

The new Paraguayan Law on international contracts: back to the past?

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Professor Joachim Bonell's leadership has undisputedly been decisive for the remarkable developments which in recent decades have led to the gradual harmonization of contract law in the world. Deeply upset when, in 2008, Europe unsatisfactorily modified its conflict-of-laws rules for international contracting (signalling a resounding defeat for the harmonization crusaders in the continent), his unbendable spirit led him to affirm that hope is the last thing to be lost,¹ and that the time was ripe to address and resolve this matter adequately on a global scale. Even though I have admired Professor Bonell for many years through his work, I only met him for the first time in The Hague in 2010, and from there on several times in the Netherlands and in Italy, where I became even more impressed with his wit, deep understanding of contract law and relentless determination to advance his beliefs on the subject. The work in The Hague was eventually concluded in 2015 and many of its accomplishments in favour of a less fragmented world in the field of international contracting can be traced back to Professor Bonell, whose principled guidance proved decisive for the fate of the endeavour and for the favourable outcome, which meant a step towards cosmopolitanism. Professor Bonell and many other missionaries (this is how the late Professor Allan Farnsworth described himself in promoting the virtues of universalism in contract law) may have lost the battle, but the defeat was merely pyrrhic: they are destined to win the war. This article, written in honour of the already legendary Professor Bonell, recounts the battle of the crusade, won in the country of Paraguay, together with the huge victory in The Hague.

INTRODUCTION

Some years ago, French legal philosopher Michel Villey, complained that after the ancient Greeks and Romans, not much progress had been made effectively to grasp the notions of law and justice.² In more "mundane" matters, not long ago Professor Friedrich Juenger of

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¹ M. J. BONELL, El reglamento CE 593/2008 sobre la ley aplicable a las obligaciones contractuales ("Roma I") – Es decir, una ocasión perdida, in *Cómo se Codifica hoy el Derecho Comercial Internacional*. J. Basedow / D.P. Fernández Arroyo / J.A. Moreno Rodríguez (eds.), CEDEP y La Ley Paraguaya, 2010, p. 218.

² M. VILLEY, *Filosofía do Direito*, São Paulo, Editorial Martins Fontes, 2003, p. 51 *et seq.* The text contained therein is a translation of work published in France in the mid-eighties of the twentieth century.

the University of California noted that the old Roman *ius gentium* and *ius commune* and the *lex mercatoria* of the Middle Ages, proved much more effective in private commercial relationships with foreign elements than the conflict-of-laws rules that spread across a multi-state world from the XIX century onwards.³

In 2015, Paraguay promulgated a brand-new law on international contracts. This Law can be qualified as a forward-looking piece of legislation, in line with recent proposals advanced by prestigious codifying organizations of the world and the Americas and taking into account current developments and the necessities of day-to-day commerce. Moreover, it may well pave the way for a return to the old cosmopolitan days, earlier aborted by the “balkanized” conception of an influential stream of “conflictualism” – leading to the application of national law to private international relationships.

In this contribution, its author will present and explain the new Paraguayan Law,⁴ focusing on its universal spirit – thus leaving behind years of chauvinism in the field of international contracting. The author is convinced that there has been nothing new under the sun since Cicero’s proclamation of the virtues of cosmopolitanism⁵ (when he stated that the day would come when the law was the same in Rome, in Athens and all around the world),⁶ and this should be particularly the case with Contract Law in a multi-State world.

I REVERSAL OF TWO CENTURIES OF MISCHIEF

The pendulum is indeed swinging again. We are moving back towards the universal spirit of the old Roman *ius gentium* and later, of the Middle and Modern Ages’ *ius commune* and *lex mercatoria*. This was interrupted when the consolidation of modern States led to the nationalization of the law in the nineteenth century, which gave a tremendous boost to the discipline of Private International Law, understood as law intended to solve “conflicts of national laws”.

Many factors are contributing to the swift changes of recent times.⁷ Inter alia, party autonomy is consolidating as a principle in international contracting. This leads to parties avoiding the unpredictable “conflictualism”, via relevant provisions in their agreements or a

³ See, in particular: F.K. JUENGER, *The Lex Mercatoria and Private International Law*, *Louisiana Law Review*, p. 1133 *et seq.* In general, see the marvelous book: F. K. JUENGER, *Choice of Law and Multistate Justice*, New York, Transnational Publishers Inc., 2005.

⁴ See, both in Spanish and English, here: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6300&dtid=41>.

⁵ As reiterated by R. GOODE, *Reflections on the Harmonization of Commercial Law in, Commercial and Consumer Law*, Chapter 1, R. Cranston / R. Goode (eds.), reproduced with minor changes in *Uniform Law Review*, 1991, p. 54 *et seq.*

⁶ See citation and the virtues of this in G. GILMORE, *The Ages of American Law*, New Haven and London, Yale University Press, 1977, p. 33. Berman speaks of an eventual new *ius gentium*. See in: H.J. BERMAN, *Is Conflict of Laws Becoming Passé? A Historical Response*, *Emory University School of Law, Public Law & Legal Theory Research Paper Series*, Research Paper No. 05-42, <http://papers.ssrn.com/abstract=870455>, p. 43.

⁷ I have addressed this topic in several previous works, such as, recently: J.A. MORENO, *Los Contratos y La Haya: ¿Ancla al Pasado o Puente al Futuro?*, in *Contratación y Arbitraje, Contribuciones Recientes*, CEDEP, Asunción, 2010, p. 5 *et seq.* <http://jmoreno.info/v1/wp-content/uploads/2014/11/Los-Contratos-y-La-Haya1.pdf>.

clear choice of the legal regime that will govern them. Additionally, arbitration is consolidating as a widespread means for solving commercial disputes, providing the arbitrators with powerful tools to arrive to fair solutions in trans-border problems, beyond the mere automatic application of national laws in accordance with a conflict-of-laws mechanism.

On a theoretical level, the basis of this orthodox “conflictualism” suffered numerous attacks, and, in practice, it has been demonstrated that the system simply does not work when it comes to providing adequate responses to the necessities of transnational commercial activity.

International organizations have responded to the need to harmonize norms governing trans-border mercantile activities and thus, to leave behind an outdated “conflictualism” in this field.⁸ Remarkable efforts include those of the International Institute for the Unification of Private Law (UNIDROIT), created in 1926 under the auspices of the then League of Nations;⁹ the United Nations Commission on International Trade Law (UNCITRAL), set up in 1966;¹⁰ and private organizations such as the International Chamber of Commerce (ICC),¹¹ among others proposing uniform norms to govern several areas of international contracting.

Today, these various developments have had an impact on the interpretation of domestic laws, strongly influenced by comparative law.¹² Thus, James Gordley speaks of a switch from a positivistic and nationalist approach to a transnational and functional

⁸ Bonell highlights as a characteristic of our times the multiple initiatives towards unification or at least harmonization of national laws (M.J. BONELL, *International Uniform Law in Practice – Or Where the Real Trouble Begins*, in *The American Journal of Comparative Law*, 38, 1990, p. 865 *et seq.*

⁹ See in: www.unidroit.org.

¹⁰ See in: www.uncitral.org.

¹¹ See in: <http://www.iccwbo.org>.

¹² The influence of comparative law in domestic laws is emphasized in K. ZWEIGERT / H. KÖTZ, *An Introduction to Comparative Law*, 3rd ed., New York, Oxford University Press Inc., 1998, p. 19. As stated by Zimmermann, we are living in an age of post-positivism. The narrowness, but also the security, of a national codification, or common law, is increasingly left behind and we are moving towards a new *ius commune* (R. ZIMMERMANN, *Roman Law and the Privatization of Private Law in Europe*, in *Towards a European Civil Code*, A. Hartkamp *et al.* (eds.), 2011, Kluwer, The Netherlands, p. 51; see also, in regard to German law: R. ZIMMERMANN, *The German Civil Code and the Development of Private Law in Germany*, in *Oxford University Comparative Law Forum 1* in ouclf.iuscomp.org, 2006, after note 144. In France, even the “internists”, albeit refusing to be labelled as comparatists, resort to comparison, whether consciously or not (B. FAUVARQUE-COSSON, *Development of Comparative Law in France*, in *The Oxford Handbook of Comparative Law*, Oxford / New York, Oxford University Press, 2006, p. 59. For developments in England, see: S. VOGENAUER, *Sources of Law and Legal Method in Comparative Law*, in *The Oxford Handbook of Comparative Law*, Oxford / New York, Oxford University Press, 2006, p. 876. In the United States, see: D.S. CLARK, *Development of Comparative Law in the United States*, in *The Oxford Handbook of Comparative Law*, Oxford / New York, Oxford University Press, 2006, p. 179.

interpretation,¹³ while Klaus Berger refers to an “internationally useful construction of domestic laws”.¹⁴

II NOT ONE, BUT TWO TROJAN HORSES

In the aforementioned scenario, the last two decades have seen the inception of two conflictualist instruments with – regardless of their character – a powerful potential to leave behind the orthodoxy of nineteenth century “conflictualism”: the Hague Principles on Choice of Law in International Commercial Contracts, approved in 2015, and the Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention) of 1994.

A) THE HAGUE PRINCIPLES

The Hague Conference on Private International Law (hereinafter: the Hague Conference), undoubtedly the most prestigious organization in the world codifying conflict or choice-of-law rules,¹⁵ has embarked on drafting Principles on Choice of Law in International Commercial Contracts, now commonly referred to as “the Hague Principles”, which it is envisaged will be very influential in the years to come.¹⁶

Qualified as “ground-breaking” for being the first legal instrument at a global level to address choice of law in international contracts, the Hague Principles are comprised of twelve Articles, including comments and some examples, all of which are preceded by an introduction and an explanation, intended to cut across the dividing line between common law and civil law, and to be used in both court and arbitration proceedings.

The origins of this idea can be traced back to 1980, inspired by the successful drafting of the so-called Rome Convention of 1980, now Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), governing the law applicable to international contracts.¹⁷ These first glimmerings were abandoned after careful consideration of the difficulties of the drafting process and later of the difficulty of securing widespread ratification to make the document effective in the universal arena.

¹³ J. GORDLEY, *Is Comparative Law a Distinct Discipline?* in *46 The American Journal of Comparative Law*, 1998, p. 607.

¹⁴ See citation in the very interesting article by V. RUÍZ ABOU-NIGM, *The Lex Mercatoria and Its Current Relevance in International Commercial Arbitration*, in *Revista DeCITA, Derecho del comercio internacional, temas y actualidades, Arbitraje*, 02.2004, p. 111.

¹⁵ The Hague Conference is the oldest of the Hague international legal institutions (H. VAN LOON, *The Hague Conference on Private International Law*, in *2 The Hague Justice Journal*, 2007, p. 4; in this article the former Secretary General of the organization describes its important work).

¹⁶ See, for instance, in L. RADICATI DI BROZOLO, *Non-national rules and conflicts of laws: Reflections in light of the UNIDROIT and Hague Principles*, in *XLVIII Rivista di diritto internazionale privato e processuale*, 2012/4, pp. 841-864.

¹⁷ See in: M. PERTEGÁS / I. RADIC, *Elección de la ley aplicable a los contratos del comercio internacional. ¿Principios de La Haya?*, in *Cómo se Codifica hoy el Derecho Comercial Internacional*, J. Basedow / D.P. Fernández Arroyo / J.A. Moreno Rodríguez (eds.), CEDEP y La Ley Paraguay, 2010, p. 341 *et seq.*

The project was resumed more than two decades later. Feasibility studies started in 2006, and in 2010 a Working Group was formed, comprised of fifteen members (two from Latin America: Lauro Gama and José A. Moreno Rodríguez) together with observers from UNIDROIT (Joachim Bonell), the ICC (Fabio Bortolotti), the ICC Commission of Arbitration (at the time represented by Francesca Mazza), UNCITRAL and the International Bar Association (IBA), among others. The Working Group was chaired by Daniel Girsberger, a renowned Private International Law Professor from Switzerland with broad expertise in arbitration, and diligently coordinated by Marta Pertegás of the Hague Conference Secretariat.

The Special Commission, (a diplomatic meeting with more than one hundred national delegations and observers) held in November 2012 - based on the propositions formulated by the Working Group - proposed a set of rules for the Hague Principles. In April 2013, the General Council Meeting of the Hague Conference, empowered to render final approval of the Principles, “welcomed the work” and “gave its preliminary endorsement” of the document. Likewise, the commentary to these rules received provisional endorsement at the General Council meeting of April 2014. Finally, in March 2015, the final version of the Hague Principles, with its comments and examples, gained formal approval.¹⁸

The Hague Principles follow the drafting technique of the UNIDROIT Principles.¹⁹ Hence, both instruments contain a preamble, rules or “principles”, as well as comments and illustrations, where necessary. The Hague Conference was persuaded by the success of this drafting technique after considering the difficulties of attempting to draft a successful “hard law” international treaty. Like the UNIDROIT Principles, the Hague Principles are expected to guide legislators or contract drafters, and to serve for the purposes of interpretation both in a judicial and in an arbitral setting.

