

NATIONAL REPORTS

A NEW AUTONOMOUS DIMENSION FOR THE ARGENTINIAN PRIVATE INTERNATIONAL LAW SYSTEM

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- I. General Overview
- II. Jurisdiction
 - A. The Illusory “Multilateral” Formulation of the Jurisdiction Rules
 - B. Defendant’s Domicile
 - C. *Forum necessitatis*
 - D. An Opening to Foreign Jurisdiction through the Acceptance of *lis pendens*
 - E. Jurisdiction Based on Party Autonomy
- III. Applicable Law
 - A. The General Flexibility Regarding the Determination of the Applicable Law by the Courts
 - B. The Limited Role of Party Autonomy
 - C. The Impact of Fundamental Principles and State Policies
- IV. International Cooperation
 - A. Cooperation in General
 - B. Cooperation in Children Return Matters
- V. Epilogue

I. General Overview

After more than four decades of failed attempts, the Argentine Republic has finally achieved codification of its Private International Law,¹ within the framework of the new Civil and Commercial Code.² It is worth noting that what has in fact been

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¹ Hereinafter “PIL”.

² Hereinafter, the “Code”. The Code was adopted by Act No. 26994 of 1 October 2014 and it will enter into force on 1 August 2015 (according to Act No. 27077 of 16 December 2014). PIL rules are contained in the Title IV (“PIL Provisions”) of the Book VI, which deals with the “Common Provisions to Personal Rights and Property Rights”.

codified is *almost all* the *autonomous dimension* of Argentinian PIL system. I say “almost all” because, on the one hand, the PIL rules of several special matters remain in the particular acts relative to those matters³ and, on the other hand, the new text has no rule on recognition and enforcement of foreign decisions.⁴ The reference to the “autonomous dimension” is even more important because, according to the Argentinian Constitution, domestic rules shall apply only when no international treaty is applicable to the same legal relationship. The pre-eminence of international treaties, besides being ordered by the Federal Constitution⁵ and having been reiterated many times by case law, is now established as a “general” rule in article 2594, which opens the Title devoted to PIL, and is specifically repeated in article 2601 (for international jurisdiction), in articles 2611 and 2612 (for general international cooperation), and in articles 2614 and 2642 (for specific cooperation regarding the international return of children). These articles serve as a simple guide for those who are not well versed in the Argentinian PIL system, given that it seems that their absence would not change the resolution that could otherwise be expected from an Argentinian court in a particular case. In fact, even if these provisions did not exist, the court could only apply the provisions of the internal dimension of the Argentinian PIL system in the absence of applicable provisions in international treaties, or when the particularities of the case require a “dialogued” solution between both dimensions of the legal system. The persistence of the legislator shall be considered, in any event, as a demonstration of the primary importance of the pre-eminence of treaties in the Argentinian PIL.⁶

Argentinian PIL scholars unanimously preferred a PIL codification by means of a special act. Nevertheless, they have generally accepted the only available option.

³ It is worth highlighting the ones related to commercial companies, insolvency proceedings, intellectual property, and checks.

⁴ The absence of provisions on the recognition and enforcement of foreign decisions in the new Code is technically regrettable, although in the end the quite reasonable trend expressed by the Argentinian courts in that regard will not change. The exclusion was absolutely deliberate since a previous version of the finally approved text did contain provisions on recognition and enforcement of foreign decisions. The reason invoked has to do with the constitutional provision that confers the federal State the legislative power over “substantial” matters and reserves to the provinces the one over procedural matters. In my opinion the question has a clearly federal nature since it refers to the “substantial” aspects of the recognition of foreign decisions and not to the merely procedural ones (such as the documents which must be presented or the competent authorities).

⁵ Article 75(22) of the Argentinian Federal Constitution. Except isolated cases, the Argentinian courts have been consistent with the respect to the priority of the application of the treaties in force in the country. See the recent decision of the Federal Court of Appeals on Social Security Matters, Chamber II, 12 March 2015, *Cicconetti Alberto v. Poder Ejecutivo Nacional et. al., el Dial* AA8DB5. What is more, the lack of their consideration not only authorizes the extraordinary recourse before the Federal Supreme Court of Justice but it is enough to characterize a judicial decision as arbitrary. See Federal Supreme Court of Justice, 9 November 2004, *Banco de Italia y Río de la Plata S.A. v. Banco Pan de Azúcar S.A., Fallos* 327-4785.

⁶ See M.S. NAJURIETA, *La codification du droit international privé dans la République Argentine*, in B. FAUVARQUE-COSSON/ D.P. FERNÁNDEZ ARROYO/ J. MONÉGER (eds), *Codification du droit privé et évolution du droit de l'arbitrage*, Paris 2014, p. 65-81.

Formally, the regulation of PIL in the Code is divided into two chapters of general provisions and a third, much more extensive, chapter of special provisions. Yet, there is no need to pay much attention to the names given to the first two chapters. In effect, Chapter 1, except for the mentioned article 2594, exclusively establishes the criteria to be taken into account for the application of the norms on applicable law. In turn, in Chapter 2 there are not only provisions on international jurisdiction. More important than these considerations, which although being relevant from a theoretical point of view do not have much practical significance, may be certain mandatory difficulties coming from the relationship between the general and special norms, on the one hand, and between the norms contained in this Title with all the rest of the Code, on the other hand. In both cases, we must trust that courts will know how to shape a clear and predictable case law, which in the end will justify the effort of having included the PIL in the new Code.

