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Choice of Law in International Contracts in Latin American Legal Systems

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Abstract

The principle of party autonomy allowing companies or individuals that enter into international contracts to choose the law applicable to them is accepted worldwide. Nevertheless, some Latin American legal systems are still reticent to freedom of choice and even reject it. This document presents a detailed regional map of choice of law in international contracts and analyses some countries' resistance to party autonomy, as well as the fissures such a resistance is being suffering, particularly in the field of international arbitration. It also presents some options for the parties to, legally, try to eliminate or minimise the effects of the states' refusal to accept party autonomy, and it proposes several ways to look for legal certainty in international contracts.

Resumen

El principio de autonomía de la voluntad en virtud del cual las sociedades o los individuos que celebran contratos internacionales pueden elegir el derecho aplicable a los mismos es mundialmente aceptado. No obstante, algunos sistemas jurídicos latinoamericanos aún son reticentes a la libertad de elección e incluso la rechazan. Este documento presenta un detallado mapa regional de la elección del derecho aplicable en materia de contratos internacionales y analiza la resistencia de algunos países a la autonomía de la voluntad, así como las fisuras que dicha resistencia está sufriendo, especialmente en el ámbito del arbitraje internacional. Asimismo, presenta algunas opciones para que, legalmente, las partes intenten eliminar o minimizar los efectos de la negativa de los estados a aceptar la autonomía de la voluntad y propone varias vías para la búsqueda de seguridad jurídica en los contratos internacionales.

Introduction

Nowadays, the principle of party autonomy allowing companies or individuals that enter into international contracts to choose the law applicable to them is commonly accepted worldwide.[1] In Latin America, however, there are still some countries which do not admit it. Unfortunately, there is no international convention unifying the determination of the law of international contracts in force in all Latin American states. Although some of the treaties ratified by these states allow for the parties' right to select the *lex contractus*, the terms and scope of such acknowledgement may vary from treaty to treaty. Also, at the level of national sources of law, while some countries have legislation or case law that expressly allows party autonomy, others are still reticent to the idea of letting the parties choose the law that shall govern their international contracts.

The traditional territorialism of the Latin region of the American continent has caused the assimilation of party autonomy to be very slow. Nevertheless, in recent years, a remarkable phenomenon has taken place: even the most reticent states, certainly compelled by the pressures of international trade and by the need for regional integration, have signed treaties on international arbitration, where the choice of the law applicable to the substance of the controversy is expressly accepted. Although these treaties only apply to international contracts subject to arbitration proceedings, they are helping to, gradually, fissure the states' resistance to party autonomy. But it is necessary to recognise that the legislators' and judges' deep-rooted mentality changes required for a general admission of choice of law in international contracts could still take some years. In the meantime, what happens in day-to-day practice? Is there any alternative for the parties who desire to exercise their autonomy by selecting their contract's law? This might be important both for a foreign party (used to choosing the law of its international contracts) and for a party established in a Latin American country where no choice of law is permitted or where the choice is subject to important restrictions.

This article presents the Latin American map of choice of law in international contracts (A), analyses some countries' resistance to party

[1] See R. J. Weintraub, "Functional Developments in Choice of Law for Contracts", (1984), 187 Recueil des Cours Académie de Droit International 271. See also S. C. Symeonides, W. C. Perdue and A. T. von Mehren, *Conflict of Laws: American, Comparative, International* (St. Paul, West Group, 2nd ed., 2003) 339; A Boggiano, "The Contribution of The Hague Conference to the Development of Private International Law in Latin America" (1992) 233 *Recueil des Cours Académie de Droit International* 137; N. Araujo, *Direito Internacional Privado. Teoria e prática brasileira* (Rio de Janeiro, Renovar, 4th ed., 2008) 372. Party autonomy is even considered as a fundamental right. See E. Jayme, "Identité culturelle et intégration: le Droit International Privé postmoderne" (1995) 251 *Recueil des Cours Académie de Droit International,* p. 147.

autonomy (B) and proposes different ways to look for legal certainty in this field (C), before drawing a conclusion.

A. The Latin American map of choice of law in international contracts

The subject of the law applicable to international contracts is dealt with by both international and national sources of law. In the absence of an international convention applying to a concrete case, we have to turn to domestic law. Initially, we will study the international treaties to which Latin American states are parties (1) and afterwards, the national laws and case law (2).

1. International treaties

We regret the fact that there is no international treaty unifying the determination of the law of international contracts in force in all Latin American states. Although some of the treaties ratified by these countries widely accept the parties' right to select the *lex contractus* (*a*), others restrict choice of law or even reject it (*b*).

(a) Wide acceptance of choice of law

The American continent has one of the most modern international conventions in this area of Law: the Inter-American Convention on the Law Applicable to International Contracts, concluded at Mexico City on 17 March 1994.[2] Nevertheless, even if its avant-garde rules have attracted the interest of scholars from diverse countries,[3] it has been a categorical failure as an international treaty:[4] after fifteen years, only Mexico and Venezuela have

[2] Mexico City Convention.

[3] See M. M. Albornoz, "El derecho aplicable a los contratos internacionales en el sistema interamericano" (2007) 16 *Iustitia, Revista Jurídica del Departamento de Derecho ITESM* 89-95, also available at (2008) 34 *Suplemento de Derecho Internacional Privado y de la Integración, Biblioteca Jurídica Online elDial.com*, http://www.eldial.com/suplementos/privado/tcdNP.asp?base=50&id=3518 and http://www.ciberjure.com.pe/index.php?option=com_content&task=view&id=3531&Itemid=9, both accessed on 1 June 2009. See also D. P. Fernández Arroyo, "La Convention Interaméricaine sur la loi applicable aux contrats internationaux: certains chemins conduisent au-délà de Rome" (1995) 84 *Revue critique de Droit international privé* 178-186; F. K. Juenger, "The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons" (1994) 42 *American Journal of Comparative Law,* pp. 381-393; L. Pereznieto Castro, "Introducción a la Convención Interamericana sobre derecho aplicable a los contratos internacionales" (1994) XXX 4 *Rivista di Diritto Internazionale Privato e Processuale* 765-776; R. Santos Belandro, *El derecho aplicable a los contratos internacionales. Con especial referencia al contrato de transferencia de tecnología* (Montevideo, Facultad de Derecho Universidad de la República–Fundación de Cultura Universitaria, 1996).

[4] D. P. Fernández Arroyo, "Más allá de *Choice of Law and Multistate Justice*: el enfoque del derecho sustantivo y la búsqueda de una jurisdicción razonable", in F. K. Juenger, *Derecho Internacional Privado y Justicia Material*, D. P. Fernández Arroyo and C. Fresnedo de Aguirre (trans.) (México, Porrúa-Universidad Iberoamericana, 2006), XXXV.

ratified it.[5] Even though it is still possible for national legislations to adopt this convention, the Venezuelan legislator is the only one that has incorporated its most relevant rules and principles in the Act on Private International Law of 1998.[6]

The Mexico City Convention is very clear when it states that "The contract shall be governed by the law chosen by the parties" (Article 7). The law chosen can even be that of a state which is not a party to the convention. Moreover, the splitting of the contract is allowed,[7] and the selection of the law can be modified at any time.[8] Thus, party autonomy is, undoubtedly, widely accepted.

This Inter-American convention certainly innovates stating that "the guidelines, customs and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case" (Article 10). This translates in innovation with regard to both the law of most American countries and the Convention on the Law Applicable to Contractual Obligations, signed at Rome on 19 June 1980 (as of 17 June 2008 the "Rome I Regulation" of the European Parliament and of the Council), European convention which has been taken as an inspiring model during the elaboration of the Mexico City Convention. Nevertheless, within the scope of the latter, we could still discuss if the parties' choice of the *lex mercatoria* as the sole regulation for the contract can[9] or cannot[10] be interpreted as a real "choice" in the terms of Article 7. The first possibility would imply recognition of the *lex mercatoria* as a complete legal system and would difficultly fit with the terms of Article 17, which states that "For the purposes of this Convention, "law" shall be understood to mean the law current in a State…". The second one, which we find more suitable to a strict interpretation of the convention's text, would not obstruct the application of the *lex mercatoria* ordered by Article 10, but it would trigger the application of Article 9, that indicates how to determine the applicable law when the parties have failed to select it.

In addition to the Mexico City Convention, there are other treaties in force in Latin American states which make an express and large admission of choice of law in international contracts. One of them is the Protocol to the

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5 The other countries that have signed the Mexico City Convention are Bolivia, Brazil and Uruguay. Nevertheless, they haven't ratified it yet. http://www.oas.org/juridico/English/sigs/b-56.html accessed on 1 June 2009.

6 See *infra*, Section A, 2, *(a)* and Section C.

7 See M. M. Albornoz, "El fraccionamiento voluntario del contrato internacional", *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, in-press.

8 See R. Santos Belandro, *supra* n. 3, pp. 76-80.

9 F. K. Juenger, "Contract Choice of Law in the Americas" (1997) 45 *American Journal of Comparative Law,* pp. 204-205. See E. Hernández-Bretón, "La Convención de México (CIDIP V, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina" (2008) 9 *DeCita,* pp. 176-178. See also Pereznieto Castro, *supra* n. 3, pp. 774-775.

10 Fernández Arroyo, *supra* n. 3, pp. 182-183. See Albornoz, *supra* n. 3, pp. 110-113. See also R. Herbert, "La Convención Interamericana sobre derecho aplicable a los contratos internacionales" (1994) *Revista Uruguaya de Derecho Internacional Privado,* pp. 53-54.

Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, signed at Cape Town on 16 November 2001[11] and binding upon Colombia, Mexico and Panama.[12] An express provision enabling choice of law is made in Article VIII.2: "The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part". Another one is the Hague Convention on the Law Applicable to Agency, concluded on 14 March 1978 in the frame of the activities of the Hague Conference on Private International Law, which was ratified by Argentina.[13] Party autonomy is enshrined in Article 5, which begins as follows: "The internal law chosen by the principal and the agent shall govern the agency relationship between them". We find here the usual conflict of laws treaties' concern regarding the exclusion of *renvoi*. Argentina is also a party to a second convention concluded under the auspices of the Hague Conference of Private International Law that allows for choice of law in the field of international contracts. We refer to the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, signed on 22 December 1986, whose Article 7 (1) establishes that "A contract of sale is governed by the law chosen by the parties". Even though this convention has not entered into force at the multilateral level,[14] it makes part of Argentinean positive law.[15]

The Pan-American movement developed in the early XX century has issued, in the field of conflict of laws, a Code of Private International Law. Generally known as "Bustamante Code"[16] after its author, the eminent Cuban legal

[11] The Convention on International Interests in Mobile Equipment was signed at the same place and on the same date. Besides Mexico and Panama, which are parties to both the Convention and the Protocol, other Latin American countries have only signed the Convention. This is the case of Chile and Cuba, who have not ratified the Convention yet. http://www.unidroit.org/english/implement/i-2001-convention.pdf accessed on 1 June 2009.

See *Diplomatic Conference to adopt a Mobile Equipment Convention and an Aircraft Protocol: acts and proceedings* (Rome, UNIDROIT, 2006); R. Goode, "Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: official commentary", (2002) 7 *Uniform Law Review*, pp. 353-693; S. Gopalan, "Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment" (2003) 9 *Law and Business Review of the Americas*, pp. 255-270.

[12] http://www.unidroit.org/english/implement/i-2001-aircraftprotocol.pdf accessed on 1 June 2009.

[13] The other parties to this convention are: France, the Netherlands and Portugal. http://www.hcch.net/index_en.php?act=conventions.status&cid=89 accessed on 1 June 2009.

[14] The Argentine Republic is the only state that has ratified this convention. Moldovia has accessed to it. But its article 27 requires the deposit of at least five instruments of ratification, acceptance, approval or accession for the convention entering into force. The other signatory states are: Czech Republic, the Netherlands and Slovakia. http://www.hcch.net/index_en.php?act=conventions.status&cid=61 accessed on 1 June 2009.

[15] In the search of coherence within the legal system, this convention should influence the interpretation of other national source rules. The international treaties concluded with foreign states make part of national law when the conclusion process is completed. In this complex act, the Executive and Legislative powers play an important role. See articles 75, sections 22, 24, and 99, http://infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/804/norma.htm accessed on 1 June 2009. See also H. J. Zarini, *Derecho Constitucional* (Buenos Aires, Editorial Astrea, 2nd ed., 1999), 80.