Indeed, we have before us two complementary instruments. Whereas the UNIDROIT Principles deal with substantive contract law issues such as – inter alia – formation, interpretation, content and termination, the Hague Principles address the problem of which law will apply to a contract: one – or several – national laws or even non-State law such as, for instance, the UNIDROIT Principles themselves.

Particular care was taken throughout the drafting process to take into account the developments in the arbitral world, since the Hague Principles are expected to provide useful guidance not only to judges but also to arbitrators in matters related to the complexities of party autonomy and its limits.

¹⁸ The relevant documents can be accessed on the Hague Conference site at: <http://www.hcch.net>.

¹⁹ In fact, the Hague Principles reveal a drafting technique similar to the UNIDROIT Contract Principles of 1994, revised in 2004 and 2010, inspired in turn by the American Restatements, which purport to “re-state” the law in particular fields, and in the case of the former, modernize the law in areas where the current state of affairs is unsatisfactory (see H. KRONKE, Most Significant Relationship, Governmental Interests, Cultural Identity, Integration: ‘Rules’ at Will and the Case for Principles of Conflict of Laws, in IX *Uniform Law Review*, 2004/3, p. 473). This is also the spirit of the Hague Principles. They should not only reflect the *status quo*, but provide for desirable solutions for improving the state of affairs in international contracting in any areas where it is deemed necessary.

The Hague Principles do not deal with issues where choice-of-law is absent. It regulates party autonomy in international commercial settings, with provisions relating to formalities, severability, exclusion of renvoi, etc., including a ground-breaking rule in its Article 3 (with regards to judges as well as arbitrators) which admits the selection of non-State law. Public policy is also contemplated as an exceptional limit to party autonomy.

The instrument has an enormous potential thanks not only to the prestige of the Hague Conference and in view of the global reach sought, but also due to the fact that its ample admission of party autonomy endorses non-State law in a “conflictualist” text. Conditions are created, therefore, for a return to the cosmopolitan spirit of the old days, since parties can choose non-State law such as, for instance, the UNIDROIT Principles, and need not confine themselves to the dictates of the current orthodoxy of selecting State laws. Because of this, it may well be qualified as a Trojan Horse in favour of universalism in a choice-of-law text, with fecund potential consequences.

The Principles enjoy the legitimacy of having been advanced by an international organization that has been working with diverse stakeholders for many years. Additionally, one must account the simplicity of its dispositions and balanced regulation it includes on public policy, which contemplates the interest of commerce in expanding party autonomy and, at the same time, States’ interest in exceptionally restricting choice-of-law when it is manifestly incompatible with the latter.

B) *THE MEXICO CONVENTION*

Non-State law is also admitted in the Inter-American Convention on the Law Applicable to International Contracts of 1994 (hereinafter: the Mexico Convention), advanced by the Organization of American States (OAS).²⁰ This instrument draws upon the Rome Convention of 1980 on the subject, albeit expressly accepting, in contrast, the applicability of non-State law for the Americas²¹ — Professor Diego Fernández Arroyo’s article stating that “some roads lead beyond” being more than appropriate.²²

²⁰ Since 1975, the OAS has been organizing its Specialized Conferences on Private International Law (*CIDIP*, for its Spanish acronym), which have generated 26 international instruments (including conventions, protocols, uniform documents and model laws), which shape the Inter-American Private Law framework. The first of these Conferences [CIDIP-I] was held in Panama City, Panama, in 1975. The most recent Conference [CIDIP-VI] was held at OAS headquarters in Washington, D.C., US, in 2002. The first half of [CIDIP-VII] took place on 7-9 October, 2009 where the Model Registry Regulations under the Model Inter-American Law on Secured Transactions was adopted (http://www.oas.org/dil/private_international_law.htm). An assessment of the CIDIP work can be found at D.P. FERNÁNDEZ ARROYO, *Derecho Internacional Privado Interamericano, Evolución y Perspectivas*, Santa Fé, Rubinzal, Culzoni Editores, 2000, p. 55 *et seq.*

²¹ Articles 9 and 10, which lead to an openness towards transnational law (see J.L. SIQUEIROS, *Reseña General sobre la Quinta Conferencia Especializada Interamericana sobre el Derecho Internacional Privado, CIDIP-V*, in *Cursos de Derecho Internacional, Serie Temática, Volumen I* (Parte I): *El Derecho Internacional Privado en las Américas, 1974-2000*, Secretaría General, Subsecretaría de Asuntos Jurídicos, Washington, D.C., 2002, p. 516. This matter is addressed again below.

²² This in a publication in French later translated into Spanish and published in Argentina (D.P. FERNÁNDEZ ARROYO, *La Convención Interamericana sobre Derecho aplicable a los contratos*

The Mexico Convention comprises thirty Articles (like its European source) regarding scope, party autonomy, absence of choice and, as a novelty, the possibility of applying non-State law. The “Trojan” effect of this Convention emerges, furthermore, from an equitable formula included in the text that empowers adjudicators to assess transnational transactions in accordance with a universal criterion of justice rather than with a more limited view, subject to one or many national laws, as will be seen.

However, even though it was welcomed by relevant legal scholars,²³ the Mexico Convention itself has so far only been ratified by Mexico and Venezuela, unlike other continental instruments which enjoy widespread reception. Speculation is rife as to why the Convention was not ratified by more countries, and while it is undeniable that some of its aspects may be subject to criticism, it defies common sense to attribute this poor reception to its openness to transnational law, considering all the aforementioned developments and other highly relevant accomplishments in this sense brought about by arbitration in the region – Unless, of course, the problem is that the legal establishment is not sufficiently aware of the consequences of these achievements, which would lead to the ratification of the Mexico Convention, fully in tune with these contemporary trends.

In fact, in a contribution written by the author of this article in collaboration with Mercedes Albornoz, it is stated that the current work of the Hague Conference should in part contribute to the concrete reception of the Mexico Convention —through the incorporation mechanism finally opted for— by a greater number of recipient countries.²⁴

Finally, another reason which influenced the Convention’s limited adoption, is ignorance of other modalities for its reception besides ratification. An alternative would be, for instance, simply copying its provisions into a national law on the matter,²⁵ as has been done in Paraguay.

internacionales aprobada por a CIDIP-V, in *Revista Jurisprudencia Argentina*, Buenos Aires, n° 5933, 1995, pp. 820-824).

²³ In fact, the modern solutions offered by the Mexico Convention have been applauded (see R. HERBERT, *La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales*, *RUDIP*, Year 1-No. 1, p. 45; J. TÁLICE, *La autonomía de la voluntad como principio de rango superior en el Derecho Internacional Privado Uruguayo*, *Liber Amicorum in Homenaje al Profesor Didier Opertti Badán*, Montevideo, Editorial Fundación de Cultura Universitaria, 2005, pp. 560-561), stating that it deserves to be ratified or incorporated into the internal laws of the countries through other means.

²⁴ J.A. MORENO RODRÍGUEZ / M.M. ALBORNOZ, *Reflexiones emergentes de la Convención de México para la elaboración del futuro instrumento de La Haya en materia de contratación internacional*, published in Spanish at www.eldial.com.ar. In English: *Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts*, in 7 *Journal of Private International Law*, Hart Publishing, 2011/3, p. 493.

²⁵ This was the case of Venezuela (E. HERNÁNDEZ-BRETÓN, *La Convención de México (CIDIP V, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina*, in *DeCITA 9, Derecho del Comercio Internacional, Temas y Actualidades*, Asunción, CEDEP, 2008, p. 170). On the Venezuelan Law, see T.B. DE MAEKELT / C. RESENDE / I. ESIS VILLAROEL, *Ley de Derecho Internacional Privado Comentada*, T. I y II, Caracas, Universidad Central de Venezuela, 2005. In particular, in Volume II, the work of J. OCHOA MUÑOZ / F. ROMERO, on the applicable law to international contracting and the *lex mercatoria* (pp. 739-832).

III VOILÀ THE PARAGUAYAN LAW

On 15 January 2015, the Executive Branch enacted Paraguayan Law 5393 “on the law applicable to international contracts” (the title in Spanish is: “*Sobre el derecho aplicable a los contratos internacionales*”). Published on 20 January 2015,²⁶ the Law has been in force as from the day following enactment.²⁷

The original bill had been presented in the previous Congress term, on 7 May 2013, by Senator Hugo Estigarribia. Authorship of the law is attributed in the Statement of Motives to Doctor Jose A. Moreno Rodriguez, mentioning his membership of the Working Group of the Hague Conference on Private International Law and his designation as a representative, formally appointed by the Ministry of Foreign Affairs, to the Special Committee which approved the text of the Hague Principles which was reproduced almost entirely by the bill.

The Statement of Motives praises this reproduction as highly commendable. Likewise some opportune modifications were needed to bring the provisions into line with the Mexico Convention of 1994. As a result, the Law incorporates the virtues of the Mexico Convention, also capturing the innovations of the instrument approved in The Hague.

In its conclusion, the Statement of Motives notes that after possessing one of the most antique regimes of the world in matters of cross-border contracting, Paraguayan Law will -with this new body of law- become forward-looking. The Law could even inspire other texts that might be adopted elsewhere in the world, given that it sets a path showing how effectively to embody the Hague Principles in a national legislative text.

The Paraguayan Law on international contracts comprises 19 Articles. Its first part (Articles 1-10, as well as Articles 13-14), regarding choice-of-law, basically reproduces the Hague Principles, with minor modifications. The following provisions (Articles 11-12, 15-16²⁸) mostly deal with the applicable law in the absence of choice, reproducing almost literally the above mentioned Mexico Convention of 1994. Finally, the Law incorporates norms regarding public policy (Article 17, which is in line with the Hague Principles) and derogations (Article 18).²⁹

In accordance with the title of the draft of the Hague Principles, the Paraguayan Law only refers to “international contracts”, not to “international commercial contracts”, as does

²⁶ <http://www.gacetaoficial.gov.py/gaceta.php?action=show&id=2670&num=13>.

²⁷ There had originally been some objections and it was modified at the Legislation Committee of the Senate, but afterwards these modifications were mostly overturned by the Senate Constitutional Committee. On 11 December, the law was passed by the Senate, and on 17 December by the Chamber of Deputies. On 9 January, the resolution of Parliament was passed sanctioning the law, which later passed to the Executive Branch for promulgation. See <http://sil2py.senado.gov.py/formulario/VerDetalleTramitacion.pmf?q=VerDetalleTramitacion%2F6372>.

²⁸ Article 15, in line with Article 16 of the Mexico Convention, states that if the registration or publicity of particular contracts is mandatory in a State, such acts will be ruled by the law of that State. In the case of a State which has two or more systems of law applicable in different territorial units, the determination of which system is applicable should be decided according to the chosen law. If it is not possible to do so, the law of the closest connection will apply, according to Article 16 of the Paraguayan Law, drawn upon Article 23 of the Mexico Convention.

²⁹ The law derogates several Articles of the Civil Code (Articles 14, 17, 297, 687 and 699 (b), regarding international contracts, most of them containing chauvinistic rules).

the final title of the 2015 version approved by the Hague Conference. This last change was introduced in the Hague Council meeting of March 2015, more than two months after the law had already been adopted in Paraguay, mainly to bring the Principles into line with the terminology of the UNIDROIT Principles (which refer to international “commercial” contracts). This distinction no longer exists in Paraguay following the enactment of the Civil and Commercial Code in force since 1987. Furthermore, since the law clarifies its scope in the text, this should not be an issue.

IV SCOPE OF APPLICATION

As indicated by its title, Law 5393 deals with international contracts. The Paraguayan Law does not take sides in the debate on the several criteria for determining the internationality of the contract, meaning, for instance, the subjective criterion of considering the domicile or establishment of the parties, or the objective criterion of the transfer of goods from one country to another.³⁰

Article 2 of the Law states that its applicability is to be interpreted in the broadest way possible, and that only those agreements will be excluded in which all the relevant elements are linked with a single State. This formula is in line with the Preamble (Comment 1) of the UNIDROIT Principles on International Commercial Contracts.

