

## CHAPTER III

GENERAL RULES ON PRIVATE INTERNATIONAL LAW  
IN THE AMERICAN COUNTRIES. COMPARATIVE LAW

From the commentaries of Acurcio (1228) up until the formulation of the early general problems of private international law in the 19th century<sup>100</sup>, more than 600 years elapsed during which time specific conflicts rules relating to various substantive areas of law became part of civil or commercial codes<sup>101</sup>. Nonetheless, general institutions of private international law normally have not been enacted, and, therefore, the discipline of private international law does not presently enjoy legislative autonomy.

In the Americas, the rules of private international law cannot be found in any single body of laws because the codes adopted throughout the hemisphere were enacted prior to the formulation of the general theory of private international law. It was only at the beginning of this century that a regional doctrinal trend, inspired by the worldwide achievement of scientific autonomy for private international law, began to develop in the Americas and sought solutions to the problems presented by the general institutions of this discipline. More recently, a number of judgments have accorded the value related institutions of private international law greater relevance by seeking due justice, rather than formal adjudication in each specific case<sup>102</sup>.

The Inter-American Convention on General Rules recognizes as fundamental this doctrinal and jurisprudential trend characterized by a growing deference for foreign law and for the individual interests related thereto. For that reason, before examining the regional convention, it is appropriate to consider the national legislation as an overview and threshold to the study of regional conventional law. This will permit a more adequate evaluation of the innovative role that the Convention may play through the consideration of some aspects of private international law which, thus far, have received scant attention in national legal systems.

In the first section of this chapter we shall examine the general framework of the national legal systems, in order to pinpoint similarities and differences. The second section will highlight the

treatment given to the general rules in a selected group of representative countries. Argentina, Brazil, Peru and Venezuela have been selected, among others, because they are the only countries of the hemisphere which have special draft laws on private international law. These will be examined in detail.

### *1. Domestic Private International Law*

#### *(a) General Framework*

There are four major groups of national conflict systems in the Americas. All owe their differences to doctrinal trends which prevailed at their inception during the 19th century. Doctrinal trends continue to influence the development of these systems by on the one hand, blending them in a coherent way, and on the other, accentuating their differences<sup>103</sup>.

The first group was inspired by the idea of Story: the Argentine code (1869), the Paraguayan code (1889) and the conflict of laws system of the United States<sup>104</sup>. The Bello doctrine exerted its influence, through the Chilean code (1855), on the codes of the following second group: Ecuador (1860 and 1950), Venezuela (1862)<sup>105</sup>. Nicaragua (1867), Uruguay (1868), Colombia (1873), El Salvador (1880), Honduras (1880 and 1906) and Panama (1916). Finally, Teixeira de Freitas' doctrine, which is reflected by the Brazilian civil code (1860), also projects its influence on the codes of Argentina and Paraguay. Unlike the others, the fourth group was not strongly influenced by the American publicists. It includes the codes of Bolivia (1831), Costa Rica (1841), Haiti (1825), Peru (1851), and the Dominican Republic (1845 and 1884), which adopted the Napoleonic Code, with some slight variations. The Mexican code (1870), which is also in this fourth group, adopted the legislative doctrine of the Spanish García Goyena draft. That draft proclaims the principles of the French statist school, although it bases personal status on nationality rather than domicile<sup>106</sup>.

It is therefore evident that the initial stage in the formulation of private international rules in the Americas was influenced by the doctrines of three jurists of our hemisphere: Joseph Story, Andrés Bello and Augusto Teixeira de Freitas. In recognizing their contributions, however, one must not overlook the elements which they borrowed from the great European masters, especially the universal-

ism of Savigny and the nationalism of Mancini, which exerted a significant influence on the codification process in the Americas in the last century. As Aguilar Navarro points out

“Savigny provided the technical formulas, the more appropriate juridical solutions, while Mancini instilled a political sense – liberal and national – to the provisions of the various bodies of laws<sup>107</sup>”.

Story, a justice of the United States Supreme Court, was a scholar of comparative law. In his works, which are devoted to the research and co-ordination of different legislation, he advocated the adoption of uniform laws, such as a uniform commercial law for federal courts of the United States. Many of his formulas on private international law were incorporated in the First and Second Restatements<sup>108</sup>. His most significant work in the field of private international law was *Commentaries on the Conflict of Laws, Foreign and Domestic*<sup>109</sup>. In this work, Story expounded upon the basic principles of his theories, particularly regarding contracts, marriage, succession and enforcement of foreign judgments. Story's thought was influenced by the statist schools, especially the Dutch school of Huber. An illustration of this is Story's statement that the laws of a country have *proprio vigore* power only in the territory of the State in which they originate.

Story's theory was that the basis for applying foreign law rests on international comity. His exposition replaced the rigid classification of personal, real and mixed statutes, with more flexible legal categories, such as: general principles, capacity of individuals, marriage, contracts, succession, jurisdiction, foreign judgments, etc. In so far as the status and capacity of individuals is concerned, Story followed the traditional statutory principle of domicile but, taking into account the requirements of international trade, he recognized certain exceptions such as the capacity to contract, which in his view was governed by the law where the legal act was executed. Story considered foreign law a question of fact, to be proven and applied on the basis of international comity, except where public policy mitigated against such application. With respect to property, he advocated the law of domicile of the owner of personal property and proclaimed the principle of *lex rex sitae* for real property.

Story's legal theories have had an influential effect not only in

the United States but also, as mentioned above, on some South American statutes, such as those of Argentina and Paraguay<sup>110</sup>. Dalmacio Vélez Sarsfield, author of the civil code of Argentina, recognized Story's work, *Commentaries on the Conflict of Laws*, as one of his sources of inspiration. Its influence on specific provisions of the code is evidenced not only in the explanatory notes which make direct reference to the *Commentaries*, but also in the language of the code which is a direct translation of principles contained in the *Commentaries*. When Paraguay adopted the Argentine civil code in 1889, Story's doctrine spread to that country. Hence, the conflicts legislation of these two countries coincide in many respects with the conflicts system of the United States<sup>111</sup>.

The legal theories of Andrés Bello are reflected in the Chilean civil code of 1855 — of which he is the author — and in the laws of Central America and some laws of South America. The most salient characteristics of Bello's theories are: equal treatment of nationals and foreigners regarding the acquisition and enjoyment of civil rights, a principle thus proclaimed for the first time in a body of civil laws; the territorial application of the law to all inhabitants of the republic, including foreigners; the application of the *lex fori* — even to Chileans residing abroad — in all matters relating to status and capacity to execute acts producing effects in Chile; the application of Chilean law to nationals in matters related to family law; subjection of property located in Chile to the *lex situ* and subjection of the extrinsic formalities of acts to local law<sup>112</sup>.

Augusto Teixeira de Freitas is the author of the first draft of the Brazilian code. His work reflects Savigny's doctrine of the juridical community, for which he is called the "American Savigny". With respect to private international law, Freitas formulated a novel system, which includes formulas of conflict of laws in both the general and special parts of the draft<sup>113</sup>. In the preliminary title he established the general principles on application of foreign law and public policy, and in the special part, along with each specific subject, the pertinent conflict rules<sup>114</sup>.

Among Freitas' most important formulations is the principle which prohibits application of a law beyond the limits of the territory or with retroactive effect. In the special part, Freitas formulated the following solutions: with respect to personal status he adopted the principle of domicile, but distinguished between *de facto* and *de jure* capacity, subjecting the former to the law of the

domicile and the latter to the *lex fori*; he also distinguished between real property (governed by the real statute) and personal property (governed by the personal statute); the principle *locus regit actum* regulates matters relating to legal acts; marriage is governed by the *lex loci* except for its dissolution, which is governed by the *lex fori*; and in contractual matters, the applicable law is that of the place of performance<sup>115</sup>.

Freitas' work has been the cornerstone of subsequent Brazilian doctrine and legislation. His theories nourished the draft civil code prepared by Clovis Bevilacqua which, in spirit, reflects Freitas' draft (*Esbozo*) as does the Argentine civil code.

#### (b) *Common Characteristics*

The influence of the doctrinal trends outlined above on private international law in the Americas has led to the coexistence of different private international law systems. Accordingly, the comparative method is particularly useful for identifying the formal and substantive characteristics which are common to those systems. Those characteristics are as follows: (i) the scattering of the rules of private international law in civil code systems, throughout constitutions, immigration laws, procedural and substantive codes, and laws concerning specific subjects, and in some cases, the inclusion of certain fundamental rules in the preliminary title of the civil code; (ii) the pervasiveness of contradictory legal doctrines together with the resulting fragmentation of theoretical structure; (iii) the existence of gaps in the general rules and rules applying to specific substantive areas; (iv) the predominance of the territorialist principle. These characteristics are discussed more fully below in relation to several representative countries.

(i) The lack of structure and systematization of rules may be observed in the case of the Argentine legislation where the rules of private international law are "scattered throughout the Argentine civil code"<sup>116</sup>. Many of the rules are found in the law on civil marriage<sup>117</sup>, in the law on corporations<sup>118</sup>, the bankruptcy law<sup>119</sup>, the copyright law<sup>120</sup>, and the law on trade-marks and trade-names, etc.<sup>121</sup>

The basic rules of private international law of Brazil are found in the introductory law of its civil code<sup>122</sup> and special provisions in other titles of its civil and commercial codes. Other rules are scattered throughout the bankruptcy law, the procedural code (on

competence, recognition of foreign judgments, etc.), and of course in the federal Constitution which covers in general terms the legal status of foreigners.

In Venezuela the rules of private international law may be found in the preliminary title of its civil code<sup>123</sup> and in other chapters thereof concerning marriage, succession, etc. The code of civil procedure determines the hierarchy of the sources of private international law<sup>124</sup>. Moreover, the commercial code contains provisions on: commercial contracts made abroad<sup>125</sup>, foreign corporations<sup>126</sup>, and conflict of laws concerning bills of exchange<sup>127</sup>, to name only the most important ones. Finally, the special laws, such as those on naturalization, copyright, and adoption, contain rules on private international law.

(ii) The fragmentation of the theoretical structure of private international law in the national legal systems is evident in the Argentine and Brazilian legislation. In the Argentine case, it is due to the diversity of sources from which the law originated. These included: the *comitas gentium* of the Dutch school, which reached the Argentine code through Story, and has particularly influenced the general part; and legal internationalism, which was due to the influence of Savigny and Freitas.

With respect to Brazilian legislation, Haroldo Valladão asserts that since the imperial era, Brazilian laws have been inspired by the statist school<sup>128</sup>. During the era of the republic and prior to the codification of rules of 1916, Brazilian doctrine was influenced by the Italo-Franco-Belgian school as reflected by the first law of introduction to the civil code (1916)<sup>129</sup>. The most outstanding feature of the new introductory law enacted in 1942 was the substitution of domicile as a connecting factor for that of nationality. This change worked in a mechanical way with an absolute disregard for the ensuing construction to the extent that Valladão, in referring to the law of 1942, remarked that "it broke with the legal tradition of Brazil"<sup>130</sup>. For this reason, Brazil amended various provisions of the 1942 law in 1957.

Although in Venezuela the influence of several doctrinal trends – statist, Bello, the Napoleonic Code and the Italian school nationality principle – have theoretically been integrated into a consistent system of private international law, in practice, this system has not been implemented due to the routine application of the *lex fori*. The tendency to apply *lex fori* is due to doctrinal

reasons, juridical “isolation”, difficulties in ascertaining the content and scope of foreign law and, above all, the literal interpretation of a specific rule of the civil code, a legacy from Bello – which seems to necessarily subject all inhabitants of the republic to the laws of Venezuela<sup>131</sup>. Also contributing to the territorialist tendency is the use of “nationality” as the personal connecting factor, which is inappropriate for a country with heavy immigration<sup>132</sup>.

(iii) The Argentine, Brazilian and Venezuelan legislation do not contain any provisions establishing general rules for some of the areas which make up private international law: characterization, renvoi, preliminary or incidental question and fraud on the law.

(iv) The predominance of the territorialist principle will be treated at length in the analysis which follows later regarding the application of foreign law under national legislation<sup>133</sup>.

### (c) *Latin American Draft Laws*

Both the desire to overcome the above-described situation, and European national views on the codification of private international law have generated within American nations an interest in adopting special laws for this subject area. This interest has been motivated by the desire to establish a legislative structure which contains precise rules, a hierarchy for their application, and principles of construction. The systematization of rules into a legislative structure is the index of legislative autonomy for a legal discipline. Achievement of such a structure for private international law will facilitate legislation of general rules and provide unity and identity to the discipline. Moreover, it will permit abandonment of parochial domestic legislation and foster progressive worldwide codification of private international law.

#### *Argentine draft*

A draft code was approved by the Argentine Ministry of Justice in 1974. This draft code is composed of a national statute on private international law and another on international procedural law for federal and territorial courts provided under the federal structure of Argentina<sup>134</sup>.

The draft code regulates the general institutions of private international law. Concerning the nature of foreign law, the traditional position is followed, but the judge is obliged to apply it *ex officio*

— theory of the notorious fact —; the issue of characterization is guided mainly by Despagnet's theory; the preliminary question is handled by means of the equivalency theory; as to public policy, the draft code follows the most modern doctrine under which it is an exception to be applied restrictively.

As for the special part of private international law, particular mention should be made of provisions which: create a mechanism for the control of transnational enterprises; proclaim the autonomy of the parties in contractual matters; admit international jurisdiction on patrimonial matters; subject succession to the law of the last domicile of the decedent (regardless of the nature and location of the estate). It also governs institutions of family law such as marriage (*lex loci celebrationis* in matters relating to capacity, formalities and validity of the act), law of conjugal domicile (in patrimonial matters), paternity, adoption, parental authority, and guardianship (which is generally subject to the law of the domicile of the interested parties). It should be noted that none of these items has been regulated by the civil code.

For its part, the federal civil and commercial procedural law established special courts for cases involving foreign elements. It provides, among other articles, that the *exequatur* proceeding shall be required only for the enforcement of judgments, thus distinguishing between recognition and enforcement.

### *Brazilian draft*

In 1974, the legislature of Brazil approved as a draft a code on the application of legal rules<sup>135</sup>. The instrument is divided into six chapters, of which Chapters III and IV are devoted to private international law.

The general part provides for the *ex officio* application of foreign law. It adopts the principles of domicile and nationality, each of which is applicable according to the legal issue in question in order to ensure more flexible solutions. The draft recognizes rights acquired in good faith abroad, save where the public policy exception comes into play. It provides for application of the public policy exception when the national sovereignty, equity, good morals or customs are offended. The draft also provides for the regulation of adaptation.

As for the special part, the draft establishes that property is governed by the law of the place of the situs and extends the principle

of party autonomy to all obligations. Included as topics are recognition and enforcement of foreign judgments; succession (law of domicile except in the case of estates in abeyance, which are subject to Brazilian law); and negotiable instruments (capacity is subject to the national law or to the law of the competent domicile).