[16] A. Sánchez de Bustamante y Sirvén, *El Código de Derecho Internacional Privado y la Sexta Conferencia Panamericana* (La Habana, Imprenta Avisador Comercial, 1929). See J. Samtleben, *Derecho Internacional Privado en América Latina. Teoría y práctica del Código Bustamante* (Buenos Aires, Ediciones Depalma, vol. I, 1983).

scholar Antonio Sánchez de Bustamante y Sirvén, this code was adopted on 20 February 1928 by the VI Pan-American Conference held in Havana, Cuba. Although it was signed by twenty Latin American states and ratified by fifteen,[17] almost all of them made reservations limiting, in different ways, the application of the international treaty. Despite the fact that the Bustamante Code has no general rule expressly accepting party autonomy for international contracts,[18] the interpretation pro-autonomy is the one that prevails.[19] In effect, selection of law by the parties is implicit in the code and no special limit is set. This can be construed from several provisions of the code: Article 184, which refers to the case when the law of the contract is under discussion and it should result from the parties' implied will; Article 185 on adhesion contracts, that mentions the express or implied will; and Article 186, which selects the personal law common to the parties or, in the absence thereof, the law of the perfection place as the law applicable to contracts, embraces even the case indicated in the foregoing article.

Moreover, eleven Latin American countries[20] are parties to the United Nations Convention on Contracts for the International Sale of Goods concluded at Vienna on 11 April 1980.[21] This significant uniform law instrument contains a regulation for the sale of goods contract, especifically conceived taking into account the international nature of the contract. Regulations of such kind are supposed to seek justice in an accurate way, particularly if we compare them to the national laws designated by the traditional conflict norms. The Vienna Convention recognises the prevalence of party autonomy,[22] allowing the parties to exclude the application of the convention or to "derogate from or vary the effect any of its provisions" (Article 6). Consequently, its uniform provisions are subject to the parties' will, which is limited by the fundamental principles of the Vienna Convention.[23]

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[17] Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haití, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela are the signatory states. The ones that have not ratified the Bustamante Code are: Argentina, Colombia, Mexico, Paraguay and Uruguay. The United States refused to sign it. See the general information chart, including declarations and reservations at http://www.oas.org/juridico/english/sigs/a-31.html accessed on 1 June 2009.

[18] This could support the interpretation of the Bustamante Code as rejecting choice of law in the field of contracts. Such an interpretation would be concordant with Brazilian Introductory Law to the Civil Code. See *infra*, Section A, 2, (*b*). On the contrary, the opposite reading would reveal a conflict inside the Brazilian legal system.

[19] See J. A. Giral Pimentel, *El contrato internacional. (Su régimen en el Derecho Internacional Privado moderno, basado en la Convención Interamericana sobre derecho aplicable a los contratos internacionales)* (Caracas, Editorial Jurídica Venezolana, 1999), 42. See also G. Boutin I, *Derecho Internacional Privado* (Panama, Edition Maitre Boutin, 2006), pp. 609-610.

[20] Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Mexico, Paraguay, Peru and Uruguay. Even though Venezuela has signed this convention, it hasn't ratified it.
http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html accessed on 1 June 2009.

[21] Vienna Convention. See B. Audit, *La vente internationale de marchandises. Convention des Nations Unies du 11 avril 1980* (Paris, LGDJ, 1990). See also A. M. Garro and A. L. Zuppi, *Compraventa internacional de mercaderías* (Buenos Aires, Ediciones La Roca, 1990) and the great deal of bibliography and cases compiled on the website UNILEX on CISG. http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315 accessed on 1 June 2009.

[22] See A. Boggiano, *Derecho Internacional Privado* (Buenos Aires, Depalma, 2nd ed., 1983) 740.

[23] 8 Ob 22/00v, http://www.unilex.info/case.cfm?pid=1&id=473&do=case accessed on 1 June 2009.

The Latin American countries belonging to the Southern Common Market (Mercosur),[24] a regional integration system founded on 26 March 1991 by the Treaty of Asunción concluded among Argentina, Brazil, Paraguay and Uruguay, are bound by the Mercosur's regulations. Bolivia, Chile, Colombia, Ecuador and Peru are associate members. In 2006, a Protocol of Accession of the Bolivarian Republic of Venezuela to Mercosur was signed at a presidential level by Venezuela and the four full members, but its entry into force requires the deposit of five ratification instruments that has not been achieved yet.[25] There are two Mercosur Protocols and two identical Mercosur Agreements which, even when dealing with procedural matters, when jointly considered, show that "party autonomy has become the cornerstone of the new contract system".[26]

The Buenos Aires Protocol on International Jurisdiction in Contractual Matters concluded on 5 August 1994,[27] allows the parties to disputes arising out of international contracts concerning civil or commercial matters to agree to submit them to the courts of a state party to this Protocol. Given the exclusion of consumer relations from the Buenos Aires Protocol scope, the gap was filled by the Santa María Protocol on International Jurisdiction in Matters of Consumer Relations of 17 December 1996,[28] which has not yet entered into force. Furthermore, in the field of alternative dispute resolution methods, the International Commercial Arbitration Agreements of Mercosur signed on 23 July 1998[29] enable the parties to a dispute subject to arbitration to choose the law that will be applied to solve the controversy on the basis of Private International Law and its principles, and of International Commerce Law (Article 10). The Mercosur Arbitration Agreements' allowance of choice of the law applicable to the substance of the dispute is clear and direct, but strictly limited to arbitration proceedings dealing with controversies hailing from international commercial contracts.

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[24] See R. X. Basaldúa, *Mercosur y Derecho de la Integración* (Buenos Aires, Abeledo-Perrot, 1999). See also M. E. Uzal, *El Mercosur en el camino de la integración* (Buenos Aires, Depalma, 1998). Official website: http://www.mercosur.int/msweb/Portal%20Intermediario/ accessed on 1 June 2009.

[25] Pursuant to Article 10 of the Protocol of Accession.

[26] D. P. Fernández Arroyo, "International Contract Rules in Mercosur: End of an Era or Trojan Horse?", in P. J. Borchers and J. Zekoll (eds.), *International Conflict of Laws for the Third Millennium. Essays in Honor of Friedrich K. Juenger* (New York, Transnational Publishers, 2001), p. 164.

[27] The Buenos Aires Protocol was ratified by Argentina, Brazil, Paraguay and Uruguay. http://www.noodttaquela.com.ar/Mercosur07.htm accessed on 1 June 2009. See A Dreyzin de Klor, "Jurisdicción internacional contractual en el Mercosur" (1994) 7 *Revista de Derecho Privado y Comunitario*, pp. 465-490.

[28] Besides the jurisdiction of the courts of the state where the consumer is domiciled (Article 4), the consumer has the choice to sue the courts of the state where the contract was concluded, where the services or goods were performed or delivered, or where the defendant is domiciled (Article 5). For general comments on the Santa María Protocol see B. Feder, "Protocolo sobre jurisdicción internacional en materia de relaciones de consumo", (1998) 3 *Revista de Derecho del Mercosur*, pp. 51-57.

[29] There are two identical Agreements: one of them was concluded among the four Mercosur full member states; the other one incorporates Bolivia and Chile. See J. R. Albornoz, "El arbitraje en el Derecho Internacional Privado y en el Mercosur (con especial referencia a los Acuerdos de Arbitraje del 23 de Julio de 1998)" (1999) *Anuario Argentino de Derecho Internacional*, pp. 51-91.

(b) Restriction or rejection of choice of law

This subsection will deal with the Montevideo Civil International Law Treaties, issued by the South-American Congresses on Private International Law held in the capital of Uruguay on 1888-1889[30] and 1939-1940.[31] Both treaties have been the object of diverse interpretations on whether they accept, restrict or reject choice of law by the contracting parties. Even if in our point of view, which we consider predominant in Argentina, the 1889 Montevideo Civil International Law Treaty makes an implied admission of party autonomy, the persistence of the opposite opinion in Uruguay, where additionally the Civil Code refers to this treaty, justifies discussing the subject here and not in the precedent subsection, which deals with international conventions expressly accepting choice of law or whose prevailing interpretation is in the sense of its admission.[32] As for the 1940 Montevideo Civil International Law Treaty and the Additional Protocol, party autonomy rejection or reception depends on whether we see the glass half empty (rejection) or half full (restricted reception).

During the 1888-1889 South-American Congress, eight treaties were drafted. Apart from the already mentioned on Civil International Law, there were treaties on International Commercial Law, International Procedural Law, International Criminal Law, Artistic and Literary Property, Patents, Commerce and Factory Marks, Practice of Liberal Professions and an Additional Protocol. The subject of international contracts is mostly developed in the Civil International Law Treaty, and some provisions inherent to certain types of contracts like insurance and transport can be found in the International Commercial Law Treaty. Such a methodology can be understood if we take into account that by the end of the XIX century, the dominant doctrine considered that International Commercial Law norms were only exceptions to Civil International Law.[33] So we will focus on the 1889 Civil International Law Treaty.

Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay are parties to 1889 Montevideo Civil International Law Treaty, which deals with the question of international contracts as juridical acts in Title X (Articles 32 to 39), designating the law of the place of performance as the law applicable to such contracts. As this treaty remains silent about party autonomy, choice of law is apparently neither accepted nor rejected. But the participants to the congress where it was negotiated did notice the issue.

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30 E. Restelli (comp), *Actas y Tratados del Congreso Sud-Americano de Derecho Internacional Privado (Montevideo 1888-1889)* (Buenos Aires, Ministerio de Relaciones Exteriores y Culto de la República Argentina, 1928).

31 *Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo, 1939-1940* (Buenos Aires, Facultad de Derecho y Ciencias Sociales, Instituto Argentino de Derecho Internacional, 1940).

32 This is the case of the Bustamante Code. See *supra*, B.1. (*a*).

33 See D. Hargain and G. Mihali, *Circulación de bienes en el Mercosur. Derecho del comercio internacional. Contratos internacionales. Compraventa. Garantías. Formas de intermediación bancaria. Transporte. Seguros. Propiedad intelectual. Propiedad industrial* (Buenos Aires, Julio César Faira Editor, 1998), p. 226.

Ildefonso García Lagos, an Uruguayan jurist who was the President of the Civil Law Commission, argued that party autonomy should be established as the general rule, and the application of the law of the place of performance only as a subsidiary rule.[34] Argentinean delegate Manuel Quintana explains that, at first, the Commission had accepted the President's proposal; but later on, the orientation has changed, on the ground that parties' freedom to choose the law could not be absolute because they couldn't exercise it against *ordre public*, and the latter should be determined by the laws of the place of performance of the contractual obligations.[35] During the debate, the subjectivist idea that freedom of choice implied the supremacy of party autonomy over the law, and that the best way of making the law prevail over the parties' will was to apply the law of the place of performance, was underlying. Finally, the position that prevailed was that, in order to know if a contract is valid, one has to consult the law of the place where it should be performed. And this would have been incompatible with a supreme party autonomy. So it was concluded that the only rule should be to apply the law of the place of performance. Notwithstanding that, from our point of view, the prevailing position lays on a mistaken foundation: it was assumed that accepting the parties' freedom of choice meant the allowance of an almighty will, superior to law, implying the incorporation of the chosen law to the terms of the contract. On the contrary, if regard had been made to party autonomy as a submission of the contract to the law selected by the parties, choice of law could have possibly been expressly permitted, subject to the limits of public policy.

Nevertheless, the fact is that the 1889 Montevideo Civil International Law Treaty says nothing about the right of the contracting parties to select the law applicable to their contractual relationship. This silence can be construed in two opposite ways: rejection or acceptance.