On this matter, the drafting of the Paraguayan Law departs from the Hague Principles,³¹ since its author considers the literality of the formula adopted to be more ample. However, the two are the same in spirit: they give the maximum possible scope of application to the term “international”.³² And in fact, the term “international” tends to be conceived broadly in instruments which regulate both international contracting and arbitration.³³

The practical effect of the Paraguayan solution is that the sole will of the parties can suffice to “internationalize” the contracts. This issue is controversial in the Mexico Convention³⁴ and also in the Rome regulation.³⁵ Anyhow, if no other relevant international

³⁰ The early debate is clearly summarized in: G.R. DELAUME, What is an International Contract? An American and a Gallic Dilemma, in *Int'l & Comp L Q* 258, 1979, pp. 264-271. From a Latin American perspective, see: G.A. LORENZO IDIARTE, ¿Cuándo un Contrato es Internacional? Análisis Desde una Perspectiva Regional, in *Avances del Derecho Internacional Privado en América Latina, Liber Amicorum Jürgen Samtleben*, J. Kleinheisterkamp / G.A. Lorenzo Idiarte (eds.), Montevideo, Editorial Fundación de Cultura Universitaria, 2002, p. 105 *et seq.*

³¹ According to which “a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the law chosen, are connected only with that State” (Article 1.2).

³² Official Comment of the Hague Principles 1.14.

³³ Thus, for example, Article 1(3) of the UNCITRAL Model Law on Arbitration, (reproduced in Article 3 of Paraguayan Law 1879 of 2002 on Arbitration), establishes: “An arbitration is international if: “...(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”

³⁴ See D. HARGAIN, Contratos comerciales en el MERCOSUR: Ley aplicable y juez competente, in *1 Revista de Derecho del MERCOSUR*, La Ley S.A. Editora e Impresora, Buenos Aires, 1997, p. 94.

³⁵ A.L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, El Convenio de Roma sobre la Ley Aplicable a las Obligaciones Contractuales de 19 de junio de 1980, in *Contratos Internacionales*,

element exist, the applicable *ordre public* notion –pursuant to the Paraguayan Law- will be the domestic one, not the one reserved for international transactions.³⁶

The Paraguayan Law states in its Article 1.1 (the same as in the final version of the Hague Principles) that the Law regulates the choice of applicable law in international contracts when one of the parties act in exercise of its business or profession. Article 1 of the Paraguayan Law also clarifies that its provisions do not apply to consumer and employer contracts. However, departing from its Hague model, the Paraguayan Law also excludes from its scope franchising, agency and distribution contracts. The drafter understood that they should be excluded, since Paraguay has a Law (194 of 1993) dealing specifically with agency and distribution contracts. Franchising contracts have no specific law regulating them, but should be considered by analogy to the previously mentioned.³⁷

Drawn upon Article 1.3 of the Hague Principles, Article 3 of the Paraguayan Law excludes from its scope of application any law governing the capacity of natural persons; arbitration agreements and agreements on choice of court; companies or other collective bodies and trusts; insolvency procedures; and the issue of whether an agent is able to bind a principal to a third party.³⁸ These matters were excluded from the Hague Principles because of divergences in comparative law regarding their contractual or non-contractual character and regarding the question as to whether party autonomy should govern them.

In turn, Article 13 of the Paraguayan Law, which reproduces Article 9 of the Hague Principles, deals with the scope of application of the Law, clarifying that it is to govern all aspects of the contract between the parties, including rights and obligations, interpretation, termination and nullity and its consequences, as well as pre-contractual obligations.

V FREEDOM OF CHOICE

A) THE SITUATION PRIOR TO THE NEW PARAGUAYAN LAW ON INTERNATIONAL CONTRACTS

The party autonomy principle encountered strong resistance in Latin America as early as in the XIXth Century – and even until recently.³⁹ However, the trend is reversing in most

A.L. Calvo Caravaca / L. Fernández De La Gándara (eds.), P. Blanco-Morales Limones (coord.), Madrid, Editorial Tecnos S.A., 1997, pp. 63-64.

³⁶ As explained in another context by A. BONOMI, The Principles of Party Autonomy and Closest Connection in the Future EC Regulation “Rome I” on the Law Applicable to Contractual Obligations, in *DeCITA, Derecho del comercio internacional, temas y actualidades*, Buenos Aires, Editorial Zavalía, 2005, p. 336.

³⁷ This analogous character is treated, for instance, by O.J. MARZORATI, *Derecho de los negocios internacionales*, Tomo II, 3^a edición actualizada y ampliada, Buenos Aires, Editorial Astrea, 2003, pp. 30-31.

³⁸ To avoid controversy resulting from a translation into Spanish, the Paraguayan norm excludes subsection (e) of Article 1.3 of the Hague Principles, dealing with proprietary rights of the contract. In Spanish a formula could have been included referring to the exclusion of the “efectos reales”, so as to exclude matters dealing with transmission of property. However, this is usually governed by imperative local norms, and anyways, Law 5393 recognizes their prevalence.

³⁹ See an account on the matter in: C. FRESNEDO DE AGUIRRE, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991. More recently, see: H.A. GRIGERA NAÓN,

jurisdictions, and Paraguay is no exception. In the past few decades, the country has adopted several instruments in favour of party autonomy, such as the OAS Panamá Convention on Arbitration of 1975,⁴⁰ the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards,⁴¹ and an arbitration law drawn upon the UNCITRAL Model Law of 1985. In the framework of the Southern Cone Common Market (MERCOSUR), Paraguay ratified the 1994 Buenos Aires Protocol on jurisdiction regarding international contracts,⁴² and did the same regarding the regional instrument on International Commercial Arbitration.⁴³ Both instruments recognize party autonomy.⁴⁴

The modernization of the legal framework has not, however, reached the Paraguayan Civil Code, in force since 1987. Misleading norms included in the Code have given rise to doubts regarding said matter.

Paraguay has not ratified the 1994 Mexico Convention, which clearly recognizes party autonomy. It has adopted the Montevideo Treaties⁴⁵ which, however, do not provide a satisfactory solution. The 1889 Treaty on international civil law is silent on the subject, thus, generating strong doubts;⁴⁶ whereas the 1940 Treaty on the same topic leaves it up to each State, exercising its sovereign powers, to decide whether party autonomy should be recognized.⁴⁷ Hence, the issue was deferred to national law.

In Paraguay, scholarly opinions were divided regarding the solution adopted by the Civil Code⁴⁸ until recently, when the Supreme Court decided in favour of party autonomy.⁴⁹

Arbitration and Latin America: Progress and Setbacks, Freshfields Lecture, in 21 *Arbitration International*, 2004/2, pp. 127-175.

⁴⁰ Ratified by Law 611 of 1976. In turn, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo 1979) was ratified through Law 889 of 1981.

⁴¹ Ratified by Law 948 of the year 1996.

⁴² Council of MERCOSUR Decision Number 1 of 1994, ratified by Law 597 of 1995.

⁴³ Council of MERCOSUR Decision Number 3 of 1998, ratified by Law 3303 of 2007.

⁴⁴ Buenos Aires Protocol, Article 4, and, the Arbitration Instrument; Article 3.

⁴⁵ The 1889 Treaties were ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay; whereas the 1940 Treaties were ratified by Argentina, Paraguay and Uruguay. The 1940 Treaties deal with identical matters as the prior treaties among the same States (such is not the case of Bolivia, Peru and Colombia).

⁴⁶ See D. OPERTTI BADÁN / C. FRESNEDO DE AGUIRRE, *Contratos Comerciales Internacionales*, Montevideo, Fundación de Cultura Universitaria, 1997, p. 16.

⁴⁷ R. SANTOS BELANDRO, *El Derecho Aplicable a los Contratos Internacionales*, 2ª ed., Montevideo, Editorial Fundación de Cultura Universitaria, 1998, p. 65.

⁴⁸ See the discussion in: J.A. MORENO RODRÍGUEZ, *Autonomía de la voluntad en el Derecho internacional privado paraguayo*, in *Libro Homenaje a Tatiana Maekelt*, CEDEP, Asunción, 2010. The article is accessible at: <http://www.pj.gov.py/ebook/monografias/nacional/internacional-privado/Jos%C3%A9-Antonio-Moreno-Autonomia-de-la-voluntad-en-el-derecho-internacional-privado-paraguayo.pdf>. Foreign legal scholars also deal with the matter, with interpretations favouring party autonomy: N. de ARAÚJO, *Contratos Internacionais*, 4ª ed., Rio de Janeiro, Editorial Renovar, 2009, pp. 89-90. M.M. ALBORNOZ, *Choice of Law in International Contracts in Latin American Legal Systems*, in 6 *Journal of Private International Law*, 2010/1, Hart Publishing, Oxford, p. 58. Also, the Uruguayans HARGAIN and MIHALI in *Derecho del Comercio Internacional*, C. Esplugues / D. Hargain (eds.), MERCOSUR-Unión Europea, Madrid y otras, Editoriales Reus y Bdef, 2005, p. 304.

However, Paraguay is a civil law system and precedent does not have the same binding effect that it has in common law jurisdictions. The need for a law to settle this issue was pressing.

B) *THE REGULATION OF LAW 5393*

Party autonomy is at the heart of the Hague Principles. This chimes with its almost universal recognition as expressed in responses to questionnaires submitted by the Hague Conference in 2007.⁵⁰

Article 4 of the Paraguayan Law, which reproduces Article 2 of the Hague Principles almost word for word, states that a contract is governed by the law chosen by the parties (Article 4.1). This was also the solution finally adopted by the Mexico Convention – even though it had been a highly controversial issue during its negotiation.⁵¹

The issue of party autonomy must be analyzed in line with developments in arbitration, regarding which most Latin American countries, including Paraguay, have modernized their laws by adopting the New York Convention of 1958 and the UNCITRAL Model Law.⁵² The paradox arose in Paraguay in the sense that parties could, simply by resorting to arbitration, choose the law applicable to the merits of their international contract, whereas this was not the case in court proceedings.⁵³ This unacceptable situation has been happily left behind with the new Paraguayan Law.

C) *DÉPEÇAGE*

Article 4.2 of the Paraguayan Law, reproducing Article 2.2 of the Hague Principles, states that the parties may choose the law applicable to the whole contract or to only part of it; they may also choose different laws applicable to different parts of the contract, provided that they be clearly distinguished.⁵⁴ Thus, *dépeçage*, a derivation of the party autonomy

⁴⁹ Acuerdo y Sentencia N° 82 of 21 March 2013, in *Reconstitución del Expte. Hans Werner Bentz c. Cartones Yaguareté S.A. s/ Incumplimiento de contrato*. The Court cited expressly the author of this contribution. See in: J.A. MORENO RODRÍGUEZ, *Derecho Internacional Privado y Derecho de la integración – Libro Homenaje a Roberto Ruíz Díaz Labrano*, CEDEP, Asunción, 2013, p. 381.

⁵⁰ Preliminary Document No. 5 of the Hague Conference Secretariat <https://assets.hcch.net/docs/cb1ca59e-5e69-4a86-b9f1-e929075fdef2.pdf>, p. 4.

⁵¹ See D. OPERTTI BADÁN, El estado actual del tratamiento jurídico de los contratos comerciales internacionales en el continente americano, in *Los Principios de UNIDROIT: ¿Un derecho común de los contratos para las Américas?*, F. MESTRE / P. DE SEUME, ed., UNIDROIT, 1998, p. 45.

⁵² See J.A. MORENO RODRÍGUEZ, *Derecho Aplicable y Arbitraje Internacional*, CEDEP, Asunción, 2013. There are also editions of this book published in Peru, Colombia, Spain and Brazil. See in: www.jmoreno.info.

⁵³ As stated by Lowenfeld, *lex mercatoria* should not only concern arbitration but also matters in a judicial setting (See A. F. LOWENFELD, *Lex Mercatoria: An Arbitrator's View*, in *ICC International Court of Arbitration Bulletin, Special Supplement*, 2002, p. 74).

⁵⁴ “To the extent that these are clearly distinguished” (“en la medida que éstas sean claramente distinguibles”) is an addition introduced by the Paraguayan Senate that does not alter the meaning of the rule as conceived by the Hague Conference.

principle, is clearly accepted,⁵⁵ in line with Rome I (Article 3(1)3) and the Mexico Convention (Article 7).

