Rabels Zeitschrift/The Rabel Journal

Max-Planck-Institut
für ausländisches und internationales Privatrecht

Rabels Zeitschrift

für ausländisches und internationales Privatrecht

The Rabel Journal

of Comparative and International Private Law

RabelsZ 80/1 (2016) 1–235

Band 80 (2016) Heft 1 (Januar)

Rabels Zeitschrift
für ausländisches und internationales Privatrecht

The Rabel Journal
of Comparative and International Private Law

Herausgegeben in Gemeinschaft mit
Ulrich Drobnig, Bernhard Großfeld, Klaus J. Hopt, Hein Kötz,
Ernst-Joachim Mestmäcker, Wernhard Möschel

von
Jürgen Basedow, Holger Fleischer und Reinhard Zimmermann
Direktoren am Institut

Redaktion: Max-Planck-Institut für ausländisches und internationales Privatrecht,
Mittelweg 187, D-20148 Hamburg
Telefon 040/41900-234 – Telefax 040/41900-288

Redaktionsausschuss: Christian Eckl, Jens Kleinschmidt, Christoph Kumpan,
Klaus Ulrich Schmolke, Kurt Siehr, Wolfgang Wurmnest

Redaktionsassistenz: Sebastian Gößling, Sophie Knebel

Manuskripte: **rabelsz@mpipriv.de**

All Rabel Journal articles are subject to peer review by at least two experts familiar with their subject matter. For more information on the submission procedure and for the style sheet in English and German please visit <www.mohr.de/rabelsz>.

Erscheinungsart: Bandweise, pro Jahr ein Band zu 4 Heften mit je etwa 225 Seiten. Empfohlener Verkaufspreis pro Band: € 304,– für Institutionen einschließlich IP-gesteuertem, elektronischem Zugang mit Hyperlinks für eine mittelgroße Institution (bis zu 20.000 Nutzer). Größere Institutionen (über 20.000 Nutzer) bitten wir um Einholung eines Preisangebots direkt beim Verlag. Kontakt: **elke.brixner@mohr.de.** Abonnement für Privatpersonen: € 154,–, einschließlich elektronischem Zugang über Benutzername und Passwort. *Einzelheftpreis:* € 81,–, jeweils zuzüglich Versandkosten. Abbestellungen sind nur zum Jahresende für das folgende Jahr möglich. Die Abbestellung muss bis spätestens 30. November erfolgen. Eine Einbanddecke ist zum Preis von € 20,– lieferbar. *Verlag:* Mohr Siebeck GmbH & Co. KG, Postfach 2040, 72010 Tübingen. *Vertrieb:* über den Buchhandel.

Satz und Druck: Gulde-Druck, Tübingen.
ISSN 0033-7250

Inhalt dieses Heftes

Aufsätze

Berichte

Materialien

Literatur

I. Buchbesprechungen

Main Characteristics of the New Private International Law of the Argentinian Republic

By Diego P. Fernández Arroyo, Paris*

Contents

I. A long-awaited codification

Argentina enacted a new internal dimension of its system of private international law (PIL) within the framework of the Civil and Commercial Code adopted in 2014.[1] As a result, the system looks now more balanced and in tune with the current requirements of international legal relationships than it used to be at its origin. Indeed, by the end of the nineteenth century, the Argentinian system of PIL could be considered to be advanced. It not only had the interesting internal dimension contained in the Civil Code which, despite being incomplete and non-systematic, possessed a notable interna-

* The author wishes to thank Ezequiel H. Vetulli for his careful edition of the final version of this article. Some parts of it are contained in an article published in Spanish in the Revista de derecho privado y comunitario (Buenos Aires), special issue (2015) 399, under the title "Aspectos generales y particularidades relevantes de la nueva dimensión interna del derecho internacional privado argentino".

[1] The "new Code", as it will be called hereafter, was adopted by Act No. 26.994 of 1 Oct. 2014 and entered into force on 1 Aug. 2015 (according to Act No. 27.077 of 16 Dec. 2014). For a German translation of its PIL provisions, see RabelsZ 80 (2016) 158–179 (this issue).

RabelsZ 80, 130–150 – DOI: 10.1628/003372516X14497453829683
ISSN 0033-7250 – © 2016 Mohr Siebeck

tionalist accent due to the adoption of the most significant doctrine of that time, with a distinguished place for the works of Savigny and Story. In addition, the Argentinian PIL already had an extraordinary international dimension, developed in the monumental work of the 1889 Montevideo Treaties and embracing the totality of PIL. This international dimension underwent a slight modernization in 1940 (when a new version of the Montevideo Treaties was adopted) and a sustained expansion and diversification from the last quarter of the past century, provoked, fundamentally but not exclusively, by the incorporation into the Argentinian system of the instruments arising out of the codification factories of the Organization of American States (OAS) and the *Mercado Común del Sur* (MERCOSUR).[2] Conversely, the internal dimension was not as lucky. Its rules grew slowly in number and according to the approval of special legislation on diverse topics, but this did nothing but emphasize the dispersion and heterogeneity of the system.

On top of that, an erroneous understanding of the Argentinian federal system also worked against the harmonious development of the internal dimension of PIL. Through the determination that the recognition and enforcement of foreign decisions does not belong to the federal law-making power, codification was relinquished to the incongruous multiplication of provincial microsystems (the member states of the federation are called "provincias"). It is true that, since the Federal Constitution was adopted in 1853, law-making responsibilities were settled by recognizing the federal power in respect of *substantial* legislation and by reserving provincial power for *procedural* issues. However, the recognition and enforcement of foreign decisions can hardly be considered as a provincial matter; it is federal by nature. Furthermore, the provisions containing the required grounds to recognise and enforce foreign decisions are substantial rather than merely procedural. In fact, the original Argentinian Civil Code, drafted by Vélez Sarsfield, contained provisions on international jurisdiction and they have always been considered to be both federal and substantial.