On the one hand, the view settled among Uruguayan academics[36] is that this treaty should be literally interpreted: as one can not presume what the rule of law fails to expressly establish, its silence about the choice of the applicable law can only be seen as a rejection. For them, the freedom of choice doesn't result from the Acts of the Congress or from the delegates' comments. As the regulatory power in conflict of laws belongs to the state in its function of delimiting its own sovereignty, it would not be reasonable to

[34] Restelli, *supra* n. 30, p. 264.
[35] *Ibid*, pp. 264-265.
[36] See D. Opertti Badán and C. Fresnedo de Aguirre, *Contratos comerciales internacionales. Últimos desarrollos teórico-positivos en el ámbito internacional* (Montevideo, Fundación de Cultura Universitaria, 1997), pp. 17-18. See also Hargain and Mihali, *supra* n. 33, p. 230. Some Argentinean authors share this interpretation. See I. M. Weinberg, "Contratos internacionales" (1984) 1984-C *Revista Jurídica Argentina La Ley* 918, and "Los contratos internacionales y los tratados" (1998) 175 *El Derecho* 659. Another Argentinean scholar who seems to adopt this position is Professor Sara Feldstein. See S. L. Feldstein de Cárdenas, *Contratos internacionales. Contratos celebrados por ordenador. Autonomía de la voluntad. Lex mercatoria* (Buenos Aires, Abeledo-Perrot, 1995), p. 97.

interpret the treaty's silence as an authorisation for the parties to solve the conflict of laws.[37] Party autonomy would be implicitly condemned.

On the other hand, the position supported by the majority of Argentinean scholars[38] is that the 1889 Montevideo Civil International Law Treaty implicitly accepts the parties' choice of the applicable law. Its text does not prohibit the selection by the contracting parties of a law different from that designated by its own provisions, and "what is not prohibited is permitted". This adage is confirmed by Article 19 of the Constitution of the Argentine Nation ("No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit."). As the referred treaty is "the law supreme of the Nation"[39] and it doesn't prohibit party autonomy, the latter should be considered allowed. As an additional argument, they refer to Article 41 of the same Montevideo treaty on marriage settlements, which recognises a role to the spouses' freedom of choice.[40]

In our opinion, the last one is the position that should prevail, not only because of the arguments its supporters present, but also for the reason mentioned above when we referred to the erroneous interpretation of party autonomy that led to the silence of the adopted treaty on this point.[41] That silence does not really imply a rejection to choice of law but the condemnation of the doctrine of the incorporation of the law to the contract.

Having set our position, we must not forget that an international treaty can be interpreted in different ways depending on the jurisdictional context where the case is presented. If the court sued is an Argentinean one, it is very probable that party autonomy would be accepted. The contrary would happen if the claimant sued a Uruguayan court.

A Second South-American Congress on Private International Law was convened in Montevideo in 1939-1940. As a result of the works undertaken in order to revise the treaties issued from the first congress, eight new treaties plus an Additional Protocol were drafted. They dealt with Civil International Law, International Commercial Terrestrial Law, International Commercial Navigation Law, International Procedural Law, International Criminal Law, Asylum and Political Refuge, Intellectual Property and Practice of Liberal Professions. The 1940 Civil International Law Treaty, in force among

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37 Opertti Badán and Fresnedo de Aguirre, *ibid*, p. 18.

38 Conclusion 3: *a)* adopted by the Private International Law Commission of the *X Jornadas Nacionales de Derecho Civil*, Corrientes, Argentina, August 1985. J. R. Albornoz, "La autonomía de la voluntad como punto de conexión" (1985) *X Jornadas Nacionales de Derecho Civil*. See Boggiano, *supra* n. 22, pp. 769-770.

39 Constitution of the Argentine Nation, Article 31: "This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation…".

40 According to Article 41 of the 1889 Civil International Law Treaty, in the absence of special settlements, on everything that is not prohibited by the law of the place of location of marital property, the spouses' relationships on such property is regulated by the law of the marital domicile set by the future spouses before marriage. J. R. Albornoz, D. P. Fernández Arroyo and A. M. C. Stagnaro de Christe, "Límites a la autonomía de la voluntad en el Derecho Internacional Privado argentino" (1986) *III Jornadas Argentinas de Derecho y Relaciones Internacionales*, Buenos Aires, Argentina, 8 to 10 October 1986.

41 See *supra*, this same subsection.

Argentina, Paraguay and Uruguay, replaced, in the relationships involving those three countries, its 1889 homonym, which is still in force among Bolivia, Colombia and Peru and in the relationships involving one or more of these countries, plus Argentina, Paraguay and/or Uruguay.

The 1940 Montevideo treaties, like the 1889 ones, regard international contracts in Title XI of the Civil International Law Treaty as juridical acts (Articles 36 to 43), designating the law of the place of performance as the applicable one; but some provisions inherent to certain types of commercial contracts have been distributed between the Treaty on International Commercial Terrestrial Law and the Treaty on International Commercial Navigation Law. The conflict of laws express answer to the question of the law applicable to international contracts established by the 1940 Montevideo Treaties is the same as the 1889's: the law of the place of performance.

In the sessions of the Second South-American Congress the issue of freedom of choice was, once again, discussed. This time, the Argentinean delegation was in favour of party autonomy, while the Uruguayan delegation was against it. The Argentinean delegation proposed to modify the conflict of laws norm by adding the phrase "without detriment of the parties' will".[42] Such addition would have meant an express and wide allowance of freedom of choice. That is why it has been rejected by the Civil Law Commission of the congress invoking that the extent of party autonomy being subject to the applicable law, it was not a Private International Law problem but a problem of each country's domestic law. The Uruguayan delegate Álvaro Vargas Guillemette sees in this rejection the triumph of the principle of illegitimacy of party autonomy for regulating conflict of laws.[43]

Vargas Guillemette was against party autonomy, which he considered a completely negative notion in the development of Private International Law, having nothing to do in the resolution of conflict of laws that are sovereignty conflicts located over the parties' will. That will could only play some role within the sphere delimited by the internationally competent legal rule; but never beyond.[44] The Uruguayan delegation proposed to incorporate to the Additional Protocol an interpretation norm valid for all of the 1940 Montevideo Treaties, imposing to the parties of a contract the general prohibition to change the judicial and legislative competence norms.

After the discussions, Article 5 of the Additional Protocol to the Montevideo Treaties of 1940 was adopted, in the following terms: "Jurisdiction and legislation applicable according to the respective Treaties, cannot be modified by the parties' will, except in the measure that law

[42] "Sin perjuicio de la voluntad de las partes."
[43] *Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo, 1939-1940*, *supra* n. 31, p. 286.
[44] *Ibid*, p. 277.

authorizes it".[45] How is this article to be interpreted? Does it forbid party autonomy? Some authors see in this article a rejection of choice of law as a connecting factor in international contracts.[46] Nevertheless, if we read Article 5 carefully, we can appreciate that the rejection of party autonomy is not absolute. We could even say that party autonomy is accepted, although with a very significant restriction. Actually, the article under analysis is making a *renvoi* to the Private International Law norms of the applicable law.[47] So the Additional Protocol leaves to the applicable law designated by the 1940 Montevideo Treaties' conflict of laws norms the freedom of accepting or rejecting party autonomy, and if the *lex contractus* does accept it, the treaties will recognize it. For instance, in a contract according to with a company incorporated and domiciled in Argentina will distribute in this country a product manufactured by a company incorporated and domiciled in Uruguay, a choice of law clause would not be invalidated by the 1940 Montevideo Civil International Law Treaty construed in conformity with the Additional Protocol, because the law of the place of performance, Argentinean law, permits choice of law in international contracts.

Depending on the interpretation of both Montevideo Civil International Law Treaties we make, we could say that they have passed from a wide reception of party autonomy to a restricted acceptance, or that they have always rejected this universally recognised principle.

2. National laws and case law

Even though party autonomy is a generally accepted principle in the area of international contracts, while some Latin American national laws widely accept it (*a*), others restrict or reject choice of law (*b*).

(a) Wide acceptance of choice of law

Most of the countries of the region that accept party autonomy in their domestic laws on civil and commercial matters have a quite recent legislation on international arbitration which accepts the right of the parties to choose the law applicable to the controversy. Therefore, for each country we consider, we'll see the substantive legislation on private matters, any other

[45] Article 5, Additional Protocol to the Montevideo Treaties of 1940: "La jurisdicción y la ley aplicable según los respectivos Tratados, no pueden ser modificadas por la voluntad de las partes, salvo en la materia en que lo autorice dicha ley."

[46] W. Goldschmidt, *Derecho Internacional Privado. Derecho de la tolerancia. Basado en la teoría trialista del mundo jurídico* (Buenos Aires, LexisNexis Depalma, 9th ed., 2002), p. 197. See Fernández Arroyo, *supra* n. 26, p. 170. Others say the Additional Protocol "almost" expressly prohibits party autonomy. See A. A. Menicocci, "Lex posterior non derogat legi priori: el singular tratamiento del ámbito temporal adoptado por la CIDIP sobre Normas generales de Derecho Internacional Privado" (2004-2005) 28 *Revista del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social*, 42. http://www.centrodefilosofia.org.ar/revcen/RevCent286.pdf accessed on 1 June 2009.

[47] See Boggiano, *supra* n. 22, p. 770.

rules we find relevant for this subject and some case law whenever it is available.

Venezuela is the only Latin American country that has a special Act on Private International Law. In the field of international contracts, this Act of 6 August 1998 in force since 6 February 1999[48] adopts the solutions adopted by the Mexico City Convention,[49] envisaging party autonomy in Article 29: "Conventional obligations are governed by the Law agreed to by the parties".[50] This norm was applied by the Supreme Tribunal of Justice in *Los Pequeños Airlines, Inc. v Air Venezuela, Línea de Transporte Aéreo L.T.A.*[51] to an aircraft sale contract in which the parties had chosen "the laws of the State of Texas and the United States". But before the 1998 Private International Law Act, Article 116 of the Commercial Code[52] already permitted the parties to agree on the application of a foreign law to the execution of a commercial contract concluded outside Venezuela and performed in that country,[53] and the national courts had accepted the right of the parties to choose even the *lex mercatoria* to govern their contract.[54]

In the Guatemalan domestic legal system,[55] the Judicial Organism Act, *Decreto* 2 of 1989, in force since 31 December 1990, accepts (in Article 31 of Chapter II devoted to Private International Law Rules) the right for the parties to choose the law that will govern their juridical acts. In line with this norm, we find Article 36 of the 1995 Arbitration Law, which specifies: "The arbitral tribunal shall decide the dispute, in international arbitration, in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute".

Article 13.V of the Federal Civil Code of Mexico,[56] applicable to international contracts, follows the 1987 reform to the Civil Code for the

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48 See generally F. Parra Aranguren (ed.), *Ley de Derecho Internacional Privado de 6 de Agosto de 1998 (Antecedentes, comentarios, jurisprudencia). Libro homenaje a Gonzalo Parra-Aranguren* (Caracas, Tribunal Supremo de Justicia, 2001).

49 See *supra*, Section A, 1, (*a*).

50 As translated from Spanish by CA Figueredo Planchart.
http://www.analitica.com/BITBLIO/congreso_venezuela/private.asp accessed on 1 June 2009.

51 [2000] SPA TSJ, file 16478, judgment 01600. http://www.tsj.gov.ve/decisiones/spa/Julio/01600-060700-16478.htm accessed on 1 June 2009.

52 Article 116, Venezuelan Commercial Code: "Todos los actos concernientes a la ejecución de los contratos mercantiles celebrados en país extranjero y cumplidos en Venezuela, serán regidos por la ley venezolana, a menos que las partes hubieren acordado otra cosa."

53 *Cf.* E. Hernández-Bretón, "Admisión del principio de autonomía de la voluntad de las partes en materia contractual internacional: ensayo de Derecho Internacional Privado" (1988) 71 *Revista de la Facultad de Ciencias Jurídicas y Políticas*, pp. 387-392. This author asserts that nor Article 1159 of the Venezuelan Civil Code (stating *pacta sunt servanda*) neither the above mentioned Article 116 of the Commercial Code are enough to justify choice of law in an international contract, because both of them are domestic rules with no international scope.

54 *Banco Unión v Banque Worms* [1989] Corte Suprema de Justicia, 144 *Gaceta Forense*, 507, cited by Giral Pimentel, *supra* n. 19, p. 234, n. 552.

55 Thanks to María del Pilar Bonilla Juárez for her orientation on the Guatemalan legal system on this issue.

56 Article 13.V, Mexican Federal Civil Code: "Except for provisions under the subsection *ut supra* , the legal effects of acts and contracts shall be governed by the law of the place where they must be performed, unless the parties had validly designated the applicability of another law." (All the translations of legal rules were made by the author, unless otherwise indicated.)