In practice, *dépeçage* is frequent in international transactions regarding situations pertaining to the currency of the contract, or special clauses related to the performance of certain obligations, such as obtaining governmental authorizations, as well as indemnity or liability clauses.⁵⁶

D) MODIFICATION OF THE CHOSEN LAW

Article 4.3 of the Paraguayan Law, which reproduces Article 2.3 of the Hague Principles, states that a choice of law may be made or modified at any time. However, a choice or modification made after the contract has been concluded may not prejudice its formal validity or the rights of third parties. This solution is in line with Rome I (Article 3(2)), the Mexico Convention (Articles 7.1 and 8) and arbitral precedents,⁵⁷ leaving behind an old controversy.⁵⁸

E) NO CONNECTION REQUIRED BETWEEN THE LAW CHOSEN AND THE PARTIES

Article 4.4 of the Paraguayan Law, transcribing Article 2.4 of the Hague Principles, prescribes that no connection is required between the law chosen and the parties or their transaction. This is still a requirement in some systems, such as the US in its Restatement (Second) of Conflict of Laws, Article 187(2)(a).⁵⁹ However, there exists a tendency towards

⁵⁵ *Dépeçage* has had a complicated relationship with the public policy principle, and the prevailing view tends to grant prevalence to the public policy conception of the forum. See, for instance: F. VISHNER, *New Tendencies in European Conflict of Laws and the Influence of the U.S. Doctrine – a Short Survey*, in *Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren*, Transnational Publishers Inc., New York, 2002, pp. 140-142.

⁵⁶ Official Comment to The Hague Principles, 2.9.

⁵⁷ *Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce* (Award of January 23, 2008, available at: <http://www.unilex.info>). Another precedent: *Tribunal Arbitral Ad Hoc*, Award of December 17 1975, IV (1979) *Yearbook Comm. Arb.*, 192 (193). The matter has not, however, been addressed by the UNCITRAL Model Law or the UNCITRAL Arbitration Rules.

⁵⁸ In Italy, for instance, the Supreme Court decided that this should not be admitted (1966 Decision, Number 1.680, in *Assael Nissim contro Crespi*), which was strongly questioned by Italian doctrine (See Report M. GIULIANO / P. LAGARDE, Informe Relativo al Convenio sobre la Ley Aplicable a las Obligaciones Contractuales, December 11, 1992 in *Contratación Internacional*, C. Esplugues (ed.), Valencia, Editorial Tirant lo Blanch, 1994; comment to Article 3).

⁵⁹ Not in England (*Steel Authority of India Ltd. V. Hind Metals Inc.* (1984). See C.G.J. MORSE, England, in *Public Policy in Transnational Relationships*, M. Rubino-Sammartano / C.G.J. Morse (gen. eds.), Kluwer Law and Taxation Publishers, Deventer, Boston, 1991, p. 62).

its abandonment, as reflected in recent international instruments,⁶⁰ among them Rome I⁶¹ and the Mexico Convention.⁶² This, in turn, is in accordance with arbitral practice.⁶³

F) *EXPRESS AND TACIT CHOICE*

Article 6 of the Paraguayan Law, in line with Article 4 of the Hague Principles, provides that a choice or any modification of a choice of law must be made expressly or appear clearly from the provisions of the contract or the circumstances. On this matter, the provision coincides with Rome I (Article 3.1) and with the Mexico Convention (Article 7).

Again following the Hague Principles, Article 6 of the Paraguayan Law further clarifies that an agreement between the parties to confer jurisdiction on a court or on an arbitral tribunal to determine disputes under the contract, is not in itself equivalent to a choice of law. This is contrary to a “homing trend” in the common law tradition.⁶⁴ Obviously, the selection of a judge could be an important element to take into consideration on this matter, but – in Paraguay – it is not decisive.

G) *NO FORM REQUIRED*

Article 7 of the Paraguayan Law, copied from Article 5 of the Hague Principles, states that a choice of law is not subject to any requirement as to form unless otherwise agreed by the parties. Thus, the agreement on choice of law can be oral or made via electronic communication.

As clarified by the Commentary of the Hague Principles, this applies to the choice of law clause. The remainder of the contract must comply with the formal requirements applicable to it. Consequently, if a law was chosen, the formal requirements of that law in respect to the contract must be met.⁶⁵

⁶⁰ A reasonable connection is not required in several international conventions in transport-related matters. It does not appear neither in the Hague Conventions of 1955 on the law applicable to international sales of movables; the 1986 Convention on international sales of goods, nor in the 1978 Convention on the law applicable to contracts of intermediaries and representation.

⁶¹ H. HEISS, Party Autonomy, in *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*, F. Ferrari / S. Leible (eds.), München, Sellier, 2009, p. 2.

⁶² See J. A. MORENO RODRÍGUEZ, La Convención de México sobre el Derecho Aplicable a la Contratación Internacional, *Publicación de la Organización de Estados Americanos*, 2006, III, D, 7.

⁶³ ICC Case N° 4145 de 1984, XII (1987) *Yearbook Comm. Arb.*, 97 (101). ICC Case No. 4367 of 1984, XI (1986) *Yearbook Comm. Arb.*, 134 (139).

⁶⁴ F. K. JUENGER, General Course on Private International Law (1983), *Recueil Des Cours, Collected Courses of the Hague Academy of International Law*, 1985, IV, Vol. 193, Martinus Nijhoff Publishers, 1986, pp. 133-134; O. KAHN-FREUND, General Problems of Private International Law, A.W. Sijthoff – Leyden, 1974, p. 280. In the deliberations prior to the adoption of the Mexico Convention, American delegate Juenger, unsuccessfully proposed that the selection of a judge should be considered as the tacit choice of that judge’s applicable law. See: M.B. NOODT TAQUELA, Reglamentación general de los contratos internacionales en los Estados mercosureños, p. 97.

⁶⁵ Official Comment of the Hague Principles 5.5

H) PACTUM DE LEGE UTENDA

Article 8.1 of the Paraguayan Law, copying Article 6 of the Hague Principles, prescribes that to determine whether the parties have agreed to a choice of law one must resort to the law purportedly agreed upon.

This delicate question of *pactum de lege utenda* or selection of law (*electio juris*)⁶⁶ creates a vicious circle since, once the law has been chosen, the governing law derives from the will of the parties, yet the question here is, in which law is the *pactum* based upon.⁶⁷

One option is to apply the *lex fori* to the *pactum*. Nevertheless, this can frustrate the parties' expectations. Another solution resorts to the law applicable in the absence of choice, but this leads to the very uncertainties that the clause was introduced to avoid. A third alternative proposes the application of the law chosen,⁶⁸ but it presents problems where consent was not adequately obtained, such as in cases of surprise.⁶⁹

In this regard, Article 8.3 of the Paraguayan Law further provides that the law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make such determination under the law specified in this Article.

This provision, copied from Article 6.2 of the Hague Principles, is in the middle between Rome I, which leads to the law applicable had the agreement existed (Article 3.5) - with the aim of giving maximum effect to party autonomy -,⁷⁰ and the Mexico Convention, according to which the law of the place of establishment of the affected party is applicable (Article 12). In the Paraguayan provision, such a result would be exceptional and occur only if it were not reasonable to apply the putative law.⁷¹

In turn, Article 8.2 of the Paraguayan Law transcribes the innovative provision of Article 6.2 of the Hague Principles, according to which "if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law."

I) SEPARABILITY

Article 9 of the Paraguayan Law, drawn from Article 7 of the Hague Principles, deals with separability of the choice of law clause as independent from the contract containing it. The

⁶⁶ F. DE LY, *International Business Law and Lex Mercatoria*, Netherlands, Elsevier Science Publishers B.V., 1992, pp. 65-66.

⁶⁷ A. BRIGGS, *The Conflict of Laws*, Clarendon Law Series, Oxford, Oxford University Press, 2002, p. 149.

⁶⁸ The latter is the solution of Article 10(1) of the Hague Convention on applicable law to the international sales of goods and Article 116(2) of the Swiss Private International Law, to cite some examples.

⁶⁹ F. DE LY, *International Business Law and Lex Mercatoria*, Netherlands, Elsevier Science Publishers B.V., 1992, pp. 67-68.

⁷⁰ Consolidated version of the Hague Principles http://www.hcch.net/upload/wop/contracts_2012pd01e.pdf.

⁷¹ As stated in the official comment of the Hague Principles to Article 6.1.

provision states that a choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

This provision is in line with Rome I, and in jurisdictional issues with the Hague Choice of Court Convention of 2005,⁷² as well as, in arbitration, with Article 16 of the UNCITRAL Model Law.

An example – mentioned in the Comments to the Hague Principles – is that of a corporation signing an international contract, regarded as a major transaction that according to its bylaws should have been subject to shareholder approval at a meeting that never took place. This invalidity does not automatically invalidate the choice of law clause. The Comments also state that if both the main contract and the choice of law clause are affected by the same vice, both will obviously be invalid, as when consent was obtained by bribery.⁷³

J) *EXCLUSION OF RENVOI*

Article 10 of the Paraguayan Law, copied from Article 8 of the Hague Principles, states that a choice of law does not refer to conflict-of-laws rules of the law chosen unless the parties expressly provide otherwise.

This issue, fiercely debated in Private International Law circles,⁷⁴ is solved in line with Article 20 of Rome I, Article 28(1) of the UNCITRAL Model Law and Article 17 of the Mexico Convention. All of these exclude *renvoi*, and therefore, any reference to the law of a country refers to its substantive law, not to its conflicts-of-laws rules.⁷⁵

K) *ASSIGNMENT*

Article 14 of the Paraguayan Law reproduces Article 10 of the Hague Principles regarding contractual assignment, with the objective of giving the greatest possible value to the choice of law in these types of agreement.⁷⁶

⁷² Consolidated version of the Hague Principles http://www.hcch.net/upload/wop/contracts_2012pd01e.pdf, p. 25.

⁷³ Comment to Article 7 of the Hague Principles, Illustration 7.2.

⁷⁴ O. KAHN-FREUND, *General Problems of Private International Law*, A.W. Sijthoff – Leyden, 1974, p. 285.

⁷⁵ Not surprisingly, the arbitral rules that deal with the matter exclude *renvoi* (L. SILBERMAN / F. FERRARI, *Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong*, Law & Economics Research Paper Series Working Paper N° 10-40, September 2010, p. 5, accessible at <http://ssrn.com/abstract=1674605>).

⁷⁶ The norm states: “In the case of contractual assignment of a creditor’s rights against a debtor arising from a contract between the debtor and creditor they shall proceed in the following way: a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract; b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen determines (1) whether the assignment can be invoked against the debtor, (2) the rights of the assignee against the debtor, and (3) whether the obligations of the debtor have been discharged.”

This is in tune with the spirit of the Hague Principles which aim to promote the acceptance of party autonomy in the broadest achievable way. A similar objective underlies the admittance of extra-State legislation, as discussed below.

VI NON-STATE LAW

The Hague Principles not only recognize party autonomy to select national laws but also to choose non-State law.

It is widely known that extra-State normativity in international commercial transactions became the subject of debate following Berthold Goldman's seminal article published in 1964.⁷⁷ The doctrine of *lex mercatoria* discussed in that paper -and immediately furthered by the subsequent French doctrine on the matter- was once treated as a “phantom” created by Sorbonne Professors.⁷⁸

After initial strong hesitations,⁷⁹ recognition of the doctrine is now undeniable, both in the arbitral world⁸⁰ and in large parts of the scholarly sector of commercial law,⁸¹ even though the expression has been severely criticized as a “wicked misnomer” or a “contradiction in terms”.⁸²

In fact, the terminology on this subject is chaotic. Some use the expression transnational law, others refer to *lex mercatoria*, soft law, or several different terms, such as world law, global law, uniform law, and so on.⁸³ The Hague Conference has opted for the expression “rules of law”, as equivalent to non-State law and other terms referring to the matter.⁸⁴ This, in order to take advantage of the extraordinary casuistic and doctrinal

⁷⁷ B. GOLDMAN, *Frontières du droit et lex mercatoria*, *Archives de philosophie du droit*, 1964, pp. 184 *et seq.*

⁷⁸ See G. TEUBNER, *Breaking Frames: The Global Interplay of Legal and Social Systems*, in 45 *The American Journal of Comparative Law*, (1997), p. 151.

⁷⁹ See, for instance, L.J. MUSTILL, *The New Lex Mercatoria: The First Twenty-Five Years*, *Liber Amicorum for Lord Wilberforce*, Oxford, Clarendon Press, 1999, p. 150.

⁸⁰ Such as admitted by a strong critic of non-State law (Ralf Michaels, *Non-State Law in the Hague Principles on Choice of Law in International Contracts*, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186, p. 2). A special event was organized recently by the ICC in which this matter was fiercely debated in light of relevant arbitral precedents. See <http://www.iccwbo.org/Training-and-Events/All-events/Events/2014/The-new-world-order-of-economic-relations-in-the-light-of-arbitral-jurisprudence>.