The preference granted by case law to treaties over domestic law, later expressly confirmed by the 1994 constitutional amendment,[3] finally consolidated the internal dimension as the poor relative of the Argentinian PIL system. If the system's evolution did not fully stop, it was only because of the innovations introduced by means of international treaties and because of the invaluable contribution of certain judges who ensured that the notorious misalignment between the internal dimension of the Argentinian PIL sys-

[2] On these instruments, see the following contributions by *Jürgen Samtleben*: Die Interamerikanischen Spezialkonferenzen für Internationales Privatrecht, RabelsZ 44 (1980) 257; *idem*, Neue Interamerikanische Konventionen zum Internationalen Privatrecht, RabelsZ 56 (1992) 1; *idem*, Das Internationale Prozeß- und Privatrecht des MERCOSUR, RabelsZ 63 (1999) 1.

[3] Article 75 para. 22 of the Federal Constitution.

tem and reality did not lead to such a consequence. However, it must not be understood that the diagnosis of the misalignment of the internal dimension of the Argentinian PIL to reality is something novel or arose out of a recent situation.

In the years after the 1949 constitutional amendment, Werner Goldschmidt outlined for the first time his *Basis of a codification draft of the Argentinian PIL*.[4] Goldschmidt reported the *gaps, contradictions, inconsistencies and ambiguities* of the Argentinian PIL system. The situation did not get much better in the sixty years between Goldschmidt's denunciation and the presentation of the codification draft, now transformed into a code. Consistent with his impression, and twenty years after his *Basis*, Goldschmidt presented his famous code draft, which (despite not having parliamentary success) exercised a notable influence on the Argentinian doctrine.[5]

There were also other attempts to codify the internal dimension of Argentinian PIL. In this respect it is worth mentioning a previous attempt to renew the Civil Code in 1999, which included a new PIL draft as its *Book VIII*.[6] After receiving some modifications, the text was sent to the National Congress in 2000 without yielding any legislative result. Later on, the project – with the modifications made – was used as a working document by a commission designated in 2002 by the National Ministry of Justice in order to put together a regulation on PIL. In 2003, the commission produced a *draft code* that was sent to the Minister, who directed it to the National Congress where, despite its undeniable qualities, the draft stalled.[7] It is with that briefly described record that PIL made itself significant in the new codification effort of Argentinian private law, embodied in the new Code.

---

[4] *Werner Goldschmidt*, Codificación del derecho internacional privado argentino (reformas requeridas por la Constitución Nacional y reformas convenientes aconsejadas por la vida y la ciencia), REDI 5 (1952) 499.

[5] *Werner Goldschmidt*, Derecho internacional privado – Derecho de la tolerancia[9] (2002) 668–691. And nowadays it continues doing so, as shown by *Alicia M. Perugini Zanetti*, Panorama general del Capítulo I del Título IV del Proyecto de Código Civil y Comercial de la Nación, in: Análisis del proyecto de nuevo Código Civil y Comercial 2012 (2012) 659, available at <bibliotecadigital.uca.edu.ar/repositorio/contribuciones/panorama-general-capitulo-i-titulo-iv.pdf>. Overall, despite the undeniable prestige and insuperable abilities of its author, the Goldschmidt Project also left room for critics (as happens with any legislative project, on any topic, in any part of the world). Fifteen years later, after congressman Jorge Vanossi put the Project on the Congress' agenda again, a commission formed by Juan Carlos Arcagni, Alicia M. Perugini, Horacio D. Piombo and Antonio Boggiano tried to re-launch and modernize it, but it failed again. See *Diego P. Fernández Arroyo*, La revisión del Proyecto 'Goldschmidt' de Código de DIPr para la República Argentina, REDI 42 (1990) 714.

[6] This proposal was in the charge of Berta Kaller de Orchansky, Amalia Uriondo de Martinoli and Beatriz Pallarés.

[7] This Commission, in which numerous professors took part, was chaired by Inés M. Weinberg de Roca. The text of the project can be found in *Inés M. Weinberg de Roca*, Derecho internacional privado[3] (2004) 437–457.

As with other topics, the Code Drafting Commission[8] entrusted the first elaboration of the PIL provisions to renowned specialists.[9] As a general appreciation, it is undeniable that it represents a significant advance for Argentinian PIL, particularly in respect of the effort made 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 already being offered by the Argentinian courts. In this way, not only has the quality of Argentinian PIL been improved, but it is also made more visible and comprehensible for all users, both nationals and foreigners. Therefore, all that remains is to thank and congratulate all those that formally and informally contributed to realizing what all local specialists wished. Needless to say, as with all human works, the new codification also has some flaws. The most important ones are its incomplete character and the fact that Argentinian PIL is contained in a Code that systematizes private law as a whole.

II. An incomplete PIL in an inappropriate venue

All the PIL projects that existed in Argentina were elaborated on the basis of two different basic approaches: (i) maintaining the general PIL regulation in the Civil Code or (ii) passing an autonomous instrument. It is evident that those approaches embrace much more than a mere formal opinion, not only because of the impossibility of the Civil Code to absorb all PIL matters, but also because of the difficulty of encapsulating the interpretation of the concepts used. However, both proposals of autonomous legislation (by Goldschmidt and by the commission designated by the Ministry of Justice) were insufficient to unify all PIL matters, as they did not include the part on the recognition and enforcement of foreign decisions.[10] Concerning the new codification, the satisfaction of having fulfilled the old aspiration to codify the PIL is tempered by the fact that PIL is neither entirely codified nor made independent from the general private law. Therefore, from a formal standpoint, the option followed by the authors of the 2014 Code is clearly conservative.

---

[8] Composed by three outstanding law professors, namely Supreme Court Chief Justice Ricardo L. Lorenzetti, Supreme Court Deputy Chief Justice Elena Highton de Nolasco and Aída Kemelmajer de Carlucci.

[9] Specifically, they were María Susana Najurieta, María Elsa Uzal, Marcelo Iñiguez and Adriana Dreyzin de Klor.

[10] In reality, Goldschmidt's proposal consisted in a national law draft on PIL and another on international procedural law (with rules on recognition) for federal matters and federal territories.