Federal District (Mexico City)[57] admitting the parties to validly select a foreign law to govern their relationship. In the sphere of international arbitration, the first Paragraph of Article 1445 (Title IV on Commercial Arbitration[58] of Book V on Commercial Lawsuits) of the Mexican Commercial Code allows the parties to choose the rules of law that the arbitral tribunal shall apply to the substance of the dispute.[59]

The 1987 Cuban Civil Code, in force since 12 April 1988, sets the right of the contracting parties to designate the law governing their obligations (Article 17).[60] In the same line, the legal instrument that regulates the Cuban Court of International Commercial Arbitration, *Decreto Ley* N° 250 of 2007, asserts on Article 29 that the law applicable to the substance of the international commercial lawsuits is the one the parties have agreed on.

Since 1984, the Peruvian Civil Code has expressly accepted that international contractual obligations are governed by the law the parties have chosen (Title X on Private International Law, Article 2095).[61] The Peruvian Arbitration Act, *Ley General de Arbitraje* N° 26572 of 1996, which followed the UNCITRAL 1985 Model Law on International Commercial Arbitration, received on its Article 117 the parties' freedom to select the law the arbitral tribunal shall apply to the substance of the dispute. The 1996 Arbitration Act has been recently replaced by a newly revised one, *Decreto Legislativo* N° 1071, which has entered into force on 1 September 2008 and takes into account the 2006 amendments to the UNCITRAL Model Law, as well as the local experience under the preceding regulation. The new Arbitration Act also accepts party autonomy, stating in Article 57.2: "In international arbitration, the arbitral tribunal will decide the controversy in conformity with the legal rules chosen by the parties as applicable to the substance of the controversy…".

Party autonomy is clearly accepted in Chile. In contracts concluded outside that country that should produce effects in Chile, the parties can select the

[57] Mexico's actual Federal Civil Code was published on 29 May 29, 2000. "In reality, save for minor changes, the language of this newly enacted code corresponds verbatim to the text of the Civil Code for the Federal District in Ordinary Matters and for the Entire Republic in Federal Matters (*Código Civil para el Distrito Federal en materia común y para toda la República en materia federal*), published in 1928 in that country and in force since 1932.", J. A. Vargas, "Features–The Federal Civil Code of Mexico" (2005) http://www.llrx.com/features/mexcc.htm#1 accessed on 1 June 2009.

[58] This Title of the Mexican Commercial Code modified in 1993 responds to the 1985 Model Law on International Commercial Arbitration produced by the United Nations Commission on International Trade Law (UNCITRAL).

[59] The first Paragraph of Article 1445 of the Mexican Commercial Code was referred to by the court in [2002] Amparo en Revisión 138, Primer Tribunal Colegiado del Décimo Quinto Circuito, Mexicali, Baja California, where the contract contained a clause in which the parties agreed to select the law of the Mexican State of Baja California in order to govern the substance of the dispute.

[60] Article 17, Cuban Civil Code: "In the absence of express or tacit submission by the parties, all contractual obligations are governed by the law of the place of performance of the contract."

[61] Article 2095, Civil Code of Peru: "Contractual obligations are governed by the law expressly chosen by the parties…".

applicable law, according to Article 113 of the Chilean Commercial Code.[62] Chilean case law interprets that the possibility of choosing the law is also contemplated in Article 16 of the Civil Code,[63] particularly in its second Paragraph.[64] In *ABN Amro Bank N.U. v Raimundo Serrano Mac Auliffe Corredores de Bolsa SA*,[65] the Supreme Court of this andean country, in reference to Article 16 of the Civil Code and Article 113 of the Commercial Code, affirmed that they receive the principle of party autonomy, so the parties are sovereign to determine the law applicable to their contractual obligations. In this case, the law of the State of New York was declared applicable to the current account contract concluded by the parties. Another legal instrument that receives choice of law is the *Decreto Ley* N° 2.349 of 1978 on State International Contracts.[66] One of the considerations on which this Act is based is that choice of law clauses are lawful and may as well be applied to contracts concluded by private companies or individuals. Finally, the Chilean International Commercial Arbitration Act, *Ley* N° 19971 of 29 September 2004, accepts in Article 28 that the parties in a dispute subject to international arbitration can select the rules of law applicable to the substance. Some Chilean authors consider that this article permits the choice of *lex mercatoria*.[67]

Article 154 of the Commercial Code of Ecuador is almost identical to its source, Article 113 of the Chilean Commercial Code.[68] A difference which deserves to be mentioned is that the first Paragraph of the Ecuadorian Code

[62] Article 113, Chilean Commercial Code: "All the acts concerning the performance of contracts entered into in a foreign country that shall be performed in Chile are governed by Chilean law, in accordance with the provisions under article 16, last paragraph, of the Civil Code.

So, delivery and payment, the currency in which the latter shall be made, measures of any kind, the receipts and their form, the responsibilities imposed by in the event of non-performance or imperfect or late performance, and any other act related to the mere performance of the contract, shall be in accordance with the provisions of the laws of the Republic unless otherwise agreed by the contracting parties."

Note the last phrase of the cited rule, setting the exception to *lex loci executionis* for the case where the contracting parties would have agreed on the application of another law.

[63] Article 16, Chilean Civil Code: "The property located in Chile is subject to Chilean laws, even when the owners are foreigners and reside elsewhere.

This provision shall be construed without prejudice of the stipulations contained in the contracts validly executed in a foreign country.

But the effects of the contracts executed in a foreign country that are to be performed in Chile, shall conform to Chilean laws."

[64] This interpretation of Article 16 of the Civil Code is not necessarily the same in other Latin American countries that have adopted (directly or as a model) the Chilean Civil Code elaborated by the eminent jurist Andrés Bello. See the case of Colombia *infra*, n. 116 and accompanying text.

[65] [2004] Primera Sala, Corte Suprema de Justicia, Rol N° 868-03, http://jurischile.com//2004/12/contratos-otorgados-en-pas-extrao-para.html accessed on 1 June 2009.

[66] See C. Villarroel Barrientos and G. Villarroel Barrientos, "Determinación de la ley aplicable a los derechos y obligaciones emanados de los contratos internacionales" (1990) 17 *Revista Chilena de Derecho*, p. 359.

[67] See P. A. Aguirre Veloso, "La determinación del derecho aplicable al contrato en la Ley N° 19.971 sobre Arbitraje comercial internacional" (2006) 12, 1 *Ius et Praxis*.
http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122006000100007&lng=es&nrm=iso&tlng=es accessed on 1 June 2009.

[68] See *supra* n. 62.

omits any reference to Article 15 of the Civil Code (equivalent to Article 16 of the Civil Code of Chile).[69] Therefore, parties to a contract concluded abroad to produce effects in Ecuador, are entitled to choose the governing law. It is not required for the contract to be about property located in Ecuadorian territory; but the choice of law agreement has to refer to the contract's performance. Even though, once party autonomy has been admitted for the performance, there is no serious obstacle to extend it to other aspects of the contract, such as those related to its conclusion, while public policy is respected. This idea could be supported by the Chilean interpretation and also by the wide allowance of choice of law in international arbitration made by the 2nd Paragraph of Article 24 of the Arbitration and Mediation Law of Ecuador, N° 000. R.O. / 145 of 1997,[70] because although its scope does not embrace lawsuits before state courts, it forms part of the same domestic legal system to which Article 154 of the Commercial Code belongs.

In Panama, Article 6 of the Commercial Code on the law applicable to commercial transactions adopts party autonomy for the essence and effects of obligations issued from them (1st Paragraph) and for their way of performance (2nd Paragraph) as well.[71] One of this country's scholars[72] considers that party autonomy is founded in two provisions: the mentioned Article 6 of the Commercial Code plus Article 1106 of the Civil Code, which provides that the parties are free to enter into the agreements, clauses and conditions they find convenient, if they are not contrary to the law, the moral and public policy.[73] Being respectful of the local interpretation of Panamanian law, we can nevertheless say that such rule refers to the parties' freedom, in the domestic order, to enter into contracts and to build their content, complying with the authority of internally mandatory rules. That autonomy is different to "conflict of laws autonomy" (*autonomía conflictual*),[74] which consists in choice of law by the parties of an international contract. So we would not allude to Article 1106 of the Civil Code as a basis for the allowance of choice of law. Further, when a dispute arises from an international contract and it is subject to arbitration, Article 43.3 of Panamanian Arbitration, Conciliation

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69 See *supra* n. 63.

70 2nd Paragraph, Article 24, Ecuadorian Arbitration and Mediation Law: "All persons, whether natural or legal, public or private, without any restriction is free to stipulate directly or by reference to arbitration regulations all that concerns the arbitral proceedings, including the constitution, the prosecution, the language, the applicable legislation, the jurisdiction and the seat of the tribunal, which could be in Ecuador or in a foreign country."

71 Paragraphs 1 and 2, Article 6, Panamanian Commercial Code. They provide that commercial transactions will be governed:

"1. As for the essence and mediate or immediate effects of the obligations resulting from them and unless otherwise agreed, by the laws of the place where they are entered into;

2. As for the manner in which they are to be performed, by the laws of the Republic, unless otherwise agreed."

72 Boutin I, *supra* n. 19, p. 613.

73 Article 1106, Panama Civil Code: "The contracting parties can establish the agreements, clauses and conditions they consider convenient, provided they are not contrary to the law, moral and public policy."

74 See M. S. Najurieta, "Apogeo y revisión de la autonomía en contratos internacionales" (1986) 1986-A *Revista Jurídica Argentina La Ley* 1006.

and Mediation Act, *Decreto Ley* 5 of 8 July 1999, authorizes the parties to choose the law applicable to their lawsuit.

Argentinian domestic law allows, for international contracts, a restricted party autonomy. In fact, by virtue of Articles 1209, and 1210 of the Civil Code,[75] international contracts are governed by the law of its place of performance, but according to Article 1212 of the same body of rules[76] they can designate such place. Consequently, they can choose the law applicable to the contract, provided it is in force in one of the places of performance.[77] Nevertheless, a wide acceptance of party autonomy has been established by case law since the latest sixties and early seventies,[78] following this line of reasoning: if parties to a patrimonial multistate case (e.g., an international contract) can agree on the jurisdiction of a foreign court (what is allowed by Article 1st of the National Procedural Civil and Commercial Code)[79] and every court must apply the forum's conflict of laws rules, the parties are indirectly choosing the law that will govern their case. And if that indirect selection is permitted, so shall be the direct choice of law.

Finally, there is a group of countries where, apart from the International Arbitration regulations,[80] no special rule sets the right of parties to an international contract to select the law applicable to it, but where Private Law provisions on the freedom of contract and/or on the binding character of contract are locally construed as allowing choice of law. This is the situation

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[75] Article 1209, Argentine Civil Code: "The contracts entered into within or without the Republic, which should be performed in the territory of the State, shall be judged as for their validity, nature and obligations by the laws of the Republic, whether the contracting parties be nationals or foreigners."

Article 1210, Argentine Civil Code: "The contracts entered into within the Republic in order to be performed elsewhere, will be judged, as for their validity, nature and obligations by the laws and usages of the country in which they should have been performed, whether the contracting parties be nationals or foreigners.."

[76] Article 1212, Argentine Civil Code: "The place of performance of the contracts in the absence of any indication therein or not indicated by the nature of the obligation, is that where the contract was made, if it is the domicile of the debtor, even when the latter changes domicile or dies."

[77] Boggiano, *supra* n. 22, p. 696.

[78] *Estudios Espíndola v Bollatti, Cristóbal J*. [1969] Juzgado Nacional de Paz 46, upheld by [1970] Sala III, Cámara Nacional de Paz 33, *El Derecho*, 26, http://fallos.diprargentina.com/2007/08/estudios-espndola-c-bollatti.html accessed on 1 June 2009. *Pablo Treviso SAFACIMI y otros v Banco Argentino de Comercio* [1976] Juzgado Nacional de Primera Instancia en lo Comercial N° 13 77 *El Derecho*, 426, http://fallos.diprargentina.com/2007/03/pablo-treviso-c-banco-argentino-de.html accessed on 1 June 2009. *Moka SA v Graiver, David* [1998] Sala G, Cámara Nacional de Apelaciones en lo Civil, 1998-E *Revista Jurídica Argentina La Ley*, 788, http://fallos.diprargentina.com/2008/07/moka-sa-c-graiver-david-2-instancia.html accessed on 1 June 2009.

[79] Article 1st, Argentine National Procedural Civil and Commercial Code: "The competence attributed to national judges is not subject to modifications.

