fundamental reason of PIL. I maintain, however, that both premises are wrong.

First of all, unification is not the only goal of comparative law, and unification is always limited. Secondly, only an absolutely outmoded conception of PIL may lead us to think that the unification of substantive law may eliminate the *raison d'être* of PIL. It is quite apparent that: *a*) PIL is no longer limited to the determination of the applicable law; and *b*) this determination can be made in other ways, different to classical choice of law rules. From this perspective, uniform and harmonised substantive law are also part of PIL to the extent that they express a specific way to cope with international private relationships. Thirdly, even if we seek to remain with a PIL that no longer exists, it appears that there has been significant progress in both unification and harmonisation in some areas of law, notwithstanding that until the happy birth of UNIDROIT Principles on International Commercial Contracts, such progress had gone only scarcely beyond some concrete aspects of substantial law about one or another specific matter, such as transport liability or some commercial contracts. Even within these matters the need for some classical PIL rules and principles survives. For instance, in the field of international commercial contracts, we find, on the part of the applicable law,

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<sup>126</sup> Recently reminded by the ECJ, in *Gambazzi* (*supra* note 49) paragraph 28. See also new Article 6 EU Treaty, in force since 1 December 2009.

<sup>127</sup> BERMANN G.A. (note 122) at 519 *et seq.* (and answer of FAUVARQUE-COSSON B., in: *RIDC* 2003, at 530 *et seq.*; see also *supra* note 1).

<sup>128</sup> BERMANN G.A. (previous note) at 529 ('*l'harmonisation du droit n'est que l'un parmi la myriade de buts du droit comparé*'). See also FAUVARQUE-COSSON B. (note 43) at 815-817.

the successful combination of the 1980 Vienna Sales Convention (CISG) and the UNIDROIT Principles and, on the part of dispute resolution, the vast harmonisation inspired by the UNCITRAL works. However, considerable room for the application of choice of law rules in some cases is left, and the strong need for solutions related to jurisdiction remains.<sup>129</sup> Even within the restricted scope of the EU, where law has achieved a high degree of unification and the supranational institutions (including the European Court of Justice) are reluctant to differences, diversity is still huge and therefore comparative methodology is still in high demand.

If we assume that unification is not and cannot be the main goal of comparative law in the field of PIL, our attention should be directed towards the improvement of international cooperation. Cooperation, indeed, in addition to being an autonomous sector of PIL with its own rules and principles,<sup>130</sup> influences the whole practical functioning of PIL, from the determination of the jurisdiction to adjudicate through to collaboration on the determination of the applicable law. Furthermore, international legal cooperation is no longer based on traditional notions of comity – according to which states would help each other more or less spontaneously – and reciprocity. Nowadays, internationalisation of modern life creates a states' duty to cooperate, by means of international agreements or unilaterally, in order to implement mechanisms to protect people's interests. This duty emerges from the fact that PIL is now based on human rights and notably on the right of effective access to justice. Thus, what was previously a matter of courtesy, a mere option for states, becomes a mandatory duty. Much data confirms this, for example, the trend to facilitate the recognition and enforcement of foreign judgments and awards, by reducing the scope of material and formal requirements but reinforcing the protection of procedural fundamental rights.<sup>131</sup>

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<sup>129</sup> Even one of the most outstanding advocates of the unification of substantive law acknowledged the limits of international legal unification. See JUENGER F.K. (note 2), at 189-190 ('unification through multilateral treaties is no panacea').

<sup>130</sup> Sector in which classic PIL, i.e., classic conflicts rules, are clearly not sufficient to solve real problems. See KRONKE H., 'Most Significant Relationship, Governmental Interests, Cultural Identity, Integration: «Rules» at Will and the Case for Principles of Conflict of Laws', in: *Festschrift Erik Jayme*, t. I., München 2004, at 760 (distinguishing cooperation from mere coordination). See also VAN LOON H., 'Unification of Private International Law in a Multi-forum Context', in: KIENINGER E.-M. (ed.), *Denationalisierung des Privatrechts*, Tübingen 2005, p. 33 *et seq.*

<sup>131</sup> In this context, the maintenance of recognition systems depending on rigid formal requirements (like, for instance, the mirror principle to evaluate the jurisdiction of origin) is no longer acceptable. See FERNÁNDEZ ARROYO D.P. / SCHMIDT J.P., 'Das Spiegelbildprinzip un der internationale Gerichtsstand des Erfüllungsortes', in: *IPRax* 2009-6, p. 499 *et seq.*