The substituted Code did not contain an integral and systematic regulation of PIL, but it did contain some general provisions as well as various provisions specifically designed to govern private international relationships relating to particular topics. The regulation governed not only the determination of the applicable law to the merits of the matter, but also the attribution of jurisdiction to the Argentinian courts. Despite the importance of those provisions, the Code never did contain all of the Argentinian PIL system. This was due to different reasons, some more inevitable than others, namely: (i) by definition, the international dimension of the (increasingly voluminous) Argentinian PIL system cannot be within the Civil Code; (ii) the PIL sector devoted to establishing the mechanisms and conditions to enable foreign decisions to have effect in Argentina (in the absence of an applicable treaty) – was never present in the substituted Code; and (iii) the substantive codes have suffered a centrifugal process by which entire topics were separated and became regulated in special acts which usually include specific PIL provisions.[11] The situation that I have just described does not change with the new Code. Conversely, it does nothing but consolidate itself.

The exclusion 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 deliberate, since a previous version of the finally approved text did contain provisions on the recognition and enforcement of foreign decisions. The reason invoked is again the above-mentioned provincial prerogatives; this is curious considering that we are dealing with the *substantial* aspects of the recognition and enforcement of foreign decisions (which exceed by far the provincial scope) and not the merely *procedural* ones (such as the documents that must be presented or the competent authorities for the recognition and enforcement). In fact, the new Code further contains *substantial* provisions on equal procedural treatment and international legal cooperation.

Formally, the regulation of PIL in the new Code[12] is divided into two chapters of general provisions (Chapter 1 dealing with *General Provisions* and Chapter 2 relating to *International Jurisdiction*), and a third, and much longer, chapter of special provisions. Yet, there is no need to pay much attention to the names given to the first two chapters. In effect (except for the norm contained in Article 2594, which is the only real *general* provision relating to the priority of international treaties over domestic legislation), Chapter 1

[11] It is worth highlighting the ones relating to commercial companies, insolvency proceedings, intellectual property, and checks. Also significant is the act on the jurisdictional immunity of foreign states.

[12] PIL rules are contained in Title IV ("PIL Provisions") of Book VI, which deals with the "Common Provisions to Personal Rights and Property Rights".

exclusively establishes the criteria to be taken into account for the application of the norms on applicable law. In turn, it is quite obvious that Chapter 2 is not limited only to provisions on international jurisdiction but also contains rules on international civil procedure and international legal cooperation.

It is clear that the Argentinian PIL is not unique in using the Civil Code to contain the internal dimension of PIL. On the American continent alone, the codification of Peru (1984) and the Canadian province of Quebec (1991) are especially well known examples.[13] However, the fact that other countries were not able, or did not want, to overcome the inertia that keeps PIL attached to a *privatist* matrix from which it should have moved away long time ago[14] does not mean that it is a proper solution. There are many examples of aberrations that can be found in some legal systems and that, fortunately, nobody proposes to include in the Argentinian legal system. Not by chance, Argentinian PIL scholars unanimously preferred a PIL codification by means of a special act. Nevertheless, they have generally accepted the only available option.

III. A PIL rather *international* than *private*

Over time, there were many labels attached to PIL as a discipline, as well as to the diverse approaches to expressing the PIL solutions in a determined legal framework. Frequently, derivations of such labels have also served to differentiate authors according to the preferences shown in their works. Thus, the utilization of epithets such as, for example, *universalists* and *particularists*, *multilateralists* and *unilateralists*, or *conflictualists* and *substantialists*, continues to appear in PIL texts. Although the origin of those terms generally relates to the sector of the applicable law, some of them admit a sort of transposition to PIL in general. However, none of them can explain the existing tension between the two adjectives accompanying the noun *law* in the name of this discipline.

At first sight, the placement of PIL in the bosom of the general codification of private law seems to show the legislature's preference for one of those adjectives. However, the general tendency of the new regulation, and the tenor of various concrete norms, indicate a clear internationalist slant,[15] to the extent that it could be said that the whole PIL Title tricks the *privatist*

[13] As a curious detail, it is noteworthy that both included provisions on recognition and enforcement of foreign decisions.

[14] What constitutes one of the "psychological disorders" of PIL. See *Diego P. Fernández Arroyo*, El derecho internacional privado en el diván – Tribulaciones de un ser complejo, in: Libro homenaje a Roberto Ruiz Díaz Labrano (2013) 17.

[15] See *María S. Najurieta*, La codification du droit international privé dans la République

corset of the new Code. Such an internationalist slant is more in line with the PIL tradition in Argentina, expressed with clarity in the importance given to international treaties, as well as in the inclinations expressed by the prevailing case law and the leading scholarly work.[16] The acknowledgement of treaties has a particular relevance since, on the one hand, it covers all PIL sectors and, on the other hand, it explains the large number of international instruments in force in Argentina.

Moreover, it must be noted that, in the absence of specific provisions applicable to a determined factual situation, the Argentinian courts usually build their answers through analogy, referring to international treaties ratified by Argentina, despite not being directly applicable to the case at hand.[17] Regarding the international return of children, the new Code confers normative status to this prevailing attitude of the courts by stating that court decisions shall follow the principles contained in the conventions on such topic (Article 2642).[18]

Besides being clearly prescribed by Article 75 of the Federal Constitution (in its paragraph 22), and having been reiterated many times by the courts, the supremacy of international treaties is now established as a *general* rule in the above-mentioned Article 2594, which opens the Title devoted to PIL, and is specifically repeated (i) for international jurisdiction in Article 2601, (ii) for international cooperation in Articles 2611 and 2612, and (iii) for the specific cooperation regarding the international return of children in Articles 2614 and 2642. These articles constitute a simple guide for those who do not have enough knowledge of the Argentinian PIL system, as it seems evident that their absence would not change, in any case, the resolution that can be expected from an Argentinian court in a concrete case. Actually, 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 pro-

---

Argentine, in: Codification du droit privé et évolution du droit de l'arbitrage, ed. by Bénédicte Fauvarque-Cosson/Diego P. Fernández Arroyo/Joël Monéger (2014) 65.

[16] That is specially reflected in the work of the most influential author in the history of Argentinian PIL, Werner Goldschmidt, and particularly in his advocacy towards tolerance as the distinctive feature of PIL and for respect to the foreign element: *Goldschmidt*, Derecho internacional privado – Derecho de la tolerancia (n. 5). See the outline of *Mario A. Oyarzábal*, Das Internationale Privatrecht von Werner Goldschmidt: In Memoriam, RabelsZ 72 (2008) 601.