As for all the other subjects, the Code Drafting Commission⁷ entrusted the first elaboration of the PIL norms to renowned specialists.⁸ The result of their job is the one that I will now comment on. Generally, it is undeniable that it represents significant progress for the Argentinian PIL, particularly for the effort made in order to make its internal dimension compatible with its enormous international dimension (including the international regulation on human rights), as well as to reflect many of the good solutions that were being offered by the Argentinian courts. In this way, not only the quality of the Argentinian PIL is improved, but it is also made more visible and comprehensible for all users, both nationals and foreigners. In this article I will only comment on some particular questions related to the three sectors of the PIL included in the Code: jurisdiction, applicable law and cooperation.⁹

The internationalist character coincides with the inclinations demonstrated by the prevailing case law and by the majority of scholars, which is particularly confirmed in the work of the most influential author in the history of the Argentinian PIL, Werner GOLDSCHMIDT, and notably in his advocacy towards tolerance as the distinctive feature of PIL and for the “respect to the foreign element”. See *Derecho internacional privado. Derecho de la tolerancia*, 10th edn (updated by A.M. PERUGINI ZANETTI), Buenos Aires 2009. See M.A. OYARZÁBAL, *Das Internationale Privatrecht von Werner Goldschmidt: In Memoriam*, *RebelsZ* 2008, p. 601-619.

⁷ Composed by Supreme Court Chief Justice Ricardo L. LORENZETTI, Supreme Court Deputy Chief Justice Elena HIGHTON DE NOLASCO, and Professor Aída KEMELMAJER DE CARLUCCI.

⁸ Namely María Susana NAJURIETA, María Elsa UZAL, Marcelo IÑIGUEZ, and Adriana DREYZIN DE KOLOR.

⁹ The space devoted to each sector will decrease in proportion to the importance of the respective solutions. A commentary of each article in particular can be consulted in J.C. RIVERA/ G. MEDINA (eds), *Código Civil y Comercial Comentado*, volume VI, Buenos Aires 2014. For a general discussion about the codification of PIL within the Latin-American context, see my work, in *La codificación del derecho internacional privado en América Latina*, Madrid, 1994. More in general, on the pertinence of the contemporary efforts towards legal codification, see C. JAMIN, *Codifier au XXe siècle: éloge de la modestie*, in B. FAUVARQUE-COSSON/ D.P. FERNÁNDEZ ARROYO/ J. MONÉGER (eds) (note 6), at 41-55.

Regarding comparative law, the new PIL norms seem particularly receptive, sometimes in a direct fashion and other times indirectly, through the adoption of the norms of the 2003 Draft Code (the most recent of the previous attempts to codify PIL rules in Argentina) based on foreign PIL texts. Two European legal systems have been particularly attractive for the authors of the codified PIL: that of Switzerland, whose Federal PIL Act adopted in 1987 has had an extraordinary influence in various jurisdictions around the world, and that of the European Union, which vertiginously develops on the basis of the legislative competence that was assigned by its member states in 1997.¹⁰ The most influential aspect of the Swiss codified PIL is the conversion of the Argentinian system on applicable law into a system with a flexible basis as a result of the general application of the so-called “exception clause”, which in a concrete case authorizes the court to correct the abstract localization made by the legislator.¹¹ From the PIL of the European Union come some of the jurisdictional norms, such as the ones on exclusive jurisdiction¹² and non-contractual obligations,¹³ as well as some on applicable law, such as the ones governing consumer contracts¹⁴ and non-contractual obligations.¹⁵

II. Jurisdiction

A. The Illusory “Multilateral” Formulation of the Jurisdiction Rules

For the provisions on special jurisdiction (except the one related to adoption in article 2635) and the general provisions in articles 2606 and 2608, the legislator deliberately opted for “multilateral” wording (also referred to as a “bilateral” approach), rather than a “unilateral” formulation, which would limit the cases and circumstances in which the Argentinian courts are competent. The approach taken must not mislead: although the Argentinian legal system of international jurisdiction establishes that in matters of civil union the competent court is that of the effective mutual domicile of the individuals who constitute the union, or the court of the defendant’s domicile or habitual residence,¹⁶ this rule binds only the Argentinian courts. Thus, if in a particular case the indicated places are, for instance, in Venezuela, the Venezuelan court would be competent or not, according

¹⁰ See M.S. NAJURIETA (note 6), at 73-74.

¹¹ Article 15 of Swiss PIL Act. See *infra* section III.B.

¹² Article 2609.

¹³ Article 2656.

¹⁴ Article 2655. Strictly speaking, in this case the influence is not exactly from the PIL of the EU – which in this subject is contained in the so-called Rome I Regulation – but, curiously, from the instrument replaced by it, the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

¹⁵ Article 2657.

¹⁶ Article 2627.

to its own provisions on international jurisdiction and not because of the rule contained in the Argentinian provisions. This is the case because jurisdiction is a matter which involves one of the essential functions of the state and it is inconceivable that a court could be found competent by virtue of the provisions on international jurisdiction in force in another State and not by the provisions of its own state. This is quite distinct from the fact that a court may take foreign jurisdictional provisions into consideration in order to modulate its activity in certain circumstances, for instance, when a claim is filed before it and a foreign legal system provides the exclusive jurisdiction of its courts, or in situations of international *lis pendens*. Nevertheless, in any of these cases, it is the provisions of the court's own legal system that allow it to accept or reject jurisdiction.

What the legislator is really seeking with the formulation of multilateral provisions on jurisdiction is that they are – at the same time – provisions on direct jurisdiction and indirect jurisdiction (i.e. provisions that serve to determine whether the foreign court which has rendered a judgment which recognition is sought in Argentina was competent or not).¹⁷ However, as is well known, despite their name, these provisions are not jurisdictional, but are conditions for the recognition of foreign decisions, a sector that has been excluded from the Code. As a result, granting such a function to the jurisdictional provisions of the Code through the utilization of a multilateral formulation would be to undermine the deliberate exclusion made by the legislator.¹⁸ It follows that, despite the wording given, the jurisdictional provisions included in the Code admit only a unilateral reading, i.e. to justify the jurisdiction of the Argentinian courts. If the foreign court was competent pursuant to a reasonable criterion (provided or not in its legal system), the automatic denial of effects in Argentina of the decision rendered by that court due to the simple fact that the criterion applied does not strictly coincide with the one provided by the Argentinian law could lead to undesirable situations, or even situations directly at odds with the proper reading of the fundamental right of effective judicial protection.¹⁹ It is important that the jurisdiction accepted by the foreign court is compatible with the “principles” of Argentinian legislation²⁰ and not that it strictly matches the Argentinian jurisdictional provisions. If the foreign decision does not violate those principles, no objection should be raised to the jurisdiction of the foreign court.