## **V. Teaching and Learning PIL on a Comparative Basis**

### **A. Why Must We Teach PIL on a Comparative Basis?**

Four main reasons justify the need for teaching PIL on a comparative basis: *a)* the life of both human beings and legal entities is no longer related to a single legal system; *b)* legal orders have become plural, i.e., they have several dimensions; *c)* law is changing (especially by the processes of internationalisation and supra-nationalisation); *d)* nowadays access to and knowledge of foreign law is no longer difficult.

All in all, today more than ever, no research or legislation that wishes to be rigorous can ignore what happens beyond the borders of the particular country. This is widely accepted. Nevertheless, it seems that there are some difficulties in realising that the same assumption should be applied to teaching. If the need of comparative law is so urgent, the teaching of law should not remain exclusively focused on our own legal systems. Otherwise, scholars would be cheating their students by transferring only a largely obsolete knowledge which does not cope with the current real problems. In a world that is so interconnected, teaching law on a comparative basis should be the general rule.<sup>132</sup> And, as far as PIL is concerned, that rule should not accept many exceptions. In other words: now, law is comparative law and therefore PIL must be comparative PIL.

#### ***1. Increased Number of Persons Related with Multiple Legal Systems***

'Multi-location', 'multi-connection', speed and mobility are characteristics of the present era. This is true for states and companies, and also for rich and poor people. Migrations have always existed but now, in addition to the massive movement of people across borders and from one continent to another, one can see how globalisation comes to almost every corner of the planet. To provide only a small selection of examples, small farmers sell their goods to foreign companies; individuals buy products from abroad via the internet; companies that had previously always been 'local' are bought by multinationals which internationalise the organisation and delocalise workers and executives; thousands of children from underdeveloped countries are adopted by foreigners from developed ones; extreme mobility of people favours ruptures of families, sometimes followed by situations of children abduction, and so on. In such a context, to keep a domestic vision in teaching PIL is no longer functional. To know only what 'our' courts do and what is the content of 'our' PIL rules can hardly allow us to solve real problems in an accurate way.

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<sup>132</sup> FAUVARQUE-COSSON B. (note 127) at 536.

## 2. *Plurality of Legal Orders*

Within many states several legal subsystems co-exist. There are federal states, different levels of regulation, and a rediscovery of the law on ethnic and cultural basis. The particularities of legal systems of federal states have long challenged comparative studies of PIL at both levels: *ad intra* (domestic conflicts / national legal unification) and *ad extra* (international conflicts / international legal unification). From a certain perspective, old issues typical of PIL systems such as those of Canada or the United States have come back, *mutatis mutandis*, on the stage of the emerging EU PIL. It is worth noting that this phenomenon stresses even more the classical problem of coexistence – in a single legal order – of national and international PIL rules. Everyone knows that learning a specific ‘national’ PIL system requires knowledge of the international conventions in force in that specific legal system and how they are applied. For instance, someone from the Americas who wishes to know the French system of PIL must know the bulk number of PIL conventions which have entered into force in France. Currently, furthermore, this requirement extends to the Community PIL, which grows without pause and enjoys a preeminent place in the legal orders of each member state. The increased significance of *soft* PIL and of non-national PIL, due to their progressive recognition by ‘hard’ legal systems (either national or supranational),<sup>133</sup> completes the complexity of the PIL framework.<sup>134</sup> Interpersonal systems of PIL also have a long history. However, the reshaping of established legal orders on the basis of ethnic premises might raise new profiles of this topic. For instance, the recognition of rights of indigenous people to live according to their traditions, enacting their own institutions including their own judicial system, is one of the key points of the 2009

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<sup>133</sup> From another perspective, the significance may be facilitated for the non-recognition of the *soft law*. See DEUMIER P., ‘La réception du droit souple par l’ordre juridique’, in: *Le droit souple*, Paris 2009, at 135-139. Even within an overregulated matter as consumer law some are essaying to find ‘transnational’ rules. See CALLIESS G.-P., *Grenzüberschreitende Verbraucherverträge. Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz*, Tübingen 2006, at 375-485, and the critic of REICH N., ‘Transnational Consumer Law: Reality of Fiction?’, in: 27 *Penn State International L. Rev.* 2009, p. 859 *et seq.*