[17] An eloquent expression of this is found in the decision of the National Civil Court of Appeal, Panel I, *S., B.I. v. C., V. et al.*, 21 November 2002, ED 201-153.

[18] The Argentinian courts have already been doing this for a long time. See, in this vein, National Civil Court of Appeal, Panel B, *P.H.M.C. v. N.L.E.A.*, 26 September 1989, LL 1991-A-325. The Court pointed out that "the lack of an express provision in our positive law regarding the measures to be taken for the return of children at the international level, allows using as a guiding rule the provisions of the Convention on the topic that was concluded and signed with the Republic of Uruguay in 1981 and approved by Act 22546, as it embodies the basis that nurtures this delicate issue related to minors" (translation by the author).

visions contained in applicable international treaties or when the particularities of the case require a *dialogued* solution between both dimensions. In any event, the persistence of the legislature shall be considered as amounting to a demonstration of the primary importance of the treaties' supremacy in Argentinian PIL.

With the exception of isolated cases, the Argentinian courts have been consistent with respect to the priority character of the application of the treaties in force in the country.[19] 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.[20] In the same sense, also with its inevitable exceptions, the trend in applying foreign law by the court's own motion,[21] and the auto-limitation of the scope of the international jurisdiction of Argentinian courts,[22] constitute other evident expressions of the internationalist slant to which reference has previously been made.

The *ex officio* application of foreign law confirms something well-known yet frequently forgotten: international jurisdiction and the applicable law, despite their obvious relationship, are two different sectors of PIL, governed by different norms and principles.[23] In this vein, it is clear that a case may

---

[19] See the recent decision of the Federal Court of Appeal on Social Security, Panel II, *Cicconetti Alberto v. Poder Ejecutivo Nacional et al.*, 12 March 2015, elDial AA8DB5.

[20] See Federal Supreme Court, *Banco de Italia y Río de la Plata S.A. v. Banco Pan de Azúcar S.A.*, 9 November 2004, Fallos 327-4785.

[21] Among the many decisions expressing this healthy trend, none is so pedagogic as that of the Mendoza Supreme Court, *Sabaté Sas*, 28 April 2005, ED 214-372.

[22] See, for instance, the decision of the Federal Supreme Court, *Pan American Energy v. Forestal Santa Barbara et al.*, 28 July 2005, LL, 2005-E-335, where the highest tribunal rejects the request for an antisuit injunction. In this case, a foreign company – through a subsidiary in Argentina – and the holder of an exploitation and transport permit in the north of the country, before a procedure initiated against it in the United States of America by an Argentinian company and a North American company that owned the area under permit, asked the Supreme Court to affirm the exclusive character of the Argentinian jurisdiction over the subject matter. The Court, by majority and against the view of the Attorney General, considered that the request involved "a sort of inhibition [*inhibitoria*] specifically related to the proceedings conducted abroad […], it is worth highlighting that such kind of questioning is inadmissible when, as in the case, it refers to jurisdictional organs of different nationality […]. The defendant in foreign jurisdiction – prevented from making the ancillary proceedings effective through the inhibitory – must raise its defence through a declinatory [*declinatoria*] or await the petition to enforce the foreign judgment and raise the lack of the competence requirement of the court that has issued it". See also the decision in National Civil Court of Appeal, Panel I, *S.M., M.R. v. A, P.C.*, 26 December 1997, LL 1998-D-144, where it is stated that "the determination of international jurisdiction requires caution to avoid its possible exercise on weak basis and to avoid the potential examination of the one that the requested state might claim, in order not to leave aside the effectiveness principle, which is key to the resolution of private international cases" (translation by the author).

[23] See *Bernard Audit*, Le droit international privé en quête d'universalité – Cours général (2001), Recueil des cours 305 (2003) 365.

present a sufficient link with Argentina to justify that the Argentinian courts hear it, but such a link may not be so relevant as to require the application of the law in force in Argentina. In turn, the auto-limitation of international jurisdiction means nothing less than in some cases there are not even sufficient links justifying the intervention of the Argentinian courts. The new Code clearly reaffirms this last trend[24] and, with less clarity, that relating to the application of foreign law by the court's own motion.[25] Nevertheless, such lack of clarity is eliminated by an uncontested fact: in any event, the application of foreign law by the Argentinian courts is governed by the 1979 Inter-American Convention on General Rules of Private International Law, which is of universal application and sets forth – with a particular terminology – the principle of the application of foreign law by the court's own motion.[26]

IV. A system concerned about assuring access to justice

Amongst the most relevant norms included in the new codification relating to this discipline are those governing the access to the jurisdiction of the Argentinian courts in *private* international cases (the emphasis is because the categorization as *private* deserves some nuance exceeding the scope of this work). More precisely, the new Code reflects a universal (or at least a quite clear and broad) trend, according to which this sector has come to eclipse the old fashioned principal role of the norms to determine the applicable law to those cases, making PIL essentially a *jurisdictional* discipline. This is nothing less than the result (still partial) of the efforts (still insufficient) to adapt this field of law to a new international scene in which abstract human rights are gradually transformed into concrete fundamental rights.[27] From all the relevant aspects that could be highlighted in this sense, the progressive consolidation of the fundamental right of effective access to justice is especially

---

[24] See below IV.

[25] See *Paula M. All/Jorge R. Albornoz*, Comentario al artículo 2595, in: Código Civil y Comercial de la Nación Comentado, dir. by Julio C. Rivera/Graciela Medina (2014) 779, 780.

[26] See the explanation of this question in *Diego P. Fernández Arroyo/Paula M. All*, The Changing Character of Foreign Law in Argentinian Legal System, in: Proof of and Information about Foreign Law, ed. by Yuko Nishitani (forthcoming). But see the wrongly persistent position expressed by Judge María E. Uzal; for instance in National Commercial Court of Appeal, Panel A, 16 October 2013, *Scrugli, Carlos Antonio v. HSBC Bank Argentina S.A.*, available at <fallos.diprargentina.com/2014/10/scrugli-carlos-antonio-c-hsbc-bank.html>.