#### *Peruvian draft*

In Peru, a draft civil code was prepared in 1974 which included in its preliminary title general rules of private international law<sup>136</sup> with the intent of "achieving the objectives of justice and legal certainty in conformity with the social and economic realities of Peru". Concerning the general rules, it prescribes the *ex officio* application of foreign law; characterization is governed by the *lex fori*; and renvoi is rejected by restricting the judge to applying the substantive rule of the foreign law (minimum reference). The draft provides that foreign law may not be applied when the outcome would be incompatible with public policy or with good customs. It adopts the principle of vested rights as limited by the public policy exception. Under the draft, no effect is given to a relationship created through a deliberate avoidance of mandatory provisions of Peruvian law (restrictive theory of fraud on the law).

With respect to the special part, the draft replaces the principle of nationality with the principle that the status and capacity of individuals are governed by the law of the domicile. The existence and capacity of a corporation are governed by the law of the place of incorporation, but in no case may foreign corporations enjoy greater rights than those granted by Peruvian law to domestic corporations. All matters relating to the broad category of family law are governed by various connecting factors, the prevailing one being domicile. The *lex rex sitae* is applied only in the case of realty, and the formalities of legal acts are governed by two alternative factors of connection: the law of the place of execution, or the law which regulates the subject-matter of the act. The law applicable to succession is that of the last domicile of the decedent, regardless of the location of the estate.

#### *Venezuelan draft*

A draft law on rules of private international law was prepared in Venezuela in 1963 and was slightly modified in 1965<sup>137</sup>. This draft, as its authors explain, seeks to correct the deep-rooted territorialism

of Venezuelan courts. The first chapter, which is devoted to the treatment of the aspects comprising the general part, provides for a system of sources of private international law, general principles among them, and clearly states that internal law determines the application of foreign law. It also recognizes equal treatment of foreign and national law, and establishes that the former must be applied consistently with the objectives of Venezuelan private international law. Although the characterization issue "has been deliberately avoided"<sup>138</sup>, the rule adopted on the nature and effects of foreign law could, according to some authors<sup>139</sup>, permit autonomous characterization.

*Renvoi* is limited to the determination of the law of the referent State, that is, if it refers back to the forum, the substantive law of the State indicated by the Venezuelan rule is applied. Public policy is conceived as an exception to be used restrictively. The notion of legitimately acquired rights is translated into a liberal formula which, while protecting national interests, nevertheless favours foreign law.

The draft adopts domicile as the connecting factor in matters pertaining to status, capacity, family and succession, and replaces the nationality factor included in the civil code. This is an important contribution to the harmonization of laws. The domicile concept, as set forth in the draft, embodies Rabel's notion of "improved domicile" in providing that change of domicile has legal effect only after one year has elapsed<sup>140</sup>.

Topics relating to family law, contracts and contractual liabilities, as well as some topics relative to international procedural law are covered in the special part. Undoubtedly, the application of domicile as the connecting factor has modified, in so far as the civil code is concerned, everything pertaining to the regulation of persons, family and succession. Thus, for example, in connection with the law on paternity, the rule contained in Article 25 is an innovation if we consider that the relationship between parents and children is governed by the law of the domicile of the child, which is also applied to all aspects of the relationship, regardless of whether the children are legitimate, natural, or adopted. Regarding the regulation of obligations and contracts, the principle of the autonomy of the parties governs, together with a rule which permits an adaptation of the principle in each specific case.

As regards legal acts, the draft law adopts the general principle

*locus regit actum* as an optional feature to prevent the annulment of the act because of failure to observe formal requirements.

(d) *Conflict of Laws in the United States*

Conflict of laws problems have traditionally played a special role in the United States due to the federal system in which interstate private cases abound. As there are few statutes on private international law, case law has been the principal source of law on the subject. In an effort to identify and unify the rules of the common law, the American Law Institute produced and published the Restatement of Conflict of Laws ("First Restatement") in 1934 and the Restatement Second in 1971. Among the topics treated in the Restatements are: domicile, jurisdiction, recognition of judgments and choice of law. Although the Restatement does not enjoy the force of law, it is cited by the courts as doctrine and as a reflection of the case law and practice in the United States<sup>141</sup>.

The First Restatement is characterized by a series of rigid black letter rules. For example, in the area of choice of law, the vested rights analysis or the so-called *Bealian theory* predominated. That theory holds that "although no law can have any force beyond the boundaries of the States of its enactment, a court will enforce rights that have vested elsewhere"<sup>142</sup>.

The Restatement Second, which almost entirely reworked the original, reflects the drastic changes in the areas of jurisdiction of the courts, as well as many changes in the area of choice of law<sup>143</sup>. Generally, the Restatement Second adopts standards that are more flexible than those contained in the first Restatement. For example, the vested rights approach to choice of law is replaced by the most significant contacts theory, which provides that rights and liabilities with respect to a certain issue will be determined by the local law of the state which has the "most significant relationship" to the occurrence and to the parties. Implementation of this weighing policy requires consideration of the following factors:

- (a) needs of interstate and international systems,
- (b) the relevant policies of the forum,
- (c) relevant policies of other interested states,
- (d) protection of justified expectations,
- (e) basic policies underlying a particular field of law,
- (f) certainty, predictability and uniformity of results, and

(g) ease in the determination and application of the law to be applied<sup>144</sup>.

Also with respect to choice of law, the Restatement Second recognizes the power of the parties to choose the governing law, whereas the original Restatement did not.

Whether the Restatement has an international scope is subject to debate. Ehrenzweig has criticized United States doctrine on conflict of laws as being generally limited to interstate law. He has further asserted that the Restatement is irrelevant to international conflict cases, and has indicated a preference for separate treatment of international and interstate conflicts. Referring to the Restatement as an "unworkable hybrid", which has only served to do a disservice to both types of conflict situations, he professed his regret that "[a]n interstate law in international garb has thus produced the image of a unitary American conflicts law applicable to both types of conflicts"<sup>145</sup>.

Although the Restatement seems to be limited to interstate conflicts, the American Law Institute expressly claimed that the principles therein would apply to international conflicts problems. Section 10 of the Restatement Second states:

"The Rules in the Restatement of this subject apply to cases with elements in one or more states of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case"<sup>146</sup>.

The comments to this section point out that for resolving choice-of-law problems, United States courts and writers have not made any distinction between international and interstate conflicts. This, however, does not imply that the results of both types of cases will be the same. After all, the forum may be more reluctant to apply the law of a foreign nation, which contains radically different standards and ideals than to apply the more similar local law of a sister state.

Criticism of another nature has been levelled against the Restatement. First, it has been claimed that the area of conflicts of law does not lend itself to a Restatement because of the difficulty of arriving at certainty in choice-of-law rules. Second, there appears to

be disagreement on the underlying principles in the area of choice of law. Cavers<sup>147</sup> and Ehrenzweig oppose the flexible approach utilized – the former feeling that there are “vast areas where settled case law should preclude theory from advancing general postulate”<sup>148</sup>. Reese, the Reporter for the Restatement Second, also acknowledges the limitations of the broad and flexible rules contained in the Restatement, but he is optimistic that the future will see a consensus in the area of choice of law<sup>149</sup>.

Notwithstanding this criticism, the Restatement represents a great step forward in the process of development of private international law. Indeed, it has provided a basis for a rapprochement between the common and civil law systems in the hemisphere. Furthermore, Professor Reese is to be commended for his excellent work in a very complex area of law.

The development of private international law in the United States has not been foreign to the process of inter-American codification, particularly as regards its new stage. The drafts presented to the two Inter-American Specialized Conferences on Private International Law, along with the preparatory documents, as well as the actual discussions at the Conferences, reveal the serious effort made to bring about a rapprochement of two apparently very different systems, which is one of the objectives of the present process of codification of private international law in the Americas.

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The foregoing discussion reveals that the process of formulating the rules of private international law in the American countries has been in progress for a long period of time and has only recently overcome the deficiencies of the national systems. In fact, spurred on by advances in doctrine and jurisprudence, a movement has arisen, whose most significant products are draft special laws, which furnish private international law with the necessary legislative autonomy. The drafts reflect progress in correcting the distortions brought about by the lack of consolidated rules of private international law, the fractured theoretical structure of the national systems as well as by the existing gaps in the law. The advances in doctrine and jurisprudence have also contributed to the erosion of the excessively preponderant territorialist principle, so dear to the legislators and decision-makers of the Americas. This may be

clearly seen in the discussion which follows regarding the application of foreign law.

## *2. General Rules: Legislation, Doctrine and Jurisprudence*

### *(a) Acceptance and Application of Foreign Law*

The interrelationship among the aspects of the general part of private international law acquires a dynamic quality whenever there is an interplay of different legal systems with respect to an issue. This gives rise to one of the chapters of wider scope which examines the legal likelihood of applying foreign rules.

#### *The Nature of Foreign Law*

The extraterritoriality of the law has been favoured by the evolution of international relations, which progressively have imposed on the State the need to apply foreign law. This situation raises two questions for the judge: one concerning the nature of the law applied in a State other than the one which enacted it; the other, concerning the situations in which it is to be applied.

The first question may be addressed from different viewpoints, depending on the doctrinal position adopted. According to the traditional theory, foreign law is considered a question of fact subject to proof by the party relying on it. Modern theories consider it a question of law and, therefore, its application is not the subject of proof. Other eclectic theories assign it the character of notorious fact, which, as such, does not require proof.

The second question arises when the connecting factors contained in the rules of private international law designate the applicability of foreign law. By and large, the early codes in the Americas did not contain any provisions regarding the application of foreign law. Those adopted in the last decades of the 19th century, for the most part, supported the traditional theory, while the modern formula is only found in a few codes and in the special drafts to be analyzed in the following sections. The most effective formulas for the application of foreign law have evolved from doctrine and jurisprudence.

The Argentine civil code is the first in Latin America to adopt explicit rules. Article 13 provides:

“The application of foreign law, in cases authorized by this

code, shall never take place except at the request of the interested party who shall have the burden of proof concerning the existence of such law. Foreign laws which become mandatory within the Republic through diplomatic conventions or by virtue of a special law are excepted<sup>150</sup>.”

The second sentence of Article 13 has not been subject to diverse interpretations and is applicable to conflicts of laws arising between Argentina and any other country signatory to the Montevideo Treaties<sup>151</sup>. In so far as the first sentence is concerned however, the doctrine is not uniform. Some commentators<sup>152</sup> lean towards the traditional formula and, in supporting it, rely on the footnote to Article 13, in which the codifier, Vélez Sarsfield, following Freitas and Story, opts for treating foreign law as a factual question<sup>153</sup>. Other jurists, such as Lafaille and Salvat, have remarked on the need for a substantial amendment to Article 13, and have suggested a provision requiring equal treatment of the foreign law<sup>154</sup>. Finally, other authors, including Carlos Lezcano, restrictively construe Article 13, sustaining that the rule only refers to instances in which the civil code “authorizes” the application of foreign law by virtue of the principle of the autonomy of the parties, but not to those cases in which the civil code compels such application<sup>155</sup> as, for example, in the case of Article 7, which stipulates that: “The capacity of a person domiciled outside of the republic shall be governed by the foreign law of his domicile.”

Part of the doctrine sustains that the theory considering foreign law a question of fact is obsolete. This position is followed by Werner Goldschmidt who affirms that foreign law constitutes a notorious fact, that is to say, “a fact about which every one can take notice in an authentic way” adding that “the judge should do so officially notwithstanding the right of the parties to allege it and submit all the evidence that they may deem appropriate”<sup>156</sup>. Goldschmidt’s position prevailed both in the Argentine Workshop on International Law and Relations, sponsored by the University of Belgrano in 1971, which recommended the *ex officio* application of the competent foreign law, as well as in the draft code of private international law which refers to the legal nature of the foreign law<sup>157</sup>.

Some judicial decisions reflect the theory that foreign law is a fact requiring proof. Argentine jurisprudence goes back to a judg-

ment dated 24 July 1894, in which the court denied the application of foreign law on the grounds that it had not been pleaded and proven, thus applying the *lex fori* as an alternative to govern the disputed legal issue<sup>158</sup>. Subsequently, the Supreme Court has rendered decisions on numerous occasions in accordance with a literal interpretation of Article 13, affirming that: "foreign law is a fact subject to proof, mainly by submitting its text and thereafter by proof of its being in force"<sup>159</sup>.

Recent judgments evince the influence of the "legal usage" theory. There are still, however, decisions that construe Article 13 in a restrictive sense<sup>160</sup>.

In Brazil, the early codes, following the orientation of the ordinances of Portugal and the doctrine of Freitas<sup>161</sup>, considered "foreign law as a mere fact to be pleaded and proven"<sup>162</sup>. More recently adopted codes provide that the foreign law must be proven only when the judge lacks knowledge of it<sup>163</sup>. Haroldo Valladão had explained that this modern approach to foreign law is based on the principle of equality before the law between foreigners and nationals<sup>164</sup>.

Brazil ratified the Bustamante Code, which provides for the *ex officio* application of foreign law<sup>165</sup>. This multilateral instrument was influential in the adoption of a uniform doctrine which has favoured and fostered the *ex officio* application of foreign law by the courts<sup>166</sup>. This trend is reflected in the draft code on the application of legal rules<sup>167</sup>.

The civil code of Chile does not contain any rule relative to the application of foreign law<sup>168</sup>. For this reason, doctrinal writings and judicial precedents are quite relevant concerning the treatment of foreign law.

Some authors, basing their opinion on Article 41, which admits the testimony of experts as competent proof of foreign law, sustain that foreign law is an issue of fact. They base this view on the opinion of one of the draftsmen of the code, José B. Lira, who affirmed that since foreign law "is not found in the codes and its existence is not known to the judge, it is necessary to prove that it exists for it to be applied"<sup>169</sup>. On the other hand, there are writers who, in supporting a more modern formula, consider that "the assertion that foreign law is a fact of the case subject to proof places the parties on a level of absolute denial of justice"<sup>170</sup>.

In so far as the jurisprudence is concerned, in 1908 the Court of

Valparaiso upheld the application of foreign law, holding that the validity of a contract entered into abroad should be determined in accordance with the principles of private international law. More recently, the Court of Appeals for Santiago held that foreign law should be applied in order to determine whether a marriage is valid or null "in spite of the failure to allege it in the pleadings"<sup>171</sup>.

The Chilean civil code is closely followed by Ecuador and El Salvador, whose codes similarly do not contain provisions concerning the application of foreign law. Ecuador has signed a treaty on Private International Law with Colombia<sup>172</sup>, which established the need to prove the foreign law invoked<sup>173</sup>. Also, Ecuador has ratified the Bustamante Code, which provides for the *ex officio* application of the foreign law.

A different view is followed in Mexican legislation which considers foreign law a question of law, but nevertheless requires proof for its application. Article 86 of the federal code of civil procedures provides that:

"Only facts are subject to proof; law is so subject only when referring to foreign laws or to usages, customs or jurisprudence."

Those who support the *ex officio* application of foreign law invoke Article 79 of the federal code of civil procedures affirming that the judge has authority to obtain notice independently of the foreign law since, according to this article,

"the judge can avail himself of any person, whether a party or a third person, and of any thing or document . . . without limitations, in matters of proof, other than the ones established with respect to the parties".

