

RECENT PRIVATE INTERNATIONAL LAW CODIFICATIONS

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A. INTRODUCTION

I. Introduction

Argentina has not enacted yet a Private International Law codification, although some drafts have been worded since the seventies.

Only to express a general idea of the legal situation of Argentine Private International Law, we may say that its basic rules in force are scattered in the Civil Code enacted in 1869 and yet in force. There are other provisions included in diverse statutes, such as Company Law (1972, amended in 1983), Bankruptcy Law (1995),

Marriage Act (1987), Navigation Act (1973), among others.

An important codification was prepared by Werner Goldschmidt in 1974; the Goldschmidt Draft Law on Private International Law was focused on the Choice-of-Law method. The procedural matters were not included in this statute, but in a separate one named Draft Law on Procedural Civil and Commercial Private International Law, for the Federal Courts.¹ Recognition of foreign judgments was regulated in this second Draft Law. Other scholars prepared other Drafts law in the seventies, such as, for instance, Juan Carlos Smith² and Alberto Juan Pardo.³

None of these Draft Laws were considered by the Parliament and in the eighties the Goldschmidt Draft Law was amended by José Carlos Arcagni, Antonio Boggiano, Alicia Perugini and Horacio Piombo.

In the next decade, the Ministry of Justice established a committee to prepare a new Civil Code.⁴ The Committee asked a Private International Law Professor, María Susana Najurieta, to draft the general rules of PIL and also the provisions concerning contracts and torts, including carriage contracts. The complete Draft Civil Code, including the said PIL rules, was presented to the Justice Ministry on March 26, 1993.⁵

Another Committee was put in place by the Ministry of Justice to prepare a new Civil Code, and after some years of work,

¹ This Draft Law was approved by the Commission created by Resolution 425/74 of the Justice Minister and was published in *Gaceta del Notariado*, Rosario, n° 65, 1975, pp. 93/126 and also in Goldschmidt, Werner *Derecho Internacional Privado*, 4ª. ed., Buenos Aires, Depalma, 1982, pp. 687/710.

² Published in *Revista La Ley*, Buenos Aires, 1976-B, pp. 484/507.

³ Published in PARDO, Alberto J., *Derecho internacional privado. Parte general*, Buenos Aires, Ghersi, 1988, pp. 359/387.

⁴ The Committee was created by decree 468/92 and was integrated by by the Professors Belluscio, Bergel, Kemelmajer de Carlucci, Le Pera, Rivera, Videla Escalada and Zannoni.

⁵ The complete Draft Civil Code was published as a book *Reformas al Código Civil. Proyecto y notas de la Comisión designada por decreto 468/92*, Buenos Aires, Editorial Astrea, 1993.

the Draft was presented in 1998, but the PIL rules were not included.⁶

So, the task was entrusted to the Professors Bertha Kaller de Orchansky, Amalia Uriondo de Martinoli and Beatriz Pallarés, who presented their work titled Book VIII of the Civil Code (articles 2533 to 2629) to the Ministry of Justice on August 24, 1999.

When the Draft Civil Code, including Book VIII of PIL rules was in the Parliament, other scholars⁷ were asked to express their views regarding that matter, which was captured in a new Draft introduced in 2000.

The last Draft Code on Private International Law was prepared by a group of academics that were named by the Justice Minister in 2002,⁸ the Draft Code was presented on May 14th, 2003 to the Ministry of Justice.⁹ This Draft Code was introduced into the National Congress by Deputy Jorge R. Vanossi, in 2004, under number 2016-D-04, but it was not considered by the House of Representatives.

The 2003 Draft Code was based to some extent on the previous codification drafted in 1999 and was influenced by some foreign codifications, such as the Swiss Law of 1987 and the Italian Law of 1995. Besides, it contains a number of provisions that are based on the rules adopted by the Inter-American Conventions on

⁶ The Committee was integrated by the Professors Héctor Alegria, Atilio Aníbal Alterini, Jorge Horacio Alterini, María Josefa Méndez Costa, Julio César Rivera y Horacio Roitman.

⁷ The scholars were the Professors Miguel A. Ciuro Caldani, Gualberto Lucas Sosa and Inés Weinberg de Roca.

⁸ The Drafting Committee was integrated by professors Miguel Ángel Ciuro Caldani, Eduardo L. Fermé, Berta Kaller de Orchansky, Rafael Manovil, María Blanca Noodt Taquela, Beatriz Pallarés, Alicia Mariana Perugini Zanetti, Horacio Daniel Piombo, Julio César Rivera, Amalia Uriondo de Martinoli and Inés M. Weinberg de Roca, according to resolutions of the Minister of Justice and Human Rights Number 191/02 and Number.134/02.

⁹ The 2003 Draft Code in the original Spanish version was published in Weinberg Inés M., *Derecho Internacional Privado*, 3rd edition, Buenos Aires, Lexis Nexis Depalma, 2004, pp. 437/457.

Private International Law. A great deal of solutions developed by the Argentinean courts to solve Private International Law cases, also appear in the Draft Code.

The 2003 Draft Code contains provisions dealing with general issues (articles 1 to 16), international jurisdiction, that were worded as bilateral rules (articles 17 to 46), and conflict of laws (articles 47 to 130). Recognition and enforcement of foreign judgments were not considered by the Draft Code because the federal organization of the country would not allow that National Congress enacts a statute including "procedural matters".¹⁰ This was the opinion of the majority of the members of the Drafting Committee.

It must be noted that some matters were not considered in this Draft Code. This was the case with Maritime and Aeronautic subjects and Secured Transactions, besides Recognition and enforcement of foreign judgments, as we already explained.

B. GENERAL METHODOLOGY

II. Legal Certainty and Flexibility

Before the seventies, the rules of private international law dispersed in different normative bodies gave a decisive pre-eminence to conflict rules of the classical type, with wide categories and choice of law through rigid connecting factors –for example, the place of execution of the contract, the place of celebration of the marriage, the domicile of the natural person, etc. This methodology reserved a marginal role to the discretion of the judge, who had the freedom to elaborate the solution for the individual case in matters not expressly regulated under private international law of a domestic source, as it happened with filiation conflicts connected with more than one legal system.

¹⁰ According to articles 5 and 75. 12 of National Constitution, 1994.

Around the seventies, laws on special matters –adoption, corporations, maritime law- were passed which show the coexistence of different methods and the elaboration of legal categories limited to the factual particularities of the conflicts. That is the case, for example, of article 33 of Adoption Act number 19134 (1971), a direct rule related to the conversion of an adoption granted abroad into a full adoption under national law, or article 604 of Navigation Act number 20094, which subjects the responsibility of the carrier due to damage or harm to the passengers or their luggage to Argentinean law in the case of a water transportation contract in certain events linked to the national territory.

The 1974 Goldschmidt Draft Code of Private International Law (“Goldschmidt Draft Code”) provided for just a few rules that designated the law on the basis of flexible criteria. That is the case of article 34, second paragraph, on the law applicable to the management of a third party’s business without an agency relationship, which bound the judge to resolve where the act was carried out “in a preponderant way.” Another rule of this kind was included in article 35 of the 1974 Draft Code, according to which there was no dishonest interest of the parties if between the international contract and the country whose law was chosen there existed a “connection worthy of consideration within the scope of Private International Law.” Nevertheless, these margins of discretion were rare.

The 2003 Private International Law Draft Code, which, generally speaking, expresses the agreements reached in the sphere of legal scholars and academicians in the recent years¹¹, contains some rules that avoid a rigid designation and make the task of the interpreter easier, enabling to come to a more appropriate law for the individual case.

¹¹ According to Professor Miguel Ángel CIURO CALDANI, Argentinean culture has matured and is at a moment in which the codification of Private International Law is adequate. In “La Codificación Civil y la Internacionalidad”, *Revista del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social* n° 24 (2000), School of Law of the University of Rosario, pp. 93/99.

- (1) *Does your codification contain any devices like the ones described above, or other similar devices, granting courts discretion in deciding individual cases?*

The 2003 Draft Code does not contain a general escape clause (nor any escape clause provided for specific categories.) Such Draft contains, however, rules that designate the law by means of connecting factors that follow flexible localization techniques and leave a good margin for the court's appreciation of the case.

- (2) *If the answer is yes, please describe and discuss them by also giving examples of how courts apply them.*

The field where flexible connecting factors appear or where the technique of connection grouping is followed is, fundamentally, contract law (articles 72 and 77 of the Draft). This topic will be enlarged in section E (**Law Governing Contracts**) of this work.

In the field of private international marital law appears a material rule, which leaves aside the solution provided for by the law of the place of the celebration of the marriage –a general conflict rule under article 103 of the Draft- and sets forth the granting of no effects to a marriage celebrated in disregard of the following impediments: prohibited degrees of relationship, crime, previous undissolved marriage, and adoption, in the cases provided for by the Argentinean substantive law. Later, a paragraph expresses an exception to the general rule, leaving in the court's hand a wide discretionary sphere. It says: "*Exceptionally, in the view of the particularities of the case, effects might be granted to marriages celebrated in disregard of the impediments referred to*" (article 106).

Although this work is focused on the Choice-of-Law part, we must mention that in the chapter dealing with "Special Jurisdictions" (Chapter II of Title II), the 2003 Draft Code, with the aim of avoiding international denial of justice, establishes the institution of

“forum of necessity,” which enjoys an old case-law tradition in the Republic of Argentina¹², and leaves in the court’s hands the appreciation of indeterminate concepts, such as “sufficient link with the country” or “convenience to reach an efficient judgment”. This rule is worded in the following manner:

“Section 19. Forum of Necessity. Although the rules of this code do not grant international jurisdiction to Argentinean courts, these courts can take part with the aim of avoiding denial of justice, when it is not possible to file the complaint abroad, provided that the case is sufficiently linked with the country, the right to defense at trial is guaranteed and it pursues the convenience of reaching an efficient judgment.”

III. Issue-by-Issue Choice and D p cage

- (1) *Does your codification provide a single choice-of-law rule for the law applicable to the entire cause of action (e.g., contract, tort, etc.) or does it provide different rules (or escapes) for the various aspects of (or “issues” in) the contract or tort? Please, explain.*

The 1974 Goldschmidt Draft Code provided for specific categories in the field of obligations originated without an agreement and in contract law (articles 34, 35 and 36). Moreover, the barter agreement, insurance contract, contract of carriage of goods, contract of carriage of passengers, contract of employment

¹² This institution was applied by the Corte Suprema de Justicia de la Naci n in the case “Vlasov, Emilia Cavura de c/Vlasov Alejandro s/divorcio”, adjudged in 1960. The highest federal court of the Republic of Argentina understood that there was a risk of international denial of justice and granted jurisdiction in re divorce to the Argentinean courts, because the last place of effective and unquestionable cohabitation of both spouses was located in our country, despite the fact that the husband alleged he had changed domicile to Genoa and, under the civil law in force at that moment, it was the husband who fixed the marital domicile.

and seamen's contract were regulated under autonomous legal categories (articles 38, 39, 40, 41 and 50).