⁸¹ See, for instance, recently in Latin America: L. PEREZNIETO CASTRO, *La Lex Mercatoria: Un Referente de Nuestros Días*, in I *Revista Chilena de Derecho Internacional Privado*, 2014/1, p. 36, available in: <http://adipri.cl/v1/wp-content/uploads/2015/03/ADIPRI-Revista-de-Derecho-Internacional-Privado-I.pdf>.

⁸² A.F. LOWENFELD, *Lex Mercatoria: An Arbitrator's View*, in *ICC International Court of Arbitration Bulletin, Special Supplement*, 2002, p. 72. To avoid a contradiction in terms, some, for instance, propose referring to the phenomena as *principia mercatoria*.

⁸³ See, for example, in J.A. MORENO RODRÍGUEZ, *Debate sobre el Derecho No Estatal y la Lex Mercatoria*, *Forseti*, 1 *Revista de Derecho*, 2014, available in: <http://www.forseti.pe/revista/2014-numero-1>.

⁸⁴ See Official Comment of UNCITRAL to Article 28. See also the report of the WG of UNCITRAL, 18 meeting, March 1985 (A/CN.9/264, pp 60-63).

developments in the world of arbitration with regards to this expression in the past several decades.⁸⁵

The expression was likewise adopted by the UNCITRAL Model Law of 1985,⁸⁶ thereby echoing the terminology used in the 1976 UNCITRAL Rules of Arbitration (amended in 2010),⁸⁷ which inspired arbitration rules all around.⁸⁸

Paraguay reproduced the UNCITRAL Model Law almost entirely, and transcribed its Article 28 (Article 31 in Paraguayan Law 1879 of 2002) admitting rules of law, which is understood to comprise the *lex mercatoria* or transnational law.⁸⁹ Moreover, Paraguay has ratified the New York Convention on Recognition and Enforcement of Arbitral Awards – also widely adopted by Latin American countries. Accordingly, as endorsed by the prestigious International Law Institute in its Cairo Declaration and arbitration practice,⁹⁰ this implies the admission of non-State law, since the recognition of arbitral awards relying on non-State law cannot be denied on this sole basis.

In line with its broad recognition of party autonomy, the Paraguayan Law on international contracts grant formal status to non-State law, becoming the first law in the world to do so openly, for the purpose of court proceedings.

The Working Group that drafted the Hague Principles, in its deliberations, pondered the question whether it should confine itself to admitting non-State law in arbitration or

⁸⁵ The author of this article has personal knowledge of this due to his participation in the deliberations on the matter.

⁸⁶ Earlier used in Article 42 of the 1965 Washington Convention relating to investment disputes and the arbitral laws of France and Djibouti.

⁸⁷ Adjustments to the new rules are discussed in Revision of the UNCITRAL Arbitration Rules, a Report by Jan Paulsson & Georgios Petrochilos, Commissioned by the UNCITRAL Secretariat, Draft for Comments, 31 March 2006. Discussions in this regard are reflected in the documents A/CN.9/614, paras. 122-124; A/CN.9/641, paras. 106-113 and A/CN.9/684, paras 91-100. This matter can be further explored in: J.A. MORENO RODRÍGUEZ, Comentario al artículo 35, in *Nuevo Reglamento de Arbitraje de la CNUDMI 2010, Anotado y Comentado*, P. Perales Viscasillas e I. Torterola (eds.), Editorial Legis, Buenos Aires, 2011.

⁸⁸ J.J. BARCELÓ III / A. VON MEHREN / T. VARADY, *International Commercial Arbitration, a Transnational Perspective*, 4th ed. Thomson Reuters, 2009, p. 70.

⁸⁹ In this regard, both the English official commentary and the Dutch explanatory text to the arbitration laws of these countries introduced the understanding that the *lex mercatoria* is included in the expression ‘rules of law’. Explanatory notes to the project in 1985, drafted by a departmental advisory committee of arbitration, stated that this section applies to Art. 28 of the Model Law (Department of Trade and Industry, Consultative Paper, Sections 1 and 2: Draft Clauses of an Arbitration Bill, p. 38). (Notes, Art. 1:101 PECL, commentary 3, a). The English text can be found at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm. The explanatory Dutch text (Document No. 18464) is found in F. DE LY, *International Business Law and Lex Mercatoria*, Elsevier Science Publishers B.V., 1992, p. 250. The new Article 1511 of the French Code of Civil Procedure also refers to rules of law, and the explanatory report emphasises that Article 1511 and other related Articles recognise an autonomous legal order in international arbitration. This evidently entails desirable consequences in favour of the applicability of transnational law.

⁹⁰ See: J.A. MORENO RODRÍGUEZ, *Derecho Aplicable y Arbitraje*, Chapter 6.

whether it should go beyond the status quo.⁹¹ The latter view triumphed, thereby “levelling the playing field”⁹² or “bridging the gap”⁹³ between arbitration and litigation, at least in countries that have adopted the UNCITRAL Model Law. It is no longer necessary to include an arbitral clause to assure that the choice of non-State law will be respected.

Article 5 of the Paraguayan Law states the following: “In this law, a reference to law includes rules of law of a non-State origin that are generally accepted as a neutral and balanced set of rules.” This norm is drawn upon Article 3 of The Hague Principles, with slight changes.⁹⁴ However, the spirit behind both provisions is the same.⁹⁵

The requirement of “neutrality” calls for a body of rules capable of resolving problems commonly encountered in transnational contracts, whereas the prerequisite of “balance” was established to address the problem of unequal bargaining power leading to the application of unfair or inequitable rules of law. In turn, the stipulation of a “set of rules generally accepted” seeks to dissuade parties from choosing vague or uncertain categories of rules of law.⁹⁶

In the current state of affairs, the applicability of the UNIDROIT Principles as non-State law if chosen by the parties, clearly emerges from the provision of the Paraguayan Law (and, of course, from the Hague Principles as well). The same applies to the UNCITRAL (Vienna) Convention on Contracts for the International Sales of Goods of 1980 that can be chosen even if not applicable to the case at hand under its own terms.⁹⁷ Other instruments clearly embodied in the legal formula are, for instance, the European

⁹¹ L. GAMA JR. / G. SAUMIER, Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts, in *El Derecho internacional Privado en los procesos de integración regional, Jornadas de la ASADIP 2011*, San José, Costa Rica, 24-26 November, ASADIP y Editorial Jurídica Continental, San José, 2011, pp. 62-63.

⁹² M. PERTEGÁS / B.A. MARSHALL, Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts, in *39 Brooklyn Journal of International Law*, 2014/3, p. 979.

⁹³ G. SAUMIER, Designating the UNIDROIT Principles in International Dispute Resolution (November 8, 2011), in *17 Uniform Law Review*, 2012, p. 533. Available at: SSRN: <http://ssrn.com/abstract=2012285>, p. 547.

⁹⁴ Article 3 of the Hague Principles states: “The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” The general acceptance of an international, supranational or regional level requirement was deleted as a requirement in Paraguayan law to avoid controversies as to which bodies of law fulfill it. The final part of the article was deleted, of course, because it only makes sense as a text in ‘Principles’ and not in a law.

⁹⁵ Article 2, as drafted by the Working Group, states: “Freedom of choice. Paragraph 1. A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law.” Article 3 of the Hague Principles accepts the selection of rules of law, that is, non-State law, but qualifies the initial proposal of the Working Group requiring that they be “generally accepted...as a neutral and balanced set of rules.”

⁹⁶ See M. PERTEGÁS / B.A. MARSHALL, Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts, in *39 Brooklyn Journal of International Law*, 2014/3, pp. 997-998.

⁹⁷ Both the UNIDROIT Principles and the CISG are expressly mentioned as examples by the official commentary to the Hague Principles.

Principles of Contract Law (PECL)⁹⁸ and the Draft Common Frame of Reference (DCFR).⁹⁹

Ralf Michaels, a strong critic of the Hague Principles where its regulation of non-State law is concerned, sustains that principles such as those of UNIDROIT cannot serve as applicable law because they do not cover as many issues of contract law as State systems do.¹⁰⁰ However, as once stated by Pierre Lalive, while it is true that the *lex mercatoria* is not complete, no domestic system can be considered complete either.¹⁰¹ Moreover, as highlighted by prominent comparatist René David, national laws are not usually appropriate to regulate international transactions.¹⁰²

Symeon Symeonides, who represented the European Union on the Special Commission meeting and later joined the Working Group in its final sessions, states that the admission by the Hague Conference of non-State norms met the parochial resentments of a coalition of yesterday's men.¹⁰³ This applies, even though “as is often the case, the phrasing of a compromise text leaves much to be desired,”¹⁰⁴ considering that “drafting by committee to reach compromise often yields results that are less than optimal”.¹⁰⁵

The author of this article presided over an *ad hoc* Committee set up in The Hague at the Special Commission meeting of 2012 due to the obstinate refusal of the European Union delegation to accept non-State law in the Principles. Finally, the only text that proved acceptable to that delegation was the one that was finally approved, following a proposal by Francesca Mazza, a Working Group observer on behalf of the Court of Arbitration of the ICC. It was felt at the time that a compromise text was a lesser evil than not admitting non-State law at all.

The rule drafted by the Working Group plainly provided: “In these Principles a reference to law includes rules of law,” whereas the compromise text now includes the requirements of “generally accepted” “set of rules”, “neutral and balanced”.

In his severe critique, Ralf Michaels states that the original provision would “at least have made analytical sense,” and that the additions introduced by the Special Commission “made a problematic rule far worse”. He considers the formula for arbitration too narrow,

⁹⁸ See the relationship of this instrument with the UNIDROIT Principles in M.J. BONELL, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, 26 *Uniform Law Review*, 1996, pp. 229-246.

⁹⁹ See, on the relationship of this instrument with the UNIDROIT Principles, M.J. BONELL / R. PELEGGI, *UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: A Synoptical Table*, XIV *Uniform Law Review*, 2009, pp. 437-554.

¹⁰⁰ R. MICHAELS, *The UNIDROIT Principles as Global Background Law*, in 19 *Uniform Law Review*, 2014/4, pp. 643-668.

¹⁰¹ P. LALIVE, *Transnational (or Truly International) Public Order and International Arbitration*, *Commentary – Full Section, ICCA Congress Series*, No. 3, New York, 1986, after note 186.

¹⁰² R. DAVID, *The International Unification of Private Law*, 2 *Int'l Ency. Comp. L.*, 1969, pp. 11-12.

¹⁰³ S.C. SYMEONIDES, *Codifying Choice of Law Around the World, An International Comparative Analysis*, Oxford University Press, New York, 2014, p. 143.

¹⁰⁴ S.C. SYMEONIDES, *Codifying Choice of Law Around the World, An International Comparative Analysis*, Oxford University Press, New York, 2014, p. 145.

¹⁰⁵ G. SAUMIER, *The Hague Principles and the Choice of Non-State ‘Rules of Law’ to Govern an International Commercial Contract*, *Brooklyn Journal of International Law*, Vol. 40, No. 1, 2014. Available at SSRN: <http://ssrn.com/abstract=2620738>, pp. 24-28.

given that the requirements introduced by the Special Commission are non-existent in arbitral laws. He also strongly opposes the application of non-State law in the judicial setting.¹⁰⁶

Andrew Dickinson, Member of the Working Group on the Hague Principles, also formulated a strong objection to the reforms introduced by the Special Commission; his proposal was that the interpreter should simply ignore the additions.¹⁰⁷

All this is true. The new drafting is not ideal. Yet it opened the way to a consensus to accept non-State law in the Hague document that would have otherwise not been achieved. In the end – as put by Patrick Glenn – the development and application of substantive, transnational law is the work of legal practitioners, academics and judges, and the primary contribution of each of these can result from openness and acceptance of the possibility of extra-State legislation.¹⁰⁸ Finally, as stated by Geneviève Saumier, while the criteria in the Hague Principles “can serve to identify ‘rules of law’ that successfully meet the requirements, the provision remains operational” nevertheless.¹⁰⁹

VII ABSENCE OR INEFFICACY OF CHOICE OF LAW

In accordance with Article 11 of the Paraguayan Law, in case of absence or invalidity of the choice of law, the contract is to be governed by the law of the State with which it has the closest connection. Paragraph 2 of that Article establishes that “the tribunal will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest connection.”

This provision reproduces Article 9 of the Mexico Convention, which adopts the formula of “the closest connection” and discards the previous highly-criticized solution of the “place of performance” followed by the Montevideo Treaties, ratified by Paraguay and also adopted by the national Civil Code.¹¹⁰

¹⁰⁶ R. MICHAELS, Non-State Law in the Hague Principles on Choice of Law in International Contracts, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186, V a and b, and VI.

¹⁰⁷ A. DICKINSON, A principled approach to choice of law in contract, 2 *Journal of International Banking and Financial Law*, 2013, p. 152.