With respect to the doctrine, Carlos Arellano García asserts that foreign law "consists of true legal rules since they are rules of bilateral external conduct which are enforceable"<sup>174</sup>. Mexico's jurisprudence sustains that "the laws of the states of the Republic are not foreign law and therefore anyone who bases his entitlement on laws enacted in another state of the Republic is not bound to prove their existence". From this statement, it may be inferred that proof of foreign law is required. Mexico's courts have held repeatedly that the interested party must prove foreign law and that otherwise the local law is to apply<sup>175</sup>.

The provisions of the Peruvian civil code are not explicit with regard to the application of foreign law, but from the harmonious interplay of the code's articles<sup>176</sup>, it may be inferred that even though the parties may plead foreign law, only the judge is authorized to obtain proof of such law. The jurisprudence supports this view by stating that foreign law is a fact, which prevents its *ex officio* application, and requires, therefore, that it be pleaded and proven<sup>177</sup>.

The draft on Rules of Private International Law reflects the doctrinal progress concerning this subject. Certain articles of the above-mentioned instrument deal specifically with the application of foreign law and provide for its *ex officio* application, notwithstanding any evidence that the parties may submit or request from the trial judge<sup>178</sup>.

In Uruguay, the *ex officio* application of the foreign rule is positive law under Article 2 of both protocols to the Montevideo Treaties<sup>179</sup>. Similarly, the doctrine provides that whenever a conflict rule orders a judge to apply foreign law, he must do so regardless of whether the parties plead it or not.

According to Quintín Alfonsín (followed by the majority doctrine in Uruguay), foreign law acquires validity in a specific case when the conflict rule indicates that it is applicable<sup>180</sup>. In referring to the judicial practice, he stated that

“we see judges who inquire *ex officio* as to foreign law and judges who receive proof from the parties, if they produce it spontaneously . . . Judges always give a liberal weight to the offers of proof of foreign law, comparing them often with their own information”<sup>181</sup>.

In Venezuela, Article 8 of the civil code provides as follows: “The authority of the law extends to all national and foreign persons within the Republic.” This provision was included in the code of 1862 and a similar formula appears in all the versions of that instrument, including the one currently in force. It has been clearly influenced by the Chilean code of 1855 drafted by Andrés Bello, an advocate of the doctrine of territoriality of law and for whom the *lex fori* was always applicable in the absence of any clear and categorical legislative mandate to the contrary. The clear preponderance given to the Venezuelan law, and the resulting restrictive application of foreign law, determined that the latter be considered

as a fact, although there was no specific rule on this point<sup>182</sup>. On this basis, writers such as Herrera Mendoza, sustained that the compulsion to apply the foreign law derives not from its nature but from the duty to administer justice<sup>183</sup>.

With the ratification of the Bustamante Code in 1931, new theories began to take shape. In fact, Article 412 of the Bustamante Code (to which no reservations were made) provides for the *ex officio* application of the foreign law and makes the appeal for annulment available in cases of violation of the competent foreign law. This position was accepted both by the doctrine and the jurisprudence and was incorporated in the 1963 draft law on rules of international law, which expressly provides that the competent foreign law is to receive equal treatment with the national law<sup>184</sup>. Venezuelan jurisprudence contains important decisions<sup>185</sup> in which the judge applied *ex officio* foreign law, holding that such application was possible even with respect to non-signatory countries of the Bustamante Code by virtue of private international law principles generally accepted by Venezuela<sup>186</sup>.

The common law rule traditionally recognized in the United States was that foreign law, both sister state and foreign country law, was a fact to be proved by expert testimony<sup>187</sup>. Eventually, the rule was modified in many states by special judicial notice statutes, and in 1966, a federal procedural rule on the determination of foreign law was enacted, which also substantially modified treatment of foreign law in the federal courts.

As a reflection of the case law and practice in the United States, section 136 of the Restatement Second of Conflict of Laws<sup>188</sup>, entitled "Notice and Proof of Foreign Law", provides as follows:

- "(1) The local law of the forum determines the need to give notice of reliance on foreign law, the form of notice and the effect of a failure to give such notice.
- (2) The local law of the forum determines how the content of foreign law is to be shown and the effect of a failure to show such content."

The comments which follow the rule provide illustrations of the scope and application of the rule and point out that the local law of the forum will determine: the method of giving notice; the effect of failure to give notice; methods of providing information as to the content of foreign law; whether a question of foreign law

shall be decided by the court or by the jury; burden of proof and the effect of failure to provide information as to the content of the applicable foreign law.

A minority of jurisdictions in the United States still adhere to the common law rule that foreign law should be treated as a fact. The rule first appeared in a decision issued by Lord Mansfield in 1774<sup>189</sup>, and was later applied by the United States Supreme Court speaking through Chief Justice Marshall in 1804<sup>190</sup>. The rationale for this rule is that on a question of domestic law, the judge is expected to know the rule or conduct his own research to make an informed conclusion. However, this is not the case for rules of foreign law, sources of which may not be available, or if they are available, are in a foreign language, or are part of a different legal system<sup>191</sup>. For these reasons, there is no presumption of knowledge of the law; therefore, it must be treated as a fact, and adduced pleadings and the evidence.

The common law rule was explained in *Fitzpatrick v. Int'l Ry. Co.*<sup>192</sup>, in which the Court of Appeals distinguished the role of the court and that of the jury as follows:

“When it becomes necessary to establish the law of a foreign country it must be proved as facts are proven, but when, after such proof is given, the questions involved depend upon the construction and effect of a Statute or judicial opinion, those questions generally are for the court and not questions of fact at all.”

This common law rule was criticized on the basis that foreign law materials were becoming available in many libraries across the country, and that even if knowledge of the law was not to be presumed, it was questionable whether all the complex rules of evidence and the restrictions of pleading and proving facts should be applicable. Furthermore, the question arose as to whether the jury is the appropriate body to determine questions of foreign law<sup>193</sup>. Difficulties were also created by the fact that under this approach, judicial review of determinations of foreign law was very limited. Generally, in jury cases, the appellate court was limited to reviewing the lower court's rulings on law. In non-jury cases the higher court's power to review the findings of foreign law made by the trial judge was limited to the power it had to re-examine the trial judge's findings of fact.

Problems of this nature gave rise to statutory reforms in many jurisdictions, including California, New York and the federal courts. Rule 44.1 of the Federal Rules of Civil Procedure, the amended version of which went into effect in 1975, was referred to by one of its draftsmen as the “death-knell” for the traditional “fact doctrine”<sup>194</sup>. The Rule is as follows:

“A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court determination shall be treated as a ruling on a question of law<sup>195</sup>.”

It may be noted that Rule 44.1 eliminates the pleading requirement as the party need only give reasonable written notice, which may be outside of the pleadings. With respect to the timing of the notice, from the standpoint of when it ceases to be reasonable, the Advisory Committee suggested that the following factors be considered: the stage reached by the case at the time of notice; the reason for failure to give earlier notice; and the importance to the case as a whole of the issue of foreign law sought to be raised<sup>196</sup>.

The Rule gives the court discretion to determine foreign law without regard to the formalities of the exclusionary rules of evidence and does not limit the court to the material presented by the parties. Hence, it permits the judge to engage in independent research. However, it should be noted that the judge is not obliged to engage in such research. According to Schlesinger<sup>197</sup>, a well-known federal trial judge revealed that judges generally will not conduct such research. Sass confirms this by pointing out that there are only three reported district court cases in which such independent research was conducted<sup>198</sup>. In *Bartsch v. Metro-Goldwyn Mayer, Inc.*<sup>199</sup>, for example, the court, in referring to Rule 44.1, noted that independent research was authorized but was not required “in the absence of any suggestion that such course will be fruitful or any help from the parties”.

Sass has discussed the hybrid character of foreign law as treated under Rule 44.1. He notes:

“As is apparent from its tenor, Rule 44.1 provides for a

treatment of foreign law different from that of fact. On the other hand, the treatment of foreign law under the Rule is different from that of domestic law, in that there is no notice requirement for raising an issue of domestic law and the court cannot, under any circumstances, deny judicial notice to the applicable domestic law. Thus, under Rule 44.1, foreign law is a mixture of fact and law. Indeed, foreign law is a *tertium genus*, a third category, between fact and law<sup>200</sup>.”

This hybrid character permits appellate courts to apply to decisions taken under Rule 44.1 a broader standard of review than the “clearly erroneous” standard of Rule 52 (*a*) applied prior to adoption of Rule 44.1.

Most States now have statutes which allow courts to take judicial notice of the law of other countries, while generally not making such judicial notice mandatory. The comments to Section 136 of the Restatement point out that the principal advantage of a judicial notice statute is that it “permits the parties in their briefs and oral arguments to refer to material regarding the foreign law that has not been formally introduced into evidence”<sup>201</sup>.

Federal Rule 44.1 has served as a model for statutes in over 20 states. Many states have adopted rules almost identical to Federal Rule 44.1<sup>202</sup>. Other states, including Florida, Kansas, Nevada and New Jersey, have adopted judicial notice statutes similar to the New York-California variety. For example, Rule 4511 of the New York Civil Practice Law and Rules provides, in pertinent part:

“Every court may take judicial notice without request of . . . the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.”

Another section of Rule 4511 provides that in reviewing cases involving findings on foreign law, appellate courts shall treat those questions as questions of law rather than of fact. The Rule further provides that courts, in treating questions of foreign law “may

consider any testimony, document, information, or argument on the subject whether offered by a party or discovered through its own resources". All determinations in this regard are made by the court.

Under Rule 4511, the decision to take judicial notice is discretionary if the party relying on foreign law fails to give proper notice or sufficient information. If the judge declines to take judicial notice, he will treat the foreign law as an issue of fact.

There are occasions in the United States when the forum will apply its own local law, such as when neither party refers to foreign law or when reference is made, but no information or insufficient information is provided, unless to do so would not be in the interests of justice, as when the parties relied on the foreign law in planning their transaction. In such cases, the court might rely on a fiction such as that the parties have acquiesced in the application of the local law<sup>203</sup> or claim that it is applying a fundamental principle of law that exists in all civilized countries, or rely on the presumption that the foreign law is the same as the forum law, particularly when it is from a common law country.

\* \* \*

The review of the legislation in force in the Americas and the analysis of the doctrine and the jurisprudence allow the formulation of some final conclusions. First, the absence of legal regulations has emphasized the role of doctrine and jurisprudence. This assertion is valid, not only with respect to the common law systems on the basis of their *stare decisis*, but to the civil law systems as well, in which the creative role of the judge, even within a limited extent, has been decisive for the determination, application and construction of the foreign law. Second, foreign law still has limited application, but it is also true that there is a growing doctrinal and jurisprudential trend favouring the treatment of foreign law on an equal footing with the domestic law<sup>204</sup>. And finally, private international law, as a structurally unified discipline, provides, in its general part, guiding rules for the application of characterization, renvoi, preliminary or incidental question, public policy, fraud on the law, adaptation, and vested rights, the seven so-called "institutions" or aspects of private international law. All of those institutions derive from problems arising out of the application of foreign

law and all are affected by the interaction of a plurality of coexisting legal systems. Both public policy and fraud of the law constitute real limitations to the extraterritorial application of foreign law. The institutions of adaptation and vested rights involve subjective or evaluative determinations. The remainder of this chapter reviews the treatment accorded each of those institutions by the statutes, jurisprudence, and doctrine of the Americas<sup>205</sup>.

(b) *Characterization*

Characterization is the interpretation and application of the rules of private international law. It involves the process of defining a given legal situation in order to relate that situation to a legal category. Characterization is indispensable – and therein lies its importance – both in relation to the factual basis of a private international law case and with respect to the connecting factor of the private international law rule.

The characterization process precedes the designation of the applicable law. Its purpose is to determine the competent law used to define or interpret the legal concepts and categories contained in the applicable conflicts rules. Given that national legal systems have their own legal categories, it is common to find that identical legal relationships are frequently characterized differently, giving rise to what Bartin calls a characterization conflict<sup>206</sup>. In this connection, there are doctrinal discrepancies on whether the *lex fori*, the *lex causae* or the process of autonomous characterization should apply in resolving characterization problems.

The scientific study of characterization dates back to 1891 when Kahn postulated the existence of three types of conflicts: those arising from the laws of different legal systems; those resulting from different definitions of the same connecting factors; and those deriving from differences in the territorial nature of legal relationships<sup>207</sup>. According to Kahn, it was the latter type of conflict that gave rise to the characterization process, since conflict rules depend upon the nature of legal relationships, which differ from State to State.

In the years following publication of Kahn's expositions, the commentators developed three major approaches to the characterization process. Bartin expounded the theory of *lex fori* which states that the concepts and categories contained in a conflicts rule

must be defined in accordance with the substantive law of the forum. Despagnet advanced the theory that the *lex causae* should govern the definition of concepts and categories in the conflicts rules. Finally, Rabel, in 1931, proposed the theory of autonomous characterization, which provides that the concepts and categories in conflicts rules must be defined to the extent feasible under principles of private international law<sup>208</sup>. Goldschmidt has explained the application of the theory of autonomous characterization by way of example. In order to characterize the term contract for application of a conflicts rule in a particular case, he states, it is unnecessary to conceptualize that term as an agreement between two parties or in accordance with the laws of one State or another. Rather, the autonomous characterization approach would define the term contract in accordance with its scope, that is the elements comprising it<sup>209</sup>.

The theoretical development of characterization, along with most of the other general problems of private international law, occurred during the first part of this century, which explains why the early codes in the Americas do not contain specific rules concerning characterization. By and large, the prevailing view in the doctrine and jurisprudence of the hemisphere is that the *lex fori*<sup>210</sup> should govern the characterization process.

Characterization is not expressly provided for in Argentine legislation. It is possible, however, to infer from its articles law to be applied in the characterization process. Article 10 of the civil code provides that real property located within the Republic is *exclusively governed* by the laws of that country with respect to its characterization as such. Article 3607 of the same code defines a will as a written act. Consequently, according to Argentine law, the writing is an essential element of a will. Therefore, an oral expression will not be characterized as such.

On the other hand, Articles 1205, 1209 and 1210 of the same code characterize the nature of a contract according to the *lex causae*. It has been urged that Article 1220, in characterizing pre-nuptial agreements as contracts and not as an institution of family law, suggests an autonomous characterization<sup>211</sup>. Article 2 of the draft code on private international law reflects this position, providing:

“The terms used in this law shall be construed according

to the competent law. The competent law is the private law of the country whose law has been declared to be applicable through the provision being construed. If the designated private law does not lead to a reasonable solution, then the private law of Argentina would be competent for the purposes of interpretation. The latter law shall, in all cases, construe the connecting factors of the various provisions.”

The doctrine on characterization is inconsistent. Some writers support Bartin’s *lex fori* theory; others advocate Despagnet’s *lex causae* theory, and a third group espouses Rabel’s autonomous characterization doctrine. Goldschmidt, for example, advocates “a characterization doctrine based on the *lex civilis causae* and resort to the synthetic judicial method in cases of disharmony”<sup>212</sup>. Antonio Boggiano takes the position that

“national judges should not only take into account the characterization of foreign private law, that is, the characterization according to the *lex civilis causae* (Despagnet), but also characterization arising from the foreign private international law which the foreign court should apply - in other words, characterization according to the *lex indirecta causae*<sup>213</sup>”.

