

CHAPTER 12 Private International Law

Ursula ~~Cristina~~ Basset

Chapter 12— Private International Law

Ursula ~~Cristina~~ Basset

Private International Law (PIL) in Argentina is since 2015 a Title in the new Civil and Commercial Code (CCC). Due to this, ~~Private international law (PIL)~~ has now a more systematic regulation.¹ This is an undeniable advance, that will, no doubt, facilitate the understanding of our PIL to foreigners and locals.²

Law-making is in many senses “the art of the possible.” Thus, ~~o~~Only thankfulness is to be conveyed to the renowned experts who worked on the matter of PIL. That said, the accomplishments of the ~~Civil and Commercial Code CCC~~ should be tempered: under the current regime it could neither be said that its compilation is complete nor that it accounts for the complexities that PIL faces in current times.

First of all, the option to include PIL within a Private Law Code was for some a lost opportunity to free it,³ and give it the scientific autonomy contemporary PIL needs under the new landscape of international relations.⁴ Not that the experts who worked on the draft preferred the “privatization” of PIL, it was probably just that it was the option available at the time.⁵ On the other hand, even if the systematic regulations included in the CCC would create the

¹ ~~Dreyzin DREYZIN~~ de ~~Klor KLOR~~, Adriana, “Las disposiciones generales del Derecho Internacional Privado en el Código Civil y Comercial”, RCCyC 2017 (Septiembre), p. 3.

² ~~Fernandez Arroyo FERNANDEZ ARROYO~~, Diego P. “Main Characteristics of the New Private International Law of the Argentinian Republic”, *RabelsZeitschrift*, 80, pp. 130–150 (2016).

³ Most of all, in times in which the private/public law division blurs. ~~Muir Watt MUIR-WATT~~, Horatia, ~~Fernandez Arroyo FERNANDEZ ARROYO~~, Diego, *Private International Law and Global Governance*, OUP, 2014e, Pp. 2. *See also*: ~~Mills MILLS~~, Alex, *The eConfluence of Public and Private International Law*, Cambridge University Press, 2009.

⁴ *Ib.* Pp. 133.

⁵ This is what seems implied in *ib.* p. 134. *See also* ~~UzalUZAL~~, María Elsa (member of the drafting commission of the CCC), “Lineamientos de la reforma del Derecho Internacional privado en el Código Civil y Comercial de la Nación”, *Sup. Esp. Nuevo Código Civil y Comercial 2014 (November)*, p. 247.

Comentado [SB1]: General Note to the Author: As per KLI House style, first person is not preferred. Hence we have raised queries wherever applicable for the first person usage. Kindly check our comments and advise.

However, if the author does not approve of the suggested changes, the change would not be carried out. Please confirm.

Con formato: Versalitas

Con formato: Fuente: Times New Roman, 14 pto, Color de fuente: Fucsia, Inglés (Estados Unidos), Diseño: Claro

Con formato: Fuente: Times New Roman, 12 pto, Color de fuente: Automático, Diseño: Claro

Comentado [SB2]: AQ: As per KLI House style, first person is not preferred. So, please consider rephrasing “our” as “Argentine” throughout.

Comentado [R3]: AU: Please confirm whether we can change *ib.* into “*Ibid.*” in this chapter.

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Sin Resaltar

Con formato: Fuente: Cursiva

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Sin Resaltar

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente: Cursiva, Español (Argentina)

Con formato: Español (Argentina)

impression of a complete PIL system, this is only a mirage. On a close look, only a small part of PIL has been compiled. Actually, the Argentinian CCC is in itself a visual illusion on this respect: it would seem to be a re-codification, a reaction against the centrifugal movement of de-codification undergone by many compared legal systems. If it intended to stop the leak, it failed to fulfill its promises. It is a ~~Civil and Commercial Code~~CCC that has not legislated upon commercial companies, insolvency, intellectual property, checks, jurisdictional immunity of foreign states or even children's law. For an effort of re-unification of Private law, it was a quite unsuccessful one. Finally, PIL did not include provisions on the recognition and enforcement of foreign decisions in the new ~~Civil and Commercial Code~~CCC, which is regrettable. It was included by the experts who drafted it (too conscious of the importance of interjurisdictional cooperation), but it was later excluded in further revisions.⁶⁶ It is, however, true, that the expert commission managed to surpass the tight constraints and political urges that surrounded the CCC, to issue, even in this context, valuable and modern provisions.

This chapter aims to provide a glance at the complex regulation of PIL in Argentina, with legal dispositions now easily found in the Argentinian CCC, but, considering that the ~~Civil and Commercial Code~~CCC does not provide a full compilation of private international lawPIL, which is still scattered in several special acts and international treaties to which, maybe, if faced with an international case, a lawyer might have need to refer to.

1- The Sources of Argentinian Private International LawPIL

Main sources of Argentinian PIL are now the ~~Civil and Commercial Code~~CCC, supplementary Acts containing PIL provisions and multilateral or international treaties to which Argentina is signatory party.