<sup>134</sup> About the complexity of PIL systems, see FERNÁNDEZ ARROYO D.P. (note 84) at 49-61; MICHAELS R., ‘The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism’, in: 51 *Wayne L. Rev.* 2005, p. 1209 *et seq.*; GAUDEMET-TALLON H., ‘Le pluralisme en droit international privé: richesses et faiblesses (Le funambule et l’arc-en-ciel)’, in: 312 *Recueil des Cours* 2005, p. 9 *et seq.* (for the author, there is a double pluralism: one of sources and one of goals); PAMBOUKIS Ch.P., ‘Droit international privé holistique: droit uniforme et droit international privé’, in: 330 *Recueil des Cours* 2007, at 157 *et seq.* and 325 *et seq.*; HERNÁNDEZ-BRETÓN E., *Mestizaje cultural en el derecho internacional privado de los países de la América Latina*, Caracas 2007.

Bolivian Constitution which, depending on its implementation, might open a rich field for the rise of mixed legal cases, both domestic and international.<sup>135</sup>

### **3. *Easy Access to Foreign Law***

The arguments mentioned above are of rather a substantial nature. However, there is also a practical reason to shift from purely domestic to comparative PIL: information on foreign law is now more accessible than ever. Legal materials formerly known only by enlightened are now at hand to everybody. Besides, the Permanent Bureau of the Hague Conference has explored the feasibility of mechanisms to develop a new global instrument to facilitate the access to the content of foreign law.<sup>136</sup> The underlying idea is expressed in the following words: 'The need for information on foreign law is bound to expand in the years and decades ahead. Increasingly, legal fact patterns will be connected with more than one legal system, and parties and their advisers will need, either *ex ante* or *ex post*, to determine the law applicable to their relationships and transactions'.<sup>137</sup> Obviously, current technological facilities are quite different than those present when multilateral instruments on the matter (the London and Montevideo Conventions) were adopted. That justifies the interest of the Permanent Bureau. Nevertheless, the Council (that is to say, the member states) seem to be less enthusiastic. In any event, the fear of the states or international organisations to seize the opportunity to update mechanisms to facilitate access to foreign law should not preclude the academic utility of modern technological means. Whatever the motivations of states to avoid adoption of accurate instruments appropriate to our times, those reasons should not influence scholars' decisions about the content of their writings and their courses.

### **B. *How Should We Teach Comparative PIL?***

The elements pointed out above show the general parameters to be taken into account when teaching a course on PIL. In the next paragraphs I will give further general indications that, in my opinion, should be considered in order to define the very content of such a course. It is worth stressing that my proposal does not only deal with some kind of special postgraduate course but with the teaching of PIL in general, whatever the level of the studies is. General courses on comparative law (or on legal systems) might continue to be useful. However, we need to incorporate comparative legal thinking in each legal discipline, in particular in the area of PIL.

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<sup>135</sup> See, in particular, Articles 30 (right to exercise their political, legal and economical systems, according to their worldview [*cosmovisión*]) and 190 *et seq.* (enacting the 'peasant native indigenous jurisdiction'). Available on <[www.vicepresidencia.gob.bo](http://www.vicepresidencia.gob.bo)>.

<sup>136</sup> See *supra* note 74.

<sup>137</sup> Hague Conference, Prel. Doc. No 11<sup>a</sup> of March 2009, paragraph 5.

**1. Remaining Usefulness of the Civil Law / Common Law Division**

Notwithstanding the increasing exchanges between common law and civil law, the division is still challenging in several important aspects, particularly: procedural law,<sup>138</sup> jurisdiction to adjudicate, and legal education and the legal profession. In fact, experience shows that comparative procedural issues are among the most attractive to PIL courses. There are always interesting new works to share with students which help to understand the reasons and consequences of using different mechanisms to determine whether a court will take a case or not.<sup>139</sup> Some of those works even try to discover the very core of the differences between the two legal traditions, offering invaluable opportunities to exercise brain muscles in respect of real practical problems.<sup>140</sup> Indeed, being an eminently practical matter, jurisdiction law offers an extremely rich case law panorama. Thus, it is not difficult to find appropriate judicial decisions to explain every particular issue.<sup>141</sup> As far as procedural and substantive matters of PIL are ‘functionally intertwined’,<sup>142</sup> there are also beautiful cases that fit perfectly in the relationship between them by illustrating the

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<sup>138</sup> In the presentation of the 2009 Congress of the International Association of Procedural Law, which was devoted to this subject, one can read: ‘Harmonization projects, mixed jurisdictions, and jurisdictions in transition are demonstrating that the traditional distinctions may not define the dispute resolution processes of the future’ (<[www.iapl2009.org](http://www.iapl2009.org)>). Nowadays, however, those distinctions are still relevant, although less than some time ago.