Alberto Juan Pardo considers that “the autarchical characterization of the *lex fori* is the proper one, because the rule of conflict should define its own terms”<sup>214</sup>.

In Argentine jurisprudence, the most important decision regarding the method used for characterization was rendered in 1963. It involved a negotiable instrument drawn up in Uruguay and endorsed in Argentina and concerned the issue of whether an order to pay money should be included in the category of a “cheque” or a “draft”. The court held that the order, according to Uruguayan law, was a draft (*lex causae*). The court, guided by the principle that the various elements of the draft may be governed by different laws, applied Argentine law to determine the validity and effects of the endorsements of the draft<sup>215</sup>.

Brazilian legislation does not contain a general rule on characterization. Rather, the rules for characterizing concepts and categories are scattered throughout Brazil’s laws. For instance, Article 8 of the law of introduction to the civil code provides that for the characterization of property and the regulation of property relations

the law of the country in which such property is located is appropriate. Article 9 provides that in characterizing obligations, a court shall apply the law of the place where they were incurred. The doctrine criticizes this solution, maintaining that the law is contradictory because Article 16 rejects the principle of *renvoi*.

The preliminary draft of the general law on application of juridical rules does not include any reference to the characterization issue. Valladão has noted that the draftsmen of the preliminary draft desired a flexible approach, which would allow a court to decide characterization questions according to guidelines set forth in the draft law (Arts. 6 and 9, referring to general principles of law, analogy, custom, equity, social justice, etc.)<sup>216</sup>.

Part of the doctrine proposes a two-pronged methodology for the characterization process. The first prong of the theory provides that the construction of a term or category used by the private international law rule should be made in accordance with the forum's private international law concepts. These concepts are given a broad interpretation that takes into consideration all the laws involved. Characterization under the first prong is provisional and subject to adjustment, where necessary, when the law designated applicable dictates a different characterization. This process of adjustment is the second prong<sup>217</sup>.

The paucity of specific legislation in matters of characterization has resulted in inconsistent jurisprudence, and, as Strenger has noted, Brazilian courts must make their characterization decisions on a case by case basis<sup>218</sup>. For example, Valladão cites a case in which the São Paulo court characterized the authorization required by a German husband to mortgage real property as a contractual matter and subject to Brazilian law according to Article 13 of the introductory law (*lex loci contractus*). On the other hand, the Federal Supreme Court interpreted this as an issue related to capacity governed by the law of the husband's nationality (Art. 8)<sup>219</sup>. By and large, it may be asserted that Brazilian jurisprudence does not follow generic criteria, but rather seeks just and equitable solutions for each case through the use of customary principles, such as analogy, equivalence, adaptation and alternatives.

Chilean legislation does not make reference to characterization. The doctrine and jurisprudence, however, adopt the position that the *lex fori* is applicable to characterization questions<sup>220</sup>.

The Supreme Court of Chile rendered a judgment in an interesting

case relating to the probate proceedings of a British citizen who made a will in Valparaiso, where he later died. According to Chilean legislation, succession is governed by the law of the decedent's last domicile. However, prior to that, he had been declared civilly dead in London as a result of a conviction. Thus, the problem arose as to the characterization of "death". If it was to be characterized according to British law, the Chilean laws were not competent. If on the contrary, the *lex fori* was to be applied, then the civil death would not be recognized and therefore the British citizen would have been deemed to have died in Chile, and thus Chilean law would be applicable to his succession. The Chilean court ruled in favour of the latter view<sup>221</sup>.

The Venezuelan system of private international law, like most Latin American law, does not contain specific rules on characterization. Consequently, the provisions of the Bustamante Code may be applicable as general principles of Venezuelan private international law<sup>222</sup>. Arcaya's draft<sup>223</sup>, provided that the *lex fori* should apply for determining the nature of legal acts and the character of foreign law. In the draft law on rules of private international law, however, specific rules on the topic were deliberately omitted. In the statement of reasons, the draftsmen recognized that this was "probably the most difficult question of all private international law" and that

"with respect to characterization and, in general, on the topic relating to the application of foreign law, included under treatment of foreign law, the draft had been limited to merely indicating general guidelines, calling attention to the general nature of the issues . . .".

Venezuelan doctrine has generally evolved from a strict territorialist approach, advocating usage of the *lex fori* in characterization, to a position that proposes application of more universalist criteria to the characterization process<sup>224</sup>. With respect to jurisprudence, many court rulings have leaned toward a *lex fori* solution<sup>225</sup>. More recent judgments, however, indicate a trend toward autonomous characterization<sup>226</sup>.

The subject of characterization appeared for the first time in the legal literature of the United States in 1920 when Professor Lorenzen published his article, "The Theory of Qualifications and the Conflicts of Law", in which he defined characterization as the determination of the meaning of common legal concepts<sup>227</sup>. In the

second part of the article he reviewed the attitude of Anglo-American courts in dealing with characterization and concluded that:

“According to Anglo-American Law the qualification of legal transactions as well as the definition of ‘domicile’, ‘the law of the place of contracting’, and of the other ‘points’ of contact are governed in general by the strictly internal law of the forum, the principal exception being that the character of property as movable or immovable is controlled by the law of the situs. This conclusion is also the only one that is consistent with the Anglo-American theory of conflicts of laws<sup>228</sup>.”

Interestingly, Lorenzen’s views were not the subject of immediate academic discussion. It was not until 1934, the year when the First Restatement<sup>229</sup> was formulated that another professor addressed the subject<sup>230</sup>. However, from this time on, the legal literature on characterization flourished and Lorenzen’s views were further refined. It is not a coincidence that the topic of characterization reached popularity when the First Restatement, which espoused territorially oriented choice-of-law rules, dominated United States choice-of-law analysis. Under this Restatement, different legal categories (tort, property, contract, etc.) were governed by different choice-of-law rules. Consequently, it was essential for a judge to determine the legal nature of the issue, in order to select the appropriate choice-of-law rule. Once the applicable law was established the judge had to determine how much of the foreign law was applicable.

At the present time most authorities in the field agree that characterization involves three stages<sup>231</sup>: the “primary characterization”, which involves assigning a factual situation to some general legal category; the “determination of the connecting factor” in which a choice-of-law rule is applied in order to determine the proper law; and the “secondary characterization”, in which the proper law chosen in step two is “delimited”<sup>232</sup>.

Although once the subject of debate, today most authorities agree that primary characterization should be made according to the law of the forum<sup>233</sup>. This view is confirmed by both the Restatement Second<sup>234</sup> and United States case law<sup>235</sup>.

With respect to the meaning of the “law of the forum”, Lorenzen’s restrictive view that only the “internal law of the forum” should be considered was criticized and rebutted in practice<sup>236</sup>. Section 7 of the Restatement Second does not provide for a defi-

inition of the term “law of the forum”. However, section 4 (2) defines the law of a state as the state’s local law, together with its rules on conflicts of laws. It is not unreasonable to assume that the law of the forum means the law of the state. Thus, under section 7 a judge would not be limited to the use of the categories of the internal law of the forum.

Although the Restatement Second of the Conflict of Laws<sup>237</sup> does not use the labels “primary” or “secondary” characterization its definition is for the most part in accord with the aforementioned stages. The Restatement Second provides that characterization involves two activities:

- “(1) classification of a given factual situation under the appropriate legal categories and specific rules of law;
- (2) definition or interpretation of the terms employed in the legal categories and the rules of law<sup>238</sup>.”

According to the Restatement Second, defining and interpreting the terms employed in the legal categories and the rules of law can involve various situations<sup>239</sup>. When the same legal term or concept appears in the local law of two states which are involved in a problem and different meanings are given in these states to the term or concept, the courts should adopt the meaning prevailing in the state whose local law governs the issue. The second situation arises when the same legal term or concept appears both in the local law of a state and in its choice-of-law rules. Here the meaning given in local law does not determine the meaning to be given the term in choice of law. Instead, the courts will classify a term or concept according to the way it is classified in the body of the law which the court is applying.

Although the categories of primary and secondary characterization generally correspond to the Restatement Second’s conceptualization of the characterization process, it made no specific provision for the traditional “determination of the connecting factor”, as understood in the traditional sense. In a way this was to be expected since the Restatement Second rejected territorially oriented choice-of-law rules<sup>240</sup>, and the connecting factor was a concept intimately related to such rules. The connecting factors of domicile, place of wrong, nationality, place of contracting and place of performance identified the geographical location of the applicable law<sup>241</sup>.

The issue of whether the connecting factor should be interpreted

by *lex fori* or *lex causae* has not been the subject of great controversy. There has always been general agreement among Anglo-American writers that the connecting factor should be determined by the law of the forum<sup>242</sup>.

Even though the Restatement Second has de-emphasized the essential role played by connecting factors, it would be a mistake to conclude that they no longer perform a function in conflicts of law. Connecting factors are used in determining the state of the most significant relationship. For instance, with respect to torts, section 145 of the Restatement Second establishes that place of wrong, domicile and nationality are contacts to be taken into account in determining the applicable law, while section 188 concerning contracts, provides that place of performance, domicile, place of contracting and nationality are to be taken into account in determining the applicable law.

Although some authorities argued that secondary characterization, which involves a determination of the extent to which the foreign law is applicable, should be determined by the *lex causae*<sup>243</sup>, the prevailing view is that the determination is to be made according to the "legal concepts and principles that prevail in the forum state"<sup>244</sup>.

With respect to secondary characterization, the line of demarcation between substance and procedure is widely accepted and there is a substantial amount of relevant case law<sup>245</sup>. The reason for this distinction is grounded upon a doctrine of the conflict of laws requiring that all questions of procedure be governed by the law of the forum<sup>246</sup>. However, the courts generally encounter great difficulties in trying to distinguish between the two<sup>247</sup>. Section 122 of the Restatement Second draws the distinction between substance and procedure, although it avoids using these terms. The section states that the forum applies "its own rules prescribing how litigation shall be conducted" even when it applies foreign law to decide other issues of the case<sup>248</sup>. The Restatement Second provides the courts with some guidance when faced with the determination of whether a given rule is one of substance or of procedure<sup>249</sup>.

United States case law supports the doctrine that the law of the forum governs matters of procedure and determines whether a given question is one of substance or procedure<sup>250</sup>.

The absence of specific rules regulating characterization as an aspect of private international law is due to the relatively recent development of the topic as well as the lack of uniform criteria in the doctrine and jurisprudence of the American countries. Nevertheless, a transition has taken place from the territorialist perspective of characterization according to the *lex fori*, toward universalist concepts, more fitting for the disposition of private international law cases<sup>251</sup>. Due to the complexity of this topic, a gradual evolution in its treatment still lies ahead.

(c) *Preliminary or Incidental Question*

A legal question is not intrinsically principal or incidental<sup>252</sup>. It only acquires such character once it becomes part of the dynamics of the judicial process<sup>253</sup>. The same legal question may be the principal issue in one case, and the incidental issue of another. For instance, a legitimacy action may be the subject of a principal action, but may turn incidental in matters of succession, that is, when the child claims rights to the estate of the presumptive father. From a procedural point of view, the relationship of the preliminary question (also referred to as the “incidental question”) to the scope and nature of the principal issue in a case requires the judge to find a solution to the former before he can pass on the latter.

The preliminary question problem, from a private international law perspective, involves determining the law applicable<sup>254</sup> to an ancillary legal issue, which, according to the forum’s choice-of-law rule, is governed by foreign law<sup>255</sup>. These situations often arise when the applicable foreign law confers a right upon an individual who enjoys a special status (adoptive child, natural child, spouse, etc.)<sup>256</sup>. Furthermore, according to some writers<sup>257</sup>, the solution to the incidental question may bring about another question<sup>258</sup>, which is referred to in the doctrine as an incidental question of the second degree<sup>259</sup>. Thus, for example, the issue of a child’s legitimacy in a succession case may lead to an examination of the validity of the marriage<sup>260</sup>.

Within the scope of private international law, the preliminary question problem arose for the first time as a result of the judgment rendered by the French Court of Cassation in 1931. In the *Ponnoucannamalle c. Nadimoutoupolle* case, which involved the probate of an estate, the court held that the legality of adoption

was governed by the law applicable to the principal question.

At first, the French commentators included the preliminary question within the category of characterization. Quintín Alfonsín partially supports this view, affirming that if the preliminary question arises prior to the determination of the applicable private international law, it becomes part of characterization process; however, if it arises after such determination of the applicable law, it becomes part of the adaptation process<sup>261</sup>.

Melchior and Wengler were the first to introduce the preliminary question in the doctrine as an independent element of private international law. The formulation of the incidental question (*Vorfrage*) is attributed primarily to Melchior who, on the basis of the judgment in the *Ponnoucannamalle* case and on principles of legal consistency, maintained that both the principal and the incidental issues should be decided by the same law. Thereafter, European doctrine included the incidental question as a general problem of private international law, responding with different criteria in defining the concept and developing formulas.

There have been two classical theories relating to the preliminary question. The first theory favours the application of the conflict rule governing the principal question to the preliminary question (global method). The second one supports the application of the forum's private international law to determine the law applicable to the preliminary question (independent method).

This latter view prevails in current doctrine. Nevertheless, based on Francescakis' thesis<sup>262</sup>, attempts have been made in recent years to mitigate the rigidity of the *lex fori* by the reference to the principle of vested rights. Francescakis' theory rejects the application of the indirect rules of the *lex fori* to situations involving the acquisition of rights in foreign countries, provided there are no connections between the legal relationship and the conflict rules. His theory is embodied in Article 25 of the draft uniform law for the solution of conflicts of laws among the Benelux countries<sup>263</sup>.

The American countries have not expressed a preference for either of the two traditional doctrines, and have applied to the incidental question either the conflicts rule governing the principal question or the forum's private international law. Most of the countries in the hemisphere simply acknowledge both solutions and apply either of them. The internal legislation of these countries,

however, does not expressly provide any clear answers to this problem.

The statutory laws in force refer to the preliminary question as a problem pertaining to domestic procedural law, but do not regulate it as a proper component of private international law. This omission is understandable because in most cases the civil codes containing rules of private international law preceded the theoretical development of this area. For the same reason, neither the Montevideo Treaties nor the Bustamante Code treat the preliminary question problem<sup>264</sup>.

In Argentina, the domestic private international law provides that the law governing the validity of the contract also governs its implementation. The following judgments are generally cited in Argentine jurisprudence. The first was rendered in 1948 and concerned the adoption in Italy of an Italian girl by an Italian national. The adoptive parent died leaving personal and real property in Argentina, but proceedings for settling the estate were brought in Italy, the decedent's domicile at the time of death. Although Italian law held that the adoptive child was the decedent's only heir, the Argentine Government claimed entitlement to the real property located in Argentina on the grounds that the trial court had held the adoption to be null and contrary to Argentine public policy, given that domestic legislation did not provide for adoption at that time. Even though the court of appeals recognized the validity of the adoption according to Italian law, it held that succession was governed by Argentine law, which did not recognize the institution of adoption. Accordingly, the court denied the adopted child the right to inherit real property. Nevertheless, with respect to the personal property, the court applied Italian law which recognized her right to inherit. The second case, also relating to adoption, was decided in 1963. The adoption was granted in conformity with Spanish law and the adoptive parent died in Argentina, where he left assets. The court adopted a solution similar to that in the first case<sup>265</sup>.