The 2003 Private International Law Draft Code has obviously opted for the elaboration of conflict rules with a detailed categorization in contract law (articles 75 through 80) and in the field of non-contractual liability (articles 90 to 93.) **The characteristics of these rules will be explained in sections D (Law governing Torts/Delicts) and E (Law governing Contracts) of this work.**

Chapter I of the title related to the applicable law of the 2003 Draft Code refers to the "Human Person" and contains a first category that encompasses the "existence and capacity of the human person", who is subjected to the law of the domicile. Since it is an essentially variable connecting factor, the rule regulates in a direct way some aspects of the legal modification:

*"The change of domicile does not limit the capacity acquired. If a person who has legal capacity or is a non-emancipated minor moves his/her habitual residence to a country whose legislation considers him/her of age or an emancipated minor, he/she acquires the capacity granted by the law of the new habitual residence. It is not possible to invoke incapacity on the basis of the foreign law when it prejudices third parties who have no knowledge thereof"*¹³.

The Draft elaborates an autonomous legal category in relation with "Rights belonging to the Person", which are also subjected to the law of the domicile of the person.

In 2003 Draft Code the "Name" of the natural person appears for the first time as an independent category, and it is subjected to the law of the domicile of the person in question, at the moment of giving him/her such name. The change of name is subjected to the law of the domicile at the moment of the change. In a regulation

¹³ The rule takes the legal foundation of articles 138 and 139 of the Civil Code currently in force, with a wording that grants it a multilateral scope.

superseding the excessive territorialism ruling the country with relation to this institution of “civil policy”, which is, in turn, deemed an inalienable personal right¹⁴, it is set forth that “*the person who changes their domicile by moving to the Republic of Argentina keeps their name pursuant to the law of their previous domicile or according to his/her nationality, notwithstanding the fact of imposing the spelling of the Spanish language.*”

In Chapter IX of the Draft, specific legal categories have been elaborated about “Property Rights”, i.e. “rights in real estate,” “rights in non-registrable personal property,” “rights in registrable personal property,” “rights about things of a personal use that the owner can take always with him” and “personal property in transit.”

As regards “Family relationships”, the rules of private international law express the material values of this field of the community's life.

The Argentinean legal tradition –formed in the context of an immigration country- has been to subject the “capacity of the persons to marry, the formalities of the act, the existence and inherent validity of the marriage itself” to the law of the place of celebration, a connecting factor which also applies to rule the proof of the existence of the marriage. This line was taken up again in the year 1987, with the important amendment in the field of marriage introduced by Act 23515, which accepted for the first time the dissolution of the marital bond by means of divorce and regulated, with a rich variety of methods and categorizations, the international aspects of matrimonial relationships.

The 2003 Draft Code takes advantage of the categories of the legislation in force and improves them. It takes into account “distant marriage”, “consular marriage” –an old claim of the Argentinean legal scholars-, “personal relationships and alimony between

¹⁴ FERMÉ, Eduardo Leopoldo, “El nombre de las personas físicas en el derecho internacional privado”, *Work for the XV Congreso Ordinario de la Asociación Argentina de Derecho Internacional and XI Congreso Argentino de Derecho Internacional*, Mar del Plata, 1999.

spouses”, “marital property system”, “provisional measures”, and “legal separation and divorce.”

An innovation of the 2003 Private International Law Draft Code is to provide for the “Non-marital unions” in an autonomous way (article 107).

The Draft elaborates for the first time in the domestic source a category for “the existence and determination of, and the objection to, filiation,” and provides for a specific conflict rule –a locating rule with a subsidiary connecting factor- to designate the law applicable to the “effects of filiation, including parental responsibility.”

Different aspects of the “intercountry adoption” institution appear to be regulated in article 116 of the Draft. In the first place, the “personal conditions of the adopting party and of the adoptee are ruled by the laws of their respective domiciles.” If the domicile of the adoptee cannot be determined, the law of his/her habitual residence shall be applied, as far as is concerned. The second paragraph of article 116 subjects the “validity of the adoption” to the law of the domicile of the adoptee. The third paragraph refers to the law applicable as regards the “effects of the adoption in relation with parental responsibility” and provides for solutions similar to those provided for on this same item in the field of “effects of filiation” (article 114 of the Draft).

The quoted rules, construed together with article 38 of the Draft –related to direct international jurisdiction in cases of granting adoption-, mean a new approach to international adoption, which overcomes the remarked disfavour towards this institution that settled in the administrative and legal practice by the extensive interpretation of the reservation stated by our country to article 21 of the Convention on the Rights of the Child, in subsections b), c), d) and e)¹⁵.

¹⁵ The Republic of Argentina stated the following reservation at the moment of delivering the ratification instruments: “The Republic of Argentina makes a reservation to subsections b), c), d) and e) of article 21 of the Convention on the Rights of the Child

The Argentinean private international law in force has not elaborated in the domestic source any autonomous categories to regulate the typically international calamities of “illegal displacements and detaining of minors (child abduction)” and “the traffic of boys, girls and adolescents.” The Draft provides for a rule that, in the field of “minors restitution”, refers to the solutions of The Hague Convention of October 25, 1980 and, in the field of “minors traffic” refers to the Inter-American Convention on International Traffic in Minors of March 18, 1994, in both cases with the condition of giving special attention to the particularities of the case.

As regards succession with foreign elements, the 2003 Draft Code distinguishes a category for “succession in case of death”¹⁶, another one for “the capacity to make a will” and a third one referring to the “formalities of the will” (articles 119, 120 and 121). The authors of the Draft have kept the old Argentinean legislative solution that regulates the formal validity of the will by means of a conflict rule materially oriented to reach the objective of giving validity to the last will of the deceased person.

and states that they shall not rule within its territorial jurisdiction because it is deemed that, in order to apply them, there must be a previous strict mechanism of legal protection of the children in the field of international adoption with the aim of preventing their traffic and sale” (article 2 of Act 23.849.)

¹⁶ The 2003 Draft Code adopts the theory of unity in the field of the law applicable to succession with foreign elements, superseding the predominant case law trend, which divides succession law and applies the Argentinean substantive law to the succession related to real property located in the Republic of Argentina and personal property located permanently in the country. Related case law, among several court decisions: Suprema Corte de la Provincia de Buenos Aires, 10/0/74 “A.P.K. y otra s/suc.” (published by *La Ley* 1975-B-437); Cámara Civil y Comercial de San Martín, 15/7/99, “P.A. y otro” (published by *Jurisprudencia Argentina* 16/2/2000). Related to applying only one law to international succession: 1ª. Instancia Juzgado Nacional en lo Civil n° 29, final judgment, 1/4/86, “G. C., s/sucesión” (published by *La Ley* 1987-A-339). Practical exercises can be found in NOODT TAQUELA, María Blanca, *Derecho Internacional Privado. Libro de Casos*, 2º updated edition, La Ley, Buenos Aires, 2006, p. 225. Related opinions of legal scholars, in favor of the unity as regards the law applicable to succession (solution followed by the 2003 Draft Code): WEINBERG, Inés M., *Derecho Internacional Privado*, 3rd edition Depalma, Buenos Aires, 2004, p. 361.

In the field of corporations law (Chapter III of Title III), the Draft takes advantage of the experience of the case law arisen out of the application of Act 19550 (1972). Broadly speaking –together with the general conflict rule that designates the law of the place of incorporation as the *lex societatis*-, it provides for specific categories for corporations that set up their main place of business in the country (article 53) or a branch (article 54), that carry out isolated legal acts and appear in court to defend their rights (article 54, last paragraph) and are incorporated or acquire real property in the Republic of Argentina (article 60). As a new category “corporate merger” is regulated (article 61) pursuant to the solutions favoured by national legal scholars.

Chapter XIV deals with “Insolvency.” The general conflict rule designates the law of the State of the court taking part in the process¹⁷, and the second paragraph of article 124 states the scope or field of the law designated, which shall be applied to “the procedures, conditions of the opening and closing of the process, effects of the insolvency proceedings on the obligations incurred by the debtor and the range of privileges.”

This chapter regulates by means of specific rules –and a direct methodology- the possibility of recognizing in the Republic of Argentina resolutions for the opening or homologation issued by competent foreign courts in an insolvency process, and the authorization to request provisional measures (articles 125 and 126 of the Draft herein commented.)

(2) *Does your codification permit the application of the laws of different status to different aspects or issues in the*

¹⁷ Article 44 of the Draft opens the jurisdiction of Argentinean courts to take part in insolvency cases, on the basis of the debtor’ domicile (the main center of his interests), the existence of property of the debtor within the country or the presence of a branch office. The competent court pursuant to these two last connections has jurisdiction to decide the extension of bankruptcy and the bankruptcy responsibilities under the law of the Republic of Argentina.

same cause of action (dépêçage)? If not, is it nevertheless possible for dépêçage to occur in certain cases?

The possibility to divide the law applicable to suit different aspects of a legal relationship appears in the 2003 Draft Code in an express way in the field of private international contract law. The *dépêçage* agreed upon by the parties is admitted as well as that resulting from an only partial election or limited to certain aspects of the contract (articles 69 and 72). This topic shall be dealt with in depth in section E (**Law Governing Contracts**) herein.

The 2003 Draft Code keeps the Argentinean legislative tradition that distinguishes –and subjects to specific conflict rules– the formal validity of the relationship in question and the substantial or inherent validity, with the exception of article 52 (applicable to the formality and inherent validity of private law entities and corporations), article 82 (which designates the law applicable to the formality and inherent validity of the obligations arising out of a credit instrument) and article 103 (related to the formal validity and inherent validity of marriage).