<sup>139</sup> An excellent example is MCLACHLAN C., ‘*Lis pendens* in International Litigation’, in: 336 *Recueil des Cours* 2008, p. 199 *et seq.*

<sup>140</sup> VON MEHREN A.T., ‘Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of Doctrine, Policies and Practices of Common- and Civil-Law Systems. General Course of Private International Law (1996)’, in: 295 *Recueil des Cours* 2002, p. 9 *et seq.*; NUYTS A., ‘Due Process and Fair Trial: Jurisdiction in the United States and in Europe Compared’, in: NUYTS A. / WATTÉ N. (eds.), *International Civil Litigation in Europe and Relations with Third States*, Brussels 2005, p. 157 *et seq.*; MICHAELS R., ‘Two Paradigms of Jurisdiction’, in: 27 *Mich. J.I.L.* 2006, p. 1003 *et seq.*; SILBERMAN L.J., ‘Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension’, in: 28 *Vand. J. Transnational L.* 1995, p. 389 *et seq.*

<sup>141</sup> See South African Supreme Court of Appeal (SCA), 23 November 2007, *Bid Industrial Holdings v. Strang*, comments of OPPONG R.F. and of SIBANDA O., in: *Journ. of PIL* 2008, p. 311 *et seq.* and 329 *et seq.* (changing traditional ground of personal jurisdiction) – for other examples in Southern Africa, see OPPONG R.F. (note 66) at 395-397 –; consolidated cases *Carlos Abad, et al. v. Bayer Corporation, et al.* (08-1504, 08-2146) and *Carlos Miguel Pastor, et al. v. Bridgestone/Firestone North American Tire LLC, et al.* (08-3101), US Court of Appeals 7th Circuit, 1 May 2009 (Judge Posner) (declaring North-American *forum non conveniens*, Argentinean *forum conveniens*); *Osorio v. Dole Food Co.*, No. 1:07-22693, US District Court (S.D. Fla.), 20 October 2009 (denying enforcement of a Nicaraguan tort decision); *Zone Brands*, French *Cour de Cassation*, Civ. 1, 14 October 2009 (accepting a North-American anti-suit injunction).

<sup>142</sup> JUENGER F.K. (note 2) at 3.

differences between common law and civil law.<sup>143</sup> Of course, independently of the envisaged subject matter, the comparison may permit analysis to go beyond a merely technical operation and to evaluate the social, political and economic effects of the respective legal solutions.<sup>144</sup> Such analysis is fundamental not only in law-making, but also in teaching.<sup>145</sup>

Notwithstanding its undeniable interest, the common law / civil law pair cannot be the only focus of comparison, either for comparative law in general or for PIL. ‘Westcentrism’ is better than ‘Americancentrism’ or ‘Eurocentrism’, yet not *much* better.<sup>146</sup> Many examples arise beyond the ‘typical divide’, concerning both procedural and substantive questions. Family law or succession law, for instance, offer a large field of issues over which a comparative approach remains ineluctable due to the deep cultural differences at hand.

## 2. *Relevance of Case Law*

For a very long time the major flaw of comparative law was its lack of attention to case law. This has been particularly true for comparativists with a civil law education, traditionally inclined to abstraction and formal categories. Nowadays, when the relevance of case law is widely recognized, the characteristics of current PIL require that case law be gathered on a plural basis, including national, international, supranational and transnational case law. The exercise of comparing laws by looking at practice is significantly better than doing it only by reference to rules and legal books. It is well known that certain rules have almost never been applied<sup>147</sup> and that others have lost the weight and the significance that they had in the past.<sup>148</sup> However, the step forward would be quite short if it would lead us to our own courts.