Without prejudice of the provisions under international treaties and article 12, section 4, of Law 48, exception is made of the territorial competence for patrimonial matters in an exclusive basis, which could be modified by the parties' agreement. If those matters are of international nature, the choice of forum agreement shall be admitted even in favor of foreign judges or arbitrators acting outside the Republic, except in the cases in which the Argentine tribunals have exclusive jurisdiction or when the choice of forum agreement is prohibited by Law."

[80] Costa Rica: Article 22, *Ley sobre Resolución Alterna de Conflictos y Promoción de la Paz Social* of 1997. El Salvador: Article 78, *Ley de Mediación, Conciliación y Arbitraje, Decreto* N° 914 of 2002. Honduras: Article 88, *Ley de Conciliación y Arbitraje, Decreto* N° 161 of 2000. Nicaragua: Article 54, *Ley de Mediación y Arbitraje* N° 540 of 2005. Paraguay: Article 32, *Ley de Arbitraje y Mediación* N° 1879 of 2002.

in Costa Rica,[81] El Salvador,[82] Honduras,[83] Nicaragua[84] and Paraguay.[85] Like we have suggested when referring to Article 1106 of the Commercial Code of Panama,[86] a rule on freedom of contract is not suitable to be cited as a ground of choice of law allowance. The same can be said about a rule receiving the principle of *pacta sunt servanda*. They are both rules meant for domestic contracts. Notice that French case law[87] sets Article 1134 of the French Civil Code[88] aside when giving the legal foundations of party autonomy. Nevertheless, we have decided to place this group of Latin American states in this subsection and not in the following, because we respect the perception of the local experts (practitioners, scholars) we have consulted who are nationals of these countries,[89] in the sense that the law of their respective states accepts choice of law in international contracts. It would be interesting to know the view of Courts on this specific issue but, unfortunately, we have found no case law available in this regard. Even though, assuming these countries permit choice of law in international contracts, it is convenient to bear in mind that party autonomy could be restricted in practice, due to the tendency of some national courts to apply their *lex fori* instead of foreign laws.[90]

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81 Article 18, Costa Rican Civil Code: "The voluntary exclusion of the law applicable and the renounce to the rights that law recognizes, shall only be valid when they do not go against the public interest or policy and they are not detrimental to third parties."The Preliminary Title of this Code has a special Chapter (IV) for Private International Law Rules, where choice of law is not allowed.

82 Article 1416, Salvadorean Civil Code: "Every contract entered into in a lawful manner is binding for the contracting parties…".

83 Article 1547, Honduran Civil Code, identical to Article 1106 of the Panamanian Civil Code, *supra* n. 73. In like sense, Article 714, Honduran Commercial Code: "The parties can freely determine the content of their contracts within the limitations legally imposed." See the answer of Honduras to the Organization of American States' Questionnaire on International Contracts, before the Fifth Inter-American Conference. OEA/Ser.K/XXI.5 CIDIP-V/11/93.

84 Article 1836, Nicaraguan Civil Code: "Obligations arising from contracts, have the force of law between the contracting parties, and should be complied with according to the contracts' terms." "Las obligaciones que nacen de los contratos, tienen fuerza de ley entre las partes contratantes, y deben cumplirse al tenor de los mismos."

85 Article 715, Paraguayan Civil Code: "Agreements made in contracts constitute for the parties a rule to which they must submit as to the law itself…". See R Silva Alonso, *Derecho Internacional Privado* (Asunción, Intercontinental Editora, 1999), p. 274.

Apart from Private Law, the Organic Charter of the Central Bank of Paraguay receives party autonomy for the economic or financial international contracts concluded by the bank (3rd Paragraph, Article 2).

86 See *supra*, n. 72 and 73 and accompanying text.

87 *American Trading Company v Québec Steamship Company* [1910] Chambre Civile, Cour de Cassation 2111 *Revue Critique de Droit International Privé* 395, 1911-1 *Sirey* 129, 1912 *Journal du Droit International* 1156. See the comments to this decision in B Ancel and Y Lequette, *Grands Arrêts de la jurisprudence française de Droit International Privé* (Paris, Dalloz, 3rd ed., 1998), N° 11.

88 1st Paragraph, Article 1134, French Civil Code: "Agreements lawfully entered into take the place of the law for those who have made them." (Translated from French into English by G Rouhette with the assistance of A Berton.) http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#Section%20I%20-%20General%20Prov accessed on 1 June 2009.

89 Juan José Obando, Costa Rica; Ana Elizabeth Villalta, El Salvador; Orlando José Mejía, Nicaragua; Diego Manuel Zavala, Paraguay. Many thanks to them all. For Paraguay, see Silva Alonso, n. 84.

90 Due to the territorialism traditional in Latin America, this observation made by J. J. Obando for Costa Rica could also be applicable to other countries of the region. See *infra*, Section B, 1.

In other countries of the region, party autonomy is restricted or even rejected not only by the judge's unwillingness to study and apply a foreign law, often in a foreign language, but also by the legislator's words or silence.

(b)Restriction or rejection of choice of law

Notwithstanding Bolivian law's clear reception of freedom of contract in Article 454.I of its Civil Code,[91] it has no provision giving any guideline to determine the law applicable to the effects of the contract.[92] This silence on the possibility for the parties to an international contract to choose the governing law, and the absence of available case law or bibliography on this issue, lead us to assume that party autonomy is not allowed in this country.

For disputes where arbitration is agreed by the parties, the Bolivian Arbitration and Conciliation Act, *Ley* N° 1770 of 1997 does not expressly allow party autonomy. Nevertheless, Article 54.I.[93] thereof might be construed as implicitly accepting it, because of its reference to trade usages and for the reason that the parties' choice of law applicable to the substance of a controversy subject to arbitration enjoys universal acceptance, plus the fact that this country is bound by the Bolivia, Chile and Mercosur Arbitration Agreement.[94]

Even so, Bolivia is a party to the Bustamante Code. It participated in the 1994 Fifth Inter-American Conference and signed the Mexico City Convention. And, a few years ago, a Draft Bolivian Private International Law Act[95] making an express admission of party autonomy (Article 30) was prepared. This shows the feasibility of a domestic legislation future change in criteria.

In Brazil's current national source legal rules there is no regulation allowing party autonomy.[96] There was one, in the 1916 Civil Code's Introductory Law: Article 13.[97] This provision expressly authorized choice of law. It provided that the law of the place where the contract was perfected was applicable, unless otherwise stipulated. However, Brazilian courts' case law before 1942, when a new Introductory Law was enacted, was reluctant to

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91 Article 454.I, Bolivian Civil Code: "The parties can freely determine the content of the contracts they enter into and agree on contracts different from those included in this Code."

92 See A. Uriondo de Martinoli, "Autonomía de la voluntad en el Mercosur y en los países asociados" (1999) 14 *Anuario Hispano-Luso-Americano de Derecho Internacional*, 402.

93 Art. 54. I, Bolivian Arbitration and Conciliation Act (on rules applicable to the substance): "The Arbitral Tribunal shall decide on the merits of the controversy in accordance with the stipulations of the principal contract. If it is a matter of commercial nature, trade usages applicable to the case shall be also taken into account."

94 See *supra*, n. 29 and accompanying text.

95 F. Salazar Paredes, "Propuesta de Ley boliviana de Derecho Internacional Privado" (2005) June *Verba Legis*, http://www.verbalegis.com.bo/Verba%20Legis,%20Articulos.htm accessed on 2 December 2005 (no longer accessible). This is a private draft that has never been discussed in Parliament.

96 The rejection to party autonomy is expressly manifested in Brazil's answer to the Organization of American States' Questionnaire on International Contracts, *supra* n. 83.

97 Article 13, 1916 Introductory Law to the Brazilian Civil Code began by stating: "Except otherwise agreed, obligations shall be governed by the law of the place where they were entered into."

permit party autonomy.[98] From 1942 onwards, the law applicable to contractual obligations is determined by Article 9 of the Introductory Law, which adopts the *lex loci celebrationis* criterion and envisages no exception based on party autonomy. Such silence[99] shall be construed as a rejection of this worldwide accepted principle.[100] Taking into account the precedent of the legislator having chosen to eliminate the freedom of choice, one can understand the absence of general pro autonomy case law in Brazil.[101]

In the realm of international arbitration, however, the Brazilian legislator enacted the *Lei* 9307 of 1996, whose Article 2.1 states that parties will be able to freely choose the legal rules which will be applied in the arbitration. This acceptance of party autonomy is nowadays limited to those contracts that are submitted to arbitration proceedings.[102] It is curious that "…while Brazilian judges routinely enforce party autonomy in arbitration agreements, the Introductory Law compels these same judges to invalidate a choice of law whenever the parties fail to realize that Brazil's conflict rules are far more restrictive outside of the arbitration context."[103]

Nevertheless, some isolated judges' voices have begun to refer to party autonomy as a valid principle in this country's legal system, regardless of the existence or inexistence of an arbitration agreement. In *Dexbrasil Ltda. v Navisys Incorporated*,[104] a Civil Judge of São Paulo has recognized that by the

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98 N. Araujo points that the few cases involving international contracts presented during this period before the Brazilian courts never treated directly the question of party autonomy. N. Araujo, *Contratos internacionais: autonomia da vontade, Mercosul e convenções internacionais. Atualizado com a Lei de Arbitragem (n° 9.307/96)* (Rio de Janeiro, Renovar, 1997), p. 109. D. Jacques refers that case law condemned any possibility for the parties to choose the applicable law. D. Jacques, "A adoção do princípio da autonomia da vontade na contratação internacional pelos países do MERCOSUL", in C. Lima Marques and N. Araujo (coord.), *O novo Direito Internacional–Estudos em homenagem a Erik Jayme* (Rio de Janeiro, Renovar, 2005), p. 285.

99 Such silence causes great uncertainty for the parties whose international contractual dispute is set before Brazilian courts. See L. Gama Jr., *Contratos internacionais à luz dos Princípios do UNIDROIT 2004. Soft law, arbitragem e jurisdição* (Rio de Janeiro, Renovar, 2006) p. 434.

100 See N. Araujo, "O direito subjetivo e a teoria da autonomia da vontade no Direito Internacional Privado", in P. Borba Casella (coord.), *Contratos internacionais e Direito Econômico no MERCOSUL. Após o término do período de transição* (São Paulo, Editora LTr., 1996), p. 43. *Cf.* L. Gama Jr., "Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: uma leitura *constitucional* do artigo 9° da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável", in C. Tiburcio and L. R. Barroso (eds) *O Direito Internacional contemporâneo. Estudos em homenagem ao Professor Jacob Dolinger* (Rio de Janeiro, Renovar, 2006) pp. 599-626.

101 In a recent and isolated case, the Tribunal de Justiça do Estado de São Paulo seemed to accept a choice of law clause pointing to the law of New York. But the parties had entered into the contract in New York, so the law chosen by the parties coincided with the law pointed by Article 9 of the Introductory Law. *Ciaci Coml Internacional Ltda. v The Lubrizol Corporation* [2007] Tribunal de Justiça do Estado de São Paulo Appeal N° 7.030.387-8 http://www.tj.sp.gov.br/consulta/Jurisprudencia.aspx accessed on 1 June 2009.

102 See Araujo, *supra* n. 99, p. 105. Lauro Gama Jr. refers to this situation as "Brazilian paradox": it's the means of dispute resolution and not the contractual nature of the legal relationship what determines the allowance or the rejection of party autonomy. *Ibid*, p. 609.

103 D. Stringer, "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way" (2006) 44 *Columbia Journal of Transnational Law*, p. 977.

104 [2002] 30ª Vara Civil de São Paulo 00.551794-0.

choice of a law different to the green-yellow one,[105] the parties had not offended the Brazilian sovereignty. In *Total Energie do Brasil, S.N.C.* et al*. v Thorey Invest Negócios Ltda.*,[106] São Paulo 7th Chamber of the 1st Court of Appeal stated that the Introductory Law to the Brazilian Civil Code is only applicable when there is an omission or a dispute about the governing law. Article 9 of the Introductory Law would be then subsidiary and its application would only be possible in the absence of a parties' choice. The 12th Chamber of the same Court established in *R S Components Limited. v R S do Brasil Com. Imp. Exp. Cons. Repr. Ltda*.[107] it is "undeniable" that Brazilian law receives party autonomy in the field of the law applicable to contractual obligations and, consequently, choice of the law applicable to international contracts by the contracting parties is permitted in Brazil. In *Ciaci Coml Internacional Ltda. v The Lubrizol Corporation*,[108] the Tribunal de Justiça do Estado de São Paulo has recently seemed to accept a choice of law clause pointing to the law of New York. But the parties had entered into the contract in New York, so the law chosen by the parties coincided with the law pointed by Article 9 of the Introductory Law. We consider that these decisions are significant but, as we have said at the beginning of this paragraph, they are isolated. In order to be able to state that in spite of the legislator's silence or rejection, case law admits party autonomy, we should first ascertain a consolidation of such judicial criterion.