[27] See *Patrick Kinsch*, Droits de l'homme, droits fondamentaux et droit international privé, Recueil des cours 318 (2005) 9; *Horatia Muir Watt*, Concurrence ou confluence?, Droit international privé et droits fondamentaux dans la gouvernance globale, in: Mélanges à la mémoire de Patrick Courbe (2012) 459.

noteworthy; it seems relatively easy to implement regarding the relationships arising within a state, but acquires peculiar characteristics and meets difficulties as to its application when the legal relationships transcend borders.

How is this right reflected in the framework of private international relationships? From a state standpoint, it could be conceived that the characterization of the right to access to justice as *fundamental* must inevitably lead to an open forum in the state, every time a person (natural or legal) of that state intends to exercise a right in relation to persons in another jurisdiction. It is true that this would require specifying the links that allow a determination of whether a person *is* from a particular state, such as nationality, domicile, or simple residence. However, once such an issue is defined, the idea would require that every prospective claimant should have a competent judge or tribunal available in his own state, saving the effort of litigating in other jurisdictions since that could be seen as an obstacle to the exercise of the fundamental right of access to justice. Nonetheless, this is not the view held by the authors of the new Code, as it is not commonly found in comparative law. In fact, when a model of that type, assuring the jurisdiction of the local tribunals for all possible cases, existed in some states (such as in Italy and Spain until a few decades ago), it was brilliantly christened as *jurisdictional imperialism*. In the same way, when a state establishes that its nationals always have the right to sue before its own tribunals (as done by France, although, in general, this right cannot be exercised against defendants domiciled in other states of the European Union or connected to France through treaties that so indicate), such criterion is unanimously condemned, and the *claimant's nationality forum* is considered to be an exorbitant forum.[28]

The reasons for dismissing the option of unrestricted access to one's own jurisdiction (actually forcing the filing of a claim abroad in certain circumstances) are of a different nature, but all of them are easily understandable. The clearest and most evident is that the right to access to justice does not – and cannot – exclusively benefit the claimant, but also the defendant. In essence, this represents the same fundamental right seen from the other side of the litigation. 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 demanding challenge for lawmakers and judges, as well as an area with great room for the lawyer's fertile and interested imagination. Another argument not to be over-generous with respect to own jurisdiction is that in many international cases the effectiveness of the decision will only materialize abroad, as happens when the debtor ordered to pay a sum of money refuses to pay and does not have assets in the jurisdiction where the judgment has been rendered. In those cases, unrestricted access to

[28] On these issues see *Diego P. Fernández Arroyo*, Compétence exclusive et compétence exorbitante dans les relations privées internationales, Recueil des cours 223 (2006) 9.

one's *own* jurisdiction can turn into an insuperable obstacle at the time of trying to enforce the judgment in another state. The state of origin will have granted access to justice in the most primary sense of the expression, but this may not be an *effective* access. Among the other reasons, it is worth mentioning that in many situations people voluntarily become involved in international legal relationships, and such willingness is inconsistent with the subsequent stance of having those relationships treated as domestic matters.

Does this mean that, in the current stage of the evolution of PIL, states do not sufficiently protect *their own people*? Or, more concretely, do the norms on international jurisdiction contained in the new Code leave citizens and permanent residents of Argentina unprotected from the point of view of access to justice? A negative answer seems correct. On the one hand, the new Code introduces special jurisdictional norms for the subject matters that it governs, generally based on reasonable criteria reflecting the proximity between the forum and the dispute or the parties to it, or both (although using for almost all of them an inappropriate *bilateral* formulation).[29] In some cases the lack of protection afforded to particular categories has made the legislature strengthen the right to access to the jurisdiction.[30] On the other hand, the new Code provides some general guidelines relating to the exercise of Argentinian jurisdiction that, as long as they are correctly constructed and applied by Argentinian judges and tribunals, should guarantee the broad, fair and equitable exercise of the fundamental right of access to justice regarding private international cases.

The most important of those guidelines (contained in Article 2601 of the new Code) emphasises the prevailing application of the jurisdictional norms contained in international conventions in force in Argentina, in accordance with the constitutional mandate in that sense. Overall, it is the contextual analysis of one of those general guidelines that allows an appreciation of how the right to access to justice in international cases is embodied under the new normative framework. I refer here to Article 2602 that establishes the so called *forum necessitatis* in the following terms:[31]

> "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 the convenience of achieving an effective decision."

The new Code reaffirms the legality criterion regarding jurisdiction, deeply rooted in the Argentinian legal system, pursuant to which a court can

---

[29] See Aspectos generales (n. *) 412 ff.

[30] See Article 2654, which deals with jurisdiction in respect of consumer contracts.

[31] Translation by the author.

only be competent if a provision in force, whatever its source, authorizes it to exercise jurisdiction in a particular case. Nonetheless, no norm in the system exists apart from its foundations and this is what happens with the norms of all sectors of PIL. The Argentinian provisions on international jurisdiction cannot be read in a different manner than as constituting a materialization of the principles and values embodied in the Constitution and in the international instruments on human rights.[32] Therefore, with the objective of ensuring effective access to justice, the legislature accepts the need to cover situations in which the exercise of jurisdiction is indispensable, despite not being stated in the provisions in force.[33] There is no doubt that compliance with essential constitutional rights cannot find an insuperable obstacle in the lack of a positive provision on international jurisdiction. Argentinian and foreign case law know examples in this sense.[34] The only difference is that, in the absence of the provision, the court's argumentative effort would be greater. Written or not, the *forum necessitatis* cannot only serve to simply create a jurisdictional forum, but also to interpret an existent forum in the way that better helps to avoid a denial of justice.