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<sup>143</sup> See Spanish *Tribunal Supremo*, 12 January 2009 (granting damages for breach of a clause selecting the forum and the law), note ÁLVAREZ GONZÁLEZ, in: *IPRax* 2009-6, p. 529 *et seq.*, note FERNÁNDEZ ARROYO, in: *Rev. cr. dr. int. pr.* 2009, p. 756 *et seq.*

<sup>144</sup> MUIR WATT H., ‘Comparer l’efficience des droits?’, in: LEGRAND P. (ed.), *Comparer les droits résolument*, Paris 2009, at 447 *et seq.*

<sup>145</sup> BERMAN G.A., ‘The Discipline of Comparative Law in the United States’, in: *R.I.D.C.* 1999, at 311-312.

<sup>146</sup> *Ibid.*, at 309.

<sup>147</sup> The examples are numerous. Thus, the Article 12(6) of Spanish Civil Code (which provides: ‘The courts and authorities will apply of their own motion the conflicts rules of the Spanish law’) may give the impression that Spanish conflict rules are mandatory. However, some procedural rules, in open contradiction with this, have led Spanish courts – with rare exceptions like *Tribunal Supremo* (civil chamber), 4 July 2006 – not to apply foreign law whenever it is neither invoked nor proved by the parties. See CALVO CARAVACA A.-L. / CARRASCOSA GONZÁLEZ J., ‘The Proof of Foreign Law in the New Spanish Civil Procedure Code 1/2000’, in: *IPRax* 2005-2, p. 170 *et seq.*

<sup>148</sup> In contrast with previous note, Article 13 of Argentinean Civil Code still requires the proof of foreign law. However, case law seems to go towards another direction. See

On the one hand, whenever a state takes part in a supranational or international organisation with its own judicial system, the decisions adopted by international and/or supranational courts are considered to be equivalent to the 'domestic' decisions taken by national courts. The relevance of that non-domestic case law is underlined by the fact that if one difference exists between both sources of decisions, it is, precisely, that the scope of national courts' decisions (and the correct interpretation of national law as well) is conditioned by the decisions issued by international and supranational courts.

On the other hand, all these courts of different level solve a considerable proportion of disputes of PIL but obviously not all of them. Another part of PIL problematic issues are solved outside judicial courts. Arbitration, formerly confined into the limits of commercial contractual disputes, expands its scope so much so that the notion of arbitrability becomes more and more comprehensive.<sup>149</sup> Thus, arbitration has reached subject matters like insolvency, whilst it is already accepted that it can deal with matters such as consumer litigation. At the same time, arbitration is gaining autonomy,<sup>150</sup> although an increasing number of situations of parallel litigation show that the isolation of non-judicial dispute settlement is not always feasible.<sup>151</sup> Mediation spreads its influence in both commercial and family matters.<sup>152</sup> Online dispute resolution is also experiencing noteworthy development.<sup>153</sup> In such a context, reducing the analysis of PIL practice to the decisions of judicial courts is clearly inappropriate.

### 3. *Other Issues at Stake*

Besides taking into account the rich variety of legal systems and the significance of case law in the broadest sense, a course on (comparative) PIL needs also to pay attention to the following topics:

a. The role of the states. Discussion about the evolution and the effects of the role of the state is one of the mantras of globalisation. Concretely, renowned analysts, as well as political actors, have predicted the coming death of the state

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Superior Court of Justice of Mendoza, 28 April 2005, *Sabaté Sas*, note CÓRDOBA, in: 5/6 *DeCITA* 2006, p. 453 *et seq.*, and Superior Court of Justice of Buenos Aires, 28 April 2004, *Soto v. Exxe*, and note FERNÁNDEZ ARROYO, 'Chronique de jurisprudence argentine', in: *Clunet* 2008-1, at 211-214.

<sup>149</sup> HANOTIAU B., 'L'arbitrabilité', in: 296 *Recueil des Cours* 2002, p. 25 *et seq.*

<sup>150</sup> The strength of this trend is obvious irrespective of the point of view on this issue and its consequences. See, for instance, GAILLARD E. (note 69) at 120, and BUREAU D. / MUIR WATT H., 'L'impérativité désactivée? (à propos de Cass. civ. 1<sup>re</sup>, 22 octobre 2008)', in: *Rev. cr. dr. int. pr.* 2009, p. 1 *et seq.*

<sup>151</sup> For example, ECJ, C-185/07, 10 February 2009, *West Tankers*.