It is important to emphasize the existence of a Draft Act on the Application of Legal Rules, *Projeto de Lei do Senado* N° 269 of 2004,[109] still under consideration by the Senate.[110] Article 12 grants the right to choose the law applicable to international contractual obligations upon the parties, following the Mexico City Convention signed and not yet ratified by Brazil.[111]

In Colombia there is neither at present an express rule admitting choice of law in international contracts.[112] Article 20 of the Colombian Civil Code[113] is

105 These are the colours of the Brazilian flag.

106 [2002] 7ª Câmara do Primeiro Tribunal de Alçada Civil do Estado de São Paulo 1.111.650-0 http://www.tj.sp.gov.br/consulta/Jurisprudencia.aspx accessed on 1 June 2009.

107 [2003] 12ª Câmara do Primeiro Tribunal de Alçada Civil do Estado de São Paulo 1.247.070-7.

108 [2007] Tribunal de Justiça do Estado de São Paulo Appeal N° 7.030.387-8 http://www.tj.sp.gov.br/consulta/Jurisprudencia.aspx accessed on 1 June 2009

109 http://legis.senado.gov.br/mate-pdf/6268.pdf accessed on 1 June 2009.

110 http://www.senado.gov.br/sf/atividade/materia/detalhes.asp?p_cod_mate=70201 accessed on 1 June 2009.

111 See *supra*, n. 5.

112 See the answer of Colombia to the Organization of American States' Questionnaire on International Contracts, *supra* n. 83.

113 Article 20, Colombian Civil Code: "Property located in the territories, and in the states, in whose property rights the Nation would have interest or right, is subject to the provisions of this Code, even if its owners are foreigners and reside out of Colombia.

This provision shall be understood without prejudice of the stipulations contained in contracts validly entered into in a foreign country.

But the effects of those contracts, to be performed in some territory, or in the cases that affect the rights and interests of the Nation, will respect this code and the other civil laws of the union."

very similar to its source, Article 16 of the Chilean Civil Code.[114] But Colombian scholar Bueno Guzmán[115] does not interpret this rule in the sense of allowing party autonomy.[116] He explains that for contracts whose subject-matter is property, Colombian law distinguishes between *titulus* and *modus adquirendi*: the *titulus* (sales agreement) grants personal rights and is governed by the obligations statute; the *modus adquirendi* (*traditio*) grants rights *in rem* and is governed by the real statute. So, having set the rule that property located in Colombia is governed by Colombian law, the 2nd Paragraph of Article 20 of the Civil Code admits stipulations contained in contracts validly perfected in a foreign country, even if they deal with property located in Colombia.[117] But it does not accept the parties' freedom to choose the law applicable to the substance of the contract.[118] Its formal validity will be governed by the law of the place of conclusion (2nd Paragraph of Article 20) and its effects, by the law of the place where the contract shall be performed (if it is Colombia, then Colombian law, pursuant to the 3rd Paragraph of Article 20).[119]

But for those contractual disputes that are subject to arbitration, choice of law is permitted. Article 2 of Colombian International Arbitration Act, *Ley* N° 315 of 1996, provides that parties are free to determine the substantive rule arbitrators shall apply to solve the dispute.[120]

According to Uruguay's answer to the Organization of American States' Questionnaire on International Contracts,[121] no single rule of its domestic positive law allows party autonomy. Choice of law would be so directly rejected. However, Article 2403 of the Appendix to its Civil Code[122] prohibits the use of party autonomy, unless the applicable law provides it is permitted. So we could say that, really, choice of law by the parties of an international contract is allowed but severely restricted. This provision adopts the criterion followed by Article 5 of the Additional Protocol to the 1940 Montevideo

114 See *supra*, n. 63.

115 C. Bueno Guzmán, "El Derecho Internacional Privado interno en Colombia. Comentarios de Derecho Comparado" (1976) 51, *Revista Universitas*, pp. 188-190.

116 *Cf.* N. 64 and accompanying text.

117 See Bueno Guzmán, *supra* n. 116, p. 188.

118 "…no queda al arbitrio de la voluntad del otorgante **la escogencia del derecho aplicable** al acto o contrato". *Ibid*, p. 190.

119 The 3rd Paragraph of Article 20 of the Colombian Civil Code is considered as a bilateral rule. *Ibid*, p. 189.

120 In a case about constitutional control of two dispositions of the Colombian International Arbitration Act, the dissidences referred to party autonomy to choose the rule applicable to international transactions, stating it does not entail a renounce to sovereignty and that states interested in promoting international relations need to offer the parties a rule allowing choice of law, so they will know exactly which legal rules will be applied to their international transactions. *C-347* [1997] Corte Constitucional de Colombia. http://www.corteconstitucional.gov.co/ accessed on 1 June 2009.

121 See *supra*, n. 83.

122 Article 2403, Appendix to the Uruguayan Civil Code: "The legislative and judicial competence rules determined in this title, cannot be modified by the will of the parties. That will could only act within the limits conferred by the competent law."

Treaties,[123] which, as we have seen, may be interpreted as directly rejecting[124] or at least restricting[125] choice of law. The classical interpretation among Uruguayan's legal scholars is that Article 2403 of the Appendix to the Civil Code rejects party autonomy.[126] This country's courts are traditionally opposed to the possibility for the parties to choose the law applicable to their international contracts, but according to the exception accepted by the letter of the referred article, they have considered choice of law is valid if the law of the place of performance[127] permits it.[128] Nevertheless, the 2009 Draft General Act on Private International Law,[129] following the Mexico City Convention Uruguay has signed but not yet ratified,[130] admits the parties' choice of law (Article 48).

In the arbitration field, the present legislation of Uruguay (Title VIII of the General Process Code) only refers to domestic arbitration and is silent about party autonomy. However, the Draft Act on International Commercial Arbitration of 2004 states that the arbitral tribunal shall decide the dispute according to the rules of law chosen by the party to be applicable to the substance of the controversy (Article 28).

123 See *supra*, n. 45.
124 See *supra*, n. 46.
125 See *supra*, n. 47 and accompanying text.
126 Q. Alfonsín, *Régimen internacional de los contratos* (Montevideo, Biblioteca de Publicaciones de la Facultad de Derecho y Ciencias Sociales de la Universidad de Montevideo, 1950) pp. 13-27. A modern (and isolated) interpretation according to which party autonomy is accepted in Uruguay as a consequence of the constitutional principle of freedom of trade is proposed by J Tálice, "La autonomía de la voluntad como principio de rango superior en el Derecho Internacional Privado uruguayo", *Liber amicorum en homenaje al Profesor Dr. Didier Opertti Badán* (Montevideo, Fundación de Cultura Universitaria, 2005), pp. 526-562.
127 Uruguayan Private International Law adopts the place of performance as connecting factor, and it makes express reference to 1889 Montevideo Treaty on Civil International Law. Article 2399, Appendix to the Civil Code of Uruguay: "Juridical acts are governed, as for their existence, nature, validity and effects, by the law of the place of performance, according, besides, to the interpretation rules contained in articles 34 to 38 of the Treaty of Civil Law of 1889."
128 *La Mannheim v China Ocean Shipping Company (COSCO)* [1994] Juzgado Letrado de Primera Instancia en lo Civil 17° 42 and [1996] Tribunal de Apelaciones en lo Civil 3° 8, 10 *Revista de Transporte y Seguros*, case 186, cited by M. B. Noodt Taquela, "Reglamentación general de los contratos internacionales en los Estados mercosureños", in D. P. Fernández Arroyo (coord.), *Derecho Internacional Privado de los Estados del Mercosur. Argentina, Brasil, Paraguay, Uruguay* (Buenos Aires, Zavalía Editor, 2003) p. 1022.
129 http://www.presidencia.gub.uy/_web/proyectos/2009/01/ANEXO2087.pdf accessed on 1 June 2009.
130 See *supra*, n. 5.

B. Some Latin American countries' resistance to party autonomy

In the preceding section of this article we have seen that two international treaties to which several Latin American states are parties,[131] as well as the domestic legal systems of some countries of the region[132] restrict or reject party autonomy. In this section we will explore the causes and consequences of such a resistance to the freedom of the parties in order to choose the law applicable to international contracts *(1)* as well as some fissures to that resistance *(2)*. But for the resistance to be totally broken several years will probably go by. In the meanwhile, we will present some options for the parties to, legally, try to eliminate or minimise the effects of the states' refusal to accept party autonomy *(3)*.

1. The resistance's causes and consequences

Territorialism is a doctrine that advocates for the application of the law of a state to all the people and activities within its territory. Under the territoriality principle foreign law is only exceptionally applied.[133] This has been the traditional approach to conflict of laws in Latin America,[134] and even in countries whose domestic law actually admits party autonomy in international contracts, territorialism is clearly established by the legislator and/or enacted by the tribunals.[135] But an absolute territorialism would leave no room to the principle of party autonomy.

The strength of territorialism in Latin American[136] countries is due to the influence of renowned scholars which, combined with a particular historical and socio-political context, favoured an emphasised territorialistic tendency in judicial practice which, nowadays, can still be identified.

Andrés Bello, who drafted the 1855 Chilean Civil Code, established the application of Chilean law to all inhabitants of the Republic, even foreigners (Article 14), and to all the matters occurred in the territory of Chile.

131 See *supra*, Section A, 1, *(b)*.

132 See *supra*, Section A, 2, *(b)*.

133 There are, of course, variations from one legal system to another on the degree of allowance of application of foreign law.

134 See generally L. Pereznieto Castro, "La tradition territorialiste en Droit International Privé dans les pays d'Amérique Latine" (1985) 190 *Recueil des Cours Académie de Droit International,* pp. 271-400.

135 Eg: Article 12, Federal Civil Code of Mexico, stipulates that Mexican laws govern every people who is in the Mexican Republic, as well as the acts and facts occurred in its territory or jurisdiction and those that are subject to such laws, except when they provide the application of a foreign law and also except for what is provided for in the treaties and conventions to which Mexico is a party. Pereznieto Castro observes this is a mixed system: territorialistic in principle but also permissive. L. Pereznieto Castro, *Derecho Internacional Privado Parte General* (Mexico, Oxford University Press, 8th ed., 2003), p. 288.

136 That territorialism has caused a resistance to the admission of party autonomy in Latin America. See R. Santos Belandro, *supra* n. 3, p. 55.

Moreover, the scope of Chilean law is extended to acts passed abroad, provided a personal or territorial connection with Chile exists.[137] The Civil Code of Chile had a strong influence on the codification process of other Latin American countries.[138] Bello's ideas, as well as Gonzalo Ramírez's, who conceived Private International Law as a problem of conflict of sovereignties,[139] had an influence on the 1868 Civil Code of Uruguay, written by Tristán Narvaja taking as a basis Eduardo Acevedo's draft.

The 1869 Civil Code of Argentina, which was written by Dalmacio Vélez Sársfield and adopted by Paraguay in 1876,[140] states the application of Argentine law to all inhabitants of the Republic, even if they are foreigners and domiciled in Argentina or simply in transit (Article 1). We can see here the trace of the Chilean Civil Code; but the legal capacity is here governed by the law of the country of domicile (Articles 6 and 7). One of the authors that inspired Vélez Sarsfield the most is Joseph Story. Story was influenced by Ulricus Huber's territorialistic ideas developed in Holland in the XVII century. According to the Dutch School, as a law emanates from a sovereign state, it should be considered as the only law applicable to people being permanently or temporarily in that state's territory, and losing its effect at the frontiers of the territory.[141] But the needs of international trade made it necessary to respect vested rights acquired abroad. Such exceptional application of foreign law was explained with the notion of "comity", a kind of courtesy[142] by which the Dutch sovereign accepted the application of foreign law in its territory.

The historical and socio-political context of the period when Private International Law rules were created is probably the chief reason of their territorialism.[143] In the XIX century, the recently gained independence of the young Latin American countries needed consolidation and an effective means used to achieve it was the creation of national codes.[144] The nationalistic feelings that appeared in South America during that period and in Mexico in the XX century as a consequence of the Revolution[145] contributed to the development of territorialism. Another important factor was the arrival of considerable migratory fluxes from Europe, which led to legislative policies tending to reduce the application of foreign laws by submitting the personal statute to the law of the country of domicile.