¹⁷ It is expressly recognized like this by M.E. UZAL, *Breve panorama de la reforma de derecho internacional privado*, in J.C. RIVERA (ed.), *Comentarios al Proyecto de Código Civil y Comercial de la Nación*, Buenos Aires 2012, p. 1239 and 1240.

¹⁸ See *supra* (note 4).

¹⁹ The same must be said about any other legal system which regulation on the recognition of foreign decisions is based in this absurd criterion. See the critique, regarding the provisions on the recognition of the autonomous dimension in the German PIL, made along with J. SCHMIDT, *Das Spiegelbildprinzip und der internationale Gerichtsstand des Erfüllungsortes*, *IPRax* 2009, p. 499-503.

²⁰ As it is wisely mentioned in article 53(4) of the Venezuelan PIL Act, even if courts of that country have not interpreted the provision in this way.

Irrespective of the above, attention should be given to the jurisdictional criteria that are drafted in a unilateral way, for instance, the necessity forum.²¹ Does the legislator presume that such wording prevents the enforcement in Argentina of a foreign judgment rendered on the basis of such criteria? In this context, and in line with the logic that lead to the exclusion of provisions on the recognition and enforcement of foreign judgments in the Code, its jurisdictional provisions shall never be used to analyze the jurisdiction of foreign courts. The fact that in this opportunity it was decided not to regulate the recognition and enforcement of foreign decisions does not mean that it cannot be done in the near future, either through a federal law or through the modernization of the procedural codes. In any event, the indirect jurisdictional criterion should change²² and, in that case, the multilateral wording of the jurisdictional provisions and the resulting alleged indirect function would only cause problems for the uninformed user.

B. Defendant's Domicile

The forum of the defendant's domicile is an old friend of legal systems with Civilian roots. The Argentinian PIL system is not unique in this respect: this forum not only constitutes one of the general jurisdictional criteria provided in the Montevideo Treaties of Civil International Law,²³ but also appears in the 1869 Civil Code for some subjects such as contracts.²⁴ In addition, courts have properly applied this forum over time.²⁵ The new Code expressly incorporates it in the Chapter generically devoted to international jurisdiction,²⁶ which allows the conclusion that the defendant's domicile plays the role of a general forum.²⁷

Normally, in comparative law, when the defendant's domicile is given the function of a general jurisdictional criterion, the result is that it serves to grant jurisdiction in all cases (unless an exception applies), without paying attention to

²¹ Article 2602.

²² In fact, in the provisions on recognition of a first draft of the Commission, the criterion of bilateralization of own provisions, currently present in the Federal Code on Civil and Commercial Procedure, had been abandoned.

²³ In article 56 of both texts (that of 1989 and that of 1940).

²⁴ Articles 1215 and 1216.

²⁵ See Family Tribunal No. 5 of Rosario, 24 October 2002, *N., B. v. B., G., La Ley* 2003-D, p. 351. The decision points out that "the international jurisdiction of the courts of the defendant's domicile constitutes «a universal rule» (W. GOLDSCHMIDT, *Derecho Internacional privado*, 8th edn, 1995, p. 480) which source are conventional provisions of international Argentinian jurisdiction that, although not being directly applicable to the case, receive such order".

²⁶ Article 2608: "Except a particular provision, the personal actions must be filed before the courts of the defendant's domicile or habitual residence".

²⁷ M.E. UZAL characterizes it as one of the "general principles" on the topic along with the one of the exclusive forums in Lineamientos de la reforma del derecho internacional privado en el Código civil y comercial de la Nación, *La Ley Online* AR/DOC/3843/2014.

the subject matter involved in the case. In turn, for each or most of the subject matters there are specific jurisdictional criteria provided. This would also be, in principle, the function that the Code assigns to the defendant's domicile, but two considerations seem to cast doubts on the proclaimed generalization. On the one hand, the criterion applies exclusively to personal actions; on the other hand, strangely, it is repeated in all subject matters for adversary cases (i.e. cases in which there is a defendant). Dismissing the possibility that this was overlooked by the legislator and in the absence of an official explanation, perhaps the objective was to set the defendant's domicile, not as a general forum (applicable to all matters), but to play the role of a residual forum (applicable to personal actions to which there is no special criterion or in which the respective criterion is not present). Besides, it is worth mentioning, that article 2608 indistinctively considers the domicile and habitual residence to the effect of determining jurisdiction. At first sight, the provision would thus have a broader scope than the one traditionally given. However, once thoroughly observed in light of the definitions given to both notions in article 2613, the first impression disappears.

Among the "special" jurisdictional provisions which use the defendant's domicile, the one contained in article 2650 regarding contracts is particularly notable. It establishes that, if the action is directed against various defendants, it is enough to trigger local jurisdiction that one of them has his or her domicile or habitual residence in Argentina. Although article 2650 does not require the fulfilment of any condition to use this channel, it is evident that the court shall be very strict in the examination of the link between the different defendants and the case, in order to avoid the exorbitant use of the Argentinian jurisdiction to the detriment of defense rights.

C. *Forum necessitatis*

The Code sets a general regulation of the international jurisdiction of the Argentinian courts. However its article 2601 reminds that jurisdictional rules contained in treaties take precedence and that there are other autonomous rules on jurisdiction outside the Code. Apart from those cases, the Argentinian subsystem of international jurisdiction must be considered "complete". This means that, other than in the stipulated cases, the Argentinian courts cannot assume jurisdiction.²⁸ In any event, it must be taken into account that the general jurisdictional provisions contained in the Code also affect the excluded matters.

Having said this, the Argentinian provisions on international jurisdiction are nothing but the concretion of the principles and values recognized in the Argentinian Constitution and in the international regulation on human rights.²⁹

²⁸ The translation of the provisions on internal jurisdiction into international cases is not an option now. If it ever was, it could only be applied as a last resort. See, in this sense, the decision of the National Court of Appeals in Federal Civil and Commercial Matters, Chamber I, 26 October 2004, *Robinsa S.A. v. Rolando S.A., La Ley Online* AR/JUR/3995/2004, p.16.