<sup>152</sup> 'Cross-border mediation in family matters' is the first subject mentioned in the current agenda of the Hague Conference. See Prel. Doc. No 1, December 2009.

<sup>153</sup> HÖRNLE J., *Cross-border Internet Dispute Resolution*, Cambridge 2009.

and its previously invaluable significance. Recent events in Latin-America, Asia and, as astonishing as it might seem, in Europe, show that states, individually or through international or supranational organisations, are taking decisions of an extraordinary significance dealing with energy, industry, environment, commerce, science, culture, social welfare, etc. As to the field of law, and in particular of the current PIL, that discussion may be done in respect of several scenarios of different relevance. However, it is fundamental to bear in mind – to learn real rather than imaginary PIL – the true power of the state to legislate (by itself or together with other states) and to impose its own law to international private relationships, irrespective of the ideas one might have about what that power should be.<sup>154</sup>

b. The ambiance of the legal system. I am referring to political, economical, and cultural factors which often determine the true scope and meaning of legal rules, on the one hand, and the functioning of governmental and judicial institutions, on the other. Without such an understanding, one could find that the mechanical application of the Regulation EC 44/2001 on *lis pendens* is the most accurate general solution on the matter, and that decisions such as the one adopted by the European Court of Justice in *Gasser*<sup>155</sup> are entirely reasonable and fair.

c. The different legal subsystems. In order to truly understand foreign legal systems the degree of plurality of them must be comprehended. As mentioned above, this plurality, whether it is based on personal or political criteria, constitutes one of the main data to be taken into account. Hence, PIL rules previously in force cannot be applied due to the presence of another rule in the same legal system which enjoys a ‘superior’ level of applicability.

d. The existence of non-judicial mechanisms of dispute settlement and the applicability of non-national rules. The growing significance of ‘private’ case law in several areas of PIL has already been underlined. It is worth stressing, once again, that states have progressively opened the doors to the full efficiency of arbitration and ADR. At the same time, following a parallel though weaker development,<sup>156</sup> states have recognised the applicability of non-national rules. Therefore,

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<sup>154</sup> PAMBOUKIS Ch.P. (note 134) at 63-68 (*‘l’époque contemporaine n’a pas marqué la fin de l’État. Elle a marqué la fin du postulat de la coïncidence entre ordre juridique et État’*).

<sup>155</sup> ECJ, C- 116/02, 9 December 2003.

<sup>156</sup> This weakness resides on a sort of ‘two steps forwards, one step back’ process. Among the former we can mention the following: sales law of many countries is now 1980 Vienna Convention (CISG) for a huge number of cases (and, as everybody knows, Article 9 of CISG establishes a strong presumption favouring the application of non-national law); UNIDROIT Principles on International Commercial Contracts are showing their great usefulness, mainly in arbitral litigation. For the latter, perhaps the most remarkable datum is the reluctance of the EU to recognise the parties’ right to choose a non-national law and the power of the court to apply it (see BONELL M.J., ‘El Reglamento CE 593/2008 sobre la ley aplicable a las obligaciones contractuales («Roma I») – Es decir, una ocasión perdida’, in: BASEDOW J. / FERNÁNDEZ ARROYO D.P. / MORENO RODRÍGUEZ J.A. (eds.) (note 107), p. 209 *et seq.*; see also BASEDOW J., ‘The Effects of Globalization on Private International Law’, in: BASEDOW J. / KONO T., *Legal Aspects of Globalization*, The Hague 2000, at 8). Apparently, such reluctance has no support from an economic point of view. See RÜHL G.,

the view of a legal system could be incomplete (and, even worse, erroneous) if attention were devoted exclusively to ‘public’ manifestations of law and case law.<sup>157</sup>

e. The interaction between PIL and other legal subsystems, particularly public international law. After more than a century of fighting for its autonomy from public international law, PIL nowadays finds itself more deeply connected than ever with its ‘elder brother’.<sup>158</sup> Of course, the relations between these two legal branches have always been pointed out. However, several facts make them closer now. Without a doubt, the two main points in this sense are, on the one hand, the emergence of a ‘PIL of human rights’,<sup>159</sup> and, on the other hand, the – so to speak – ‘priority’ given to international and supranational sources of law, two phenomena certainly intertwined.<sup>160</sup> However, not only human rights issues and the increasing ‘internationalisation of the PIL’ deserve attention. There are many other international legal problems whose solutions require the complementary vision of publicists and privatists,<sup>161</sup> such as state contracts, investment law, protection of the environment, international commerce, codification of PIL, state immunity, and so on. Total isolation of both disciplines is no longer an option. All those reasons recommend a common legal scholarship, as was the case in many states and perhaps only Italy has totally kept.<sup>162</sup>