In all other respects, the application by the forum judge of the mandatory rules of the Argentinean private international law leads to the division of the applicable law. An example of the aforementioned in the law in force is the material rupture due to the application of the Argentinean law to the liability of the carrier for harm to the passenger in a water transportation contract that is discussed in the Argentinean jurisdiction (article 604 of the Navigation Act number 20094,) whereas a foreign law chosen by a contractual clause can be applied to the question of the validity of the transportation contract. The 2003 Draft Code keeps the rules of private international law of a domestic source set forth in the Navigation Act in force; as a consequence, this case will continue to appear even if the Code of Private International Law came into force as foreseen.

The risk of providing for restrictive categories and admitting

different ways of *dépéçage* lies in the fact of causing the rupture of the material harmony of the solution of different aspects of an individual case. This methodology requires some orientation for its later adaptation to the functioning of the rules of private international law, which is provided for in article 12 of the 2003 Private International Law Draft Code as follows¹⁸:

“Adaptation. The different laws applicable to different aspects of the same or different legal relationships involved in a case shall be applied harmoniously, with the aim of reaching the objectives pursued by each one of those laws.”

IV. State-Selection and “Conflicts Justice” versus “Content-Oriented Law-Selection” and “Material Justice”

- (1) *Does your codification contain provisions that: (a) directly select the applicable law based on its content or the result that law produces; or (b) indirectly allow the court to consider the content of the conflicting laws and make the choice dependent on that content.*
- (2) *If the answer is yes, please describe and discuss these rules and also provide examples of their application by the courts.*

The rules of private international law –fundamentally, conflict rules- set forth in the Civil Code in force (1869) are rules inspired in the Savignian method¹⁹, whose purpose is to designate the

¹⁸ Among others, FERNÁNDEZ ARROYO, Diego P. (Coordinador), *Derecho Internacional Privado en los Estados del MERCOSUR*, Zavalia Editor, Buenos Aires, 2003, pp. 276/277. The background is article 9 of the Inter-American Convention on General Rules of Private International Law.

¹⁹ The Argentinean Civil Code, whose author was Dalmacio VÉLEZ SÁRSFIELD, was enacted by Act 340 on September 25, 1869 and came into force on January 1, 1871. Besides Friedrich Carl de Savigny, other influences in the rules of private international law were the works of Joseph Story and Brazilian jurist Teixeira de Freitas.

appropriate law –close, justified, foreseeable- with a certain abstraction of the substantial content of the chosen law. By verifying the compatibility between the material solution given by the foreign law and the spirit and principles of the Argentinean legislation –the control of the international public policy– neutrality gives way to pondering the underlying substantial interests of the solution.

The conflict methodology prevails in the 1974 Goldschmidt Draft Code with a few exceptions. At the moment of drafting the 2003 Draft Code, new agreements had been reached upon the object and method of this branch of the law, from the point of view of the legal scholars and academicians²⁰, with an impact on judicial decisions.

Together with indirect rules, founded on the principle of proximity and which seek to designate a law justified by foreseeability and formal justice, there appear in the Draft material rules that take in the legal category a multinational private law case and create directly a regulation of a national and special character.

There are examples in matrimonial law. Articles 104 and 105 regulate “distant marriage” and “consular marriage” through the direct method. In that sense, article 112 provides for the conversion of judicial separation decreed in a foreign country into divorce granted by the Argentinean court of the domicile of one of the spouses, as long as the marriage had been celebrated in the Republic

²⁰ In the recommendations of the III Jornadas Argentinas de Derecho Internacional Privado that took place in the city of Rosario, Provincia de Santa Fe, from November 18 to 19, 1994, focused on the topic “Contents, objectives and methods of Private International Law”, it was sustained that: “...in our times Private International Law, in a wide sense, not only feeds on the traditional problems that were the center of its object and employs the indirect method but it also enriches itself, before the demands of the current reality –which further includes the treatment of the integration problems– due to the use of the direct method, in a sphere not only of the harmony but also of uniformity in the analysis of international cases. In this way, virtuality is given to the material solutions and the rules of immediate application that solve the questions submitted in an exhausting way...” See: UZAL María Elsa, “El pluralismo en el derecho internacional privado como una necesidad metodológica”, *El Derecho* 161-p. 1056.

of Argentina and the conditions under Argentinean law for the dissolution of the marital bond are met.

In all other respects, the 2003 Draft Code has different conflict rules that reveal a clear underlying material orientation. In general, they offer an option –either in favour of one party or leaving the decision in the hands of the court– which intends to satisfy a certain condition as regards the content of the designated law. Examples of rules that reflect substantial foundations are the following: contract of employment (article 80), alimony (article 88), environmental torts (article 90), products liability (article 91), liability for traffic accident (article 92), filiation (article 113), capacity to make a will (article 120) and formal validity of wills (article 121.)

An example is the conflict rule materially oriented set forth to regulate the existence, determination and, even, the objection to filiation:

“Article 113. *The existence, determination and objection to filiation are ruled by the law of the domicile or habitual residence of the child, parent involved, or place of celebration of the marriage, the one which is more favourable for the bond.*”

It offers a range of five laws –although abstract connections may coincide in the individual case– with the aim of favouring the purpose pursued by the lawmaker.

Although this essay on national law is focused on the field of the “applicable law”, as regards the present point –“material justice as the founding of the rules”–, it seems relevant to add that the 2003 Draft Code provides for rules that open a range of possibilities to justify the *international jurisdiction of Argentinean courts*, with the clear substantial intention of making it easy to have access to the jurisdiction of any of the parties to the lawsuit.

In this way, upon the choice of the plaintiff, a variety of forum laws open for lawsuits based on the international carriage of goods by land (article 25) and for the carriage of passengers by land (article 26). Furthermore, the plaintiff has the choice to elect among

different courts –justified through different connections with the Republic of Argentina- when they are claims grounded on the existence of non-contractual civil liability (article 32.) As regards consumption relationships, only the consumer has the possibility to choose among a range of forums available (article 27). In lawsuits that deal with the payment of alimony, the one who requests alimony can choose whether to file the claim before the Argentinean court of his/her domicile or habitual residence or before the court of the respondent’s domicile or habitual residence.

- (3) *...Are there any cases in which courts made a content-oriented or result-oriented choice of law despite the lack of explicit statutory authority for (or prohibition of) such a choice? If yes, please, provide examples.*

As far as the applicable law is concerned, we shall cite a case adjudged in 1981 by the Suprema Corte de la Provincia de Buenos Aires, which recognized succession rights to the niece of the deceased –the brother of the adopting mother- on real property located in the Republic of Argentina, despite the hindrance represented by the designation of the Argentinean law by article 10 of the Civil Code. At the moment of the decedent’s death, the Argentinean law denied succession rights in the collateral line to a person related by “simple adoption.” The provincial court invoked a “domestic renvoi” –from article 10 of the Civil Code to article 32 of adoption Act 19134, which designated the law of the domicile of the adoptee at the moment the adoption was granted- with the aim of recovering the material coherence of the solution, by means of the application of the French law both to the validity of the adoption and said adopted person’s inheritance rights. In the words of professor Werner Goldschmidt, the result is valuable since the judgment “contributes to the progress of the science of private international law”²¹.

²¹ Suprema Corte de la Provincia de Buenos Aires, 25/3/81, *El Derecho* 94-pp. 602/613, with a note of Werner GOLDSCHMIDT.

In a conflict of international jurisdiction, the Cámara Nacional de Apelaciones en lo Civil of Buenos Aires city fills a legal loophole in a court decision of 1985²², with a clear material orientation. At the moment of the decision, Act 23515 (which introduces rules of international jurisdiction and applicable law into the alimony duty between spouses) had not been passed yet. In this matter and because of the legal loophole, the court considers that the right to receive alimony is comprised by the inalienable personal rights of the holder and qualifies the alimony petition as “an urgent measure”, applying in an analogous way rules of the Montevideo Treaty on International Civil Law of 1940 (articles 61 and 30) outside their specific scope, for the purpose of admitting the Argentinean jurisdiction of the residence of the alimony creditor, due to the urgent need of the weak party to the legal relationship, in spite of the fact that the matrimonial domicile was in Spain. This decision opens the Argentinean jurisdiction on the basis of the residence of the alimony creditor, solution adopted in 1987 in article 228 of the Civil Code, after the amendment of Act 23515.

V. Unilateral Rules and Rules of Immediate Application

Question 1. Does your codification contain any unilateral choice-of-law rules, either inward-looking (i.e., delineating the reach of forum law) or outward-looking (i.e., submitting a particular subject to a specified foreign law)?

Question 2. Are there any unilateral choice-of-law rules in other statutes?

If the answer to either 1 or 2 is affirmative, please provide a

²² Cámara Nacional en lo Civil, Sala A, 8/4/1985 “B. de M. y C., I. y otro c/M. y C., A”, published in *La Ley* 1986-D-168. A comment can be found in FELDSTEIN DE CÁRDENAS, Sara, *Derecho Internacional Privado y de la Integración*, La Ley publishing house, 2007, p. 86 with a note of Rodrigo LAJE y Rodrigo Fernando PIÑEIRO.

brief description and discussion of these rules, including whether these rules have been “bilateralized” by judicial practice.

Question 3. Does your codification recognize the concept of règles d'application immediate? If the answer is yes, please discuss cases in which courts have applied or recognized such rules. If the answer is no, are there any cases in which courts have nevertheless recognized this concept? What is the position of academic authors on this topic?

The answer to these questions needs a brief introduction about the acknowledgement of rules of this nature in the Argentinean legal system in its dynamic vision (that is to say, both in its legislative aspect and in the interpretation of legal scholars and judicial practice.)

The American States are familiar from long ago with the concept of “public policy rules” –a category present in the Bustamante Code²³– which becomes meaningful and grounded upon the protection of essential public policies to defend national values. The Republic of Argentina was not bound by this codification and, since the end of the XIX century –like other states of the Cuenca del Plata, which became bound by the Montevideo Treaties on International Civil Law of 1889- developed the concept of international public policy as the last stage of the conflict reasoning, that is, as control *a posteriori* of the compatibility of the foreign law with the spirit of the Argentinean legislation.

The 1974 Goldschmidt Draft Code does not contain typically unilateral rules²⁴ nor rules of immediate application. The concept of a normative system of Professor Werner Goldschmidt was focused

²³ The Bustamante Code–which was named after Antonio Sánchez de Bustamante y Sirvén- was approved in 1928 in the Sexta Conferencia Panamericana.

²⁴ Maybe it is possible to cite within this normative category article 10 of the 1974 Goldschmidt Draft Code, related to multinational companies, conglomerates or *holding* being subjected to Argentinean legislation.

on the indirect rule and on the conflict method, and considered material rules and mandatory rules as part of other branches of the law, to wit, International Private Law and Private or Public Law regulating the rights and duties of aliens, as the case might be²⁵. In the subsequent years there was an interesting dialogue between legal scholars²⁶, judicial practice and academic teaching, whose benefits were seen in the codification works that ended in the last ten years.