²⁹ In fact, if one looks at article 1 of the Code it will be seeing that the same can be said about all the norms included therein.

Therefore, with the objective of guaranteeing an effective access to justice, the legislator leaves the door open to cover cases in which the exercise of jurisdiction is indispensable, despite not being stipulated in the provisions in force. It is clear that the fulfilment of the essential constitutional principles cannot find an insuperable barrier in the absence of a positive provision on international jurisdiction. Nevertheless, the legislator has preferred to include a *forum necessitatis* provision.³⁰ The “necessity” refers, precisely, to the requirement of not depriving the claimant of an effective access to justice. The *forum necessitatis* can serve not only to create a jurisdictional forum, but also to interpret an existent forum in the most favourable way, in order to avoid the denial of justice.

The provision in question does not authorize unfettered access to the “own jurisdiction”, for many reasons.³¹ The clearest and most evident is that the right to access justice does not – and cannot – exclusively benefit the claimant, but also the defendant. The difficult balance between both rights or – in other words – of the same right seen from opposite perspectives, is, as in many other fields of law, a real challenge for lawmakers and judges, as well as an area with great room for lawyer’s imagination. For this reason, the legislator is right to expressly restrict the scope of application of this exemption. In effect, being by definition the private relationships connected with different legal systems the subject matter of PIL, the fact of having to litigate abroad is perfectly foreseeable for someone who voluntarily participates in a relationship of this kind. Thus, the adverb “exceptionally” is of vital importance for the application of the provision, although curiously it did not exist in the original draft. Therefore, the *forum necessitatis* can only be applied when initiating an action abroad is “unreasonable”, a term that shall never be equated with “inconvenient” and that, to the contrary, is close enough (without being the same) as “impossible”. The requirement of sufficient contact with Argentina seeks to avoid the exorbitant exercise of jurisdiction by the Argentinian courts, rejecting some sort of universal jurisdiction in their favour.

If, for an exceptional provision, the contact is required to be “sufficient”, it is inevitable that the standard will be even higher for the “normal” forums. That is why I insist in my criticism of the potentially exorbitant jurisdictional criterion regarding contracts, consisting of admitting Argentinian jurisdiction when the performance of any consideration of the contract is done in Argentina.³² This may be justified if it were useful to enhance the fulfilment of justice, which could

³⁰ Article 2602: “Although the rules of the present Code do not grant international jurisdiction to the Argentinian courts, they can exceptionally intervene with the purpose of preventing the denial of justice, provided that it is not reasonable to require initiating the action abroad and as long as the private situation presents a sufficient connection with the country, the right to defence is guaranteed and it serves de convenience of achieving an effective decision”.

³¹ See D.P. FERNÁNDEZ ARROYO, *Compétence exclusive et compétence exorbitante dans les relations privées internationales*, 323 *Recueil des Cours* 2006, p. 55.

³² Included in article 2650 as one of the options for jurisdiction in contractual matters, the criterion is broadly used in Argentinian case law, especially since the decision of the Federal Supreme Court of Justice, 20 October 1998, *Exportadora de Buenos Aires S.A. v. Holiday Inn’s Worldwide Inc.*, *La Ley*, 2000-A, p. 404, with commentary of IUD C.

happen when the claimant is the weaker party of the legal relationship.³³ Conversely, when applied without distinction, the idea is less plausible. Without entering into a discussion of the merits of the question, it must be recalled that this criterion potentially applies when the defendant is neither domiciled in Argentina nor has in this country a subsidiary, agency or representation that has taken part in the case (which are the other two options provided in article 2650). Therefore, an obvious scenario is that the enforcement of a judgment rendered on such basis will take place abroad. There, the weakness of the founding jurisdictional criterion can drastically jeopardize the effectiveness of the decision. For this reason, I consider that the courts will be correct to restrict as much as possible the apparent generosity of this provision, which contradicts the general feature of reasonableness of the Argentinian jurisdiction, applying to that effect the principle of effectiveness, expressly stated in article 2602 *in fine* of the Code.

D. An Opening to Foreign Jurisdiction through the Acceptance of *lis pendens*

The institution of *lis pendens* essentially aims at safeguarding the proper administration of justice, avoiding the strategic utilization of jurisdictional provisions. The hypothesis is that the Argentinian court has jurisdiction to entertain the case, but at the time of initiating the action in Argentina, the case is already being heard abroad. Consequently, the acceptance of jurisdiction by the Argentinian court would potentially cause not only problems of procedural economy, but also a real damage to the justice of the case, given the likelihood of contradictory judgments and of inconveniences arising out of their effectiveness. The latter is precisely what is often sought when initiating a second action in a different jurisdiction.

The Code incorporates the *lis pendens* in its article 2604.³⁴ The article establishes the obligation of staying the Argentinian proceedings when the recognition of the prospective foreign decision in Argentina is “foreseeable”. If the goal of this provision is to prevent the abuse of jurisdictional forums, it is important to remember that the invocation of *lis pendens* can be abusive in itself. European case law (it is Europe where the commented norm originates) is full of cases in which a claim is cleverly filed in the country whose judicial system presents several functioning problems,³⁵ even knowing about the lack of jurisdiction of its courts, with the sole

³³ It is, to some extent, what article 2654 does in a concrete way regarding consumer contracts, or what was done in some case related to a labour contract (National Labour Court of Appeals, Chamber IV, 17 September 2008, *Verdaguer, Ricardo Anibal v. IMPSAT Fiber Networks Inc. et. al., La Ley Online* AR/JUR/10520/2008).

³⁴ Article 2604: “When an action which has the same object and the same cause has been previously initiated and is pending abroad between the same parties, the Argentinian courts shall stay the judicial proceedings in this country if it is foreseeable that the foreign decision might be object of recognition. The stayed proceedings may continue in the Republic if the foreign court declines its own jurisdiction or if the foreign procedure terminates without a decision on the merits of the case or, in the event a decision was rendered abroad, it is not capable of being recognized in our country”.