Also relevant is Goldschmidt's innovative thesis of equivalence<sup>266</sup>. The Argentine jurist premises this thesis on the notion that the hierarchical theories (terminology that he uses in referring to classical solutions) are unfair because they lead to undesirable results<sup>267</sup>. For this reason, Goldschmidt maintains that the preliminary question should be approached as an issue that is linked to another

simultaneous issue that has not yet been resolved. He concludes that each judicial case, whether brought severally or jointly with others with which it forms a logical whole, is governed by its own law; that is, the law indicated by the forum's private international law<sup>268</sup>.

Goldschmidt's theory is reflected in the Argentine draft code of private international law, which provides that when the conflict rule determines the law applicable to any principal question, it refers only to that question and not to the preliminary question<sup>269</sup>. A similar pattern is followed by the Peruvian draft which, in addition, provides for the use of adaptation in order to achieve just and equitable solutions in each case<sup>270</sup>.

The Brazilian draft rules of private international law do not include a specific rule on the incidental question. The Brazilian doctrine, however, supports the thesis that the preliminary question is governed by its own conflict rule which is independent of the rule governing the principal question. Some jurists assert that the internal split produced by this type of solution could disappear through the harmonization of rules<sup>271</sup>.

Worthy of mention is a joint action brought before the Brazilian courts. One of the actions concerned a paternity claim, while the other involved an inheritance claim brought in 1917 by children born in 1907 in connection with the right to succession accrued in 1915. Although this case poses the problem of preliminary question with respect to successive laws, it is relevant because the court held that the preliminary question was not governed by the law applicable to the preliminary question, but by its own rule of law. The judgment affirms the doctrine that the incidental question has its own conflicts rule, which is independent of that governing the principal question<sup>272</sup>.

Similarly, in Venezuela there is no provision relating to the determination of the applicable law governing the preliminary question in private international law cases. The doctrine is divided in support for both classical solutions.

The terms of Article 5 of the Venezuelan draft imply a tendency toward the theory of *lex causae*. The article recognizes, with certain exceptions, the effects of legal relationships created under foreign law, which is applicable in accordance with relevant international criteria. Some authorities maintain that the purpose of this rule is to recognize the effects of certain facts, acts and transactions

that have taken place abroad, in good faith and in conformity with a valid and normally competent law (*lex causae*)<sup>273</sup>.

In the United States, not only has the preliminary or incidental question not received much attention, but “the courts have not been conscious of dealing with the incidental question as a specific topic or problem of private international law”<sup>274</sup>. Indeed, there is “great confusion surrounding the subject” and “the confusion extends to all aspects of the problem, from the issue of its very existence in the conflict of law, and its scope and definition, to the myriad of arguments and considerations that are thought to relate to its solution”<sup>275</sup>. “Decisions or even dicta involving the incidental question are very rare”<sup>276</sup>, and “courts will sometimes apply a rule to the subsidiary issue which happens to be the rule both of the *lex fori* and the *lex causae* so it is not always possible to know precisely on what basis they selected the rule”<sup>277</sup>.

In some cases, the courts have applied the forum law to the preliminary question, notwithstanding the application of foreign law to the main question<sup>278</sup>. Nonetheless, the majority of the English language cases have applied the law governing the main question to the preliminary question<sup>279</sup>.

\* \* \*

The incidental question is another aspect of private international law that has not been adequately regulated by the laws of the American countries. Moreover, different views prevail in both doctrine and jurisprudence. It may be observed, however, that in some countries there is a trend toward accepting the thesis that the preliminary question should be regulated by its own conflicts rule. This solution is embodied in some of the draft special laws on private international law, although it will take some time before the legislation, doctrine and jurisprudence conform to a precise definition of the question<sup>280</sup>.

#### (d) *Renvoi*

Aguilar Navarro maintains<sup>281</sup> that there is a “three-dimensional phenomenon” in the process of finding a solution to cases with foreign elements: characterization, connection and application of foreign law. It is in connection with the third dimension, and only

since the 19th century, that *renvoi* arises as a general problem of private international law<sup>282</sup>.

*Renvoi* occurs in those circumstances in which the forum's conflict rules require the application of foreign law and that foreign law is broadly defined to include both the substantive law and conflict rules of the relevant foreign State. In some cases, such as those involving personal law, which may be linked to domicile or nationality, *renvoi* may ultimately operate to refer the case to a third legal system (transmission) or back to the forum's legal system (remission).

The conditions for *renvoi* are therefore twofold: first, the conflict rules of the forum must require application of the whole law of the relevant foreign State, including its conflict rules, i.e., "the maximum reference". Second, the connecting factor of the foreign law applied must be different than the connecting factor used under the private international law of the forum.

The reasons which favour adoption of *renvoi* are several. First, it makes little sense not to treat the foreign laws as the "maximum reference". The laws of most nation States are integrated into a complete and coherent system. It is simply illogical to fragment them by taking into consideration only the substantive law and not the conflict rules<sup>283</sup>. Second, *renvoi* favours a positive harmonization of national laws by requiring application of all national laws connected with a legal question at issue. Third, *renvoi* discourages forum shopping and promotes certainty and uniformity of results<sup>284</sup>. Finally, *renvoi* furthers the pluralist conception of law<sup>285</sup>, by operating as a method for the integration of different legal systems.

*Renvoi* can create a situation of "indefinite reference" of a case depending upon the different connecting factors employed by the various national laws to which the case is referred. This is known by the name of "international ping pong" and, obviously constitutes an anomaly which prevents the proper functioning of the legal system. Efforts have been made to overcome this situation by means of referring the case not only to the rules of law of a legal system, but also to all other provisions governing the matter, including any pertinent jurisprudence, for the purpose of checking "indefinite reference".

Notwithstanding the solid arguments in support of *renvoi*, there are formidable reasons mitigating against its use. *Renvoi* finds acceptance among the writers of the universalist doctrine. Those who oppose *renvoi* are the commentators guided by territorialist

and nationalist principles who maintain that the forum should apply its own law or whatever law it declares competent. Recently, an increased number of writers have indicated support for renvoi. Niboyet, for example, who was initially opposed to renvoi eventually defended it along with other contemporaneous jurists such as Savatier, Goldschmidt and Aguilar Navarro. Most of the Italian commentators are opposed to the use of renvoi (Anzilotti, Fedozzi, Pacchioni)<sup>286</sup>.

In Latin American countries, most of the national laws do not contain any provisions on renvoi. Some countries reject it and only a minority accept it in their legislation.

Examples of legislative systems that do not regulate renvoi are those of Argentina, Colombia, Paraguay, Peru and Uruguay. This is because their codes date prior to the theoretical development of renvoi, and especially because the territorialist doctrine, which is still influential, does not permit foreign conflict rules to determine the field of application of the forum's rules.

The doctrine and jurisprudence of those countries reject renvoi because it is not precisely defined and because there are no rules for its application<sup>287</sup>. Even the Argentine draft private international law code does not contain any rule relating to renvoi, and the Peruvian draft code, for its part, rejects renvoi in Article XII, providing that: "judges shall apply only the internal law of the State that is declared competent by the Peruvian conflict rule".

Argentine jurisprudence cites a 1920 judgment concerning a proceeding for settling the estate of a decedent in which, even though there was a renvoi of the case to Uruguayan law, the Argentine judges applied their own law<sup>288</sup>. In contrast, Uruguayan jurisprudence contains no provisions concerning renvoi<sup>289</sup>.

The doctrine in Paraguay holds that Article 3283 of the civil code would eliminate the possibility of accepting renvoi, since it submits succession to the law of the decedent's domicile, thus applying the private law of the corresponding country<sup>290</sup>.

Colombian doctrine holds that even though there are no known judgments which make use of renvoi, the concept would probably be rejected, thus following the example of Italy and Brazil<sup>291</sup>.

Similarly, the Chilean civil code contains no specific provision regarding renvoi. However, part of the Chilean doctrine<sup>292</sup> infers its applicability under Article 135 (2), which regulates marital property when both spouses, or only one of them, is a foreigner and

the marriage took place abroad, although both were domiciled in Chile. In that case, this rule provides that marital property is regulated by the law "under whose jurisdiction" the marriage was contracted. Some Chilean jurists<sup>293</sup> believe that the law referred to is not necessarily the law of the State in which the marriage was performed, because it may be that in so far as the property is concerned, such a law could refer the case to a foreign law, in which case renvoi would result with respect to the marital property. This construction was affirmed by the Supreme Court in a decision of 1944<sup>294</sup>.

The law of introduction to the civil code of Brazil specifically and clearly rejects renvoi<sup>295</sup>. However, Brazilian legislators have been criticized for adopting a legal text which is radically opposed to the doctrine and the uniform national jurisprudence<sup>296</sup>.

Brazilian doctrine considers that outright rejection of the renvoi theory is inappropriate. Valladão has written that the application of Article 16 may lead to the most "flagrant injustices". Indeed, the preliminary draft of the general law specifically provided for renvoi<sup>297</sup>. Renvoi prevents a judge from applying foreign law in a mechanical manner and even provides that if foreign law makes reference to a provision of a religious nature (such as in the case of Italy and Spain) or a law which is applicable to certain ethnic groups, that law should be applied. Valladão's way of thinking is followed in Brazil by writers representative of the doctrine, Irineu Strenger and Oscar Tenorio, among others<sup>298</sup>.

On the other hand, it should be pointed out that Brazilian jurisprudence, from 1930 until the enactment of the above-mentioned Article 16 of the law of introduction, proposed adoption of renvoi in numerous cases, thus placing a gloss on the Brazilian rules of private international law which did not address the matter. Two judgments of the Court of Appeals of São Paulo and another of the Supreme Federal Court<sup>299</sup> serve as illustrations.

A considerable change with respect to the above-mentioned position in Brazilian legislation has resulted from the recent ratification of the Geneva Convention on Conflict of Laws on Bills of Exchange, which embodies renvoi in its first article.

Mexican legislation refers to renvoi only in Article 3 of the Law of Navigation and Maritime Commerce (1976) and restricts the applicability of renvoi only to cases in which Mexican laws govern. Mexico, therefore, accepts renvoi in a limited manner, although it is one of the countries of the hemisphere that recognizes an almost

absolute predominance of the territoriality of the law. Mexican doctrine and jurisprudence, however, reject renvoi as a general principle<sup>300</sup>.

In Venezuela there is no regulation of renvoi as a general rule of private international law. However, Article 483 of its commercial code provides that the capacity to incur liability by means of a draft is determined by the national law and if this law declares the law of another State competent, the latter is applied. This rule adopts simple renvoi or renvoi to the first degree and double renvoi or renvoi to the second degree<sup>301</sup>.

Venezuelan doctrine states:

“the existence of Article 483 in Venezuelan legislation is not due to an original creation of Venezuela’s legislators with the intention of recognizing in a general fashion the principle of renvoi but, to the contrary, it is due to the acceptance in the Venezuelan legislation of the 1912 Hague Convention on the unification of legislation in exchange matters, which provides for renvoi in matters of capacity<sup>302</sup>”.

Other than this, there are no additional provisions of Venezuelan legislation in which renvoi is mentioned.

In the early part of the 20th century, one viewpoint had held that Venezuela did not belong to the group of countries that accept renvoi<sup>303</sup>. Foreign doctrine, however, has maintained the opposite. The foreign doctrine has its origin in a note on jurisprudence prompted by a decree of adoption issued by the Superior Court of the Federal District and state of Miranda in which simple renvoi was accepted. The applicable Venezuelan law provided that capacity was governed by the law of nationality of the adopting parents, Austrian law, which, under its conflicts rules, referred the matter back to the law of domicile, Venezuela.

As a consequence of this note, Venezuela has been considered a country which accepts renvoi as a general principle, and this has been recognized by certain Latin American commentators writing on Venezuelan practice<sup>304</sup>.

As a result of the judgment rendered by the trial judge Gonzalo Parra-Aranguren and affirmed by the Supreme Court of Justice, the principle of renvoi was accepted in a general way in the Venezuelan system<sup>305</sup>. Clearly, then, this judgment provides a basis for the affirmation in the doctrine that Venezuelan courts recognize renvoi,

and therefore accept the reference made by the foreign law selected by the Venezuelan rules of private international law.

Arcaya's draft on private international law favoured renvoi, and in its Article 3, accepted it in its simple form. Similarly, Article 4 of the draft law on rules of private international law expressly provides for simple and double renvoi because, as explained in the statement of reasons, it is "useful, on the basis of a principle of legal certainty, to establish definite rules in matters of renvoi"<sup>306</sup>.

In the United States the doctrine of renvoi has been repudiated by many authorities<sup>307</sup>. One of the main criticisms concerns the situation where there is total renvoi (indefinite reference), that is, where the remission or transmission is to the whole law. An illustration is the case where the forum's choice of law directs the judge to apply the whole law of State X and State X's choice-of-law rule says to apply the forum's whole law. In turn, the forum's choice-of-law rule will again refer the case to State X's whole law, and so on. This situation may be avoided by the forum court by interpreting the word "law" as its internal law (partial renvoi)<sup>308</sup>. Nevertheless, the general view is that the forum should apply the foreign internal law; the choice-of-law rules are not to be taken into account<sup>309</sup>. In this case, the forum is said to reject the renvoi. In spite of the general consensus, some authorities support the doctrine and some courts have looked to the whole law as opposed to just the internal law of the other jurisdiction.

This division of opinion is also reflected in the Restatement Second and in United States case law<sup>310</sup>. Section 8 of the Restatement Second rejects renvoi except in two instances. First, "where the objective of the particular choice of law rules is that the forum reach the same result on the very same facts involved as would the courts of another state". The second case is "where the forum has no substantial relationship to the particular issues or the parties and the courts of the interested states would concur in selecting the local law rule applicable to this issue". Other cases where the Restatement Second advocates the renvoi doctrine include those involving validity of a divorce decree (sec. 8), land title cases (sec. 8 (20)), intestate distribution of personal property (sec. 260) and *inter vivos* and post death realty transfers (secs. 223, 236, 239)<sup>311</sup>.

With respect to renvoi there are serious disagreements in the jurisprudence and doctrine of the American countries, as well as a dearth of relevant provisions in the legislation, and a tendency to reject it<sup>312</sup>. Some of the draft special laws on private international law favour renvoi (Brazil and Venezuela); others reject it (Peru); and still others make no reference to it at all (Argentina). On the other hand, while the jurisprudence of most countries rejects renvoi as a general rule of application for resolution of private international law cases, the recent trend is to accept it with respect to specific situations. Therefore, it is to be hoped that the evolutionary process will continue and that it will result in the development of practicable rules on renvoi for use in the American countries.

(e) *Public Policy*

When a conflict rule indicates that a foreign law is applicable, it is not automatically applied. In fact, it may be that the law violates some basic tenets of the legal system of the forum and in such cases, under the public policy exception, the forum will reject the application of the foreign rule. The public policy, also known as the reservation clause (*Vorbehaltsklausel*), has its roots in the distinction that the statist school made between “favourable” and “odious” statutes of which the latter are denied extraterritorial application. Thenceforth, various theories have been formulated to explain the public policy concept and to define the circumstances and conditions under which it should be applied<sup>313</sup>.