The unilateralist method and the understanding of some of its manifestations, the mandatory rules and rules of immediate application had the consent of the legal scholars in the III Jornadas Argentinas de Derecho Internacional Privado, which took place in Rosario, in November 18-19, 1994, organized by the Asociación Argentina de Derecho Internacional around the topic "Contents, Objectives and Methods of Private International Law"²⁷. A decade later, these concepts are commonly accepted both by legal scholars and academicians. Moreover, we realize the acknowledgement of the imperative quality and preeminence of these rules in judicial decisions, where frequently they are not cited with their specific denomination.

Argentinean legal scholars did not widely accept the

²⁵ GOLDSCHMIDT, Werner, *Derecho Internacional Privado. Derecho de la tolerancia*. Ninth edition, Lexis Nexis, Depalma, Buenos Aires, 2002. On pages XX and XXI the author transcribes the Foreword to the 3rd edition, where he remarked the presence of rules that seek to benefit the homeland element and follow the direct method. Goldschmidt considered that said rules were part of related matters, but outside the science of private international law.

²⁶ BOGGIANO, Antonio, "Nuevo panorama del derecho internacional privado argentino", *El Derecho* volume 66-pp. 767/789; *Del viejo al nuevo derecho internacional privado*, Depalma, Buenos Aires, 1981; *Derecho Internacional Privado*, 1st edition, 1978; in all these works, professor Boggiano introduced in our circle the wide concept of private international law, comprehending the methodological pluralism.

²⁷ UZAL, María Elsa, "El pluralismo en el derecho internacional privado como una necesidad metodológica", cited in note 10, pp. 1056/1063; PALLARÉS, Beatriz y KILIBARDA, Claudia, "Perspectivas desde el pluralismo metodológico en el derecho internacional privado", *El Derecho* 161-pp. 1071/1074; NAJURIETA María Susana, "El pluralismo metodológico en el derecho internacional privado actual", *El Derecho* 161-pp. 1064/1070.

distinction French legal scholars make between “règles d’application immédiate” and “lois de police”. Although the ideas of Photion Francescakis²⁸, as well as the ideas of those who later studied this normative reality more in depth, were known in the academic circle, the Argentinean authors, although they conceptually distinguish the categories, assimilate the rules of immediate application with the mandatory rules as regards their characteristics and foundations²⁹.

The normative reality in force shows the characteristics as follows: formal structure of a unilateral rule, connections with the State itself, which, instead of designating the law, limit an excessive application sphere of the *lex fori* –which outlimits the sphere regularly limited by the general conflict rule-, reference or subjection to a whole area of the national law for the case precisely defined in the legal category, and a higher imperative quality, which supersedes the functioning of the conflict rule and the game of party-autonomy. A typical example, which is not modified in the 2003 Draft Code, is article 604 of the Navigation Act.³⁰

We can find in the 2003 Draft Code unilateral rules and rules that reflect the characteristics of the “règles d’application immédiate”.

²⁸ FRANCESCAKIS, Photion, “Quelques précisions sur les lois d’application immédiate et leurs rapports avec les règles de conflits de lois”, *Revue Critique de Droit International Privé* 1966-p. 1 and subsequent pages. Later in time: Mayer Pierre, « Les lois de police », *Journal de Droit International* 1981-p. 277 and subsequent pages.

²⁹ BOGGIANO, Antonio, *Derecho Internacional Privado*, 5th edition, Abeledo Perrot, Buenos Aires, 2008, p. 75. FERNÁNDEZ ARROYO, Diego (Coordinador), *Derecho Internacional Privado en los Estados del MERCOSUR*, *op cit*, pp. 308/309; WEINBERG, Inés M., *Derecho Internacional Privado*, 3rd edition, Lexis Nexis Depalma, Buenos Aires, 2004, p. 144.

³⁰ Article 604 of Act 20.094 (1973) sets forth: “*The provisions of this act that regulate the responsibility of the carrier as regards the passenger and their luggage are applied to any contract of carriage of passengers by water entered into in the Republic of Argentina or whose fulfillment is begun or terminated in an Argentinean port, whether the vessel be national or foreign, or when the courts of the Republic of Argentina are competent to hear the case*”. CAPPAGLI Alberto C., *El derecho internacional privado en la ley de navegación argentina*, Buenos Aires, 2004, p. 141, expresses a critical opinion towards what is considered excessive territorialism.

The rule contained in article 62 is unilateral, since it subjects to the *lex fori* the public offer in the Republic of Argentina of negotiable instruments issued by natural persons or entities domiciled or incorporated abroad. Moreover, the rule of the second paragraph of article 95 of the Draft is unilateral, since it subjects to the law of the Republic of Argentina the formalities of legal acts executed abroad and related to real property located in the Republic of Argentina (the equivalence between the instrument executed and the law of the Republic of Argentina is admitted, an item to be judged by the *lex fori*).

We understand that the rule contained in article 100 of the Draft, which refers to “copyright”, was worded as a unilateral rule. There are also unilateral rules provided for with relation to provisional measures in relationships between spouses and in order to protect incapable persons or their property (articles 110 and 118).

It seems interesting to pay attention to the wording used by the 2003 Private International Law Draft Code to refer to the “mandatory rules”. Article 15 introduces them as follows:

“15. Mandatory Rules. The exercise of private autonomy and the functioning of the conflict rules are excluded by the Argentinean rules enacted in order to preserve the public interest. The courts shall take into account the rules enacted by the foreign States to preserve the public interest if their purpose and the consequences derived from their application were compatible with the principles of the Argentinean legislation and the reasonable prior knowledge of the parties.”

This rule changes the focus of the attention from the formal structure of the rule towards its objective or foundation: “Argentinean rules enacted to preserve the public interest.” As a consequence, the scope of the rule encompasses different structures –self election in an imperative way of a whole area of the domestic law; material rule accompanied by the definition of a superseding application sphere of the law usually designated by the general

conflict rule, etc., as far as this satisfies the purpose of ensuring the application of solutions of the national law in matters deemed essential for public policies or social order.

The examples presented hereinafter, as well as those included in section *VII (Ordre Public and Mandatory Rules)*, can be classified in a different way, but -anyway- they respond to rules enacted to “preserve the public interest.”

As rules that shall be applied immediately by the Argentinean courts to multinational cases, we can mention:

In matters related to corporations, article 56 of the Draft imposes the obligation to carry in the Republic of Argentina separate accounts and submit financial statements before the controlling authorities that correspond to the association type, even if it is the case of business associations and charities incorporated abroad – regularly subjected to the law of the place of incorporation-, as long as they have a branch or a head office in the country. The second paragraph of article 58 of the Draft is also worded with the structure of an imperative material rule since it sets forth that the representative of a business association incorporated abroad with activities in the country shall give proof –at least fifteen days in advance- before registering their renunciation that they have notified the association either in the country of incorporation or of the main place of business, as corresponds.

VI. International Uniformity and Protection of National Interests

Questions. Does your codification contain rules which, directly or indirectly are motivated by the need to protect or promote the values and policies (indeed “interests”) of the enacting state? If the answer is yes, please describe and discuss them and also provide examples of their judicial application. If the answer is

no, are there any examples of judicial decisions that are motivated by the need or desire to protect or promote the values and interests of the forum state?

In the general provisions (Title I) of the 2003 Private International Law Draft Code is contained a rule that orientates the reasonings typical of private international law –interpretation, determination, elaboration, application of rules and adaptation- in the sense of respecting the international nature of the cases and the scientific autonomy of this branch of the law (article 5.) This encompasses a tendency to settle, in solving cases, the principles of uniformity, international harmony of the decisions and justice (upon which there is the agreement of the legal scholars and academicians).

Nevertheless, it is accepted in a peaceful way that through the control of the international public policy, the presence of conflict rules materially oriented and the mandatory rules or rules of immediate application of the forum law, the preeminence of the values and principles that sustain the Argentinean legal system is lawfully expressed.

Apart from the examples cited in sections V and VII, there are rules that indirectly reveal the preference for the material values expressed in the Argentinean legislation and open the choice in favor of one or both parties of subjecting the case to the national law, despite the existence of a different solution under the law usually designated by the general conflict rule. Thus, in article 112 of the Draft (conversion of foreign legal separation into Argentinean divorce), underlies a positive assessment of the dissolution of the matrimonial bond by divorce, despite the existence of a restrictive law in force in the State where the separation was decreed.

Another example of a rule favouring values which the Argentinean legislation is familiar with is the last paragraph of article 109 of 2003 Draft Code, which allows the spouses who change their domicile to the Republic of Argentina to exercise a choice by public instrument in favour of the application of the

Argentinean law to the marital property system, in spite of the existence of a different solution under the law of the prior matrimonial domicile.

As regards court practice, we will mention two spheres sensitive to the preeminence of national interests and values. The first one of them, difficult to be defined, is the one called “economic public policy” that opposes the recognition of foreign judgments or the recognition and enforcement of international judicial aid measures when the solution based on the foreign law appears to be clearly inconsistent or offensive to the constitutional rights in view of the objective economic conditions of the Republic of Argentina³¹. Exceptionally, the Corte Suprema de Justicia de la Nación has given validity to rules of administrative law –which have functioned as “rules of immediate application”-, which have affected a public credit transaction³².

The second sphere –regulated by material standards of a multi-state conventional source- is the protection of industrial property by means of granting patents. The Republic of Argentina was bound by the TRIPs Agreement (*Trade Related Aspects of Intellectual Property Rights*) according to which, after a transition period, our country shall include in its national legislation the protection, by means of patents of products, of technology sectors –pharmacological patents- which before said Agreement came in

³¹ The Superior Tribunal de Justicia de la Provincia de Córdoba, Sala Civil y Comercial refused to grant the provisional measures clearly deemed inadmissible, understanding that it would affect national sovereignty under the provisions of article 11, subsection 3, of the Hague Convention on Civil procedure of 1954. “Exhorto diplomático del Tribunal Popular de Kuznetsky (Federación Rusa) en autos Terentiev Víctor c/Soinco S.A.C.I.”, 2/5/2001, published in *Semanario Jurídico* vol. 85-2001-B-p. 617.