³⁵ For instance, ECJ, C-116/02, 9 December 2003, *Gasser*.

purpose of then invoking *lis pendens* before the competent courts of another state, artificially delaying the procedure. This problem would have been settled in the Code by regulating the *lis pendens* as a prerogative instead as an obligation of the courts, allowing a way out for cases of evident abuse.³⁶ In absence of such tools, the problem can only be dealt with through sophisticated arguments about abuse or violation of fundamental rights in the procedure.

For the *lis pendens* to proceed there must be a threefold identity: of object, cause and parties. Although the Code does not incorporate any nuance in that respect, at the time of verifying such identity, courts must take into consideration the goal pursued. Such a consideration might lead the court to act with certain flexibility, for instance, regarding the object expressed by the parties, when it is clear that, despite using different presentations, the object is the same. The standard to make this decision is that the actions essentially relate to the same case. This is because the legislator did not want to include a “connection” provision authorizing the Argentinian courts not to hear cases for which they have jurisdiction when, although the identity requirements of *lis pendens* are not met, the case is so intimately linked to another case being heard abroad that the intervention of the Argentinian courts would be absolutely unreasonable. The possibility of “connection” in its positive version (i.e. authorizing the Argentinian court to extend the jurisdiction to a case intimately linked to another one which it is already entertaining) has also been omitted.³⁷

E. Jurisdiction Based on Party Autonomy

Regarding the parties’ right to choose the competent court, the legislator preferred to maintain the *status quo* prevailing since 1976 and decided to continue limiting the scope of party autonomy to patrimonial matters.³⁸ This is to say that such right does not indistinctively apply to all matters, but only to the ones that can be considered of such a character. This decision does not only contrast with the general evolution of party autonomy, but also with the considerable changes produced in non-patrimonial fields, some of which are broadly adopted by the Code. When the right to derogate the Argentinian jurisdiction was incorporated into the Argentinian positive legislation in 1976 (with a quite concrete purpose) the

³⁶ The Peruvian Civil Code allegedly used as a source of this Title, uses a temporal criterion, perhaps too short, of three months in its article 2066.

³⁷ See Belgium PIL Code, article 9.

³⁸ Indeed, article 2605 of the new Code reproduces the almost identical terms of article 1 of the National Code of Civil and Commercial Procedure, with this wording: “In patrimonial and international matters, the parties are allowed to extend jurisdiction to courts or arbitrators outside the Republic, except that the Argentinian courts have exclusive jurisdiction or that the extension is prohibited by law”. The provision refers both to courts and arbitrators. However, the Code specifically defines the scope of the “arbitration contract” in article 1651 to which one must refer due to its special character. The provision does not require, correctly, any link between the case and the country of the chosen forum, acknowledging that what in many cases encourages the exercise of party autonomy (particularly in arbitration) is precisely the search for a “neutral” jurisdiction.

limitation perfectly fit in a context in which there was, among other things, great concern to safeguard the country from the alleged terrible consequences of divorce, which was prohibited until the arrival of democracy (to the country and the family). Nowadays, comparative law provides us innumerable examples of how the parties' right to choose the competent court serves in many cases to resolve people's real problems in non-patrimonial matters.³⁹ Moreover, taking into account that, except in the case of adoption of children domiciled in Argentina, the jurisdictional forums provided by the Code for non-patrimonial matters are all concurrent, there is no reason to deny effect to the parties' agreement to choose one of the concurrent forums and dismiss another or others. In any event, the strict wording of the provision along with the previously mentioned context, mandate respect for the parties' choice in any patrimonial matter, even within the family field, which coincides with the right to choose the applicable law, expressly recognized in the Code regarding maintenance agreements⁴⁰ and the matrimonial property regime.⁴¹

Like all international jurisdictional provisions included in the Code, article 2605 is essentially addressed to the Argentinian courts. In this sense, it plays as a sort of negative jurisdiction provision, preventing them from exercising jurisdiction when the parties have voluntarily excluded them, insofar as the conditions imposed by the Argentinian law are met. But what is most striking is not this, but that when opting to reproduce the biased wording of article 1 of the Argentinian Federal Code of Civil and Commercial Procedure, the provision only contemplates what is technically the derogation of the Argentinian jurisdiction, but it does not say anything regarding the jurisdiction of the Argentinian courts when the parties submit to it. A teleological construction allows the inference that party autonomy should also permit the choice of the Argentinian courts as competent.⁴² Actually, the contrary solution would make little sense. This is further confirmed, from a systematic standpoint, in the first paragraph of article 2650, which takes for granted this right of the parties with respect to contracts. It could be thought that the "choice of forum" made in favour of the Argentinian courts is regulated in article 2607, which explains that the choice of forum may be either express or tacit, but it does not include any of the formulas that appear in the other provisions conferring jurisdiction. Due to the wording, it seems like a development, a provision for the application of article 2605.⁴³ In other words, despite the significance of the question, the jurisdiction of Argentinian courts on the basis of party autonomy is set out in the Code in only an implicit fashion.⁴⁴

³⁹ See for instance article 42(2) of the Venezuelan PIL Act, which authorizes the parties' submission to the courts of that country in matters of civil status and family provided that there is an effective link between the case and Venezuela.

⁴⁰ Article 2630.

⁴¹ Article 2625.

⁴² In this sense, Commercial National Court of Appeals, Chamber E, 26 September 1988, *Welbers S.A., Enrique C. v. Extrarktions-Technik Gesellschaft Fur Anlagenbau M. B. M., La Ley* 1989-E, p. 304, with commentary of A. BOGGIANO.

⁴³ Like the one in article 2606 which points out the exclusive character of the choice of forum except that the parties agree otherwise.