One theory, associated with Mancini, relates public policy to the existence of certain laws – so-called laws of public order – the application of which is mandatory and which reject foreign rules designated by the conflict rules. Laws of public order are rules of *a priori* application, that is, they are to be applied prior to analysis of the foreign law or of its effects. Mancini’s theory of public policy is in keeping with the broad interpretation of the territorialist doctrines which gives an excessive preponderance to the forum law, thus identifying laws of public policy with public law. These laws are, however, applied as a general rule, and therefore, the public policy exception is not brought into play.

Another theory, advanced by Savigny, treats the application of the reservation clause as an exception which is operative only in very special cases. The universalist doctrine of the German jurist

gives public policy a limited effect, applicable only after an analysis of the foreign law indicated by the conflict rule and a comparison of its eventual effects with the basic principles of the forum's legal system. The public policy exception, therefore, only operates *a posteriori*.

Similarly, the common law systems treat public policy as an exception based on notions of State sovereignty. In keeping with the nature of those systems, the application of the public policy exception is within the discretion of the trial judge, who has ample leeway and is guided by the principles of justice or equity when passing on the application of the foreign law in each specific case.

Under most recent theories, the public policy exception may only be invoked when two conditions are satisfied: the conflict rule must indicate that a foreign law is applicable and such law must be contrary to the principles of primary importance in the forum's legal system. International public policy tends to protect, therefore, the basic principles of the States' legal system. In this respect, it should be noted that international public policy differs from internal public policy, in that the matter is applied to individuals acting within a legal system, to prevent the violation of any of its basic elements.

The substance of international public policy is determined by the fundamental principles represented in the legal system of a State. Therefore, the content may change over the course of time, depending upon the nature of the principles involved. Furthermore, principles which may be valid in one State may not be valid in another. Thus, the content of public policy also varies among countries.

Article 14 of the Argentine civil code<sup>314</sup> establishes that foreign law is not applied when it opposes the public or criminal law of the Republic, the religion of the State, exercise of religious freedom or good morals (sec. 1); or is incompatible with the spirit of the rules of law of the code (sec. 2); is merely a privilege (sec. 3) and when the provisions of the Code are more favourable to uphold the validity of the acts (sec. 4).

Argentine legislation clearly distinguishes between domestic and international public policy. The provisions of section 2 of Article 14 constitute an exception to the application of foreign law which operates *a posteriori*. This may be distinguished from the provision of Article 21 which refers to certain categories of laws which are

mandatory, may not be waived, and limit *ab initio* the autonomy of the parties. Article 21 limits the principle of the autonomy of the parties with respect to choice of law. The code, nevertheless, does not indicate what law is to be substituted for the inapplicable foreign law.

According to Argentine doctrine, subsection 2 of the above-mentioned provision constitutes a general reservation clause in which subsections 1 and 2 are subsumed. As for section 4, the international law specialists feel that this is a clause *in favore negotii*. They further affirm that although subsection 2 proscribes the application of foreign law when it conflicts with "the spirit of the rules of law of the code", that subsection should be construed to reflect all the national laws, because it is set forth in the preliminary title of the civil code which deals with laws in general<sup>315</sup>.

The draft code on private international law adopts the modern conceptualization of international public policy, and further provides that foreign rules are to be substituted by the forum law only when the legal system to which the rejected rule pertains contains no applicable substitute provision<sup>316</sup>.

Argentine jurisprudence generally distinguishes between the scope of domestic and international public policy<sup>317</sup>.

In Brazil the public policy exception was first addressed in Article 5 of Freitas' *Esbozo*, which established that foreign laws are not applicable when contrary to the public law of the empire, to religion, to freedom of religious exercise, when merely prescribing a privilege, when incompatible with the spirit of the rules of law of that code or when otherwise provided in the *Esbozo*.

Article 5 was reproduced in other legislation, such as that of Argentina, and, as amended by Bevilacqua's draft, was included in Article 17 of the law of introduction to the civil code. Article 17 states:

"The laws, acts and judgments of another country, as well as any other private act shall not be valid in Brazil when they offend the national sovereignty, the public policy and good morals."

This article has harmonized the cases in which foreign rules may be rejected. In general, the various codes in Brazil provide for rejection of a foreign rule in three cases: when it violates national sovereignty, public policy or good morals.

The doctrine distinguishes between internal public policy and international public policy and sustains that the term in Article 17 “any other private act” is incomplete since its scope is undefined. For this reason, Article 80 of the draft rules on private international law contains an amended version of Article 17, which states:

“The laws, acts and judgments of another country, as well as any private act *formulated there* (emphasis added) shall not be valid in Brazil when they offend the national sovereignty, public policy, and the good morals.”

The doctrine and the jurisprudence concur in considering public policy as an exception of a restrictive nature, which may only be invoked when the foreign law designated by the forum’s conflict rule is *wholly incompatible* with the general principles of Brazilian legislation<sup>318</sup>.

In numerous judgments of Brazilian courts, international public policy has been associated with principles of justice and equity in order to recognize rights which have vested in another country and which could not have vested in the forum. Thus, support has not been denied to spouses and children of polygamous marriages between Muslims or incestuous marriages celebrated abroad<sup>319</sup>.

Similarly, Brazilian jurisprudence has been truly constructive by authorizing the recognition of incidental effects to situations arising from foreign law contrary to public policy, as long as such effects are similar to those permitted by Brazilian law. An example is the recognition of patrimonial effects of foreign judgments in cases of divorce between Brazilians, which may not be recognized in the forum<sup>320</sup>.

Bello’s territorialist concept, according to which the application of laws of other countries is not mandatory, had a great influence in Chile. Thus, the application of foreign law based on international comity is the exception. For this reason, the concept of public policy as an exception to the application of foreign law is not necessary and consequently is not provided for in Chile’s legislation<sup>321</sup>. The public policy operates to set a limit on the principle of autonomy of the parties in Chile and has not been used as a reservation clause which prevents the application of foreign rules.

The Bustamante Code regulates public policy both as laws of mandatory application and as a reservation clause. However, due

to the general reservations made by Chile to the code, its validity there is very limited. Nevertheless, some of the doctrine supports the application of the code's provisions<sup>322</sup>.

Chilean doctrine, influenced by the German school and writers such as Albónico Valenzuela, among others, tends to conceive of public policy as a reservation clause of restrictive application; nevertheless, the jurisprudence has not been consistent in applying it in this fashion. Chilean courts have held in various judgments that the following are laws of public order: procedural laws which establish substantive rights; laws regulating family relations, even when the national is residing abroad; and in general, those legal relationships in which the State has an interest<sup>323</sup>.

In Mexico, the application of foreign law is minimal. Because the territorialist principle has much latitude in the Mexican system, Mexican legislation makes mention of public policy only in so far as it relates to the laws of public order and not as a reservation clause<sup>324</sup>. The only provisions referring to public policy in the sphere of private international law is found in the Law of Navigation and Maritime Commerce which provides: "All provisions of foreign legislation which contravene public policy as characterized in Mexico are inapplicable<sup>325</sup>." Obviously, in this particular case public policy operates as an exception *a posteriori*, although the expression "as characterized in Mexico" brings to mind the existence of laws of public order.

Normally, a judge must apply general principles of law when the competent foreign law contradicts the Mexican system, due to the absence of a guiding provision<sup>326</sup>. In this connection, Pérez Verdia asserts that the public policy exception is subject to a broad judicial interpretation<sup>327</sup>. By and large, the doctrine does not distinguish between domestic public policy and international public policy. Carlos Arellano García considers public policy to be domestic in nature because there is no rule of private international law which defines the concept, but he affirms that "nevertheless, it operates in regard to international issues since it rejects the application of a foreign legal rule characterized as inapposite to the national interests"<sup>328</sup>. Arellano García's position strikes a balance between the territorialist philosophy of the Mexican system and the claims for certainty arising from international legal relations between individuals.

Article 10 of the preliminary title of the civil code of Peru con-

tains a general provision concerning public policy: "Foreign laws are not applicable when contrary to public policy or good morals." This article does not define the content of public policy, in that it sets forth general principles which allow the forum a broad defence against the application of foreign law. This is reflected in judgments in which Article 10 has been applied. Such judgments have tended to equate public policy and laws of public order: "Judgments rendered by foreign courts have legal validity in Peru provided they do not affect national laws of public order"<sup>329</sup>.

The doctrine has made advances with respect to the concept and nature of public policy by adopting the modern formula of Article 13 of the draft on rules of private international law. That article embodies the public policy exception, without relating it to internal legislative provisions and, most of all, restricts the use of the reservation clause to the cases in which it is impossible to apply the foreign law within the ambit of the law of the forum. It states:

"The provisions of the foreign law indicated by the Peruvian conflict rules will only be rejected when their application produces results incompatible with public policy or good morals."

Venezuelan legislation contains no specific rule embodying international public policy. Nonetheless, the public policy exception is reflected in the interpretation given by the doctrine to certain provisions contained in the codes. Based on an article of the civil code, which refers solely and exclusively to domestic law, a theory of international public policy has been formulated following the French method of transplanting the concept of internal public policy to the field of private international law<sup>330</sup>.

Lorenzo Herrera Mendoza has asserted that the embodiment of international public policy is found in Article 8 of the civil code, in which it is established that "the authority of the law extends to all nationals or foreigners within the Republic". Herrera Mendoza sustains that this article has a scope similar to that of corresponding provisions in other codes, such as that of Spain, Cuba, Italy, etc.<sup>331</sup>. He adds that "in France, the text of the code is less expressive, but the doctrine and jurisprudence attribute to it the same scope as do the three countries mentioned"<sup>332</sup>. According to Herrera Mendoza, the language of Article 8 of the civil code, which states that "the

authority of the law extends . . .”, when read between the lines, means “the authority of the laws of public order extend . . .”<sup>333</sup>.

Benito Sansó is of a different opinion and held that the principle of international public policy may be indirectly embodied in the code of civil procedure through Article 8. Sansó argued that

“this article in fact considers the generally accepted principles of private international law, among which the principle of international public policy is universally included, to be a source of private international law in Venezuela<sup>334</sup>.”

Furthermore, international public policy is contemplated in specific cases, through special clauses, in numerous rules scattered throughout Venezuelan legislation. For example, Article 105 of the civil code, which does not recognize impediments to marriage based on differences of race, class, or religion; Article 11, with respect to the necessity of complying with the requirement of a sealed document or a private writing when so provided by Venezuelan law; Article 879 of the code, which requires that a will made abroad be done in an authentic manner and establishes that a will made by two or more persons in the same act, an oral will or a holographic will, are not acceptable<sup>335</sup>.

On the other hand, it is necessary to keep in mind that in Venezuelan law, there is a legislative precept which refers to public policy considerations with respect to the substance of a foreign judgment. In Article 748, subsection 4, of the code of civil procedure, one of the requirements for the execution of a foreign judgment is that “it does not contain declarations contrary to public policy or to the domestic public law of the Republic”.

The interpretation of this rule has given rise to repeated references in the jurisprudence to the institution of international public policy, especially in the area of family law<sup>336</sup>. The posture taken through jurisprudence in this respect is a reflection of the territorialist tendency which has prevailed in domestic practice and which has prevented the application of foreign law. Nevertheless, there are cases in which the Supreme Court of Justice has granted the *exequatur* to foreign divorce judgments rendered on grounds different from those set forth in the national legislation, upon stating that the facts surrounding those foreign grounds coincide with, or are equivalent to, the grounds provided for in the internal legislation<sup>337</sup>. Such explanation has not been entirely satisfactory,

and it has been pointed out in the doctrine that there are objective grounds for divorce contemplated by foreign law whose equivalency with those provided for in Article 185 of the civil code would be difficult to establish. In such cases, we have seen a situation similar to that mentioned in connection with the Brazilian jurisprudence and Haroldo Valladão's commentary<sup>338</sup>, that is, as described by the French court of cassation "the mitigating effect of public policy". These cases show, once again, the search for substantive justice by the judges and, equally important, the application of a given institution of private international law for the accomplishment of social purposes. In those cases, the judges sought to equate the grounds for divorce to justify a decision which satisfies the just expectations of the parties who rely on a divorce validly decreed abroad.

Pedro M. Arcaya's draft contemplates, in Article 4, the "impossibility of applying foreign laws of a political, administrative, penal or law enforcement nature nor those contrary to the good morals or Venezuelan public law"<sup>339</sup>. The draft law on rules of private international law contemplates rejection of provisions of foreign law indicated by that law, when their application produces results "manifestly" incompatible with the "essential principles" of Venezuelan public policy. Article 16 of the draft law provides that restrictions on capacity established by the law of the domicile based on differences of race, nationality, religion or social standing will have no effect in Venezuela. This seems to have been considered such an obvious area of application of public policy that its repetition in the draft was felt to be desirable<sup>340</sup>.

The courts of the United States will also at times decline to apply the otherwise indicated foreign law on the grounds that the law violates local public policy. In the United States, the public policy doctrine can be implemented in both the interstate and international contexts. On the interstate level, due to political similarity among the states, and constitutional provisions such as the full faith and credit clause, the courts are less likely to invoke the public policy exception.

The concept of public policy is applied by the forum court as an exception to giving effect to foreign law, and as such it is applied restrictively. There is no clear definition or statutory embodiment of the concept of public policy, although it is generally accepted that the public policy of a state "is to be found in its constitution, its statutes, the decisions of or settled rules laid down by

its courts and the prevailing social and moral attitudes of the community”<sup>341</sup>.

During the early period of United States legal history, actions on claims arising under statutes of other States would not be allowed if the foreign statutes were “substantially dissimilar” to that of the forum<sup>342</sup>. Judge Cardozo attempted to steer away from the “dissimilarity rule” considering that “we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home”<sup>343</sup>. The following passage has been described as the “classic definition of public policy as a valid reason for closing the forum to suit without disposing of the merits”<sup>344</sup>:

“The courts are not free to refuse to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency of fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”<sup>345</sup>.

On the other hand, staunch defenders of the doctrine have stressed that “practising liberalism becomes preposterous where it is exercised towards a foreign law which is plainly directed against the interests of the forum”<sup>346</sup>.

The court in *Mertz*<sup>347</sup>, seemingly reverting to the “dissimilarity rule”, found a conflict with the policy of the forum where there was a conflict in the foreign statutes to be applied, and declared: “A state can have no public policy except what is to be found in its constitution and laws”<sup>348</sup>. The *Mertz* court’s definition of public policy has been criticized as very parochial in so far as its liberal application would obviate the need for any conflicts analysis because no foreign rule that differed from local law could be applied at the forum<sup>349</sup>.

*Intercontinental Hotels Corp. v. Golden*<sup>350</sup> repudiated the public policy definition in *Mertz*. In *Golden*, the court noted that denial of access to the courts based on local public policy must be restricted to transactions “inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense”<sup>351</sup>.

Today, the dissimilarity rule has almost disappeared, and courts will generally refuse to hear a foreign cause of action only on the basis of *strong* local public policy considerations, “Cardozo’s enlightened hospitality to extrastate causes of action has . . . now

been reinstated”<sup>352</sup>. Section 90 of the Restatement Second entitled “Action Contrary to Public Policy”, adopted this approach, stating:

‘No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum’<sup>353</sup>.”