The logical and laudable character of the arguments that support the *forum necessitatis* should not lead to its distortion. As already mentioned, the claimant's access to justice cannot infringe the defendant's right to a defence, since the former is as important as the latter for the fulfilment of justice. The fair balance between both rights is a challenge for any court, even more so in international cases. In the context of this precept, the guidelines for finding the most impartial decision possible lies in the other requirements prescribed, especially in the exceptional character of this forum. In this sense, the new Code is right in expressly restricting the scope of application of this exceptional rule. Being, by definition, the private relationships connected with different legal systems – the subject matter of this area of law – the fact of having to litigate abroad is perfectly foreseeable for someone who voluntarily participates in a relationship of this kind, as already mentioned above.

Thus, the adverb "exceptionally" is crucial for the application of the provision, although curiously it did not exist in the original draft. Hence, the *forum necessitatis* can only be applied when initiating an action abroad is "unreasonable", a term that shall never be assimilated to mean "inconvenient"

---

[32] That is expressly stated in Article 1 of the new Code regarding all matters contained therein.

[33] Reciprocally, the new Code includes *lis pendens* in its Article 2604. According to this rule, an Argentinian court, despite being competent, shall stay proceedings if it is foreseeable that the decision to be taken in a case, with the same object and the same cause of action that has been previously initiated and is pending abroad between the same parties, may be recognised in Argentina.

[34] See in France, *Koehler*, Cass. req., 7 March 1870, *S.*, 1872, I, 361; in Argentina, *Vlasov*, Federal Supreme Court, 25 March 1960, Fallos, 246:87.

and that, on the contrary, is close enough (without being necessarily the same) to "impossible".[35] The unpredictability of the foreign forum is also an element that could be taken into account. The requirement of sufficient contact with Argentina aims at avoiding the exorbitant exercise of jurisdiction by the Argentinian courts, rejecting some sort of universal jurisdiction in their favour. It is true that the scope of this affirmation will depend – to a great extent – on how "sufficient" is understood, but it is clear that the utilization of this adjective implies that not any contact is enough, as minimal as it is.

The last of the arguments contained in Article 2602 also relies on logical reasoning; despite the difficulties caused by the use of the term "convenience". If the intention of the provision were to guarantee the effective protection of rights, little favour would be done to the claimant if he were offered a forum in which to exercise his pretentions without paying attention to the fate that any prospective decision will have. Now, compliance with this requirement does not have the same weight as the others, given that the *prima facie* evaluation of the effect that will be granted to a judicial decision abroad cannot always provide an unmistakable answer. In this sense, it is worth asking whether the inclusion of the effectiveness criterion, found exclusively in this provision of exceptional application, implies the legislature's desire to remove it as a general principle of the jurisdictional system. I am inclined to think that it does not. The principle is implicit in the fundamental right of (effective) access to justice. It is only mentioned in this article because it is here where its importance becomes more urgent. In other words, in my opinion the norms of the Argentinian system on international jurisdiction must not automatically apply, but must be examined in light of the effectiveness principle, in order to avoid jeopardizing the right of access to justice in those cases in which it is evident that any Argentinian judgment cannot be given effect abroad.

Finally, for those foreigners who do not have permanent residence in Argentina, the new Code confirms the principle of equal procedural treatment that already exists with respect to people from other states with which there are treaties in force containing that principle. In effect, Article 2610 states that the right of access to justice is a right that must be all without distinctions in terms of nationality or residence and to legal entities whatever the state of their incorporation, authorization or registration. Put another way, the litigant who has no local link can never be put in an unfavourable condition in comparison to the litigant who does have such a link. The concrete

[35] That is the idea surrounding the well-known Article 3 of the Swiss Federal PIL Act and the rules influenced by it. Thus, in Canada "c'est désormais clair que ce n'est pas suffisant qu'aller à l'étranger serait plus compliqué et couteux"; see *Jeffrey Talpis/Gerald Goldstein*, The Influence of Swiss Law on Quebec's 1994 Codification of PIL, Yearbook of Private International Law 11 (2009) 339, 353.

expression of this principle is the total elimination of security for costs in judicial proceedings, which already existed in international conventions in force in Argentina.[36] The character of the provision makes the prohibition affect any kind of pecuniary requirement for 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 legislature. Actually, it is nothing but a correct understanding of what is a *fundamental* right, the exercise of which cannot depend on the origin or the condition of the right-holder.

V. A system with a flexible approach to determining the applicable law

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*.[37] This means that in the new internal PIL, the localization of legal relationships within a certain legal system to the effect of the application of its law is no longer a matter that is the exclusive concern of the legislature. From now on, courts will have the power to correct, when it is incompatible with the reality of the case, the *a priori* localization made by the legislature. Thus, the conflict rules of the internal dimension of the Argentinean PIL have lost their traditional strictness and have become more flexible, as happened with the Swiss equivalent more than a quarter of a century ago.[38] It is noteworthy that the legislature does not give a blank cheque to the court. To the contrary, the legislature emphasises that this is an exceptional circumstance, which must comply with a series of steps in order to be implemented. It is appropriate to insist that the authorization granted to the courts refers to the stage of localization of the legal relationship. In no case does it allow the modification of the substantial result of the localization, but only the localization itself.

The legislature's interest in providing the system with this flexible basis appears to be so great that it has inserted a (clearly unnecessary) similarly

[36] See Article 17 of the 1954 Hague Convention on Civil Procedure, and Article 4 of the 1992 Las Leñas Protocol (MERCOSUR) on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters.

[37] 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" (translation by the author).

[38] See Article 15 of the Swiss Federal PIL Act.

specific exception clause in the field of contracts (Article 2653). In addition, even though the purpose of correcting the connection established by the legislature in a particular case is shared with the general provision of Article 2597, the different wording of the two provisions raises some doubts as to its rationale, and perhaps some interpretative problems too. In this sense, it seems clear that, although the purpose of the distinction is difficult to understand, in contractual matters the clause does not set up an exclusive prerogative for the courts, but it cannot exist without the concurrency of the parties' intention (*upon party request*).