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137 According to Article 15 of the Civil Code of Chile, Chilean citizens living abroad are governed by their national law on questions related to their marital status and legal capacity to perform certain acts producing effects in Chile.
138 Eg: Colombia, Ecuador, El Salvador, Honduras, Nicaragua, Panamá.
139 See Araujo, *supra* n. 99, p. 76.
140 Paraguay adopted a new Civil Code in 2185.
141 See B. Audit, *Droit International Privé* (Paris, Economica, 2nd ed., 1997), p. 64.
142 "Comity" is an ambiguous term. Even if generally referred to as courtesy, it can also be construed as a legal obligation. See Boggiano, *supra* n. 22, pp. 25-26.
143 See Pereznieto Castro, *supra* n. 135, p. 378.
144 *Ibid*, p. 368.
145 *Ibid*, p. 166.

In order to complement this panorama, we have to mention the judicial practice consisting in always tending to apply its own law (*lex fori*) to multistate cases[146] and, the opposite side of the story, to avoid the application of foreign law.[147] We could explain but not justify this behaviour if we observe that these countries' courts dockets are often clogged. The implementation of the conflict of laws' method presents in itself a high degree of difficulty, and when it leads to the application of a foreign law the judicial task of interpreting it requires a huge effort to which they might not be used.[148] The tribunals may evade the application of foreign law, for instance, by directly ignoring the internationality of a case which is treated as a domestic affair governed by domestic law, by expanding the scope of mandatory rules (*lois d'application immédiate*)[149] or by indiscriminate use of the public policy exception. In some countries, as the distinction between domestic and international public policy is not yet solidly established,[150] the tribunals may tend to consider that any foreign law whose content differs from the forum law is contrary to public policy; consequently, the *lex fori* would be applied.[151]

Although some changes are occurring in Brazilian case law, territorialism and the fastening to the deep-rooted idea that domestic law solutions should prevail are still present in the Brazilian legal system, where they are combined with another factor which we can also find in Uruguay, where it has a strong weight: the defence of national interests.[152] In fact, the fear exists that if choice of law was admitted, the foreign subject coming from a developed country would impose the designation of its own country's law to

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146 See, about the excessive interventionism of judicial practice in the Mercosur countries: Jacques, *supra* n. 99, pp. 286-292.

147 Nevertheless, in countries like Argentina and Uruguay, we cannot identify a tendency to avoid application of foreign law. In general terms, Argentinean and Uruguayan courts apply foreign law when the applicable conflict of laws rule selects it.

148 The complexity of this task increases when the applicable foreign law comes from a country whose official language is different to the one of the forum.

149 See A. Marques dos Santos, *As Normas de Aplicação Imediata no Direito Internacional Privado: Esboço de uma Teoria Geral* (Coimbra, Almedina, 1999) 41, cited by Jacques, *supra* n. 99, p. 286.

150 Eg: the Primera Sala of the Corte Suprema de Justicia of Costa Rica, making reference to the application of foreign laws in exequatur procedures, affirmed that it couldn't be imposed to a State the obligation of applying laws that are in conflict with its *intern* public policy. *Faith Freight Forwardin et al v Teresita Ruiz Ruiz et al* [2004] 000113-E-04, http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=264820&strTipM=T&lResultado=8&strLib=LIB; *John Warner Smith et al v Jerome Franke Smith Jr.* [2004] 000476-E-04 http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=286041&strTipM=T&lResultado=7&strLib=LIB; *Powerware Corporation v G. y G. Soluciones y Sistemas, S.A.* [2004] 000943-E-04,
http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=287174&strTipM=T&lResultado=6&strLib=LIB. All websites accessed on 1 June 2009.

151 But in other countries, like Uruguay, the distinction between national and international public policy is clearly established, at least by legal scholars. See Q. Alfonsín, *El orden público* (Montevideo, Imp. Peña y Cía, 1940).

152 The defence of national or even regional interests is the main reason for Uruguay to reject party autonomy as a general rule, even if this country's approach to conflict of laws is not territorialistic but internationalistic. Thanks to Cecilia Fresnedo de Aguirre for her enlightening comments on this point.

the defenceless Latin American part,[153] especially in adhesion (small print) or "take it or leave it" contracts, where the weak party has practically no bargaining power .

The consequences of the resistance of certain countries to admit the freedom of choice are negative for the parties who are national of these states or domiciled in their territories and, indirectly, for the states themselves. From the point of view of the foreign party, a prohibition or a severe restriction to party autonomy could discourage the conclusion of international contracts with parties from these states. This could provoke a gradual isolation of such countries in the global context of international commercial transactions. It is also possible for the foreign party to add a risk premium to the contracts they enter into with parties whose states are reticent to admitting choice of law,[154] and such situation would be detrimental to the local party. If, notwithstanding the legislative and judicial rejection of party autonomy, a choice of law clause is inserted in an international contract and a dispute arising from it is brought before a domestic court, it is very probable that said clause would be considered invalid. This would frustrate the expectations of the foreign party who is used to choosing the law applicable to its international contracts, especially if it lacks information about its counterparty's domestic legal system. Confusion and legal uncertainty would prevail.

But in the last years, some fissures to that resistance have begun to appear and the challenge is to make them grow until the resistance is eliminated.

2. Fissures to the resistance

Excluding the domain of arbitration, the legal systems of the countries which are reluctant to party autonomy[155] seem to present a contradiction on this issue: while on the one hand their national source's laws reject choice of law, on the other, they are parties (or at least signatory states) to international treaties that directly or indirectly permit it. Bolivia, Colombia and Uruguay are parties to 1889 Montevideo Civil International Law Treaty.[156] Bolivia and Brazil are parties to the Bustamante Code.[157] Colombia and Uruguay are

153 People and companies who often take part in international transactions, even if they come from a developing country, do know the trade rules and usages. But if one of the parties takes advantage of the other, the legal systems which allow party autonomy have remedies to neutralize this situation.

154 "Brazil's conflict rules have in fact forced U.S. lawyers to add a risk Premium to their contracts with Brazilian parties –dubbed the "Brazil cost"– to capture the negative impact of increased transaction costs upon their client's bottom line." Stringer, *supra*, n. 104, p. 960.

155 See *supra*, Section A, 2, *(b)*.

156 As we have seen, 1889 Montevideo Civil International Law Treaty's acceptance of party autonomy was under discussion. Its interpretation against the allowance of choice of law is generally admitted in Uruguay, so the mentioned contradiction would not be so from the perspective of a Uruguayan judge. See *supra*, Section A, 1, *(b)*.

157 See *supra*, Section A, 1, *(a)*.

parties to the Vienna Convention on International Sale of Goods,[158] and both Brazil and Uruguay have ratified the Buenos Aires Protocol on International Jurisdiction in Contractual Matters.[159] Moreover, Bolivia, Brazil and Uruguay are signatory states of the modern and widely supporting party autonomy Mexico City Convention, which they have not ratified.[160] Besides, Colombia has accessed to the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment.[161] In spite of the criticism that could be made of these contradictions, the referred international treaties are fissures to the reticence against choice of law allowance.

Furthermore, in recent years, a remarkable phenomenon has taken place in the whole region, including those countries with a higher resistance to choice of law: compelled by the pressures of international commerce and by the regional integration's needs, Latin American countries have become parties to international treaties such as the Mercosur Arbitration Agreements[162] and/or have reformed their national laws on international arbitration,[163] expressly admitting the parties' choice of the law applicable to the substance of the dispute. These gradual fissures are possible because of the consolidation that party autonomy has achieved in the field of arbitration. In fact, most arbitration rules in the world establish the arbitral tribunal's obligation to solve the dispute following the choice of law made by the parties.[164] We find these fissures are particularly relevant because, though this pro-autonomy regulation is restricted to arbitration cases, departing from Brazilian *Lei* 9307, some judges of this country have begun to consider that party autonomy is admitted by Brazilian law for all international contracts.[165] Even though it is actually a question of a few random decisions, we should not rule out a gradual generalization of this criterion. And a similar interpretation of arbitration regulations could perhaps be made in other countries which still reject or restrict choice of law by the parties of an international contract. One could legitimately wonder why party autonomy remains rejected for international contractual disputes presented before a judge, while it is permitted whether it is an arbitral tribunal the one who holds jurisdiction to

158 See *supra*, n. 20.
159 See *supra*, n. 27 and accompanying text.
160 See *supra*, n. 5.
161 See *supra*, n. 11 and accompanying text.
162 See *supra*, Section A, 1, *(a)*.
163 See *supra*, Section A, 2.
164 See, *eg*, Article 28 (1), UNCITRAL Model Law on International Commercial Arbitration, and Article VII. 1, European Convention on International Arbitration of 1961. See also Article 10, Mercosur Arbitration Agreements, *supra*, text to n. 29, and the various references made to Latin American national arbitration acts: *supra*, Section A, 2.
165 See *supra*, Section A, 2, *(b)*.

solve exactly the same controversy, especially when the parties have the freedom to conclude an arbitration agreement.[166]

Yet, for the judicial anti-autonomy attitude to be converted into a pro-autonomy approach in a context of no legislative reforms, whether it be via international treaties on contractual matters or via arbitration international conventions or national laws, deep-rooted mentality changes are required. The same mentality changes are needed (and they seem to be in progress)[167] in state legislatures to adopt modern international treaties, such as the Mexico City Convention, and/or to modify the domestic rules which prohibit or strictly reduce the use of party autonomy in international contracts. And we must bear in mind that the weight of tradition is really heavy and hard, but not impossible, to defeat.

3. Some options for the parties

We hope the Draft Acts which are being considered by the legislative bodies of countries reluctant to party autonomy[168] will soon be enacted. This process may still last some years and, unfortunately, there is no certainty on what its result would be. In the meantime, we will propose some alternatives for contracting parties who face the present regulatory panorama of these Latin American countries, to legally eliminate or reduce the effects of the said reluctance.

The parties wishing to choose the *lex contractus* may enter into an arbitration agreement. If before the state's jurisdictional authorities the right to select the law is not granted and the contracting parties need to designate a foreign law, they may overcome the obstacle by resorting to arbitration.[169]

Staying in the judicial sphere, a judge of one of these states would condemn as invalid the parties' choice of law, because it is harmful to the forum's international public policy.[170] An indirect selection of foreign law may be achieved by the localisation of the contract's factual element underlying

166 Provided, of course, the issue is arbitrable. The relationship between international arbitration and a large allowance of party autonomy has been pointed out by several authors. See M. J. Bonell, "The CISG, European Contract Law and the Development of a World Contract Law" (2008) 56 *American Journal of Comparative Law* 27 and D. P. Fernández Arroyo, "What's New in Latin-American Private International Law?" (2005) 7 *Yearbook of Private International Law* 110. See also C. Fresnedo de Aguirre, *La autonomía de la voluntad en la contratación internacional* (Montevideo, Fundación de Cultura Universitaria, 1991) 68 and "La autonomía de la voluntad en la contratación internacional" in Comité Jurídico Interamericano, *XXXI Curso de Derecho Internacional* (Washington, Secretary General of the Organization of American States, 2005) pp. 348-349.

167 See references to Draft Acts on Private International Law in Bolivia, Brazil and Uruguay, *supra*, Section A, 2, *(b)*.

168 See *supra*, Section A, 2, *(b)*.

169 Remember, however, that Uruguayan actual arbitration rules are silent about the possibility of the parties choosing the law the arbitral tribunal will apply to the substance of the dispute. See *supra*, Section A, 2, *(b)*, *in fine*.

170 See Jacques, *supra*, n. 99, pp. 290-291. In the countries that prohibit party autonomy, this prohibition makes part of its international public policy.

the connecting factor of the conflict of laws rule in the desired country.[171] For instance, from a Brazilian forum perspective,[172] supposing French and Brazilian parties want their international contract to be governed by French law, they should perfect it in France or at least the proposal should be made by the French party.[173] Or, from a Uruguayan forum perspective,[174] if Canadian and Uruguayan companies want their sales contract on certain and individualised goods existing in New York to be governed by Canadian law, they can transport the goods to Canada so that they are in Canadian territory at the moment they enter into the contract.[175] But the purposes of the concrete transaction will not always allow this solution which could, additionally, increase the operation's costs.