The public policy exception has been criticized on grounds that broad discretion not to enforce foreign law destroys the possibility for uniformity<sup>354</sup>. Indeed, the public policy doctrine has served as an escape from application of a rule designated by the forum’s choice-of-law rule.

With respect to the analysis of the public policy exception in Anglo-American law, it has been pointed out that difficulties arise due to the characterization and qualification devices which a court may implement instead of rejecting the foreign law on public policy grounds. Some of these escape devices include the substantive-procedural distinction, the use of domicile to determine personal law, the prohibition against enforcement of penal statutes and the mechanical application of precedents which gives rise to rules of law that are independent from their public policy origins<sup>355</sup>.

Schlesinger seems to confirm this view. He indicates that United States courts will sometimes approach public policy as a reservation clause and reject the foreign law designated by ordinary choice-of-law rules as unbearable on grounds of public policy. He suggests, however, that United States courts, rather than rely upon the public policy exception to avoid application of foreign laws, will instead mould the basic choice-of-law rule or approach itself to give effect to relevant interests and policies of the forum. He maintains that in the absence of rigidly codified choice-of-law rules and to the extent public policy considerations are reflected in choice-of-law decisions it is unnecessary to cultivate a separate public policy doctrine<sup>356</sup>.

Paulsen and Sovern point out that the overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection and that perhaps this indicated that foreign law should not have been applied to the transaction because of the forum’s relationship to it<sup>357</sup>. In their opinion, problems occur when the public policy exception is “employed as a cloak for the selection of local law to govern a transaction having important local contacts”<sup>358</sup>.

They further state:

“The principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws<sup>359</sup>.”

\* \* \*

The current conceptualization of public policy remains broad and incomplete. There is more to public policy than just “good morals”. Moreover, laws which offend national sovereignty or laws of a public nature, have received different treatment. All in all, however, public policy has a wide scope which allows the judge to reject frequently the application of foreign law<sup>360</sup>.

Nevertheless, the above analysis demonstrates that public policy has experienced a gradual evolution in the Americas, from the territorialist concepts inspired by Mancini, to the universalist doctrines influenced by Savigny. Doctrine and jurisprudence have played an important role in this evolution. The former has identified the principles of general value which make up the content of public policy; the latter has formulated the specific criteria applicable to individual cases.

(f) *Fraud on the Law*

The notion of fraud originated in Roman law and has been included in the general theory of legal acts. As a concept of private international law, its history dates from the time of the statutists. Dumoulin, Huber, Pothier and Froland<sup>361</sup> extensively referred to this institution. However, even today it is debated in doctrine whether fraud on the law should be considered as a proper issue of private international law. Generally, there are two schools of thought: one school identifies it as a typical institution of private international law, distinguishing it from the concept drawn up by the civilists; the other school rejects it, denying its application in cases involving foreign elements.

A broad concept of fraud on the law that comprises a workable definition for both civil law and private international law is that given by Adolfo Miaja de la Muela: “it is the performance of a

lawful act to obtain an unlawful result”<sup>362</sup>. Within the ambit of the general law it is defined as an act performed with the intention to deceive and cause harm; it may be remedied by an action for revocation (Paulinian action). In private international law, fraud on the law is the avoidance of competent foreign law by deliberately displacing the connecting factor so that a more favourable law may be applied<sup>363</sup>.

It is easy to distinguish the elements that coincide as well as those that differ in the above-cited definitions. In civil law, as in private international law, the notion of fraud consists of a material element as well as a psychological one. The first of these is common to both disciplines and consists of a certain *prima facie* lawful conduct, such as the sale of property or the establishment of a particular domicile. On the other hand, the psychological or volitional element is directed toward different ends; in civil law, it is the acquisition of a benefit by causing harm to another; in private international law, it is to take advantage of a more lenient law without necessarily harming another person. Both civil and private international law provide similar remedies for fraud. Under civil law, the fraudulent act may be voided and is not binding on the injured party. At private international law, the fraudulently created legal relationship is not accorded recognition. It should be noted that doctrine still debates the appropriate treatment for fraud on the law.

By and large, internal legislation does not govern fraud on the law as part of private international law, and within the Latin American region there are only a few provisions that deal with it in connection with specific relationships, e.g., contracts, marriage, corporations, etc. Some examples are analyzed below.

The civil marriage law of the Argentine civil code regulates fraud in an atypical manner. It provides that the validity of the marriage is governed by the law of the place of its celebration, even if the parties have displaced the connecting factor to evade the competence of the applicable law, and as long as there are no impediments to the marriage under the law<sup>364</sup>.

The doctrine construes Article 2 as having rejected the exception of fraud<sup>365</sup>. However, Goldschmidt has sustained the contrary view, asserting that Article 2 was inspired by Story’s theory that two principles coexist in marriage: the prohibition of fraud on the law and *favor matrimonii*, the latter prevailing over the former to safe-

guard the interests of the children. This idea, Goldschmidt claims, underlies the terms of Article 2 and refers to prospective fraud. He bases his position on an article of the same law which provides that a new marriage will not be permitted after a foreign divorce dissolves an Argentine marriage, when the law of Argentina does not provide for divorce<sup>366</sup>.

Furthermore, other articles of the civil code deny legal consequences to contracts made abroad in avoidance of the *lex fori* or vice-versa. In fact, such provisions not only penalize fraud on the domestic law but also fraud on the law in general, in its broadest sense<sup>367</sup>. The commercial code also considers fraudulent the practice employed by some businesses of incorporating in one country but carrying out all corporate activities in another<sup>368</sup>.

Goldschmidt observes that fraud changes one of the features of the legal category which he calls "facts underlying the connecting factors" from positive to negative<sup>369</sup>. For this reason, Goldschmidt states that both fraud and public policy have a common element in that they both act as negative factors on the conflicts rule. Their effect is also identical, but the difference, according to the Argentine jurist, lies in that fraud is linked to the legal category, while public policy is linked to the legal consequence. Goldschmidt recognizes three types of fraud: retrospective fraud, committed to avoid the consequences of an act performed in the past; simultaneous fraud, carried out to falsify the facts at the time of engaging in the transaction; and prospective fraud, which is committed to avoid a future situation.

The Argentine draft code of private international law regulates fraud by establishing that the law indicated by the conflict rule should be applied without considering the displacement of the connecting factor caused in order to avoid the application of those rules<sup>370</sup>.

Argentine jurisprudence records numerous decisions rejecting recognition of foreign divorce *a vinculo* decrees relating to marriages celebrated in Argentina. It considers that such decrees were issued in evasion of Argentine law, which does not recognize divorce *a vinculo* and which provides that marriage is governed by the law of the place of its celebration<sup>371</sup>.

In Brazil, the concept of fraud on the law is reflected in ordinances which provide that "contracts disguised under any form which are prejudicial to the rights of creditors or other persons

and of our rights and evade the provisions of our laws and ordinances shall have no effect whatsoever"<sup>372</sup>. None of the introductory laws to the Brazilian civil code (1916 and 1942) regulates fraud on the law as an aspect of private international law, except with reference to some specific subjects.

Fraud on the law is regulated by Article 10 of the introductory law of the civil code which establishes:

"Personalty, the location of which changes during or pending an action concerning title, continue to be subject to the law of the place in which they were situated at the time the proceedings started."

Article 10 expressly denies validity to an act carried out abroad when the *lex fori* requires that such act be performed subject to its provisions. For example, Article 7, paragraph 6, of the introductory law provides that a divorce granted abroad to Brazilian citizens shall not be recognized in Brazil<sup>373</sup>.

Brazilian doctrine deems that the exception of fraud on the law is a constant which is temporal, spatial, rational and realistic, unavoidable, and which is gaining ground with the new moral and social guidelines of the law. It states "the exception of fraud on the law shall always find a basis in an important principle of defence of the legal order or of legality, which penalizes acts carried out with an unlawful or immoral purpose"<sup>374</sup>.

Valladao, although he accepts fraud on the law as the indirect violation *in fraudem agere*, does not include it in his preliminary draft. Article 12 of the approved draft sanctions the abuse of law, which is the abuse exerted to the detriment of another party or in a selfish, unconscionable or antisocial manner<sup>375</sup>. Hence, the notion of fraud is implicitly included in that article. Some writers maintain that fraud encompasses an abuse of law in the social sense, that is, the improper use of a legal right for purposes other than those sought by the legislator<sup>376</sup>.

The preliminary title of the Peruvian civil code<sup>377</sup> bears a close resemblance to the treatment given this subject in Brazil. Article 15 of the draft rules of private international law included in the second title of the preliminary draft amendment of this code, specifically regulates in a general manner fraud on the applicable law, stating that the effects of legal relationships created by fraud on Peruvian law shall not be recognized. Thus, Peruvian doctrine admits the

theory that fraud on the law constitutes an improper use of the law<sup>378</sup>.

Chilean legislation does not regulate fraud on the law within the scope of private international law. The lack of an express rule is reflected by a split in the doctrine. Dunker Biggs<sup>379</sup> maintains that Bello rejects the exception of fraud on the law. In support of his view, he alludes to Article 11 of the draft civil code of 1853 which provides that in all matters relating to the personal law, Chileans were subject to the national law, regardless of their subsequent residence, domicile or naturalization in another country. Dunker Biggs states that while this provision is directed toward avoiding fraud on the applicable law, Bello himself implicitly accepted it in amending that article in the civil code of 1855. Albónico Valenzuela rebuts Dunker Biggs and observes that the amendment of Article 11 of the civil code (presently Art. 15) omitted any reference to naturalization since it is obvious that if a person is no longer a Chilean citizen, it is not possible to subject him to the laws corresponding to a nationality which he no longer enjoys. He adds that if the intention of the codifier had been permissive towards the fraudulent fabrication of the connecting factor that links the person to the *lex fori*, he would have deleted the article in its entirety<sup>380</sup>.

Through numerous decisions, Chilean jurisprudence has sanctioned the execution of acts carried out by fraud on the applicable law<sup>381</sup>.

Except for those provisions contained in the special laws on navigation, and maritime commerce and the law on nationality, Mexican legislation does not contain an explicit provision on fraud on the law. Under the navigation laws, any legal situation created according to a foreign law through fraud on the Mexican law is void<sup>382</sup>. The nationality law sanctions fraud on the law in matters of divorce, not only with respect to the *lex fori* but also with regard to the law of any other State.

The Paraguayan civil code does not deal expressly with fraud on the law, but Paraguayan doctrine affords it some recognition. The doctrine states that "the fraudulent act being void due to an unlawful cause, it is obvious that the provisions of Article 502 of the Paraguayan civil code may be applied, according to which the obligation based on an unlawful cause lacks validity"<sup>383</sup>. The doctrine also notes that there are other rules in the code which do not expressly refer to the fraud on the law doctrine but nonetheless

reflect it. Articles 1207 and 1208 provide that contracts made abroad in order to violate the laws of the Republic have no legal effects, even though they may be valid in the country where the contract was executed. The same consequence follows in regard to contracts made in the Republic in order to violate foreign laws<sup>384</sup>.

In Uruguayan doctrine, legislation and jurisprudence, fraud on the law has no application. Quintín Alfonsín, following Arminjón, asserts that the exception offers less advantages than disadvantages, because by such exception "an individual becomes tethered to a local law that prevents him from enjoying the freedoms granted him by the other States of the world"<sup>385</sup>. Alfonsín maintains that the exception must be applied when the parties avoid a law with mandatory, not permissive, provisions. In other words, the rule of private international law must make it clear that the law is mandatory. Alfonsín's position is an approach to Bartín's doctrine, which makes the fraud on the law doctrine similar to the public policy exception and conceives of it as an escape device leading to the application of local laws of international public policy which the interested party has evaded. Uruguayan legislation follows the same trend. The private international law of that country rejects the principle of autonomy of the parties by prohibiting parties from making contracts involving foreign elements. In some cases, Uruguay also proscribes the application of the *lex celebrationis* and, for the purpose of preventing fraud, imposes the application of the *lex loci solutionis*<sup>386</sup>.

The legislative situation in Venezuela does not differ from the above-mentioned countries, as its legislation on private international law does not contain any express rule dealing with fraud on the law. However, the naturalization law of 1955 contemplates two cases of fraud on the law in matters concerning the loss of Venezuelan nationality (acquired by naturalization). Paragraph 4 of Article 11 of such law refers to fraud on the law of private international law, although not in an express way<sup>387</sup>, and paragraph 6 of the same article refers to fraud on the law concerning internal legislation<sup>388</sup>.

Prior to 1946, foreign divorce decrees were not subject to *exequatur* in Venezuela's jurisprudence. Accordingly, the courts recognized numerous foreign decisions rendered by incompetent courts. In contrast, the present legislation requires the *exequatur* as a condition for the legal recognition of all foreign judgments<sup>389</sup>.

Venezuelan doctrine considers that fraud on the law of private international law exists only in one special case, which is contained in the naturalization law, since had the legislator wanted to establish it as a general rule, an express provision for that purpose would exist. Moreover, the draft law on rules of private international law does not address the issue. Rather, it contemplates solutions such as the one contained in Article 21 which provides that "divorce and separation are governed by the law of the domicile of the party that brings this suit". The draft offers ample possibility for the interested party to manipulate the connecting factor in order that the divorce be governed by the most advantageous law. Some authors sustain that, with a view to preventing fraud, the draftsmen, when establishing the regulation of the personal law by the law of the domicile, contemplated the valid cases of change of domicile (Rabel's concept of "improved" domicile). In fact, Article 8 of the draft requires the lapse of a period of one year before any change of domicile may have effect. As expressed in the statement of reasons, the rationale of the article is "to prevent that indefiniteness and changeability of domicile become undue sources of uncertainty and constitute a mechanism which facilitates fraud on the law".

In the United States there is no general doctrine of evasion of the law, although the principle is sometimes applied. Ehrenzweig draws an analogy between the avoidance of domestic rules through the fabrication of foreign contacts and the avoidance of taxation by the use of statutory "loopholes", the latter of which is held to be legitimate<sup>390</sup>. According to Justice Holmes:

"We do not speak of evasion, because when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law<sup>391</sup>."

Conflict rules in the United States may be interpreted as excluding application of the foreign law under some circumstances, but there is no general rule compelling such interpretation. It has been suggested that "the individual should not be blamed for exercising a choice which the conflict norm opens to him; rather, it is felt that the lawmaker should qualify the rule where it leads to undesirable

exploitation”<sup>392</sup>. For example, United States courts will generally uphold a contract concluded abroad between citizens of the forum in order to avoid the domestic statute of frauds provided that that contract satisfies the formal requirements of the place of contracting<sup>393</sup>. Similarly, in the area of corporate law, incorporation for the purpose of tax avoidance is legitimate except in those cases where legislatures or courts have otherwise provided<sup>394</sup>. Reese points out that the law of the state of incorporation must be applied to determine rights and obligations<sup>395</sup>. An exception to the general rule will occur when the corporation has only an insignificant contact with the state of its incorporation and concentrates its activities in some other state. In such a case, the law of the other state will be applied. For this reason, incorporating in Delaware or Panama, where favourable treatment is received, has become a widely recognized practice<sup>396</sup>.