¹⁰⁸ H.P. GLENN, Harmony of Laws in the Americas, in *Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS*, Organization of American States General Secretariat, Washington, 2002, p. 43. This considers the broad recognition of party autonomy and the importance of commercial custom and practice as a source governing law on international contracts.

¹⁰⁹ “Only time will tell whether Article 3 is a bold step forward or a step in the wrong direction... With such minimal downside risk it is a step worth taking, if only to see where it leads” (G. SAUMIER, The Hague Principles and the Choice of Non-State ‘Rules of Law’ to Govern an International Commercial Contract, in 40 *Brooklyn Journal of International Law*, 2014/1, p. 28, available at SSRN: <http://ssrn.com/abstract=2620738>).

¹¹⁰ Article 37 of the Montevideo Treaties and Article 17 of the Civil Code. The flexibility of this formula of the “closest connection” was in line with the former English notion (up to 1991, when the Rome Convention came into force in England) of the “proper law of the contract” (H.C. MORRIS, *The Conflict of Laws*, 7th ed., D. McClean / K. Beevers, Sweet & Maxwell, Thomson Reuters, 2009, p. 352), also in line with Restatement (Second) of “Conflict of Laws” of 1971 (Sections 145, 188) of the United States and the test of the “most significant relationship”, prevailing in the majority of States (see S.C. SYMEONIDES / W. COLLINS PERDUE / A.T. VON MEHREN, *Conflict of Laws: American, Comparative, International, Cases and Materials*, *American Casebook Series*, West Group, St. Paul,

Moreover, the Paraguayan Law does not reproduce the final part of Article 9 of the Mexico Convention which stipulates that “the general principles of international commercial law accepted by international organizations” are to be taken into account.

This was a compromise solution reached by the negotiators of the Mexico Convention after the United States delegation had proposed the direct application of the UNIDROIT Principles in the absence of choice. Friedrich Juenger, the US delegate, understood that the agreed upon formula nonetheless led directly to the UNIDROIT Principles.¹¹¹ The relevance of this opinion is highlighted by José Siqueiros, the original drafter of the Mexico Convention, since he was the one who proposed the compromise solution.¹¹² Regarding a similar provision included in the Venezuelan Private International Law, the Supreme Court of Venezuela stated that the closest connection formula leads to the *lex mercatoria*, which is comprised of commercial customs and practices.¹¹³

The exclusion of the final part of Article 9 of the Mexico Convention from the Paraguayan Law is due to the fact that the Law already clarifies, in its Article 5, that reference to law includes rules of law. If adjudicators find that transnational rules are more appropriate and thus more closely connected to the case than national law, they will apply them directly, whether they stem from an international organization – such as UNIDROIT – or not.

Minnesota, 1998, p. 139). The Rome Convention of 1980 was a major blow to an effective system developed by more than one hundred and forty years of English judgments recognized all over the world. The situation did not improve with the Rome I Regulation of 2008 (See G.A. BERMANN, Rome I: A Comparative View, in *Rome I Regulation: The law applicable to contractual obligations in Europe*, F. Ferrari / S. Leible, p. 350), with its complicated rules to reach characteristic performance (U. MAGNUS, Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice, in *Rome I Regulation: The law applicable to contractual obligations in Europe*, F. Ferrari / S. Leible, p. 29), which have been qualified as a labyrinth or jungle (G.A. BERMANN, Rome I: A Comparative View, in *Rome I Regulation: The law applicable to contractual obligations in Europe*, F. Ferrari / S. Leible, p. 358) and even an “*inferno*” regarding insurance law (U.P. GRUBER, Insurance Contracts, in *Rome I Regulation: The law applicable to contractual obligations in Europe*, F. FERRARI / S. LEIBLE, pp. 110-111).

¹¹¹ See F.K. JUENGER, *The Lex Mercatoria and Private International Law*, in 60 *Louisiana Law Review*, 2000, pp. 1133, 1148.

¹¹² J.L. SIQUEIROS, Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales, in *Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT*, México, Universidad Nacional Autónoma de México, Universidad Panamericana, 1998, p. 223.

¹¹³ *Banque Artesia Nederland, N.V. vs Corp Banca, Banco Universal CA* (Exp. 2014-000257), of 2014. The Supreme Court held that, in accordance with the Venezuelan Private International Law Act (Articles 29, 30, and 31), if the parties to an international contract have not expressly chosen the law applicable, judges may apply the “closest connection” criterion. To this end, the judges need to take into account all objective and subjective elements of the contract to determine the law with which it has the closest ties, as well as the general principles of international commercial law recognized by international organizations. This includes, the Supreme Court held, the *lex mercatoria*, which is composed of commercial customs and practices (see in www.unilex.info).

As stated by Jürgen Samtleben, there is no justification for insisting on a conflictual method leading to a national law whose connection to the contract may be more occasional than real.¹¹⁴

Many decades ago, Arthur von Mehren already preached influentially in favour of solutions tailored to the specific case at hand in international contracts, leaving behind conflict-of-law rules.¹¹⁵ It should also be borne in mind that judges are generally ill-prepared to apply foreign domestic laws, as reflected in the famous Max Rheinstein investigation regarding a renowned casebook on Private International Law, in which of the forty cases applying national law in accordance with the traditional conflictualist method, only four reached the correct outcome, albeit for the wrong reasons.¹¹⁶ Patrick Glenn makes the point that matters get worse in many countries where judicial corruption is widespread, being difficult to predict the outcome because of precedents of dubious origin.¹¹⁷

In the arbitral world, it appears that Article 28(2) of the UNCITRAL Model Law of 1985 only admits the application of non-State law when the parties choose it, not in the absence of choice. This was considered in 1987 by Lord Michael Mustill as a major blow to *lex mercatorists*.¹¹⁸ However, subsequent case law indicates the contrary, and leading arbitral authorities, such as, *inter alia*, Emmanuel Gaillard, propose an extensive interpretation of said text.¹¹⁹ An express solution in this sense (regarding arbitration specifically) can be found, for instance, in Article 187(1) of the Swiss Private International Law¹²⁰ and in the new Article 1511 of the Procedural Code of France.

Contrary to a widespread orthodox conception, it is more predictable to apply transnational rules than classic “conflictualism” Parties that have not taken the precaution of choosing the law governing their contract should not be surprised by the application of a rule generally accepted in comparative law.¹²¹

¹¹⁴ J. SAMTLEBEN, *Avances del Derecho Internacional Privado en América Latina, Liber Amicorum Jürgen Samtleben*, Montevideo, Editorial Fundación de Cultura Universitaria, 2002, pp. 26-27. Regarding cyberspace, as stated by Lessig, what before was the exception is now the rule. Conduct was once governed within a jurisdiction or jurisdictions in coordination. Nowadays, it is systematically governed within multiple jurisdictions that are not coordinated (L. LESSIG, *Code and Other Laws of Cyberspace*, New York, Editorial Basic Books, 1999, p. 192).

¹¹⁵ Nafziger complains that a famous von Mehren article in 1974 in the *Harvard Law Review* was not given more attention J.A.R. NAFZIGER, *In Memoriam: Arthur T. von Mehren*, 119 (2006/7) *Harvard Law Review*, p. 1960. See also the article by G. J. SIMSON, *The Choice-of-Law Revolution in the United States: Notes on Rereading von Mehren*, 36 *Cornell Int'l L.J.* 125, 2003, pp. 130-131.

¹¹⁶ Cited by O. LANDO, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification*, in *Uniform Law Review*, 2003, p. 126.

¹¹⁷ H.P. GLENN, *An International Private Law of Contract*, in *International Conflict of Laws for the Third Millennium, Essays in Honor of Friedrich K. Juenger*, New York, Transnational Publishers Inc., 2001, pp. 58-59.

¹¹⁸ L.J. MUSTILL, *The New Lex Mercatoria: The First Twenty-Five Years*, in *Liber Amicorum for Lord Wilberforce*, Oxford, Clarendon Press, 1999, p. 181.

¹¹⁹ E. GAILLARD, *Teoría Jurídica del Arbitraje Internacional*, Ed. La Ley Paraguay / CEDEP / Thomson Reuters, Asunción, 2010, p. 124.

¹²⁰ Even though – as was kindly pointed out to the author of this article by Professor Daniel Girsberger – this is disputed in Swiss law due to different wording in the French and German text.

¹²¹ E. GAILLARD, *Teoría Jurídica del Arbitraje Internacional*, Ed. La Ley Paraguay / CEDEP / Thomson Reuters, Asunción, 2010, p. 126. Based on a von Mehren report, the 1989 Resolution of

VIII CORRECTIVE FORMULA

A) THE “BROADER BRUSH”

Sir Roy Goode coined the expression “broader brush” in reference to the interpretation of national laws in transnational contracting with “an eye on international usage”.¹²²

Even in domestic laws, as pointed out by Jürgen Basedow, usages should be considered incorporated in a contractual relationship as implied consent of the parties, when they are widely known in a given sector of economic activity, and in this sense, they should prevail over suppletive provisions of national law.¹²³

Moreover, as stated by Jan Paulsson, national laws themselves contain corrective norms which are formidable. They can be derived from principles contained, for instance, in the national Constitutions, or from ratified treaties –for example, regarding Human Rights – and national courts have both the duty and the authority to apply them.¹²⁴

In addition, domestic laws are recurrently the subject of a comparative construction. It should be borne in mind that the different legal systems have open formulas granting broad powers to adjudicators, such as *good faith*, *force majeure* and *hardship*. Here, comparative law has proven very effective as an interpretative tool.¹²⁵ In this regard, Ralf Michaels, *inter alia*, notes that, “like *ius commune* and common law”, the UNIDROIT Principles “serve as a global background law” for which “we find, more and more, that judges and legislators justify their decisions against a global consensus (whether imagined or real) that they find, amongst others, in the UNIDROIT Principles.” They “are becoming, more and more, a sort of general benchmark against which legal arguments take place.”¹²⁶

This comparative construction holds even more firmly in international contracting, where there are additional reasons. As stated by Yves Derains, it is impossible to dissociate law and the language of its expression. For instance, regarding the terms consideration, implied terms, misrepresentation or frustration,¹²⁷ evidently an ample (or broad brush) interpretation is called for when one of the parties does not hail from a common law tradition. Furthermore, when parties choose a third country’s law, they do so mainly with the aim of finding a neutral solution but rarely with an in-depth knowledge of its content.

Santiago de Compostela of the Institute of International Law left aside a 1957 position, and now states, in its Article 6, that in the absence of choice arbitrators can, if they deem it appropriate, apply general principles, that is, principles of non-State origin.

¹²² R. GOODE, *The Adaptation of English Law to International Commercial Arbitration*, 8 *Arbitration International*, 1992, p. 1.

¹²³ J. BASEDOW, *El derecho privado estatal y la economía: el derecho comercial como una amalgama de legislación pública y privada*, in *¿Cómo se Codifica hoy el Derecho Comercial Internacional?* CEDEP y La Ley Paraguaya, 2010, pp. 9-10.

¹²⁴ J. PAULSON, *The Idea of Arbitration*, Oxford University Press, United Kingdom, 2013, p. 232.

¹²⁵ C. BRUNNER, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration*, *Kluwer Law International* 2008, pp. 30-32.

¹²⁶ R. MICHAELS, *The UNIDROIT Principles as Global Background Law*, Final version published in 19 *Uniform Law Review*, 2014/4, pp. 643-668, after note 63.

¹²⁷ Y. DERAIS, *The ICC Arbitral Process. Part. VIII. Choice of the Law Applicable to the Contract and International Arbitration* in 6 *ICC International Court of Arbitration Bulletin*, Foreword, 1995/1, p. 6.

The subtleties of its rules as distilled from the case law may be surprising to a foreign party.¹²⁸

This whole matter, of course, calls for careful scrutiny. Christoph Brunner proposes a case-by-case analysis taking into account the legitimate interest of the parties. If a party chose a national law because it desired a rigid solution for a specific case, it can express so, thus, excluding the possibility of considering other laws or transnational law.¹²⁹ Otherwise, the judge should have discretion to reach an appropriate solution taking into consideration the circumstances of the contract and the international environment in which the relationship develops.