It goes without saying that none of the formulations of the exception clause are connected to the situation considered in Article 2639 regarding parental responsibility. In this case, the power of replacing the localization determined by the legislature (which 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 another legal system, but the court is authorized to *take into consideration* the law of the other state with which the situation has *relevant links* if this is required in the best interests of the child. The exception clause (like the one in Articles 2597 and 2653) has to do with the geography of the case, i.e. 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.[39] With this understanding, the clause of material correction for parental responsibility is far more similar to the provision governing the maintenance right, based on the protection of the maintenance creditor's interests,[40] and to the provision governing the determination and challenge of paternity, based on the protection of the fundamental rights of the child.[41]

VI. A system looking for the balance between party autonomy and the public interest

Regarding the parties' right to choose the competent court, the legislature preferred to maintain the *status quo* prevailing since 1976 and continued

[39] The origin of this provision lies in Article 15 of the 1996 Hague Convention on the Protection of Children, which is not in force in Argentina.

[40] 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 was inspired by Article 6 of the 1989 Inter-American Convention on Maintenance Obligations.

[41] 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.

to limit the scope of party autonomy to patrimonial matters.[42] This is to say that such right does not apply equally to all matters, but only to those that can be considered to be of such a character. This decision not only contrasts 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 new Code.

When the right to derogate from Argentinian jurisdiction was incorporated into Argentinian legislation in 1976 (because of the requirements of international contracts related to the external debt), the limitation fit perfectly into 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. Nowadays, comparative law provides us with innumerable examples of how the parties' right to choose the competent court serves in many cases to resolve real problems in non-patrimonial matters.[43] Moreover, taking into account that, except in cases of adoption of children domiciled in Argentina, the jurisdictional forums provided by the new 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 others. In any event, the strict wording of the provision, along with the previously mentioned context, mandates respect for the parties' choice in any patrimonial matter that coincides with the right to choose the applicable law, expressly recognized in the new Code regarding maintenance agreements (Article 2630) and the matrimonial property regime (Article 2625).

As with all international jurisdictional provisions included in the new Code, Article 2605 is essentially directed at the Argentinian courts. In this sense, it plays as a sort of negative jurisdictional 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

---

[42] Indeed, Article 2605 of the new Code reproduces, almost identically, the 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" (translation by the author). The provision refers both to courts and arbitrators. However, the new Code specifically defines the scope of the arbitration contract in Article 1651 to which one must refer because of its special character. Correctly, the provision does not require 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.

[43] See for instance Article 42(2) 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.

Commercial Procedure, the provision only contemplates what is technically derogation from 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 the competent forum.[44] 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. Because of its wording, it seems like a development, a provision for the application of Article 2605.[45] In other words, despite the significance of the question, the jurisdiction of Argentinian courts on the basis of party autonomy is established in the new Code in an implicit fashion only.[46]

In respect of the parties' right to select the law governing their legal relationships, the new Code is similarly conservative. Indeed, whereas the courts' role in the determination of the applicable law has been notably developed by the new 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 limited to contracts (Article 2651) and, in a very restricted fashion, the matrimonial prop-

---

[44] In this sense, National Commercial Court of Appeal, Panel E, *Welbers S.A., Enrique C. v. Extraktions-Technik Gesellschaft für Anlagenbau M. B. M.*, 26 September 1988, LL 1989-E-304, with commentary of Antonio Boggiano.

[45] Like that in Article 2606 which points out the exclusive character of the choice of forum except that the parties agree otherwise.

[46] Dismissing, by logic and by the tradition of Argentinian case law, the admission of the voluntary submission to foreign courts and not to the own courts, it can be assumed that the intention of the legislature is that such submission is also subject to the criteria of patrimoniality and internationality. With much logic, the negative effect given to the derogation of the Argentinian jurisdiction is dismissed in those matters for which Argentinian jurisdiction is provided. The same happens if the derogation of jurisdiction is prohibited by law or by the new 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. Concerning arbitration, it is necessary to look at specific provisions of the new Code, particularly at Article 1651, which lists the matters excluded from the contract of arbitration. See *Diego P. Fernández Arroyo/Ezequiel H. Vetulli*, El nuevo contrato de arbitraje del Código Civil y Comercìal: ¿un tren en dirección desconocida?, Revista del Código Civil y Comercial, 19.10.2015, 161.

erty regime[47] and maintenance agreements.[48] The absence of a general rule of autonomy regarding applicable law contrasts with the meticulousness with which the legislature deals with the parties' intention regarding the determination of the regime of international contracts (Article 2651).[49]

Article 2651 provides considerable flexibility for the choice of law in contracts. First, the choice may affect parts, or the whole, of the contract. Second, the choice may be made and modified at any time, but the validity of the contract and third party rights must always be safeguarded. Within certain limits, the parties may design a regulation of their contracts *à la carte*. In addition, within the boundaries of this right, they can, among other things, submit their obligations to certain standard clauses, such as the INCOTERMS published by the ICC, or directly to a non-state body of rules. This is consistent with the context provided by the legislature. 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 so well-known a text as the UNIDROIT Principles of International Commercial Contracts cannot be admitted.[50] 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.[51]

It must be equally clear that the goal of the legislature was that any decision to submit to those material rules (usages, practices, customs or princi-

---

[47] 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.

[48] Here, the choice is limited to the law of the domicile or habitual residence of the parties to the agreement (Article 2630, para. 2).

[49] So much detail actually reveals 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 become problematic, the second silence leaves certain questions open (on which case law has already elaborated; see National Court of Appeal on Civil and Commercial Federal Matters, Panel III, *Banco Europeo para América Latina v. Banco de Galicia y Buenos Aires S.A.*, 27 October 2006, LL 2007-E-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 new Code.

[50] It is in this sense that the 2015 Hague Principles on Choice of Law in International Commercial Contracts are pronounced; cf. *Dieter Martiny*, Die Haager Principles on Choice of Law in International Commercial Contracts – Eine weitere Verankerung der Parteiautonomie, RabelsZ 79 (2015) 624.

[51] National Commercial Court of Appeal, Panel A, *Prensiplast S.A. v. Petri S.A.*, 8 November 2007, LL 2008-B-674. Compare with the recently approved Paraguayan Act on Applicable Law to International Contracts, which has adopted the Hague Principles on the matter, including the parties' right to choose non-state law as the sole applicable law to the contract.

ples) must be expressly stated in the contract, i.e. 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 Vienna Convention on Contracts for the International Sale of Goods (which in that case operates as *internal* law), which establishes the presumption of applicability of usages in Article 9(2). This is the Argentinian material PIL provision, at least with respect to international sale contracts.