³² Corte Suprema de Justicia de la Nación, 10/12/96 “Brunicardi Adriano C. c/Estado Nacional s/cobro.” The modification of the conditions for the issuance of credit instruments was admitted because they were deemed “rules of unavoidable application in the Argentinean jurisdiction no matter what the place of payment of the loan was... and the law to which the original international loan was subject to.”

effect did not enjoy protection³³. In a decision related to divisional patents on medicine products, the Corte Suprema de Justicia stated that it was essential to understand the commitments undertaken by the Republic of Argentina in the light of the objectives and principles of the TRIPs Agreement, taking into account the pressing needs of the population in the health sector³⁴.

VII. Ordre Public and Mandatory Rules

Questions:

- (1) *How do courts in your country apply the ordre public exception?*
- (2) *Does your codification recognize the concept of mandatory rules? If the answer is yes, does this include mandatory rules of a state other than the forum state? How have the courts applied the pertinent provision of the codification?*

With the aim of completing the answers expressed on these questions in other sections, we shall cite article 14 of the 2003 Draft Code which takes the current and prevalent concept about the defensive application of the reservation of international public policy³⁵:

³³ On the protection of intellectual property in a wide sense see: ARMANDO, Miguel y LIPSZYC, Delia, "Bienes Inmateriales", Chapter 23 of the work *Derecho Internacional Privado de los Estados del MERCOSUR* (Coordinador: Diego FERNÁNDEZ ARROYO), *op. cit.*, p. 916 and subsequent pages.

³⁴ Corte Suprema de Justicia de la Nación, 21/5/2002, "Pfizer" case.

³⁵ The two concepts of this institution, with an opinion favorable to the prevailing position –public policy as an exception to foreign law and not as the foundation of the usual jurisdiction– is presented clearly by KALLER DE ORCHANSKY, Berta, *Nuevo manual de derecho internacional privado*, with the collaboration of Adriana DREYZIN DE KLOR and Amalia URIONDO DE MARTINOLI, editorial Plus Ultra, Buenos Aires, 1991, pp. 136/148.

“Article 14. Argentinean International Public Policy. The provisions of foreign law applicable pursuant to this code shall be excluded when they lead to a solution clearly incompatible with the principles of the Argentinean international public policy”.

The modern concept of taking into consideration or applying foreign mandatory rules –of a State closely connected with the case or of a third State which has enacted mandatory rules with the purpose of ruling the case and reasonably foreseeable for the parties– is expressed in the second paragraph of article 15 of the 2003 Draft Code as follows: *“The courts shall take into account the rules enacted by foreign States to preserve the public interest if their purpose and the consequences derived from their application were compatible with the principles of Argentinean legislation and the reasonable prior knowledge of the parties.”*

As an example of the acceptance of the functioning of international public policy as a set of fundamental principles that limit *a posteriori* the solution of the foreign law, we shall cite a decision of the Corte Suprema de Justicia de la Nación, issued on December 11, 1996. The legal framework of the reasoning was the Montevideo Treaty on International Civil Law of 1940, whose article 13, second paragraph, sets forth that a party State is not bound to recognize the validity of a marriage celebrated in another party State with certain impediments, among them, a “previous undissolved marriage”. After the celebration of a second marriage in Paraguay, and after Act 23515 came into force, Mr. S. had converted before an Argentinean court the decree of legal separation into a decree of divorce under the new legislation. At the moment of his death, his second wife claimed to be recognized as his spouse as well as her succession rights. The Corte Suprema stated:

“...the international public policy is not an immutable and definite concept but an essentially variable one, since it expresses the essential principles that sustain the legal organization of a certain community, and its contents depend to a great extent on the opinions and beliefs that prevail at a certain moment in a determined state. As a consequence of that, confrontation shall take place with a criterion

of present time, a notion that is widely accepted by comparative law...” Since the first marriage of the deceased celebrated in the Republic of Argentina had been dissolved in 1989, the Corte stated: “...the Argentinean legal system lacks interest in acting before a marriage celebrated in Paraguay that is invoked in the forum state in order to claim inheritance rights by the surviving spouse”.³⁶

The Argentinean law of social security (rules of a collective bargaining agreement that imposed employer’s contributions) has been considered a rule of immediate application in the Argentinean jurisdiction by the Corte Suprema de Justicia de la Nación in a decision of April 9, 2002³⁷. The highest federal court sustained that the employment relationship should not be classified as a seamen’s contract nor be subject to the conflict rule provided for in article 610 of Navigation Act number 20094 because it did not involve a vessel nor a naval artifact accessory or supplementary to navigation. It stated:

“...the foundation for localizing the contract of employment is the protection of the employee and the fulfillment of the public policies of the place where the work is carried out that relate to the general interests of the social and economic order...” In the absence of a specific conflict rule, localizing the employment relationship had to take into account the place where the platform operated, the domicile or head office of the company that exploited the business, as well as the nature of the claim (the employer’s contributions set

³⁶ Corte Suprema de Justicia de la Nación, “S., J.V. s/sucesión”, 11/12/96, see the commentary of professor FELDSTEIN DE CÁRDENAS, Sara Lidia, “Divorcio y orden público internacional: una pareja indisoluble para el derecho internacional privado argentino”, in the work *Derecho Internacional Privado y de la Integración, op-cit*, pp. 96/107.

³⁷ Corte Suprema de Justicia de la Nación, “Federación Argentina Sindical del Petróleo y Gas Privados y otro c/Total Austral Sociedad Anónima y otro”, 9/4/2002. The foreign company JFP International Inc. owned a movable platform located in the Argentinean territorial sea, exploited by Total Austral S.A., where oil workers and technicians worked with respect to whom the employers did not pay the contributions because they alleged that the respective “seamen’s contracts” were ruled by the law of the homeland of the “naval artifact” (article 610 of the Navigation Act), which designated Panamanian law.

forth by a local collective bargaining agreement, corresponding to periods in which the platform had remained in the Argentinean territorial sea). The Court found against the co-defendant companies pursuant to the rules of public policy of the Argentinean law of the place where the work is carried out, which it deemed applicable even in the event individual employment contracts were subject to a foreign law and provided that the place of execution was within the Argentinean jurisdiction.

VIII. Renvoi

Does your codification allow renvoi? If the answer is yes, is renvoi allowed in all cases or only in some cases? If the latter, then which? In any case, are there any cases in which the courts have employed renvoi?

The 1974 Goldschmidt Draft Code did not expressly provide for a rule on renvoi since, according to the author's ideas, "the theory of judicial usage" (*"la teoría del uso jurídico"*) led to equivalent practical consequences. In his words: "Our theory constitutes a correct form of renvoi...Practically, with this doctrine we achieve results similar to those of the theory of integral remission ..."³⁸. The theory of "judicial usage" had a decisive influence on the opinions of legal scholars and on the subsequent codification bills.

In the last decade, the 1999 Draft Code –elaborated by Berta Kaller de Orchansky, Amalia Uriondo de Martinoli and Beatriz Pallarés- established: "Exclusion of Renvoi. Apart from the exceptions contained in specific matters, the remission to the foreign

³⁸ GOLDSCHMIDT Werner, *Sistema y filosofía del derecho internacional privado*, Ediciones Jurídicas Europa-América, Buenos Aires, 2nd. Edition, 1952, volume 1, p. 377. The rule of the 1974 Goldschmidt Draft Code set forth that, in case of applying a foreign law, the court had to give it the same treatment that, with the maximum possible level of probability the court of the country whose law had been declared applicable would give it in the case it was competent.

law shall be with respect to its material law, with the exclusion of the private international law rules.”

The 1999 Civil Draft Code (Book VIII), that was introduced into Congress in the year 2000, provided for a rule that allowed a flexible reasoning: “Article 2540. Renvoi. Notwithstanding the provisions in specific matters, the conflict rules of the foreign law declared applicable shall be taken into account as long as that does not distort the purpose of the Argentinean conflict rule. If the law of that State renvoies to the Argentinean one, the Argentinean rules of the domestic law shall apply.”

Finally, the 2003 Private International Law Draft Code sets forth: “10. *Renvoi*. *The conflict rules of the foreign law declared applicable shall be taken into account. When the parties choose the law it is understood, except for an agreement to the contrary, that they refer to domestic law.*”

The position of the latest Draft Code tends, thus, to accept the renvoi as a general rule, excluding it expressly in the case the parties had chosen the law applicable on the basis of the valid game of the parties autonomy.

As regards judicial practice, the courts do not tend to apply the abstract reasoning of consulting the private international law rules of the State whose law is designated by the conflict rule of the forum law. As an exception, there are judicial precedents in the matter of succession law, where the reasoning of renvoi seems to be oriented to rearrange the unity of the law applicable to the succession case.³⁹

³⁹ HOOFT, Eduardo, “Sucesiones en el derecho internacional privado del MERCOSUR”, *La Ley* 2005-A-pp. 1422/1435, especially the decisions cited on p. 1432. Opinions of legal scholars: ALBORNOZ, Jorge R., “Sucesión hereditaria”, in *Derecho Internacional Privado de los Estados del MERCOSUR* (Coordinador: Diego FERNÁNDEZ ARROYO), chapter 21, *op. cit.*, p. 852 and subsequent pages.

IX. Characterización or Qualification

Does your codification address the question of which law governs characterization? If so, what does it provide and how have the courts applied the pertinent provision? If not, what law do the courts apply in characterizing a problem or issue?

The 2003 Draft Code contains a rule in the title of “General Provisions”, with qualifications of autonomy and autarchy of different concepts used as connecting factors or as categories of analysis (the matrimonial domicile, the domicile of the minor, the domicile of the incapable adult, the place of incorporation of entities and companies, the insolvency process, etc.). In some rules of Title III there appear specific qualifications, as the concept of “international contract” (article 68.)

The final paragraph of article 6 of the Draft Code states: *“Except for an agreement to the contrary, the connecting factors are qualified according to Argentinean law. The other concepts used by the rules of private international law are defined in accordance with the law declared applicable.”*

The Republic of Argentina does not currently have a normative provision of domestic source that sets forth which law defines the complex process of qualifying a troublesome legal relationship with the aim of classifying it under one or the other of the categories used by the conflict rules of the forum law. Legal scholars favor flexible reasonings⁴⁰ that allow the understanding of the legal relationship pursuant to the legal system that created it or where it developed, and the interpretation of the categories used in the conflict rules of the forum law in an extensive way, with the aim of preserving the meaning of the rule.