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‘Party Autonomy in Private International Law of Contracts. Transatlantic Convergence and Economic Efficiency’, in: GOTTSCHALK E. / MICHAELS R. / RÜHL G. / VON HEIN J. (eds.), *Conflict of Laws in a Globalized World*, Cambridge 2007, at 179-180.

<sup>157</sup> Beyond this obvious assumption, things are, of course, more problematic. In this sense, MICHAELS R. (note 134) at 1258 (‘We cannot go back to the illusion that the state is the only relevant creator of norms in the world and so continue choice of law as before (...). At the same time, the challenge of legal pluralism for choice of law has far more dramatic implications than one might have thought’).

<sup>158</sup> See the essays assembled in LEIBLE S. / RUFFERT M. (eds.), *Völkerrecht und IPR*, Jena 2006.

<sup>159</sup> See *supra* notes 42-61 and accompanying text. See also LEQUETTE Y., ‘Le droit international privé et les droits fondamentaux’, in: CABRILLAC R. / FRISON-ROCHE M.-A. / REVET T. (eds.), *Libertés et droits fondamentaux*, 6<sup>th</sup> ed., Paris 2000, at 97-98.

<sup>160</sup> JAYME E., *Internationales Privatrecht und Völkerrecht. Studien-Vorträge-Berichte. Gesammelte Schriften*, t. 3, Heidelberg 2003, at 3-8; GAUDEMET-TALLON H. (note 134) at 34-35.

<sup>161</sup> In my opinion the question is neither whether the PIL is being publicised nor whether it is coming back (as it seems understand MICHAELS R., ‘Public and Private International Law: German Views on Global Issues’, in: *Journal of PIL* 2008, at 124) but the evidence that many issues are claiming for a complementary view, indeed. By sure, often public and private views will be rather contradictory than complementary but that would not be bad *per se*. After all, most of contradictions will be rooted in the heavy weight of old concepts. See also DOMINGO OSLÉ R. (note 63) at 113-114.

<sup>162</sup> See the Resolution of the IDI on the joint teaching of both disciplines, and the complementary report of JAYME E. (‘Droit international privé et droit international public: utilité et nécessité de leur enseignement dans un cours unique’), in: 67-II *Ann. IDI* 1998, pp. 466-475 and 99-109, respectively; but see MUIR WATT H., ‘New Challenges in Public and



## **VI. Some Final Remarks**

- Global problems demand global solutions; however global solutions do not necessarily mean uniform substantive solutions. Improving international cooperation could also help to achieve required global solutions.

- Main data which should be internalized are:

- The central role of human rights;
- The current limited scope of traditional legal concepts;
- The significance of public international law within PIL;
- The growing and diversification of international cooperation;
- The relevance of international organisations;
- The trend to privatisation of both, codification and dispute settlement.

- Need for a change in the teaching of the PIL (to students, law makers, public officers, judges – and even to professors...). A comparative approach to PIL education is no longer an option but a necessity. It should include:

(1) - teaching global PIL rather than only national PIL;<sup>163</sup>

(2) - connecting PIL with other matters; in particular with public international law;

(3) - dealing not only with hard law and judicial case law but also with soft law and ADR case law.

For all that I have said, I celebrate the first ten years of existence of the *Yearbook of Private International Law* and I congratulate all who make it possible, because the *Yearbook* is the model of publication which represents the current PIL, that is to say, the current comparative PIL.

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Private International Legal Theory', in: VAN HOECKE M., *Epistemology and Methodology of Comparative Law*, Oxford et al 2004, at 272-273.

<sup>163</sup> There is a wonderful experience in matter of transnational commercial law, under the leadership of Roy GOODE and Herbert KRONKE, which consists in teaching the same course at the same time in several universities (at this moment Oxford, Heidelberg, Luxembourg, Paris II, Catholic of Milan, East Anglia, IDC Herzliya, Kyushu, Eötvös Loránd). Why not a similar experience for other areas of international studies?