Is it possible for a Brazilian party to escape to the choice of law prohibition by entering into a contract in a foreign pro-autonomy country and selecting the law of a third state? All in all, Article 9 of the Introductory Law to the Civil Code would seem to be respected. Nevertheless, such choice would not be enforced by a Brazilian judge, on the grounds that Article 16 of the same Introductory Law[176] forbids *renvoi*.[177] On the contrary, a Uruguayan tribunal would enforce a choice of law accepted by the country of performance.[178]

Another alternative to circumvent the rejection to party autonomy by some domestic legal systems could be to attribute jurisdiction to a foreign country's court. The choice of a pro-autonomy forum could be accompanied

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171 Articles 1209, 1210 and 1212 of the Civil Code of Argentina allow this selection, which is usually called restricted autonomy. See *supra*, Section A, 2, *(a)*.

Talking about international contracts, area in which choice of law is almost universally accepted, there is no space for fear of falling into fraudulent practices. Mandatory rules and public policy are guarantees enough to protect the forum state essential interests. For some appreciations on changes to the connecting factor of conflict of laws rules in general, not specifically in the area of contracts, see S. Rodríguez Jiménez, *Competencia judicial civil internacional* (Mexico, Universidad Nacional Autónoma de México, 2009) pp. 99-101.

172 According to Article 9 of the 1942 Introductory Law to the Brazilian Civil Code, contractual obligations are governed by the *lex loci celebrationis* (see *supra* n. 100 and accompanying text) and they are reputed constituted in the place of residence of the proponent.

173 Nevertheless, this would not guarantee the desired result, because Brazilian judges have a "propensity for applying Brazilian law in spite of the parties' efforts to make an enforceable "choice" of foreign law pursuant to Article 9". Stringer, *supra*, n. 104, p. 975.

174 Article 2399 of the Appendix to the Civil Code, interpreted in accordance to the first Paragraph of Article 34 of the 1889 Montevideo Treaty on Civil International Law.

175 We find Uruguayan judges are, in general, more willing to apply foreign law than their Brazilian colleagues. See, eg, *SA Cristalerías del Uruguay v Telestar SA* [2000] Tribunal de Apelaciones en lo Civil de 2° Turno 74, *La Justicia Uruguaya* cited by C. Fresnedo de Aguirre, "Jurisprudencia uruguaya en materia de contratos internacionales" (2008) 9 *DeCita*, pp. 243-245. http://asadip.wordpress.com/2008/11/03/jurisprudencia-uruguaya-en-materia-de-contratos-internacionales/ accessed on 1 June 2009. The tribunal stated Brazilian law should be applied. Even though, Fresnedo de Aguirre criticizes the interpretation of "place of performance" made by the tribunal, having omitted the application of the second Paragraph of Article 34 of the 1889 Montevideo Treaty on Civil International Law which would have led to apply Uruguayan law.

176 Article 16, Introductory Law to the Civil Code of Brazil: "When, in the terms of the preceding articles, a foreign law shall be applied, its provisions shall be taken into account, without considering any remission made by it to another law."

177 Thanks to Brazilian Professor Claudia Lima Marques for her comments on this issue.

178 See *supra*, Section A, 2, *(b)*.

by a choice of law agreement which, in principle, the selected tribunal would enforce. Even without designating the law applicable to the contract, the parties could choose a forum where the *lex fori* would very probably be applied. In this last case, the parties would be indirectly choosing the law. The question arises of the effects the national judiciary would recognise to that choice of a foreign forum.

In 1963, the Supreme Federal Tribunal, highest constitutional Brazilian court, developed *Súmula* 335,[179] stating that "a contractual choice of forum clause is valid".[180] Nevertheless, the existence of this *súmula* does not always guarantee a friendly reception to forum selection clauses. In *R S Components Limited. v R S do Brasil Com. Imp. Exp. Cons. Repr. Ltda*,[181] the STJ confirmed the decision of the São Paulo 1st Court of Appeal providing the concurrent competence of Brazilian courts in a dispute hailing from a distribution contract between a foreign producer and a Brazilian distributor, in spite of a clause only selecting the United Kingdom's forum. It was considered that public policy was offended by the exclusion of Brazilian jurisdiction in contracts to be performed in Brazil. However, a choice of forum clause pointing to Uruguay was enforced in *Bankboston NA Sucursal Uruguay et al. v Ned Smith Junior* et al.,[182] providing that the defendants are not hiposufficient and that they can defend themselves in the Uruguayan forum. In *General Electric Company v Varig S/A Viação Aérea Rio Grandense*,[183] the STJ recognized a foreign judgment on a dispute hailing from a sales contract between a foreign company and a Brazilian one, which contained a law selection and a forum selection, both pointing to New York, United States. The Brazilian court respected the parties' agreement conferring jurisdiction to New York's tribunal (although it interpreted that the Brazilian courts had concurrent jurisdiction), as well as the application it

179 A *súmula* is a "uniquely Brazilian procedural device for harmonizing case law at the appellate level that has since been adopted by the Superior Tribunal of Justice (STJ), the highest federal court for all non-constitutional matters". It "is a one-sentence summary of a Brazilian court's holding that is located in the headnotes of the court's written decision and can be used by lawyers seeking to persuade a different court to come to the same conclusion in a future case." Although *súmulas* are not binding for courts different from the one that formulated them, they are generally treated as *de facto stare decisis*. Stringer, *supra*, n. 104, pp. 966-967.

180 "È válida a cláusula de eleição do foro para os processos oriundos do contrato." http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=335.NUME.%20NAO%20S.FLSV.&base=baseSumulas accessed on 27 March 2009.

181 [2008] STJ Recurso Especial N° 804.306 – São Paulo (2005/0207126-3)
http://www.stj.gov.br/webstj/processo/justica/default.asp accessed on 1 June 2009.

182 [2003] Tribunal de Justiça do Estado do Rio Grande do Sul Agravo de Instrumento N° 70005228440 – Porto Alegre, http://www.tjrs.jus.br/site_php/jprud2/index.php accessed on 1 June 2009. In like sense, considering the choice of forum clause as valid, see *MSC Mediterranean Shipping do Brasil Ltda. v Sumatra Comércio Exterior Ltda.* [2008] Tribunal de Justiça do Estado de São Paulo Agravo de Instrumento N° 7250372700 http://www.tj.sp.gov.br/consulta/Jurisprudencia.aspx accessed on 1 June 2009. See also: *Fórmula F3 Brazil S.A. v Ducati Motor Holding S.P.A.* [2007] Tribunal de Justiça do Estado de Rio de Janeiro Agravo de Instrumento N° 2007-002.24569 http://www.tj.rj.gov.br accessed on 1 June 2009.

183 [2008] STJ Sentença Estrangeira Contestada N° 646 – US (2006/0027904-9)
http://www.stj.gov.br/webstj/processo/justica/default.asp accessed on 1 June 2009.

made of the chosen law. In this regard, it has taken into account the impossibility of discussing the material rules applied by the foreign judge, because homologation procedures are limited to check the foreign decision's formal requirements.

If the last alternative we have proposed seems possible in the Brazilian jurisdiction, in spite of the uncertainty that still surrounds the enforceability of choice of forum clauses in that country,[184] it would not work in Uruguay, where forum selection agreements are contrary to the positive law. Applying this prohibition, it has been decided in *Picart Mariana et al. v Trans-Uruguay S.A. et al.*[185] that the choice of forum clause pointing to Buenos Aires which was written at the back of a passenger's transportation ticket was not valid, on the grounds that international competence is determined by the legislator by reasons that are superior to the parties' will, which cannot modify it (according to Articles 2401 and 2403 of the Appendix to the Civil Code;[186] Articles 56 of 1889 and 1940 Montevideo Treaties on Civil International Law).[187] The tribunal referred that the Mercosurian evolution on international jurisdiction does not attain transportation contracts.[188]

[184] Stringer, *supra*, n. 104, p. 987.

[185] [2000] Tribunal de Apelaciones en lo Civil de 4° Turno Ficha N° 204/1999, upholding [1999] Juzgado Letrado de Primera Instancia en lo Civil de 7° Turno Sentencia N° 1158, both cited by Fresnedo de Aguirre, *supra*, n. 177, pp. 238-239.

[186] Article 2401, Appendix to the Uruguayan Civil Code: "The judges of the state the law of which is applicable to international legal relationships are competent to decide the cases arisen from such relationships. If it is about patrimonial personal actions, these can also be filed, at the option of the plaintiff, before the judges of the country of domicile of the defendant."

Article 2403, Appendix to the Uruguayan Civil Code: see *supra*, n 123.

[187] Article 56, 1889 and 1940 Montevideo Treaties on Civil International Law: "Personal actions must be brought before the court of the place to whose law the juridical act object of the proceedings is subject. They could also be brought before the Judges of the domicile of the defendant."

[188] In effect, Article 2.7 of the Buenos Aires Protocol on International Jurisdiction in Contractual Matters excludes of its scope transportation contracts.

C. Different ways to look for legal certainty

The legal certainty party autonomy implies for the contracting parties[189] is nowadays essential for the development of international commerce, and especially in order to achieve a better insertion of Latin American countries in the global context. The states' fundamental interests must not be neglected,[190] but respecting public policy there should still be leeway left to companies and individuals for them to tailor their contractual relationships and choose the law to which they will be subject.

Beyond the field of international arbitration, whose particular private justice nature has allowed the parties to select the law applicable to solve a dispute, Latin America intra-regional and extra-regional trade would surely benefit if a uniformed or (at least) harmonized regulation expressly allowing the parties to choose the law of their international contracts (regardless of the selected forum) was adopted in all countries of this big area of the continent. In order to attain this goal different technical courses could be followed.[191]

We believe Latin American countries should make the most of the existence of a modern convention drafted within the regional framework of the Organization of American States. The Mexico City Convention being an international treaty, the first and most logical option is its general accession and ratification so that states assume the international obligation to apply it. Nevertheless, we must accept this seems rather improbable, considering that in its fifteen years of life the said convention has only been ratified by two states, the rest of the signatory states have not ratified it, and no other third state has accessed to it.[192] Other possibilities are the incorporation by reference, consisting of a global allusion to the convention by states' legislator,[193] the material incorporation of the convention's integral text to a national Act, and the use of the Mexico City Convention as a model law whose basic principles would be incorporated to a national Act. Eugenio Hernández-Bretón refers to the last method, which was followed by the Venezuelan legislator, explaining that the conventional provisions are not literally copied, but its principles are taken as a basis to set the internal regulation on international contracts; and the whole conventional provisions serve to

189 *Cf.* Fresnedo de Aguirre, *supra* n. 167, pp. 378-379.

190 See Fresnedo de Aguirre, *ibid*, pp. 383-384, showing that, even nowadays, sovereignty and national interests need to be defended, particularly those of small, developing countries (like, for instance, Uruguay). This leads her to conclude that rejecting party autonomy is the best way to achieve that defense.

191 The courses we propose coincide with those shown by Hernández-Bretón, *supra*, n. 9, pp. 184-187.

192 See *supra*, n., pp. 4-5.

193 Legislators could enact a rule stating that "International contracts are governed by the Inter-American Convention on the Law Applicable to International Contracts signed at Mexico City on 18 March 1994". See Hernández-Bretón, *supra*, n. 193, p. 186.

construe or to complement the internal regulation.[194] Supposing these last three courses are followed in several countries of the region, the solutions would tend to be unified and no international obligations for the states would have been created[195]. We consider that the technique of using the Mexico City Convention as a model law is more likely to be followed because its flexibility allows, if necessary, to adopt its text to each national legal culture.

[194] *Ibid*, p. 187.
[195] Because they would not have become parties to the Mexico City Convention. See *ibid*, p. 186.

Conclusion

In conclusion, party autonomy in international contracts —widely accepted in comparative law— is not so clearly received or is subject to serious restrictions, and is even rejected in some Latin American legal systems. But the resistance to this principle is being fissured by the accession to more liberal international treaties and, particularly, by the regulations on international arbitration. Although there are some options for the parties who have to face this uncertain scenario, we think the states should make the most of the existence of the Mexico City Convention in order to look for legal certainty by means of party autonomy. It's no longer tenable to allow for the parties' right to choose the law that shall govern their contract when they submit their dispute before an arbitral tribunal and to deny for it when they do it before a state's court.

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