In any event, the chosen law will be subject to the limits established by the principles of public policy and the *internationally* (overriding) mandatory provisions of Argentinian law, as well as those provisions of third-party states that have *prevailing economic links with the case*. Concretely, in addition to the general provisions contained in Articles 2599 and 2600, the new Code contemplates various particular expressions. Thus, in matters of natural filiation, filiation by adoption and children protection, the new Code provides the application of a special public policy, which relies on fundamental rights or best interests of the child, as the standard to allow, in Argentina, for the recognition of situations constituted abroad.[52] In contractual matters, special references to the international mandatory provisions and the principles of public policy are also introduced (Article 2651(e)). In this case, it is worth adding that the different wording of both provisions might have some impact on their 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 speciality of the latter, it can be assumed that the intention was that, in general, those peculiar foreign provisions remain at the court's discretion, and that the court will take them *with a grain of salt*, but that, particularly in contractual matters, the court is bound to apply them except in exceptional cases justifying otherwise (what would be meant by "in principle"). The court would do well to carefully analyse the consequences of such an imposition before coming to a final decision.

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 the weaker parties in the legal relationships in which they participate, in both contractual and personal respects. In the first case, I specifically refer to passive consumers whose contracts are, in principle, governed by the law of their domicile (Article 2655). In the second case, among various possible examples, two situations stand out: (i) the already discussed principle in favour of the maintenance creditor (Article 2630), and (ii) the regulation of international adoption, which combines different

[52] See Articles 2634, 2637 and 2640.

methodologies in order to assure the functioning of the adoption without putting aside the basic criterion of the prohibition on individuals domiciled abroad from adopting children domiciled in Argentina.[53]

VII. A national codification globally tuned

With its lights and shadows, the new internal dimension of Argentinian PIL has successfully contributed to the consistency and the modernisation of the whole PIL system. Two elements especially signify the effort of the authors of the new PIL provisions to offer a harmonic regulation with the best contemporary standards in the field. On the one hand, the sensitivity demonstrated to combining the solutions contained in the new Code with those already existing in international treaties in force in Argentina must be stressed. On the other hand, a thoughtful look at comparative law is shown.

The sensitivity regarding international treaties is justified when verifying that the international dimension of the Argentinian PIL system contains many more provisions than is usual and that all of them benefit from the priority consideration generally granted to international treaties in relation to the domestic provisions by the Argentinian legal system. Thus, for instance, and to refer to just one sector of PIL, before determining the question of the competence of the Argentinian courts in a particular case, it will be necessary to find out whether in such case a jurisdictional provision contained in an international instrument is applicable.

In that sense, it is usual to note the 1889 and 1940 Montevideo Treaties on International Civil Law, Article 56 of both setting forth general jurisdiction criteria (i.e. that are applicable irrespective of the concrete subject matter involved), as well as various special provisions less well remembered. Likewise, several of the Inter-American Conventions adopted by the OAS within the framework of the Inter-American Specialized Conference on Private International Law (CIDIP), which are in force in Argentina, contain special jurisdictional provisions. In addition, these types of norms are present in multilateral conventions of universal potential, in force in Argentina, such as those relating to different questions of responsibility, transport or cultural property.

In the PIL regulation emanating from the MERCOSUR, in addition to the specific rules present in the instruments relating to traffic accidents, arbitration or interim measures, there exists an instrument solely devoted to jurisdiction in contractual matters, known as the Buenos Aires Protocol (1994), capable of application to cases not strictly Mercosouthern in nature.[54]

[53] 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 *Najurieta*, La codification (n. 15) 78–81.

[54] In fact, Article 1(b) mandates the application of the Protocol when the parties to a con-

The purpose of this particular enumeration is to emphasize that all the jurisdictional provisions included in the new Code, general and special, will be frequently inapplicable in practice. Moreover, the affirmation is equally valid to the other PIL sectors. It is on this basis that the authors made an effort so that the solutions offered in both dimensions of the Argentinian PIL system were not drastically different.

As to comparative law, the new PIL provisions appear particularly receptive, sometimes directly and some other times indirectly, through the adoption of the provisions of the 2003 PIL Code Draft, based on foreign PIL texts. Two European legal systems have been especially attractive for the authors of the codified PIL: (i) Switzerland, from where the Federal PIL Act adopted in 1987 has exerted extraordinary influence in various geographies around the world, and (ii) the European Union, which vertiginously develops on the basis of the legislative competence that was assigned by its member states in 1997.[55] It must be remarked, above all, that the conversion of the Argentinian system on applicable law to a flexible system, because of the general application of the *exception clause* – which in a concrete case authorizes the court to correct the abstract localization made by the legislature – stems from the Swiss influence.[56] From the PIL of the European Union come some of the jurisdictional norms, such as those relating to exclusive jurisdiction (Article 2609) and non-contractual obligations (Article 2656), as well as others on applicable law, such as those governing consumer contracts (Article 2655)[57] and non-contractual obligations (Article 2657).

Overall, at least as far as PIL is concerned, the new Code constitutes a clear improvement to the Argentinian legal system. Its authors have accomplished a valuable task. It is hoped that the Argentinian courts will consolidate the best solutions of the new Code and develop the simply adequate provisions through progressive case law.[58] On the other side of the *Rio de la Plata*, a new Uruguayan PIL is likely to be adopted soon. Both are genuine Latin-American PIL codifications and show that the PIL of that part of the world is highly dynamic.

---

tract have agreed on the jurisdiction of a court in a state party to the 1991 Asunción Treaty, provided that there is a reasonable connection, although one of the parties has his domicile or place of business in a state party.

[55] See *Najurieta*, La codification (n. 15) 73 f.

[56] See above V.

[57] Strictly speaking, in this case, the influence is not exactly from the PIL provisions of the EU – in this subject 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.

[58] Perhaps a new step would be to draft a federal act (or a model federal act) on the recognition and enforcement of foreign judgments. It is difficult, at this moment, to contemplate an autonomous act containing the entire internal dimension of Argentinian PIL.