⁴⁴ Dismissing, by logic and by the tradition of Argentinian case law, the admission of

III. Applicable Law

A. The General Flexibility Regarding the Determination of the Applicable Law by the Courts

Regarding the determination of the applicable law, the most important modification of the system in force is provoked by the norm embodied in article 2597, which recognizes what is known as the “exception clause”.⁴⁵ This means that in the new national PIL, the localization of legal relationships in a certain legal system to the effect of the application of its law is no longer a matter exclusively concerned to the legislator. From now on, courts will have the power to correct, in view of the particular case, the localization *a priori* made by the legislator when it is incompatible with the reality of the case. Thus, the conflict rules of the internal dimension of the Argentinean PIL lose their traditional strictness and enter into the flexibility era, as occurred with its Swiss equivalent more than a quarter of a century ago.⁴⁶ It is noteworthy that the legislator does not give a blank cheque to the court. To the contrary, the legislator reminds that this is an exceptional circumstance, which must comply with a series of patterns in order to be implemented. It is appropriate to insist: the authorization granted to the courts refers to the stage of localization of the legal relationship. In no case it allows modifying the substantial result of the localization, but only the localization itself.

The legislator’s interest to provide the system with this flexible basis appears to be so great that it has inserted a similarly specific exception clause in the field of contracts,⁴⁷ obviously unnecessary. In addition, even though the purpose of correcting the connection established by the legislators in a particular case is shared with the general provision of article 2597, the different wording between both provisions raises some doubts about its rationale, and maybe, some interpretative problems too. In this sense, it seems clear that although the purpose of the distinction is difficult to understand, that in contractual matters, the clause

the voluntary submission to foreign courts and not to the own courts, it can be assumed that the intention of the legislator is that such submission is also subject to the criteria of patriminality and internationality. With much logic, the negative effect given to the derogation of the Argentinian jurisdiction is dismissed in those matters for which the Argentinian jurisdiction is provided. The same happens if the derogation of jurisdiction is prohibited by law or by the Code itself, as it happens with respect to consumer contracts (article 2654). Consequently, there would be no room to accept the parties’ submission to the Argentinian courts in reciprocal situations. When it comes to arbitration, I repeat the reference to the specific rules, in particular to article 1651.

⁴⁵ Article 2597: “Exceptionally, the law designated by a conflict rule shall not be applied when, by virtue of the factual circumstances of the case, it is evident that the situation has little link with such law, and conversely, it presents very close links with the law of other state, which application is foreseeable and under which rules the relationship has been validly established. This provision is not applicable when the parties have chosen the applicable law to the case.”

⁴⁶ See article 15 of the Swiss Federal PIL Act.

⁴⁷ Article 2653.

does not set up an exclusive prerogative of the courts, but that it cannot exist without the concurrency of the parties intention (“upon party request”). In contrast, the consequences of not repeating in the contractual exception clause the terms of article 2597 such as “manifest” or “close links”, are not so clear.⁴⁸

It goes without saying that none of the formulations of the exception clause are identified with the situation considered in article 2639 regarding parental responsibility. In this case, the power of replacing the localization provided by the legislator (who situates the relationship in question in the habitual residence of the child) is not given to the courts because the concrete case presents “very tight links” with other legal system, but it is authorized to “take into consideration” the law of the other state with which the situation has “relevant links” if this is required by the best interest of the child. The exception clause (like the one in articles 2597 and 2653) has to do with the geography of the case, with the place where its elements are located. Here, instead, it is about the material solution of the case, which must be modified or modulated in order to satisfy the cornerstone of the legal relationship in question.⁴⁹ With this understanding, the clause of material correction for parental responsibility is much more similar to the provision governing the maintenance right, based on the protection of the maintenance creditor’s interests,⁵⁰ and as the provision governing the determination and challenge of paternity, based on the protection of the fundamental rights of the child.⁵¹

B. The Limited Role of Party Autonomy

Whereas the courts’ role in the determination of the applicable law is notably reinforced by the Code, the parties’ role is much less reinforced. As has already been pointed out, the exception clause applies to all matters. Conversely, the parties’ power to designate the applicable law is concentrated in contracts⁵², in a very

⁴⁸ It is worth remarking that the use of the second paragraph of article 9 of the 1994 Mexico Convention on the Law Applicable to International Contracts, as a source in article 2653, presents some curious features. Among other things, it allows to verify the suggestion made by the wording of article 2652, in the sense that the legislator deliberately dismissed the possibility that the court applies or takes into account the “general principles of international commerce accepted by the international organisms”, which is what the following phrase of the second paragraph in article 9 of the inter-American text says.

⁴⁹ The origin of this provision is in article 15 of the 1996 Hague Convention on the Protection of Children, which is not in force in Argentina.

⁵⁰ Indeed, the first paragraph of article 2630 establishes as localization criteria the domiciles of both parties of the maintenance relationship, ordering the competent authority to apply the most beneficial law to the creditor. This solution is inspired in article 6 of the 1989 Inter-American Convention on Maintenance Obligations.

⁵¹ The options offered by article 2632 are: the law of the child’s domicile at the time of his or her birth, the law of the domicile of the parent or alleged parent at the time of the child’s birth, or the law of the place of celebration of the marriage.

⁵² Article 2651.

restricted fashion, in the matrimonial property regime⁵³ and in maintenance agreements.⁵⁴ The absence of a general rule of autonomy regarding applicable law contrasts with the meticulousness with which the legislator deals with the parties' intention regarding the determination of the regime of international contracts.⁵⁵

Article 2651 provides considerable formal flexibility for the choice of law in contracts. Firstly, the choice may affect the totality or parts of the contract. Secondly, the choice may be made and modified in any moment, but always safeguarding the validity of the contract and third-party rights. Within certain limits, the parties may design a regulation of their contracts *à la carte*. Within the frame of such right, they can, among other things, submit their obligations to certain standard clauses such as the well-known INCOTERMS published by ICC or directly submit to a non-state body of rules. This is consistent with the context provided by the legislator. Indeed, if the choice of the law of a state not connected with the case is valid, one can legitimately ask how the submission to a so known text as the UNIDROIT Principles of International Commercial Contracts cannot be admitted.⁵⁶ However, it is noteworthy that if the article in question authorizes the parties to "remove" the (internal) mandatory provisions of the chosen law (which might be the Argentinian law), its wording seems to indicate that there will always be an applicable state law to fix the framework in which the non-state law designated by the parties must function.⁵⁷ In any event, the chosen law will be subject to the limits established by the principles of public policy and the international mandatory provisions of the Argentinian law, as well as this kind of provisions of third-party states that have "prevailing economic links with the case".