1.1. A Brief Sketch of the Spirit and Contents of the PI

Regulations in the Argentinian CCC

⁶⁶ Ib. Pp. 134.

Comentado [SB4]: AQ: As per US style, prefix hyphenation does not follow hyphen. So please confirm if hyphen could be removed in all such instances.

Comentado [UCB5R4]: fine

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Español (Argentina), Sin Resaltar

Con formato: Español (Argentina)

In this section dedicated to the sources of PIL in Argentina, the regulation of the CCC will be discussed only referring to the issue of the legal sources of PIL and a short sketch of its contents. In Section 2, and mostly in the following sections, the reader will be able to find a presentation of its main features.

Concerning the issue of the sources of PIL, it should be stated right from the start that the regulation the CCC considers itself to be subsidiary to other autonomous sources of PIL: Art. 2594 states that “applicable norms to cases with international dimensions will be determined by treaties, international conventions currently in force applicable to the case, subsequently to norms of international source, and, in the absence of those, norms of Argentina ~~PIL private international law of an internal source~~”⁷. The stress on the international dimensions of Argentine “private” international law strikes right from the start. Another issue to be noted is the special importance according to international treaties, and especially those referring to human rights matters, with local doctrine has put right at the source of PIL, aligning with current trends on the matter.⁸ This prevalence of international law over domestic law mirrors a constitutional approach to the hierarchy of norms (it might be thus said to be a cultural matter), and is replicated further in the norms concerning international jurisdiction (Article- 2601), international cooperation (Articles- 2611–2612), and specific cooperation in regard to international restitution of children (Articles- 2614, 2642).⁹ It is also in line with Article- 1 and 2 of the Argentine CCC, when disposing on the sources of law and of interpretation of law.

One of the main derives of this internationalist approach is the quest of what local doctrine has called simply “justice”¹⁰; a part of which could be coined also a realization of the quest of

⁷⁷ “Las normas jurídicas aplicables a situaciones vinculadas con varios ordenamientos jurídicos nacionales se determinan por los tratados y las convenciones internacionales vigentes de aplicación en el caso y, en defecto de normas de fuente internacional, se aplican las normas del derecho internacional privado argentino de fuente interna.”

⁸⁸ The starting point is the new place made for “justice” in PIL, which naturally derives in considering Human Rights treaties as a direct or indirect source. See, [MILLS](#), *The eConfluence...*, *supra* en: [Fawcett](#) [FAWCETT](#), James J. et al., *Human Rights and Private International Law*, OUP, 2016. In Argentina: [Uzal](#) [UZAL](#), María Elsa, *Derecho Internacional Privado*, La Ley, 2016, Chapter 2.

⁹⁹ [Fernandez Arroyo](#) [FERNANDEZ ARROYO](#), “Main eCharacteristics...”, *et-supra* p. 136. ¹⁰¹⁰ [Uzal](#) [UZAL](#), *Derecho Internacional...*, eChapter 1.

Con formato: Resaltar

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente: Cursiva

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente: Cursiva, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

universal access to justice even in cases with international dimensions. The new Argentinian CCC includes the right of international jurisdiction of national judges, in case of absence of international treaties and agreements between the parties, which will apply according to vernacular laws (Article 2601). Moreover, Article 2602, to avoid any loophole includes a *forum necessitatis* provision, by which Argentinian judges will have international jurisdiction even without any norm according it to them in order to prevent the denial of justice. On the other hand, and again making use of the rhetorics of international human rights treaties, Article 2010 establishes a clause of “equal treatment”: “Citizens and those who reside permanently abroad have free access to the jurisdiction to defend their rights and interests in the same conditions as citizens and permanent residents in Argentina”. This equal treatment clause applies to legal persons registered abroad. The concern seems to be to address a concrete and real access to justice in cases with international dimensions.

As to the contents, as said before, the Argentine CCC has included PIL in Title IV (“Dispositions of Private International Law”) within Book VI (“Common Dispositions for Personal Rights and Rights in Rem”). Title IV is divided into three chapters:

- (1) Chapter 1 deals with general provisions.
- (2) Chapter 2 deals with international jurisdictions.
- (3) Chapter 3, with special provisions.

The dispositions within the CCC are structured, notwithstanding the formal presentation in three chapters, in two domains: (a) a general part (including general regulations and international jurisdiction, criteria to apply PI norms, international civil procedure and international cooperation norms); and (b) a special part, with PI norms divided by matter.

1.2. Special Acts eContaining PIL Private International Law rRules

Nevertheless, its inclusion in the CCC, several parts of PIL Private International Law are still contained in other private law sources such as the Act for Commercial Societies, the Bankruptcy act, the Navigation Act, Trade-marks Act, the Insurance Act, and the Aeronautical Code. PIL is still scattered, even if the codification intent, compiled at least a significant part of it.

1.3. International or mMultilateral PIL tTreaties

This section started with the prevalence given to international sources over the “privatized” PIL in the CCC and special acts. Putting aside international treaties on specific matters, there are also

Comentado [SB6]: AQ: As per style, the enumerated list have to follow Arabic numbers and so the change has been made. Kindly approve.