B) *THE CORRECTIVE FORMULA IN ARBITRATION*

In the arbitral world, Article 28(4) of the UNCITRAL Model Law, which corresponds exactly to Article 32 of Paraguayan Arbitration Law 1879 of 2002, states that in all cases, the terms and conditions of the contract and the commercial usage and practices applicable to the transaction are to be taken into account. This formula was originally included in the European Convention on Arbitration of 1961 (Article VII), and qualified by a leading arbitrator as one of the most significant accomplishments of the XXth century, liberating arbitration of local perceptions.¹³⁰

As is widely accepted, the application of a rule such as this one does not depend on the will of the parties, but prevails over what is determined by conflict rules. This eventually leads to the *lex mercatoria* or transnational law, at least as regards the application of its fundamental principles to the particular case. This was recognized by an Arbitral Tribunal sitting in Costa Rica¹³¹ and by an Argentine Arbitral Tribunal. In the latter case, notwithstanding the fact that both parties had designated Argentinean law as applicable, the Arbitral Tribunal resorted to the UNIDROIT Principles as international commercial usage and practices reflecting the solutions of different legal systems and international contract practice, stating that, as such, according to Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law.¹³²

Marc Blessing criticizes those who consider this corrective formula as creating complications or uncertainty in arbitration proceedings, stating that those who take this view have probably never been in a real-world arbitration facing the problem of local

¹²⁸ F. BORTOLOTTI, *The Application of Substantive Law by International Arbitrators*, International Chamber of Commerce (ICC), DOSSIERS ICC Institute of World Business Law, Paris, 2014, p. 8.

¹²⁹ C. BRUNNER, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration*, *Kluwer Law International* 2008, pp. 30-32.

¹³⁰ M. BLESSING, *Choice of Substantive Law in International Arbitration*, in 14 *Journal of International Commercial Arbitration*, 1997/2, p. 54. Hascher speaks of a progressive interpretation of the convention, favouring the *lex mercatoria* and international principles (T. HASCHER, *European Convention on International Commercial Arbitration (European Convention, 1961) – Commentary*, in *Yearbook of Commercial Arbitration*, A. J. van den Berg (ed.), 1995, pp. 1030-1031).

¹³¹ *Ad Hoc Arbitration in Costa Rica*, 30.04.2001, accessible at www.unilex.info.

¹³² *Ad Hoc Arbitral Award of 10.12.1997*, accessible at www.unilex.info.

norms leading to inappropriate or inadequate results.¹³³ Gabrielle Kaufmann-Kohler, another prestigious jurist with a lifetime's experience in the arbitral world, remembering the disputes in which she participated under German, French, English, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisian, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinean, Colombian, Venezuelan, Swiss, Illinois, and of New York law, asks herself if she knows these systems. And she replies that, except for the law of New York, which she learned many years ago and does not expect to know now, and Swiss law, which she practices actively, the answer is clearly: no.¹³⁴

In a recent survey among experienced arbitrators in the United States, more than a quarter of respondents “feel free to follow [their] own sense of equity and fairness in rendering an award even if the result would be contrary to the applicable law,” at least some of the time.¹³⁵

Well, undoubtedly, the dual formula of the arbitration law is wise, in that it permits the introduction of international standards for a transnational transaction in order to arrive at a more equitable solution, which should be desirable in the judicial setting as well.

C) *THE CORRECTIVE FORMULA IN THE AMERICAS AND IN THE NEW PARAGUAYAN LAW*

In the Americas, the corrective formula has been accepted for many years through Article 9 of the 1979 OAS Inter-American Convention on General Rules of Private International Law, ratified by several countries in the region.¹³⁶ This Convention admits equitable solutions to achieve justice in particular cases, notwithstanding the provisions of national laws potentially applicable to the transaction.¹³⁷

¹³³ M. BLESSING, Choice of Substantive Law in International Arbitration, in 14 *Journal of International Commercial Arbitration*, Kluwer CD, 1997/2, p. 3.

¹³⁴ International Commercial Arbitration Committee's Report and Recommendations in Ascertainning the Contents of the Applicable Law in International Commercial Arbitration, in 26 *Arbitration International*, 2010/2, p. 198.

¹³⁵ T.J. STIPANOWICH, A Recent Survey of Experienced U.S. Arbitrators Highlights Areas for Further International Study and Discussion, in http://kluwerarbitrationblog.com/blog/2015/02/06/a-recent-survey-of-experienced-u-s-arbitrators-highlights-areas-for-further-international-study-and-discussion/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29.

¹³⁶ Argentina, Brazil, Colombia, Guatemala, Paraguay, Ecuador, Mexico, Peru, Uruguay and Venezuela. See in: <http://www.oas.org/juridico/spanish/firmas/b-45.html>.

¹³⁷ Article 9 of this Convention states: “The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case.” Herbert and Fresnedo de Aguirre have pointed out that said article draws upon American doctrines of Currie (of governmental interests) and Cavers (of equitable solutions), contrary to the abstract and automatic system in place before in Latin America. The adoption of these doctrines has the merit of having left open an ample interpretative field to relax the rigid criteria of the continent up until then (see C. FRESNEDO DE AGUIRRE / R. HERBERT, *Flexibilización Teleológica del Derecho Internacional Privado Latinoamericano*, in *Avances del Derecho Internacional Privado en América Latina, Liber Amicorum Jürgen Samtleben*, Montevideo, Editorial Fundación de Cultura Universitaria, 2002, p. 57. See also R.

The spirit of this formula is replicated in Article 10 of the Mexico Convention. Under the title “equitable harmonization of interests”, Article 12 of the Paraguayan Law copies that provision. Accordingly, it states that: “In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usages and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.”

This equitable or corrective formula will, therefore, apply both when the law was chosen and in the absence of choice.

However, the matter of corrective formulas is controversial in comparative law in terms of terminology and scope,¹³⁸ and was not addressed in the Hague Principles, perhaps due to their non-binding nature as a text dealing with questions of party autonomy. Therefore, on this matter, the Paraguayan Law follows the solution consolidated in the Americas over many years.

A terminological clarification is necessary. The Paraguayan norm of Article 10, copied from the Mexico Convention, uses the words: guidelines, customs, principles, commercial usages and practice. These are all terms that tend to be used interchangeably in comparative law, but the end purpose of the legal formula is the same: to give the judge the tools needed to reach an equitable solution.

Usages can be expressly incorporated in a contract (as when referring to INCOTERMS), but they can also be implicit, when it is understood that they would have been desired by the parties.¹³⁹ This is where they acquire their corrective value, when a suppletive norm states something contrary in the chosen law, in light of the international setting of the transaction.

A usage is specific to a given activity, but once it gains general acceptance, it becomes a “general principle”,¹⁴⁰ as was decided by an arbitral tribunal presided over by Pierre Lalive.¹⁴¹

HERBERT, La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales, 1 (1994) RUDIP, pp. 89-90).

¹³⁸ As stated in the comment to Article 1:105 of the European Principles of Contract Law (PECL). An escape clause is strongly defended for instance by the Swiss Professor Visher, commenting on an escape clause of Article 15 of the Swiss Law of Private International Law (F. VISHER, General Course on Private International Law, *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, 1992, I, Vol. 232, Martinus Nijhoff Publishers, 1993, p. 106).

¹³⁹ Two categories of usages can be derived from Article 9 of the CISG and Article 1(8) of the UNIDROIT Principles, regarding “usages and practices”. The first category comprises the usages deriving from commerce itself, and the second category covers practices known by the parties to the contract and observed by them in their business.

¹⁴⁰ R. GOODE, Usage and Its Reception in Transnational Commercial Law, 46 ICLQ 1, 1997, pp. 16-17. He further states that usages can express an ample or a specific principle of conduct. The ample variety, if extended to a type of activity in international contracting, can be elevated to general principles of law or included in an international convention, and lose its distinctive status as a usage of commerce (for instance, *pacta sunt servanda*). R. GOODE, Usage and Its Reception in Transnational Commercial Law, 46 ICLQ 1, 1997, p. 12.

¹⁴¹ Case CCI 3380/1980, cited by L. CRAIG / W. PARK / J. PAULSSON, International Chamber of Commerce Arbitration, 3rd ed., Oceana Publications, 2000, p. 102.

Principles, usages and customs of international commercial law have been referred to also as *lex mercatoria* or new *lex mercatoria*, such as, for instance, in the famous English case of 1998 (*Deutsche Schachtbau-und Tiefbohrgesellschaft mbH*).¹⁴²

The *broader brush* of the Paraguayan Law that enables usages, principles, and equity to be taken into account coincides with the visionary perspective of Martin Wolff, who, many decades ago, declared that a Private International Law system lacking a supranational vision would be contrary to justice.¹⁴³

IX PUBLIC POLICY AND OVERRIDING MANDATORY PROVISIONS

Article 17 of the Paraguayan Law adapts Article 11 of the Hague Principles, since the former directly targets the Paraguayan courts and not arbitrators. The numbering (for Article 11) is the same as in the Mexico Convention.

Public policy is a highly contested notion.¹⁴⁴ There is not a consensus in regards to the various terms used to refer to the same notion, neither to its relevance and applicability, and certainly there is a lack of effective communication among academics and practitioners.¹⁴⁵ Moreover, this obscure subject is rendered even more opaque by the imprecision, diversity and confusion of the vocabulary used.¹⁴⁶

As do the Hague Principles, the Paraguayan Law attempts to clarify this mess and to simplify the terminology. It refers to both aspects of imperative norms: public policy and *lois de police* or mandatory norms.

Regarding the latter, it states that the parties' choice of law does not forbid the judge to apply the mandatory norms of Paraguayan Law which, according to the latter, should prevail even in the presence of a choice of foreign law. Moreover, paragraph 2 of the Paraguayan Law provides that the judge may or may not take into consideration the mandatory norms of other States closely connected with the case, taking into account the consequences of its application. This possibility is also contemplated by the Mexico Convention in its Article 11, paragraph 2.

With respect to public policy, paragraph 3 of the Paraguayan Law states that the judge may exclude the application of a provision of the law chosen by the parties if and to

¹⁴² R. GOODE, *Usage and Its Reception in Transnational Commercial Law*, 46 ICLQ 1, 1997, p. 29.

¹⁴³ M. WOLFF, *Derecho Internacional Privado*, Traducción española de la segunda edición inglesa por Antonio Marín López, Barcelona, Editorial Bosch, 1958, p. 15.

¹⁴⁴ No wonder then, that it was one of the most delicate issues treated in the preparation of The Hague Principles (See Consolidated Version, note 72, p. 32). This matter has been addressed extensively, regarding arbitration, by the International Law Association, London Conference (2000), Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (www.ila-hq-org). More recently, the International Bar Association has conducted an extensive comparative research. See at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx.

¹⁴⁵ L.A. MISTELIS, *Mandatory Rules in International Arbitration – Too Much Too Early or Too Little Too Late?*, in *Mandatory Rules in International Arbitration*, G.A. Bermann and L.A. Mistelis, (eds.), Juris, New York, 2010, p. 291.

¹⁴⁶ P. LALIVE, *Transnational (or Truly International) Public Order and International Arbitration*, Commentary – Full Section, ICCA Congress Series, N° 3, New York, 1986.

the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy.

When drafting the Hague Principles, a key consideration for the Working Group was to restrict State interference with party autonomy to a maximum. A consensus was reached that it is impossible to lay down precise guidelines on this matter, except in regards to the restrictive nature of public policy as an exception to party autonomy.¹⁴⁷

Many decades ago, H.C. Gutteridge noted that public policy was a serious menace to international collaboration in conflict of law matters.¹⁴⁸ This is why the expression “public policy” in international instruments tends to be understood restrictively.¹⁴⁹ Some instruments use the expression international public policy,¹⁵⁰ whereas all the Hague Conventions of Private International Law after 1955 use the word “manifest”¹⁵¹ to allude to the infringement of public policy, thus highlighting its restrictive character in the international field.¹⁵² The word “manifestly” has also been used by the Mexico Convention (Article 18) and other Inter-American and MERCOSUR instruments.¹⁵³ As we have seen, both the Hague Principles and the new Paraguayan Law adopt the term as well.

X THE PARAGUAYAN DRAFTER IS AN “ARRANT THIEF”

The legendary J.P. Walton qualified legislators as *arrant thieves*,¹⁵⁴ while applauding them for copying successful models to incorporate them into other jurisdictions.

Unlike other recent reforms in the Americas,¹⁵⁵ the Paraguayan legislator is a perfect thief. The Law was drafted on the understanding that the proposals of laws directed to

¹⁴⁷ http://www.hcch.net/upload/wop/contracts_2012pd01e.pdf.

¹⁴⁸ H.C. GUTTERIDGE, *Comparative Law, An Introduction to the Comparative Method of Legal Study & Research*, 2nd ed., Cambridge University Press, 1949, p. 161.

¹⁴⁹ In this sense, the UNCITRAL Model Law (Art. 34(2)(b)(ii)) and several other statutes aligned with it, as well as arbitral rules and the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards (Article V, 2 b).