It must be equally clear that the goal of the legislator was that the decision to submit to those material rules (usages, practices, customs or principles) must be expressly stated in the contract: it is not to be presumed. This raises a contradiction when the applicable law (chosen or not) is the law of a member state to the 1980

⁵³ In reality, article 2625 only indicates in its paragraph 3 that spouses, who change their domicile to Argentina "can record in a public instrument their option for the application of Argentinian law" without affecting third party rights'.

⁵⁴ Here, the choice is limited to the law of the domicile or habitual residence of the parties to the agreement (article 2630, paragraph 2).

⁵⁵ Article 2651. So much detail actually shows what it does not say. On the one hand, the choice is not subject to any connection requirement between the chosen law and the contract. On the other hand, the internationality requirement, which is present with respect to jurisdiction, is not required. Whereas, given the subjection to the limits imperatively applicable, the consequences of the first silence do not turn problematic, the second silence leaves certain questions open (on which case law has already elaborated; see National Court of Appeals in Civil and Commercial Matters, Chamber III, 27 October 2006, *Banco Europeo para América Latina v. Banco de Galicia y Buenos Aires S.A.*, *La Ley* 2007-E, p. 616). What is clear, instead, is that there is a contract in which party autonomy does not proceed: the consumer contract. More specifically, the consumer contract as defined in article 2655 of the Code.

⁵⁶ It is in this sense that the 2015 Hague Principles on choice of law in international commercial contracts are pronounced.

⁵⁷ Commercial National Court of Appeals, Chamber A, 8 November 2007, *Prensiplast S.A. v. Petri S.A.*, *La Ley* 2008-B, p. 674.

Vienna Convention on Contracts for the International Sale of Goods (which in that case operates as “internal” law), which in article 9.2 establishes the presumption of applicability of usages. This is “the” Argentinian material PIL provision, at least with respect to the international sale contracts.

C. The Impact of Fundamental Principles and State Policies

The flexible elements included in the system find their counterweight in the reinforced protection included by the legislator to the fundamental principles of the Argentinian legal system – whether they are dispersed as “public policy principles” or have a concrete and tangible expression in an “international mandatory material provision” –, and in the translation of public policies into the PIL provisions (or in both at the same time).

Regarding the former, in addition to the general provisions contained in articles 2559 and 2600, the Code contemplates various particular expressions. Thus, in matters of natural filiation, filiation by adoption and children protection, the Code provides the application of a special public policy, which lies on the fundamental rights or in the best interest of the child, as the standard to allow in Argentina the recognition of situations constituted abroad.⁵⁸ In contractual matters there are also special references introduced to the international mandatory provisions and the public policy.⁵⁹ In this case, it is worth adding that the different wording of both provisions might have some impact on the respective construction and application. For instance, whereas in the general provision of article 2599 it is provided that, under certain circumstances, “the effects” of the international mandatory provisions of third-party states “may be recognized”, in contractual matters (with less requirements) it is stated that such provisions “are in principle imposed to the contract”. Given the specialty of the latter, it can be assumed that the intention was that, in general, those peculiar foreign provisions remain at the court’s discretion which will take them “with a grain of salt”, but that particularly in contractual matters the court is bound to apply them except in justified cases (what would be meant by “in principle”). The court would do well to carefully analyse the consequences of such an imposition before deciding.

With regard to the reflection of public policies in the concrete field of PIL, it is important to note the decision to give specific protection to those who are considered as the weaker parties of the legal relationships in which they participate, either in a contractual or personal aspect. In the first case, I specifically refer to passive consumers whose contracts are, in principle, governed by the law of their domicile.⁶⁰ In the second case, among various possible examples, two situations stand out: the already commented principle in favour of the maintenance creditor⁶¹ and the regulation of the international adoption, which combines different methodologies in order to guarantee the functioning of the adoption without

⁵⁸ See articles 2634, 2637 and 2640.

⁵⁹ Article 2651(e).

⁶⁰ Article 2655.

⁶¹ Article 2630.

putting aside the basic criterion of the prohibition to adopters domiciled abroad of adopting children domiciled in Argentina.⁶²

IV. International Cooperation

A. Cooperation in General

In the new Code, the general provisions on cooperation are included – for some reason that I ignore – in the chapter devoted to the jurisdiction: mixed as usual, with a provision related to the rights of the “alien” in the judicial procedure conducted in Argentina. In particular, the right of access to justice is deemed fundamental, extending universally a criterion that was already established in the Argentinian PIL at a regional level, through the 1992 Las Leñas *Mercosouthern* Protocol.⁶³ Indeed, article 2610 states that the access to justice is a right, exercise of which must be guaranteed to human beings without distinction on the basis of nationality or residence, as well as to legal entities, regardless of their state of incorporation, authorization or registry. In other words, the litigant who has no local link can never be placed in an unfavourable condition compared to the litigant who does have such a link. The concrete expression of this principle is the total elimination of the security for costs in judicial proceedings, which already existed in international conventions in force in Argentina.⁶⁴ The character of the provision makes the prohibition affect any kind of pecuniary requirement to a litigant who does not have a local link, that involves a discrimination against him, not only irrespective of the designation (as it is expressly said in the article) but also of the amount, the form of receiving it or the purpose of the sum collected. It is not an altruist or naive attitude of the legislator. In reality, it is nothing but a correct understanding of what is a “fundamental” right that exercise as such, cannot depend on the origin or the condition of the right-holder.