Not always this width of reasoning is seen in judicial practice. As regards the “qualifications conflict”, the courts have understood the problem as one of interpretation of the conflict rules of the forum

⁴⁰ BOGGIANO Antonio, *Derecho Internacional Privado*, 5th edition, *op. cit.*, p. 161.

law and have solved it with a *lex fori criterion*.⁴¹

X. Judicial Application

Since the Republic of Argentina has not made the 2003 Draft Code a reality yet as the law in force, we consider that we must express a positive judgement on the efforts made by the courts to resolve multinational cases with respect to foreign elements, interpreting the old rules in effect and trying to reach a fair solution for the individual case.

It must be taken into account that the judicial organization system of the Republic of Argentina does not provide for courts specialized in private international law conflicts.⁴² There exists an encouraging interrelation between the teaching of private international law, the publications of the authors in legal journals of widespread coverage and the judicial practice.

XI. Any Other General Features that Deserve Note

We believe we have presented the general characteristics of the Drafts that show the efforts made by the Republic of Argentina to finally achieve a Private International Law Code.

⁴¹ About the qualification of the institution of “statute of limitations” by the Argentinean court of the drafting of a check: Cámara Nacional de Apelaciones en lo Comercial, Sala E, 20/3/89 “Spirito *c*/Curi”, published in *Jurisprudencia Argentina* 1989-III-346; Cámara Nacional de Apelaciones en lo Comercial, Sala B, 20/7/95 “Italtur S.A. *c*/Guzzetti José y otro”, en *La Ley* 1997-D-842.

⁴² Reviews of Argentinean court decisions on matters of private international law appear regularly in *Revista DeCITA Derecho del Comercio Internacional* (for example, number 9-2008-pp. 203/228, note of María Blanca NOODT TAQUELA with the collaboration of Julio C. CÓRDOBA, “Jurisprudencia argentina sobre contratos internacionales”). Recently there has appeared a report on relevant court decisions prepared by Professor Diego FERNÁNDEZ ARROYO, with the collaboration of Caroline KLEINER, in *Journal du Droit International*, janvier-février-mars 2008 number 1, pp. 199/231, which comprises the international jurisdiction conflicts, applicable law and recognition and enforcement of foreign court decisions.

D. LAW GOVERNING TORTS/DELICTS

XII. Law Governing Torts

Provisions of the Argentinean codification on the law governing torts/delicts and the way in which the courts have applied those provisions.

The 2003 Draft Code deals with non-contractual obligations in Chapter VIII, articles 89 to 94. The *lex loci delicti* rule is the general rule, unless otherwise provided in other provisions (article 89).

The exceptions to the general rule are based on different types of torts. Environmental torts are governed by the *lex loci delicti* or by the law of the country in which the consequences of the event occur or by the law of the country of the domicile or the habitual residence of the person that is liable for the damage caused, depending on the claimant's choice. (Article 90).

Products liability is governed by the law of the place of business or domicile of the manufacturer of the goods or by the law of the country in which the product was acquired, if technical service took place in that country or advertisement was carried out in local media, depending on the claimant's choice. (article 91).

The law applicable to non-contractual liability arising from traffic accidents shall be – depending on victim of the accident's the choice - that of the State where the accident occurred, or the law of the country of the common domicile of the parties or the law of the State where all the vehicles are registered (article 92).

In cases of personal injury, the law of the domicile of the person who have suffered damage applies (article 93).

The 2003 Draft Code has a detailed provision that determines the scope of applicable law. It includes the basis and extent of liability; the grounds for exemption from liability, any limitation of

liability, the liability originated in the behaviour of third persons, the liability of a principal for the acts of his agent or that of a master for the acts of his servant; the type and extent of the damages; the type and extent of compensation and rules on statutory limitations (article 94).

There exist no judgments applying these provisions due to the fact that they are not in force.

Argentinean Private international Law in force does not have any rule concerning torts. The legal loophole is solved through the application of the 1940 Montevideo International Civil Law Treaty rule on torts, namely article 43, that follows the traditional *lex loci delicti* rule. The civil non-contractual liability was the subject matter of the Private International Law Section of the 10th. Congress of the Argentine Association of International Law, that took place in Buenos Aires, on November 9 to 11, 1989. During said Congress a resolution was adopted recommending that the rule of the “place where the event took place” contained in the Montevideo Treaties, may be construed as referring to the place where the behaviour takes place, and also to the place where the consequences of the behaviour appear. This wide characterization of *lex loci delicti*, allows to introduce exceptions to the traditional *lex loci delicti* rule.⁴³

Nevertheless, there are two scholars who understand that the rule of Montevideo Treaty cannot be applied by analogy.⁴⁴

The Goldschmidt Draft Code determined that torts are governed by the law where the event occurred (article 34), without considering any exception to the *lex loci delicti* rule.

⁴³ The resolution was adopted according to the Report of FERMÉ, Eduardo L., “La responsabilidad civil por hechos ilícitos en el Derecho Internacional Privado”, Report presented to *Xth Congress of the Argentine Association of International Law*, that took place in Buenos Aires, on November 9 to 11, 1989.

⁴⁴ DREYZIN DE KLOR, Adriana - URIONDO DE MARTINOLI, Amalia “Obligaciones extracontractuales. Dimensión autónoma de Argentina” Chapter 28, in *Derecho Internacional Privado de los Estados del Mercosur*, Diego P. FERNÁNDEZ ARROYO (coordinator), Buenos Aires, Zavalia, 2003, pp. 1194-1195, paragr. 1336.

Regarding a particular type of tort, namely traffic accidents, Argentina is a part to the San Luis Protocol on civil non-contractual liability arising from traffic accidents, between Mercosur States, signed in Potrero de los Funes, San Luis, on June 25, 1996.⁴⁵ This treaty followed the solutions of the Agreement between Argentina and Uruguay on civil non-contractual liability arising from traffic accident, signed in Buenos Aires, on July 8, 1991.⁴⁶

Both instruments maintain the general rule of the place where the accident occurred, but they introduce some exceptions to the *lex loci delicti* rule. The law of the common domicile of all the parties, victims and liable persons, shall apply to the accident (article 3 of San Luis Protocol and article 2 of the Agreement between Argentina and Uruguay).

The application of these treaties in cases concerning traffic accidents that occurred in Uruguay, between persons domiciled in Argentina, has given rise to different judicial criteria. Some courts have not applied the San Luis Protocol or the Agreement between Argentina and Uruguay, when the accident occurred before the date when the treaty entered into force, in spite of the fact that it was in force when the judgment was rendered. Judge Eduardo L. Fermé has carried out a profound analysis of this issue in the ruling handed down in re: “Cámara Nacional en lo Civil, sala “I”, 14/04/1998, *Rivas Cordero, Santiago v. Natanson, Jorge Gustavo o Gustavo Jorge Osvaldo*⁴⁷. This judgment applied the conflict-of-law rule of Montevideo Treaty on International Civil Law (article 43), that follows the *lex loci delicti* rule, due to the fact that the accident took place in 1989 and the Convention between Argentina and Uruguay had entered into force on 07/06/1995. As a consequence thereof, the Uruguayan law was applied to civil non-contractual liability.

⁴⁵ The San Luis Protocol was approved by Argentina through Act number 25.407, was ratified by Argentina on 20/11/2001 and is in force in Argentina since 20/12/2001. It is in force in all Mercosur countries.

⁴⁶ The Agreement between Argentina and Uruguay was approved by Argentina through Act number 24.106 and entered into force on 07/06/1995.

⁴⁷ Published by Julio C. CORDOBA in <http://fallos.diprargentina.com> and also in *Revista El Derecho*, Buenos Aires, t. 182, p. 752.

Another judgment that followed the same approach was rendered by the Cámara Nacional en lo Comercial, sala A, on 30/12/2008, in re *Cucciolla Carlos Alberto s. quiebra s. incidente de revisión por Héctor Tapia y otros*.⁴⁸

On the contrary, the judgment of the Cámara Nacional en lo Civil, sala “L”, applied the Convention between Argentina and Uruguay to an accident that took place in 1986, in spite of the fact that the Convention had signed in 1991 and entered into force on 07/06/1995. The decision was rendered on 23/09/96, in re *Giuliani, Mario y otro c. Khafif, Isaac y otros*, and Argentinean law was applied as the law of the common domicile of all the parties were involved in the accident that took place in Punta del Este, Uruguay.⁴⁹ In the same line of thinking, the Cámara Nacional en lo Civil, sala A, on 23/05/2000, in re *Gómez, Eduardo C. y otro c. Barbosa, Hernán y otros*, applied Argentine law as the common domicile of all the parties involved in an accident that also took place in Punta del Este, Uruguay in 1993, based on the Convention between Argentina and Uruguay that was not in force at that date.⁵⁰ In these judgments no thorough analysis is carried out as to the reasons to apply one treaty or another.

In relation with other types of torts, such as personal injury, products liability, environmental torts, and defamation there are no provision, neither in international treaties, nor in domestic law. We have not found reported cases on this type of international torts.

⁴⁸ Published by Julio C. CÓRDOBA in <http://fallos.diprargentina.com>

⁴⁹ Published by Julio C. CÓRDOBA in <http://fallos.diprargentina.com> and also in *Revista La Ley*, Buenos Aires, t. 1998-C, p. 682.

⁵⁰ Published by Julio C. CÓRDOBA in <http://fallos.diprargentina.com> and also in *Revista La Ley*, Buenos Aires, t. 2001-A, p. 312.

E. LAW GOVERNING CONTRACTS

XIII. Law Governing Contracts

1. The Role and limitations of party-autonomy in international or multistate contracts.

The 2003 Private International Law Draft Code, has some detailed provisions - articles 68 to 80 - on law governing contracts. Party-autonomy is expressly allowed by article 69, provided that the contract is international in its nature. Article 68 qualifies the internationality of the contract; this provision requires that the contract has objective contacts with more than one State, such as the place of performance, the place of execution, the domiciles or the place of business or the habitual residence of the parties or the place of location of the goods that are the subject matter of the contract.

The internationality of the contract is a prerequisite for parties to be able to freely choose the law applicable. A contract is international when it has objective contacts with more than one State. The draft provisions follow the criteria of the Argentine courts and the interpretation of scholarly writings.

An interesting case showing Argentinean courts' determination of the relevant factors for a contract to be deemed international was the judgment handed down by Cámara Nacional de Apelaciones en lo Civil y Comercial Federal, Sala III⁵¹, 27/10/2006, in re *Banco Europeo para América Latina v. Banco de Galicia y Buenos Aires S.A. s. proceso de conocimiento*.⁵²

In the same line of thinking, Article 1 of the National Civil

⁵¹ Federal Court of Appeal having jurisdiction on Civil and Commercial Matters.