¹⁵⁰ For example, in Articles 1514 and 1520(5) of the French Procedural Code (reformed by Article 2 of Decree 2011-48 of 13 January, 2011); in Article 1096 (f) of the Portuguese Procedural Code of 1986; as well as in the legislation of Algeria, Lebanon and Paraguay.

¹⁵¹ See in E. JAYME, *Identité Culturelle et Intégration: Le Droit International Privé Postmoderne, Cours général de droit international privé, Recueil Des Cours, Collected Courses of the Hague Academy of International Law*, 1995, IV, Vol. 251, Martinus Nijhoff Publishers, 1996, p. 229.

¹⁵² See: M. RUBINO-SAMMARTANO and C.G.J. MORSE, *Public Policy in Transnational Relationships*, Kluwer Law and Taxation Publishers, Deventer, Boston, 1991 pp. 19-20. Comparative law is key in determining this matter (see, *inter alia*, LAGARDE, Public Policy, in *International Encyclopedia of Comparative Law*, Vol. 3, Chapter 11, J. C. B. Mohr (Paul Siebeck) / Tübingen / and Martinus Nijhoff Publishers / Dordrecht / Boston / Lancaster, 1994, p. 44).

¹⁵³ The Word “manifestly” has also been incorporated in international Inter-American instruments, such as the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Article 2.h), the Inter-American Convention on Letters Rogatory (Article 17), the Inter-American Convention on General Rules of Private International Law, the Mexico Convention of 1994 and, in MERCOSUR, the Protocol on Cooperation and Judicial Assistance in Civil, Commercial, Labor and Administrative Matters (Article 20(f)) and the Protocol on Interim Measures (Article 17).

¹⁵⁴ See in J.W. CAIRNS, *Development of Comparative Law in Great Britain*, in *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford-New York, 2006, p. 146.

achieve the uniformity of contract law on an international level, emitted by the institutions which have been established precisely to achieve that objective, (some of which Paraguay is a member of, such as the Hague Conference or UNCITRAL), should be adopted or copied literally to the greatest extent possible.¹⁵⁶

At least, regarding choice of law, in a way the Paraguayan drafter is copying himself. He was part of the Working Group first convened by the Hague Conference on Private International Law in January 2010.¹⁵⁷ The decisions there, were adopted by consensus, and the Paraguayan drafter is in full agreement on major aspects of the resulting Hague Principles.

Moreover, both with respect to the Mexico Convention and the Hague Principles, Paraguay has participated, through its official delegates, in the deliberations that led to the drafting of the respective instruments.

XI A GIANT STEP ON A JOURNEY OF ONE THOUSAND LEAGUES

It is a prisoner's dilemma! The parties tend to assume that the choice of non-State law will not be accepted by the courts. Even in an arbitration setting, as stated by Fabio Bortolotti, the parties often react to this uncertainty by selecting domestic laws to minimize the risks of attack based on what has been decided by domestic tribunals at the seat or at eventual places of enforcement.¹⁵⁸

The Paraguayan Law creates the conditions to leave behind this fear. Obviously, it will take time to realize the fecund potential of the Law and secure the effective use of the tools it confers upon contracting parties, judges and arbitrators. For instance, it should be clear that a judge, absent a choice of law, should not seek the application of a national law *per se*; on the contrary, such a solution must be the exception, as already stated.

Some years ago, a study conducted by Klaus Berger among 2733 lawyers found that approximately a third of them indicated that they knew of at least one case in their practice in which parties had referred to transnational law in their contracts, and more than 40% had

¹⁵⁵ Argentina changed its Civil Code completely and included in the new text several Private International Law norms, among them provisions dealing with international contracting. It is a pity that the work of the Hague Conference on this topic was not taken into account for this purpose, specifically where it refers to non-State law. Argentina has also failed to follow the formula of the Mexico Convention regarding absence of choice, adopting instead a solution inspired by Article 4 of the Rome Convention and Rome I (which has been subject of wide criticism). The Inter-American solution grants the possibility of directly applying non-State law (see, in this regard: D. FERNÁNDEZ ARROYO, in *Código Civil y Comercial de la Nación Ley 26.994*, J.C. Rivera /G. Medina, Thomson Reuters, Buenos Aires, 2015, comentario al artículo 2651. For criticism of the Republican Dominican and Panamanian reform (again reformed by a new law), see my article: Nueva Ley Paraguaya de Contratos Internacionales: ¿Regreso al Pasado?, accesible at www.asadip.org).

¹⁵⁶ In Brazil, for instance, the proposal was made by Agatha Brandao de Oliveira and Valesca Raizer Borges (A. BRANDAO DE OLIVEIRA / V. RAIZER BORGES, *Un Enfoque Crítico del Sistema Brasileño de Derecho Internacional Privado y los Retos de la Armonización: Los Nuevos Principios de La Haya Sobre la Elección del Derecho Aplicable en Materia de Contratos Internacionales*, in *Los servicios en el Derecho Internacional privado*, ASADIP-UFRGS, Porto Alegre, 2014, pp. 41 ss.

¹⁵⁷ See in: http://www.hcch.net/index_en.php?act=text.display&tid=49.

¹⁵⁸ F. BORTOLOTTI, *The Application of Substantive Law by International Arbitrators*, International Chamber of Commerce (ICC), DOSSIERS ICC Institute of World Business Law, Paris, 2014, p. 7.

knowledge of at least one arbitral proceeding in which the term had been used.¹⁵⁹ A more recent research, using 136 extensive questionnaires and qualitative data based on 67 in-depth interviews, found that the use of transnational law is fairly common in the arbitral setting (approximately 50% of those interviewed used the term at least “sometimes”).¹⁶⁰ More recently, in 2014, a survey on the use of soft law instruments in International Arbitration was open for responses at Kluwer Arbitration Blog. The users were asked to report on their real-life encounters with the UNIDROIT Principles of International Commercial Contracts, the *lex mercatoria* and similar expressions. The outcome for the UNIDROIT Principles and the *lex mercatoria* was strikingly similar, which may suggest that they are used interchangeably. Around 50% of the responses stated that they had used both occasionally, whereas about 20% specified that they used them always or regularly.¹⁶¹

XII A DEFENSE OF PRIVATE INTERNATIONAL LAW JURISTS

They created the mess, but they are fixing it themselves. In its chauvinistic version – a legacy of the nineteenth century, – the discipline has been qualified as “private law”, that is, “nationalized” instead of universal law dealing with international law,¹⁶² and its specialists have been referred to pejoratively as “conflictualists” rather than “internationalists”.¹⁶³

Today the mainstream of conflictualism no longer defends the extremist orthodoxy, and the field specialists are more open to a methodological pluralism that also admits party autonomy so as to leave behind the system or uniform rules to govern international contracting, including non-State law. Those who are not open to change (or the “champions of the past”, as René David called them), are losing their time and are running the risk that the new law will be established without them, leaving them teaching a fossilized system that will be more and more abandoned in practice.¹⁶⁴

The author of this article remembers a moment during the deliberations of the Working Group in The Hague back in 2010, when Professor Joachim Bonell was so excited about the debates and recollected how things had changed from the 1970s, when in his youth he attended the debates that led to the 1980 Vienna Sales Convention, where conflictualist orthodoxy was still strong. How different the ambience was now in the discussions on the Hague Principles!¹⁶⁵

¹⁵⁹ See in: C.R. DRAHOZAL, Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration, 20 *Journal of International Arbitration*, 2003/1, p. 30.

¹⁶⁰ 2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary, University of London, School of International Arbitration (SIA) and White & Case, pp. 11 ss.

¹⁶¹ The survey was conducted within the Fondecyt (National Foundation for Scientific and Technological Development, Chile) Project No. 1110437. Elina Mereminskaya, Bofill Mir & Alvarez Jana Abogados, for ITA, Results of the Survey on the Use of Soft Law Instruments in International Arbitration, 6 June 2014, in <http://kluwerarbitrationblog.com/blog/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration>.

¹⁶² B. AUDIT, *Droit International Privé*, Cinquième Edition, Paris, Editorial Economica, 2008, p. 3.

¹⁶³ See R. DAVID, *Los Grandes Sistemas del Derecho Contemporáneo*, translation to portuguese by Hermínio A. Carvalho, 4ª edición, São Paulo, Editorial Martins Fontes, 2002, p. 25.

¹⁶⁴ See in: R. DAVID, *Los Grandes Sistemas del Derecho Contemporáneo*, translation to portuguese by Hermínio A. Carvalho, 4ª edición, São Paulo, Editorial Martins Fontes, 2002, p. 26.

¹⁶⁵ I have been a privileged witness to this assertion.

Much of this is due to the road paved by contemporary preachers of the discipline,¹⁶⁶ and also to efforts like those of The Hague Conference and the Mexico Convention, which have set the stage (with an official endorsement, so to speak) for the new scenario.¹⁶⁷

CONCLUSIONS

Paraguayans need no longer be ashamed. After suffering one of the more anachronistic regimes in the world in the field of international contracting, they are now reaping the benefits of an apt regulation. The new law recognizes broad party autonomy, clarifies several issues that can arise in connection with the principle and sets a limit on this liberty in a balanced public policy context that takes into account basic postulates of local law as well as the relevant requisites in this matter, seen through the prism of cosmopolitanism.

Now, the real “Trojan Horse” is the admission of non-State law. The Hague Conference on Private International Law has taken sides in the debate and openly admits the applicability of non-State law. In doing so, it goes further than Rome I, which rejects this stance, and beyond the Mexico Convention, spelling the matter out with clarity.

Both Rome and Mexico have paved the way for many of the other solutions contained in the Hague Principles, which have the merit of settling in clear terms many of the issues and developments of recent times in diverse matters affecting choice-of-law in international contracts. The Hague Principles have given the world a formidable model

¹⁶⁶ See the seminal work of E. JAYME, *Identité culturelle et intégration: le droit international privé postmoderne*, Cours général de droit international privé, *Recueil Des Cours, Collected Courses of the Hague Academy of International Law*, 1995, IV, Vol. 251, Martinus Nijhoff Publishers, 1996. Regarding further evolution, Reimann notes that, especially after the 1990s, legislative changes have been occurring in Private International Law, via international conventions and other domestic initiatives. This is also a response to the globalization of the economy and the mobility of recent times, which have led to an urgent need for modern, functional rules in the discipline (M. REIMANN, *Comparative Law and Private International Law*, in *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford-New York, 2006, p. 1379). See also: B. AUDIT, *Le caractère fonctionnel de la règle de conflit (sur la “crise” des conflits des lois)*, *Recueil Des Cours, Collected Courses of the Hague Academy of International Law*, 1984, III, Vol. 186, Martinus Nijhoff Publishers, 1985, pp. 349-350. See also: H. KRONKE, *Most Significant Relationship, Governmental Interests, Cultural Identity, Integration: ‘Rules’ at Will and the Case for Principles of Conflict of Laws*, in *IX Uniform Law Review*, 2004/3, p. 476. In Latin America, see the provocative article of D. FERNÁNDEZ ARROYO, *El derecho internacional privado en el diván – Tribulaciones de un ser complejo, Derecho Internacional Privado y Derecho de la integración – Libro Homenaje a Roberto Ruíz Díaz Labrano*, pp. 21-24. For a statement on this evolution in the United States at the end of the twentieth century, see A. GARRO, *El Derecho Internacional Privado en los Estados Unidos: balance y perspectivas*, in *Revista Mexicana de Derecho Internacional Privado*, Mexico, DF, 2000, pp. 113-114.

¹⁶⁷ However, the dichotomy between conflictualism and internationalism will continue (B. FAUVARQUE-COSSON, *Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple*, 49 *American Journal of Comparative Law*, 2001, pp. 409 and 415). As stated by C. Fresnedo de Aguirre, this depends on the topic. In a major community of principles and interests there are more possibilities to arrive at supranational material solutions (C. FRESNEDO DE AGUIRRE, *Curso de Derecho Internacional Privado*, T. I, Parte General, Editorial Fundación de Cultura Universitaria, Montevideo, 2001, p. 41).

upon which to craft legislation. Paraguay has taken advantage of this with its new Law. Hopefully, other countries will soon follow suit.

In the wider picture of world history, the new Paraguayan Law is geared towards a healthy return to a past of cosmopolist splendour, on the one hand, while building bridges with the future, on the other hand. It indicates a path that will indubitably serve as a reference in all future codification efforts in this regard, where what was done in Paraguay will not be ignored.¹⁶⁸

Naïve readers beware: a battle has been won – but the war is far from over.

¹⁶⁸ Highlighted by the Hague Conference itself on its official site: http://www.hcch.net/index_en.php?act=conventions.text&cid=135.