Ehrenzweig attributes the reluctance of United States legislatures and courts to depart from the general rule to the interests of certainty and simplicity of law and law enforcement. He is of the opinion that the reason for this attitude in the United States has been the absence of the typical problems which in continental countries have led to the adoption of the fraud on the law doctrine<sup>397</sup>.

An example is the issue of evasive divorce, which in the United States is handled as a problem of jurisdiction, rather than choice of laws<sup>398</sup>. With respect to the question of evasive marriages, the validity of a marriage is, as a rule, governed by the law of the state in which the ceremony takes place, and if it is valid there, it will usually be recognized everywhere<sup>399</sup>. Section 283 of the Restatement reflects the position that the validity of marriage is governed by the state having the “most significant relationship” and the notes point out that this is usually the state where the ceremony was performed, unless the marriage violates the strong public policy of another state which has predominant contacts<sup>400</sup>. The comments in the Restatement state that the task of the forum is to determine whether the requirement or requirements that were not satisfied represent a sufficiently strong policy of the state of most significant relationship to warrant invalidation of the marriage. This is done by :

1. Consulting statutes of the state. Some states have statutes which invalidate in specified circumstances the out-of-state marriage of local domiciliaries<sup>401</sup>.

2. Determining whether it would be invalid on the basis of choice-of-law rules by consulting prior decisions of the courts.
3. Determining whether there is a sufficiently strong policy of the state to warrant invalidation of the marriage.

In the absence of an explicit statute or judicial precedent in the state of most significant relationship, the only rules that the forum would be likely to find to embody a sufficiently strong policy of that state to warrant invalidation of an out-of-state marriage are rules which prohibit polygamous marriages, certain incestuous marriages, or the marriage of minors below a certain age<sup>402</sup>.

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The foregoing discussion reveals the lack of regulation of fraud on the law as a general rule of private international law. Fraud on the law is contemplated only in relation to certain specific subjects (marriage, contracts, corporations, naturalization, etc.), and in other cases its application is the result of an extensive interpretation of the concept of fraud or abuse of law as used in the general law. The infrequent application of the fraud on the law doctrine is perhaps due to the more frequent reliance on public policy as an escape device in most jurisdictions. Nevertheless, the drafts on private international law of the American countries, following the criteria adopted by the most recent European laws on private international law, provide rules for application of the fraud on the law exception<sup>403</sup>.

(g) *Adaptation. Unknown Institution*

In most conflict of laws cases in which the conflict rule does not lead to the application of the substantive law of the forum, only one foreign law is competent (principle of the single law). The application of the rules of private international law, however, generally requires the division of a legal issue into several technical categories such as capacity, succession, marital property, parental authority, etc. This division, through the juxtaposition of the connecting factors, may result in the application of rules from different legal systems to each of the technical categories involved.

Wolff points out that a likely consequence of this plurality of

applicable laws may be either a plethora or dearth of rules<sup>404</sup>. The first case may lead to logical inconsistencies or to unjust results created by the lack of harmony of partial solutions. The second case may result in the more serious problem of a "legal vacuum", which is equivalent to a denial of justice. Neither case may be entirely anticipated and resolved *a priori* through legal rules. The task of crafting a harmonious coexistence of different legal systems is left to the judge who must transform or adapt substantive rules to each specific case<sup>405</sup>. This task is called adaptation. Raape and Lewald<sup>406</sup> illustrate various instances of adaptation (*Angleichung*) that compel the judge to combine rules to achieve an equitable solution of the specific case.

In one instance, the unsuitability results when categories of private international law sever relations that are necessarily linked. This occurs, for example, when capacity is governed by one rule and yet, the incompetent person is placed under the protection of the provisions of a different legal system<sup>407</sup>.

Another instance when unsuitability is likely to arise is when certain aspects of a particular relationship are linked through contingent events. Clearly, adoption bears no relationship whatsoever with succession, but eventually, or in an incidental manner, it may become a legal condition of the latter. In those cases where the *lex fori* tends not to apply the law of the legal system applicable to the principal issue to the preliminary question, the judge must solve the inconsistencies or contradictions that may result from the application of different rules.

In other instances, the purpose of adaptation is not to harmonize fragments of private international law invoked for the regulation of different aspects of a relationship, but to provide the judge with a tool that allows him to give due deference to a case with foreign elements, thus bringing it closer to the basic idea of the so-called foreign court theory<sup>408</sup>. This is the case where adaptation is used to mitigate the effects of institutions that operate as an exception to the application of foreign law.

In most cases, when the application of the foreign rule violates principles of public policy, the forum does not have an express rule at hand which indicates the substitute rule to be applied. Usually, therefore, preference will be given to the *lex fori*, which is an unsatisfactory result. In such a situation, and in the absence of any express rule, before resorting to the *lex fori*, the judge may find a

rule of the foreign legal system to be adapted to the case and substituted for the rule that is incompatible with his own law. The substitution of rules may also operate as an inverse procedure when the application of the *lex fori* is more favourable for upholding the validity of the legal transaction (principle of *favore negotii*). In these cases, the judge does not mechanically apply the foreign legal rule, but instead adapts the solution to the specific case.

Finally, the task of adaptation may be of great importance when foreign law concepts that are not contemplated in the local law, so-called unknown "institutions", are involved<sup>409</sup>. For example, the concept of civil death is recognized in some legal systems and not in others, and the Anglo-Saxon concept of trusts finds no equivalent in the concepts of *fundación albacea* (administration of trusts) or *heredero fiduciario* (fiduciary beneficiary) of the civil law system.

In the case of civil death, the failure to apply foreign law would be due to ideological incompatibility between legal systems and not to the non-existence of the institution. In the second example, on the other hand, the institution, while non-existent, does not violate principles of public policy. The problem resides in a lack of exact correspondence of characteristics and consequences with other similar institutions of the foreign law. In these instances the judge may adapt the characteristics or the effects of the institution contemplated by the foreign rule to those of the *lex fori*<sup>410</sup>.

Provisions treating adaptation or harmonization have not been included in the legislation of the American countries because, above all, of the impossibility of providing for all the instances in which the legal rules would need to be adapted. Nevertheless, the Argentine draft provides that when the foreign rule is inconsistent with principles of public policy, the judge shall only apply the *lex fori* when it is not possible to substitute the rule by another pertaining to the foreign legal system<sup>411</sup>. Likewise, the Brazilian draft mitigates the effect of the public policy clause by permitting, for reasons of equity and fairness, the recognition of partial effects to the competent foreign rule as long as those effects are similar to those provided for by a specific legal rule of the forum<sup>412</sup>. The Peruvian draft only accepts the exception of the unknown institution when the matter may not be solved by analogy. The Venezuelan draft does not include any rules on adaptation; nevertheless, the judge may resort to it by virtue of Article 2 (2)<sup>413</sup>.

With respect to the jurisprudence, it is obvious that the task of combining rules is both more frequent and feasible in flexible legal systems, such as those of the Anglo-Saxon tradition, which have not felt the direct influence of Roman law, built on the basis of the supremacy of statutory law (principle of legality). However, the jurisprudence involving application of general principles of law and the solution of cases by analogy should provide an important precedent for conflict of laws cases that require the harmonization of partial solutions as well as for those that require the assimilation of institutions arising from different legal systems.

In the United States, although there is no established doctrine of adaptation, the courts, when faced with foreign laws having no equivalence in their own legal system, will sometimes attempt to resolve the problem by identifying the domestic law which most closely resembles the foreign law to be applied<sup>414</sup>. Because the modern approach to the analysis of conflicts problems has been issue-by-issue, it is more likely that courts will apply laws of different States to different aspects of a particular case<sup>415</sup>. Weintraub describes adaptation under the "new rule approach" as follows:

"It may be possible to fashion a rule for the case in issue that differs in some respects from the domestic law of either contact State but that permits the accommodation of otherwise irreconcilable policies<sup>416</sup>."

Emphasizing the need for apt solutions, von Mehren also suggests the possibility of combining rules of different States to produce a new rule different from either State's rule but which represents the governmental interests and concerns of each State<sup>417</sup>. He foresees such a process as being useful when domestic rules do not lend themselves to cumulative application<sup>418</sup>, when situations involve considerations which do not have particular significance in comparable domestic settings, or when two legal orders hold inconsistent views in regulating a particular dispute.

With respect to recognition of foreign institutions that are unknown in the domestic legal system of the forum, section 85 of the Restatement Second<sup>419</sup> points out that a court may decide not to exercise jurisdiction with respect to a foreign cause of action if it is not prepared to devise a type of proceeding unknown to its local law in order to give appropriate relief. An example given is the case where the institution of dowry, the awarding of which

depends on the discretion of the court, is unknown to local law. Under these circumstances, the court may dismiss the action, although it might entertain it if it would be impossible or unduly burdensome for the plaintiff to obtain relief elsewhere. On the other hand, the comments to section 10 of the Restatement Second provide the following with respect to international cases:

“A legal relationship under the local law of a foreign nation, such as polygamy or a novel kind of security interest, may be unknown to the local law of the forum state. The choice-of-law rules of an American state should permit, by application of general principles and by analogy, just and predictable decisions in novel situations such as this<sup>420</sup>.”

Robertson seems to concur with the spirit of those comments. He observes that a judge must not be confined to categories of his own internal law because he will not be able to provide for any rule or institution of foreign law which has no counterpart in internal law, thus defeating one of the reasons for the existence of conflict of laws which is “the necessity of making provision for factors and institutions not known to the internal law”<sup>421</sup>.

#### (h) *Vested Rights*

The problem of articulation and co-ordination of different conflict of laws systems also arises concerning the so-called principle of vested rights. In fact, the objectives of legal certainty and predictability impose the contemplation of those situations which are internal *ab initio* but subsequently become internationalized, thus requiring the recognition of established rights and of the resulting effects in a State other than that in which they were created.

It is indeed unusual to find that national or international conflict rules specifically address this principle. A general formulation is found only in Article 8 of the Bustamante Code which states:

“The rights acquired under the rules of this Code shall have full extraterritorial force in the contracting States, except when any of their effects or consequences is in conflict with a rule of an international public order.”

None of the legislation of the Latin American countries protects rights acquired under the laws of another legal system. There are,

of course, special rules that recognize the validity of legal relations originated abroad. Such rules, however, are not universally valid and are applied only to those cases specifically determined by the law in each particular case<sup>422</sup>.

The doctrine distinguishes two aspects of the notion of vested rights: one dealing with the theory of vested rights as a basis of private international law; the other relating to the principle by which such rights are recognized. The difference is subtle, but nevertheless valid when considering the different orientations of writers of the two systems, common law and civil law. The former have traditionally sought to justify with the notion of vested rights the very essence of private international law. In contrast, Latin American doctrine bestows upon vested rights a more limited meaning. The principle of vested rights is necessary because it enables the laws of one country to be accorded all their intended effects in another<sup>423</sup>.

Among Latin American jurists, the theories of Bello and his followers in the field of private international law concerning the due deference for vested rights are significant. Bello maintains in his *Derecho de Gentes*<sup>424</sup> that the non-recognition of this institution of private international law would imply the uncertain existence of all rights.

Part of the doctrine, however, ignores the theory of vested rights. It maintains that, in the first place, the adjective "vested" adds nothing to the concept of rights because, in order to speak of rights, it is necessary that their existence or acquisition depend on a pre-existing rule, and a right which has not vested does not legally exist. Second, the doctrine makes a distinction between two instances concerning a particular right: its creation and its enforcement. Creation may be treated under conflicts rules because the problem may arise of determining which law is competent to create the right. However, with regard to enforcement, the conflict rules do not come into play, the only question is to determine the effects a right will have in a country other than the one in which it was created.

By and large, the doctrine has shown a propensity to replace the vested rights principle by a theory involving the conditional recognition of legal relationships. The four conditions precedent to recognition of the validity of a legal relationship are: (1) that it arises in conformity with the law internationally competent as indicated by the conflicts system of the country where it is being invoked, (2)

that all the internal conditions imposed by the internationally competent law have been observed, (3) that its exercise does not violate the public policy of the country where its effects are felt, and (4) that the relationship has not arisen as a result of fraud on the law of the system invoked in its support<sup>425</sup>. In this sense, the Brazilian, Peruvian and Venezuelan drafts establish general rules that provide for the international validity of rights definitively created (Niboyet), always linked, of course, to the public policy exception<sup>426</sup>.

The Anglo-American school is characterized by the radical affirmation of territorialism and a factual conception of foreign law which incorporates thereto the notion of vested rights as a reaction against the utilitarian basis of *comitas gentium* invoked to justify the application of foreign law. For the Anglo-American school the principle of vested rights maintains that the judge does not apply foreign law, but rather merely recognizes its effects<sup>427</sup>.

As noted in a preceding section, the vested rights approach as adopted by Beale and incorporated into the First Restatement has generally been rejected by most scholars and by many courts in the United States<sup>428</sup>. The local law theory, whereby states are free to establish their own conflicts laws, has achieved general acceptance. Under this theory, the forum does not apply foreign law, nor does it enforce foreign created rights. Rather it enforces rights created by the *lex fori* in a form resembling as closely as possible similar foreign rights<sup>429</sup>. In the words of Leflar:

“Rights arising from two-state or multistate transactions cannot be said to have ‘vested’ until the forum court has decided, under its own conflicts law, what state’s law governs the transaction<sup>430</sup>.”

Recent theories pertaining to choice of law have emphasized the importance of identifying policy concerns and the weighing of the interests of the states involved. One such theory is adopted by the Restatement Second, which would have courts determine the state having the “most significant relationship”<sup>431</sup>.

### 3. Final Observations

In this chapter we have analyzed the general rules of private international law as treated under the legislation, doctrine, and jurisprudence of the American countries. From this perspective, it

should be emphasized that in the legal system of the civil law tradition there is an unbroken relationship between the general rules and the classical doctrine. This relationship is translated into the statutory formulation of principles used by a judge in applying conflict rules and the rationale which has been formulated by the doctrine concerning these principles. The conflict system of the United States displays different characteristics but, above all, a pronounced scepticism concerning the existence and functions of such principles or general rules of universal validity. The different emphasis given the deductive and inductive methods, positive and sociological aspects of the rules, formal and equitable justice, dogmatism and case law, applicable law and jurisdiction presents private international law with a complex set of problems which are reflected in its general part, particularly in light of the increasing interpretive discretion exercised by the courts.

Although in the abstract, both systems may still be considered as unsympathetic, an evaluation of the preceding pages indicates that the possibility of reaching a synthesis which reconciles them, through their approximation towards a common midpoint, is not remote. Such a synthesis is possible, not only because of the integration of the inter-American system, but also because of the recognition of the need for reciprocal influence, by means of an acceptable path for all, deriving from a balance between solid and orderly principles and general institutions, which will guarantee the existence of a scientific system, so dear to Latin American thinking, and the necessary and wholesome Anglo-Saxon pragmatism. This enriching pluralism gains full intensity in the current stage of conventional formulation of private international law rules in the hemisphere and, in particular, in the Inter-American Convention on General Rules of Private International Law, which will be analyzed in the following chapter.