⁵² CNCivComFed., Sala III, 27/10/2006, "Banco Europeo para América Latina c. Banco de Galicia y Buenos Aires S.A. s. proceso de conocimiento", in *Revista El Derecho*, Buenos Aires, 23/07/07, also available in <http://fallos.diprargentina.com>

and Commercial Procedure Code,⁵³ allowing selection of forum, requires the situation to be international, in order to accept the choice of a foreign court made by the parties.

In fact, the 2003 Draft Code adopts the same solution as the Inter-American convention on the law applicable to international contracts, signed at Mexico, D.F., Mexico, on March 17, 1994,⁵⁴ which article 1 rules:

Scope of Application

Article 1- This Convention shall determine the law applicable to international contracts.

It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party.

Parties' choice must be done "freely" and may refer to any aspect of the contract, including form of contract. (article 69.1)

The parties to the contract may choose the law applicable to the entire contract or to a part of it. They may also choose different laws to govern different aspects of the contract. (article 69.2). Thus, "depeçage" is broadly accepted when it is introduced by party autonomy.

Parties may choose a law which has no local contact with the contract (article 69.3)

In spite of the fact that Private International Law rules that are in force in Argentina do not have a provision referring to choice of

⁵³ The National Civil and Commercial Procedure Code ("Código Procesal Civil y Comercial de la Nación") was enacted by law 17.454 of 1967, published on 7 November, 1967 and amended by law 22.434 of 1981 (text reordered restatement by decree 1042/1981 of 18 August, 1981 published on 27 August, 1981).

⁵⁴ The Inter-American convention on the law applicable to international contracts, signed at Mexico, D.F., Mexico, on March 17, 1994, is not in force in Argentina. The Convention was ratified only by México and Venezuela. [http:// www.oas.org](http://www.oas.org)

law in contracts, the opinion of scholars is favourable to party autonomy. This appeared clearly in 1985 during the 10th. National Congress on Civil Law that took place in Corrientes, Argentina; all the members of the Private International Law Commission agreed that contracts are governed by the law chosen by the parties. There were different opinions concerning the possibility of choosing a neutral law, without having ties with the contract.⁵⁵

The 2003 Draft Code allows express choice of law and if there is no express agreement, the parties' agreement must be clearly deducted from the clauses of the contract or from the circumstances of the case (article 69. 4). The provision discards the presumed intention of the parties as a way of expressing the parties' agreement.

Although the 2003 Draft Code does not contain an express provision on the effects that a choice of forum may have on a choice of law, Argentinean scholars' as well as courts' interpretation hold that the selection of a certain forum by the parties does not necessarily entail selection of the applicable law.

The same solution was adopted by the Inter-American convention on the law applicable to international contracts, signed at Mexico, D.F., Mexico, on March 17, 1994, which provides that: *Selection of a certain forum by the parties does not necessarily entail selection of the applicable law* (Article 7).

The 2003 Draft Code establishes that the law chosen by the parties shall be understood to mean the law currently in force in that State, excluding the possibility of "renvoi" through any reference to conflict of laws rules (article 69. 5).⁵⁶

It is possible that the parties agree to a change of the chosen law after the conclusion of the contract. This change will not impair

⁵⁵ X Jornadas Nacionales de Derecho Civil, Corrientes, 1985, Resolution of the 7th Commission, in *Conclusiones de Congresos y Jornadas de los últimos treinta años*, Buenos Aires, Universidad Notarial Argentina, 1991, p. 49.

⁵⁶ DOLINGER, Jacob. "Evolution of Principles for Resolving Conflicts in the Fields of Contracts and Tort", *Recueil des Cours*, Volume 283, 2000, pp. 187-512, p. 407, footnote 599.

the formal validity of the contract or affect the rights of third parties (article 73). Moreover, parties may choose applicable law after the conclusion of the contract, including during the judicial process (article 69.1).

Freedom of the parties includes the drafting of the clauses of the contract that may exclude different provisions of the applicable law, such as domestic mandatory rules of the applicable law.

The contract will also be governed by the principles and usages that are widely known and observed when the parties have understood to be bound by them (articles 70 and 4).

General limitations of party-autonomy that affect any type of contracts are those concerning principles of public policy (*ordre public international*) of the law of the *forum* (article 14 of the 2003 Draft Code). Mandatory rules (*lois de police*), could be defined as those rules of the law of one country that cannot be derogated by contract, or by the law of another State, which is also deemed to be a general limitation to party-autonomy. Article 15 of the 2003 Draft Code allows courts to apply mandatory rules of third countries provided that the purpose and consequences of their application are compatible with principles of Argentine law and conform to the parties to the contract reasonable expectations. The provision does not expressly require that mandatory rules should have a close connection with the case, but we considered that this is an implied requirement.

The choice of court is almost unrestricted in contract matters, with the exception of cases regarding exclusive jurisdiction of Argentine courts (art. 17 of the 2003 Draft Code). None of the cases dealing with exclusive jurisdiction that are regulated in article 45 refer to contracts claims.⁵⁷

⁵⁷ In relation with choice of court see: UZAL, María Elsa "Prórroga de jurisdicción", cometary to the judgment of Cám. Nac. Com., sala A, 14/9/1988 "Nefrón S.A. c/ Gambro Sales A. B. s/ ordinario" in *Revista del Derecho Comercial y de las obligaciones (R.D.C.O.)* Year 21, 1988, pp. 970/973.

Parties may execute an agreement by any communication means allowing for the identification of the person/s that send/s the message and the person's approval of the information contained in the data message (Article 17). This wording refers to electronic communication and thus the written form is not required for the validity of choice of forum agreements.

The Navigation Act number 20.094 (1973) does not allow a choice of court agreements to be included in bill of lading and in other maritime contracts (article 621). This provision allows choice of court or arbitration agreements concluded after the fact that generated the dispute between the parties. The Draft Code does not introduce any amendments to the private international law provisions set forth in the Navigation Act in force; as a consequence, this provision will continue in force, even if the Code of Private International Law came into force as expected. Regarding insurance contracts, choice of court agreements are not allowed, according to the Insurance Act number 17.418 (1967), article 16.

The prorogation of jurisdiction in favour of a foreign court is also accepted when a defendant enters an appearance before a court without contesting the jurisdiction. The defendant's voluntary submission will not have effect when Argentine courts have exclusive jurisdiction (Article 18).

Argentine codification does not allow party autonomy in other areas such as succession or matrimonial property, neither does the 2003 Draft Code, nor the Goldschmidt Draft Code.

2. Comparison of the treatment of choice-of-law clauses with arbitration clauses.

During the last 40 years Argentina has not enacted any new piece of legislation regarding Arbitration. As a federal State comprised of twenty three provinces, legislative competence is divided between federal government and the provinces, each of them having competence over certain matters within its respective

territory, namely procedure rules. Thus the provisions on arbitration may be found in the National Code of Procedure for Civil and Commercial Matters ⁵⁸ and in the Code of Procedure for Civil Matters of each Province.

Since domestic legislation does not deal with arbitration agreements, the 1958 New York Convention rules and the 1975 Panama Convention rules shall apply to arbitration clauses. In addition, courts may give effect to the provisions referred to the agreement to arbitrate of the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 and amended in 2006.

Freedom of the parties to agree on an arbitration clause is as wide as freedom for choice of forum or choice of law. Limitations to party autonomy are arbitrability of the matter, exclusive jurisdiction, principles of public policy and mandatory rules.

We do not consider that the Argentinean legislation deals with arbitration clauses in a better way than it does with choice of law clauses.

3. Law applicable to contracts that do not contain a choice-of-law clause.

The 2003 Draft Code introduced an important change in the Argentinean PIL approach to the law applicable to contracts in case of absence of choice-of-law. The Civil Code enacted in 1869 and yet in force has rigid rules that apply to contracts. The place of performance is the main connecting factor used to govern international contracts (articles 1209 and 1210) and when it cannot be ascertained, the law of the place of execution of the contract will

⁵⁸ Articles 736 to 773 of the National Civil and Commercial Procedure Code of 1967 amended in 1981.

govern the contract (article 1205).⁵⁹

The 2003 Draft Code introduces a flexible approach: a contract shall be governed by the law of the country with which it is most closely connected (article 72).

There is a presumption that the contract is most closely connected with the country where the characteristic performance takes place and subsidiarily where the place of business or the habitual residence of the party who is to perform the characteristic performance is located (article 72).

Within the Drafting Committee legal scholars did not hold unanimous opinions regarding the way in which the characteristic performance theory can be presumed to exist. Some professors preferred the application of the place of business of the debtor of the characteristic performance while others understood that the presumption must be referred to the place where the characteristic performance is to take place effectively.⁶⁰

This debate is not new in Argentina: the judgment rendered in

⁵⁹ The interpretation of said provisions in order to coordinate the rules that have different connecting factors is a controverted point. One way of coordinating those provisions was suggested by GOLDSCHMIDT, Werner, see, *Derecho Internacional Privado*, 4 th ed., Buenos Aires, Depalma, 1982, n° 315, pp. 393/397; see also Kaller de Orchansky, Berta *Manual de Derecho Internacional Privado*, Buenos Aires, Plus Ultra, 1976, pp. 383/389; idem, *Nuevo Manual de Derecho Internacional Privado*, Buenos Aires, Plus Ultra, 1990, pp. 356/362 and BOGGIANO, Antonio, *Derecho Internacional Privado*, 3rd ed., Buenos Aires, Abeledo-Perrot, 1991, tome. 2, pp. 282/283. The other interpretation was put forward by PARDO, Alberto J. , during his teaching at Buenos Aires University; this approach was followed by GRIGERA NAÓN, Horacio A. "Autonomía contractual y derecho aplicable" in *Revista del Derecho Comercial y de las Obligaciones (RDCO)*, Buenos Aires, Year 22, 1989, pp. 409/462, spec. p. 450 and NOODT TAQUELA, María Blanca, "Reglamentación general de los contratos internacionales en los Estados mercosureños" Chapter 25, in *Derecho Internacional Privado de los Estados del Mercosur*, FERNÁNDEZ ARROYO, Diego P. (coordinator), Buenos Aires, Zavallia, 2003, pp. 979/1026, spec. pp. 1010/1011, paragr. 1115. Notwithstanding, all scholars accept that the law of place of execution of the contract should apply when the place of performance may not be determined.