Probably even more interesting than this is the recognition of the mandatory nature of the international jurisdictional cooperation of the Argentinian courts.⁶⁵ Like the previous provision, this universalizes an obligation already assumed by Argentina with respect to its courts through international instruments, both bilateral and regional (and of universal potential).⁶⁶ This is a logical and inevitable

⁶² Articles 2636 to 2638, which are combined with the provision on exclusive jurisdiction on the topic referred in the first paragraph of article 2635. See M.S. NAJURIETA (note 6), at 78-81.

⁶³ Articles 3 and 4.

⁶⁴ G. ARGERICH, *El arraigo y su supresión por los tratados internacionales*, in II *Doctrina Jurídica* 1996, p. 633. See also Federal Supreme Court of Justice, 3 April 2001, *Plenkovich, Liliana E. v. Salvia, Mercedes et. al.*, *La Ley Online* AR/JUR/5170/2001.

⁶⁵ Article 2611.

⁶⁶ I specially refer to the Inter-American Conventions (and their respective Protocols) on Letters Rogatory (CIDIP I, 1975), on the Taking of Evidence Abroad (CIDIP II, 1979), on the Execution of Preventive Measures (CIDIP II, 1979), on Proof and

consequence of the generalization of the right of access to justice. Indeed, the unjustified lack of cooperation by the authorities of a state may represent an insuperable and terrible obstacle to the exercise of the right of access to justice. The provision, however, while it makes the principle quite clear, does not mention the concrete channels through which it develops.

A different subject is the one of the scope of the cooperation obligation, which should have been somehow specified. At the *Mercosouthern* level, the lack of specification is because it is understood that the obligation reaches all the subjects treated by the Protocol. Translating the principle into the Code, isolated from any specific development (besides the one which appears in the following article on cooperation for the taking of evidence and procedural acts of a merely formal nature), the provision in question is susceptible of being invoked for the most varied questions. For instance it could be invoked on occasion of a direct communication from a foreign court to an Argentine court, so that the latter helps the former to determine the validity and content of the Argentinian law applicable to a case that is being heard in the country of the requesting court. The adjective “broad” accompanying the obligation of cooperation can be applied either to the subject matter or to the extension of the activity requested to the court.⁶⁷

B. Cooperation in Children Return Matters

The so repeated and generally correct application of the Hague Convention on the Civil Aspects of International Child Abduction clearly indicates that in Argentina the return of the minor to the state of his or her habitual residence is considered a principle.⁶⁸ Therefore, the generalization of the applicability of the principles contained in the international conventions on the topic to cases in which they are

Information on Foreign Law (CIDIP II, 1979), and on the International Return of Children (CIDIP IV, 1989), to the *Mercosouthern* Protocols on Cooperation and Judicial Aid on Civil, Commercial and Administrative Matters (1992) and on Preventive Measures (1994), and to the Hague Conventions on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) and on the Civil Aspects of International Child Abduction (1980). Specifically, the commented provision universalize the obligation assumed by Argentina with respect to its fellow member states of the MERCOSUR in article 1 of the mentioned 1992 *Mercosouthern* Protocol, without including the references made therein to administrative matters and procedures.

⁶⁷ It must be taken into account that regarding cooperation in the field of international children return, article 2642 contains a specific modulation of such an obligation.

⁶⁸ See, among many others, the reasoning applied by the Federal Supreme Court of Justice, 14 June 1995, *W., E.M. v. O., M.G., La Ley* 1996-A, p. 260; and by the National Civil Court of Appeals, Chamber H, 18 November 2003, *M.V., M.L. v. C., C.A.S., El Derecho* 206-215, to order the return of minors in compliance with the 1980 Hague Convention.

not strictly applicable⁶⁹ should not be surprising. It is also worth mentioning the provision related to the manner in which the return of the child or adolescent must be done, stating that the competent court to decide the return not only shall supervise the safe return after a judicial restitution order, but shall also foster solutions leading to the voluntary fulfilment of such decision.⁷⁰ In practice, the application of these criteria is often made on the basis or with the help of direct communications between the authorities of the different states involved. It can be expected that, although the Code does not expressly mention them, the promptness usually required in the return proceedings will often lead to prefer those fast mechanisms to the obligation of using letters rogatory.

V. Epilogue

Many of the solutions provided by the new Code are already known by Argentinian courts, so no great changes are to be expected from them. Regarding the more novel ones and the ones with a somehow cryptic wording, certainly the courts – with the humble contribution of scholars – will find the adequate interpretations. If this was the general feature regarding a domestic PIL fragmentary and dispersed, everything should work even better in relation to the new system. As to the “venue” selected for the internal codification of the Argentinian PIL, it may be worth remembering that frequently, the perfect is the enemy of good. It goes without saying that the conception that keeps the PIL in the privatistic prison⁷¹ should have long since been abandoned. However, it is true that the real possibility of carrying out this codification was no other than taking the train of the drafting of the Civil and Commercial Code. I understand that, in this opportunity, this option was much more attractive than simply staying in the platform waiting for the ideal train, which has already derailed several times.

⁶⁹ Article 2642. The Argentinian courts have already been doing this for a long time. See, in this vein, National Civil Court of Appeals, Chamber B, 26 September 1989, *P.H.M.C. v. N.L.E.A., La Ley* 1991-A, p. 325.

⁷⁰ See recently Supreme Court of Justice of Buenos Aires, 16 April 2014, *P.C. v. S. B. d. P. M., el Dial* AA8715; High Tribunal of Justice of Jujuy, 12 August 2014, *El Derecho* 19/1/2015 No. 13.651; Family Tribunal of Rosario No. 7, 18 July 2014, *El Derecho* 9/1/2015 No. 13.645.

⁷¹ This constitutes one of the “psychological” disorders of PIL. See my work: *El derecho internacional privado en el diván – Tribulaciones de un ser complejo*, in *Derecho internacional privado y derecho de la integración. Libro homenaje a Roberto Ruiz Díaz Labrano*, Asunción 2013, p. 17-35. Argentinian PIL scholars and case law are actually much more “internationalist” than “privatistic”.