⁶⁰ NAJURIETA, María Susana, "El domicilio del deudor de la prestación característica en los contratos multinacionales", in *Doctrina Judicial*, Buenos Aires, t. 1985-I, pp. 287-293.

1969 in re *Estudios Espíndola c. Bollati, Cristóbal J.*, applied the characteristic performance as referred to the place where it took place effectively, in this case an agent domiciled in Argentina had agreed with the other party to register trademarks in Chile, so the judge applied Chilean law to the contract.⁶¹ On the contrary, Professor Boggiano was of the opinion that Argentinean law should apply due to the fact that the agent had its domicile in Argentina.⁶²

Nevertheless, Argentinean courts and legal scholars consider that the characteristic performance theory is a suitable device to determine applicable law to contracts when parties have not chosen it. There is a great deal of judgments following the characteristic performance theory regarding different categories of contracts, applying the 1869 Civil Code conflict-of-law rules that are still in force.

Sale of goods:

Corte Suprema de Justicia de la Nación, 19/02/2008 and Cámara Nacional en lo Comercial, Sala E, 03/11/2005, "Penguin Books LTD. c/ Librería Rodríguez SACIF s/ ordinario",⁶³ where the seller had his place of business in the United Kingdom and, thus the Vienna Convention was not applicable.

⁶¹ Nacional Peace Court, 1st. Instante, number 46, (Juzgado Nacional de Paz, n° 46) 07/10/1969, *Estudios Espíndola v. Bollati, Cristóbal J.*, in *Revista El Derecho*, Buenos Aires, t. 33, p. 26 and also in NOODT TAQUELA, María Blanca, *Derecho Internacional Privado - Libro de casos*, 2 ed., Bs. As., La Ley, 2006, pp. 196-200. Free access in <http://fallos.diprargentina.com>

⁶² *Revista Jurisprudencia Argentina*, Buenos Aires, t. 8, 1970, p. 101; also published in BOGGIANO, Antonio, *Derecho Internacional Privado*, 2nd. ed., Buenos Aires, Abeledo-Perrot, 1983, t. II, pp. 968/982.

⁶³ Corte Suprema de Justicia de la Nación CSJN, 19/02/2008 "Penguin Books Ltda. c/ Librería Rodríguez S.A.C.I.F. s/ ordinario" <http://www.csjn.gov.ar>. Cámara Nacional en lo Comercial, CNCom, Sala E, 03/11/2005, "Penguin Books LTD. c/ Librería Rodríguez SACIF s/ ordinario", published on 28/02/2006 in www.eldial.com and in *Revista La Ley*, Buenos Aires, 16/05/2006, 4, with a commentary of Alejandro A. MENICOCCHI. Free access in <http://fallos.diprargentina.com>, with a commentary of Julio C. CÓRDOBA.

Cámara Nacional en lo Comercial, Sala A, 31/05/07 “Bravo Barros, Carlos Manuel del Corazón de Jesús c/ Martínez Gares, Salvador”⁶⁴, where the seller had his place of business in Chile and the buyer in Argentina and, the Vienna Convention was applicable.

Cámara Nacional en lo Comercial, Sala C, 31/10/95 “Bedial S.A. c/ Paul Muggenburg and Co GMBH”.⁶⁵ The seller was a German company and the buyer an Argentinean one, the goods - dried mushrooms- were shipped in Hong Kong, under a C & F clause and the court decided that German law applied to contract.

Cámara Nacional en lo Comercial, Sala C, 16/02/2007, “Rovagnati, Vincenzo SPA c/ Wasserman, Samuel L.”,⁶⁶. This case was related to the application of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974. As the seller had his place of business in Italy and the buyer in Argentina, the court decided that the 1974 Convention did not apply to statute of limitation, and therefore applied Italian law, as law of the characteristic performance of the contract.

Loan agreements: Cámara Nacional en lo Comercial, Sala A 08/05/2007, “Flowtex France S.R.L. c. Flowtex Servicios Urbanos S.A. s. ordinario”⁶⁷; Cámara Nacional en lo Comercial, Sala B, 07/08/2007 and Juzgado Nacional en lo Comercial n° 16, Secretaría 31, 22/03/06, *Standard Bank London Ltd. y otros c. Administración*

⁶⁴ CNCom., Sala A, 31/05/07 “Bravo Barros, Carlos Manuel del Corazón de Jesús c/ Martínez Gares, Salvador” <http://cisgw3.law.pace.edu/cases/070531a1.html> and <http://fallos.diprargentina.com>

⁶⁵ CNCom., sala C, 31/10/95 “Bedial S.A. c/ Paul Muggenburg and Co GMBH”, in *Revista La Ley*, Buenos Aires, 1996-C, pp. 156-160 and in *Revista El Derecho*, Buenos Aires, 1996, tomo 169, pp. 404-425. It is possible to accede to the judgments in <http://fallos.diprargentina.com> and there is an abstract in English in <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940318a1.html>

⁶⁶ CNCom., Sala C, 16/02/2007, “Rovagnati, Vincenzo SPA c/ Wasserman, Samuel L.”, in *Lexis Nexis*, N° 35011012. Free access to the judgments in <http://fallos.diprargentina.com>

⁶⁷ CNCom., sala A, 08/05/2007, “Flowtex France S.R.L. c. Flowtex Servicios Urbanos S.A. s. ordinario”.

*Nacional de Combustibles, Alcohol y Portland y otros ordinario*⁶⁸

The 2003 Draft Code provides that if a party has more than one place of business, the place of business that has the closest relationship is the one that shall be considered relevant to the contract and its performance (article 72).

There are specific rules for some type of contracts, such as contracts on real estate (art. 75), agency contracts (art. 76), carriage of passengers and goods (arts. 77 and 78); consumer contracts (art. 79) and contracts of employment (art. 80)

However, seamen's contract and other maritime issues were not regulated because the Drafting Committee did not want to introduce changes in the Navigation Act number 20094 (1973). The same criteria was followed in relation with carriage by air, in spite of the fact that the Aeronautic Code Act number 17.285 (1967) does not contain any conflict-of-law rules concerning contracts of carriage, not even contracts related with aircrafts.

The 1974 Goldschmidt Draft Code provided for the place of performance as the main connecting factor to govern international contracts, in cases of absent of choice of law (article 36). The characteristic performance is expressly introduced in this provision. Goldschmidt followed some solutions of the Montevideo Treaties concerning characterization of place of performance.

Some types of contracts have an autonomous provision; this is the case with barter, insurance, carriage of goods, carriage of passengers, maritime contracts and employment contracts (articles 38 to 41 and 47 to 50.)

The rule of international Jurisdiction on contracts (article 24)

⁶⁸ It is possible to accede to both judgments in <http://fallos.diprargentina.com>. There is a commentary of the said judgments written by María Blanca NOODT TAQUELA, with the collaboration of Julio C. CÓRDOBA "Jurisprudencia argentina sobre contratos internacionales", in *Revista Derecho del Comercio Internacional. Temas y actualidades, DeCITA*, n° 9.2008, Asunción, Centro de Estudios de Derecho, Economía y Política (CEDEP), 2008, pp. 203/228, spec. pp. 216/220.

allows to initiate proceedings before the courts of the defendant's domicile, or habitual residence or where there are many defendants, before the courts of the place of performance of the obligation whose performance is being claimed. In addition, if the dispute arises out of the operations of a branch, or other establishment, before the courts of the place in which the branch, or other establishment is situated.

The draft rule discards the solution adopted by the Argentinean Supreme Court of Justice in 1998, in re *Exportadora Buenos Aires v. Holiday Inn's Worldwide Inc.*,”⁶⁹. According to this leading case, the courts of Argentina have jurisdiction in matters relating to a contract, when one of the different places of performance that an obligation of a contract may have is situated in Argentina. This extension of the jurisdiction had also been accepted in a case judged in 1985 by the National Chamber of Commerce, Division E, in re *Espósito e hijos, SRL v. Jocqueviel de Vieu*, related to an international sale of goods, between a French seller and an Argentinean buyer.⁷⁰ The problems of this dangerous interpretation were expressed by Diego Fernández Arroyo, who submitted that the plaintiff may have problems to obtain recognition of the judgment due to the basis of jurisdiction in what the claim was brought to the Court.⁷¹ Nevertheless, other legal scholars have not criticized the solution adopted in the *Exportadora Buenos Aires* case, and the

⁶⁹ CSJN. 20/10/1998 “Exportadora Buenos Aires Sociedad Anónima v. Holiday Inn's Worldwide Inc.”, in *Revista La Ley*, Buenos Aires, 2000-A, pp. 403-426, with a commentary of Carolina D. Iud “Contrato internacional y juez competente”; also available in *Revista El Derecho*, Buenos Aires, t. 186, p.287, with a commentary of RAMAYO, Raúl Alberto “Los Contratos Internacionales y la Jurisdicción Internacional”.

⁷⁰ CNCom., sala E, 10/10/1985 “Espósito e hijos, SRL c/ Jocqueviel de Vieu”, with a commentary of Werner GOLDSCHMIDT “Jurisdicción internacional en contratos internacionales”, in *Revista La Ley*, Buenos Aires, 1986 - D, pp. 46/49. Judgment available at: <http://fallos.diprargentina.com>

⁷¹ FERNANDEZ ARROYO, Diego P. “Compétence exclusive et compétence exorbitante dans les relations privées internationales », *Recueil des Cours*, tome 323, 2006, pp. 9-259, spec. p. 137 and note 369. See also Diego FERNANDEZ ARROYO, with the collaboration of Caroline Kleiner, « Chronique de jurisprudence argentine » in *Journal du Droit International*, janvier-février-mars 2008 number 1, pp. 199/231, spec. p. 218/219.

courts continued to apply the solution of this leading case, including the Supreme Court, which rendered judgments in 2004 following this approach.⁷²

There are specific provisions regarding jurisdiction on international carriage of goods by land (article 25) and for the transportation of people by land (article 26). As regards consumers relationships, only the consumer has the possibility to choose among a range of forums available (article 27).

Applicable law to contracts governs also the limitation period. In fact the provision (article 128) refers to all kind of obligations, thus it applies to non-contractual obligations also.

⁷² CSJN, 14/09/2004, "Sniafa S.A.I.C.F. E I. c. Banco UBS. AG". Published by Julio Córdoba in <http://fallos.diprargentina.com>, also in *Fallos* 327:3701 and in *Revista El Derecho*, Buenos Aires, 22/03/2005.