Comentado [UCB7R6]: Fine

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Comentado [SB8]: AQ: Please consider rephrasing as: “Nevertheless, amidst its inclusion in the CCC, several parts of PIL”

Comentado [UCB9R8]: Fine

Comentado [SB10]: AQ: Please consider rephrasing if the intended meaning is not modified as:

PIL is still scattered, even though the codification intent compiled at least a significant part of it.

Comentado [UCB11R10]: Fine

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

the International or multilateral treaties containing different aspects of Private International relations, to which Argentina is a signatory part. To hint only some of them:

- Athens Convention relation to the Carriage of Passengers and Luggage by Sea, 1974.
- Berne Convention for the Protection of Literary and Artistic Works, 1971.
- Convention of Geneva on International Recognition of Rights in Aircraft, 1948.
- Convention of Paris for the Protection of Industrial Property, 1883.
- Convention of Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, Brussels, 1910.
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
- Hague Convention on the Civil Aspects of International Child Abduction, 1980.
- Hague Conventions of 1899 and 1907.
- Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices, 1975 (CIDIP-I).
- Inter-American Convention on Conflicts of Laws concerning Commercial Companies, 1979 (CIDIP-II).
- Inter-American Convention on the Law Applicable to International Contracts, 1994 (CIDIP-V).
- Interamerican Convention on General Rules of Private International Law, 1979.
- Interamerican Convention on Support Obligations, 1989.
- Interamerican Convention on the International Return of Children, 1989.
- Interamerican Convention on the Law Applicable to International Traffic in Minors, 1994 (CIDIP-V).
- New York Convention on the Limitation Period in the International Sale of Goods, 1974.
- Treaty of Montevideo of 1889 (between Argentina, Bolivia, Peru)¹¹ about Civil and Commercial Law, Criminal Law, Procedure Law, Literary and Artistic property rights, patents of invention, trademarks and liberal professions.
- Treaty of Montevideo of 1940 (between Argentina, Paraguay, Uruguay) about Civil and Commercial Law, Navigation and terrestrial circulation.
- UN Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriages, 1964.
- United Nations Sales Convention, 1985.
- Warsaw Convention for Unification of Certain Rules Relating International Carriage by Air, 1929.

According to Articles 1 and 2 of the CCC, to the hierarchy of norms according to our National Constitution, and, last but not least, our legal culture, International treaties dealing with Human Rights and even sometimes soft law, such as recommendations of international organizations or committees, or case law from the Interamerican Court of Human Rights have an effective influence on the application of PIL, not only contouring policy norms, but also the choice of law and the application of material law.

¹¹ Uzal, María Elsa-, *Derecho Internacional Privado*, La Ley, Buenos Aires, 2016.

Comentado [SB12]: AQ: Some of the generic terms are capitalized such as:
International
Private International.

Please confirm if lower case could be followed.

Comentado [UCB13R12]: Yes, no need to capitalize this sentence

Comentado [SB14]: AQ: When checked online for the names of the Convention "Inter-American" is followed. Please confirm if the same could be followed throughout.

Comentado [UCB15R14]: You are right

Comentado [SB16]: AQ: Please consider rephrasing as the meaning seems convoluted as:

According to Articles 1 and 2 of the CCC, the hierarchy of norms according to Argentine National Constitution, and, last but not least, Argentine legal culture, international treaties dealing with human rights and even sometimes soft law, such as recommendations of international organizations or committees, or case law from the Interamerican Court of Human Rights have an effective influence on the application of PIL, not only on contouring policy norms, but also the on choice of law and the application of material law.

Comentado [UCB17R16]: perfect

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

2- Outline of the Private International Contents of the New Civil and Commercial Code CCC. The General Provisions.

As we already anticipated above, general provision covers manifold subjects beyond the neat labels of “general provisions” and “international jurisdiction.” The sharp spirit of the legislator has been to provide a flexible and open regulation.¹² Overregulation might be counterproductive. Let us give a broad overview of its main features. In the next sections, a broad overview of the main features will be provided.

2.1. Prevalence of International Norms

According to the Vienna Convention on the Rights of Treaties (1986) and the Argentine National Constitution (1994) the hierarchy of sources is clearly detailed (Article- 2594, see above).¹³ Faced with a case with international dimensions, the first question an Argentinian judge would ask, is if this case is subject to an international treaty.¹⁴

2.2. Application of International Law

Article- 2595 has a flexible approach on the application of international law.¹⁵ As to the interpretation of international norms, the legislator follows the directives of the Interamerican Convention on General Norms on International Private Law (1979), in the understanding that the application of foreign law must be made as the judges of the country of origin would have applied it. Subsidiary, if the content of foreign law could not be established, Argentine law will be applicable (Article- 2595, a). The Argentine legislator did not dare to empower the judge to apply directly international law, however, an Argentinian judge is entitled to do so, because of the Interamerican Convention cited above.¹⁶

¹² UzalUZAL, “Lineamientos...”, *supra*.

¹³ FeldsteinFELDSTEIN de CárdenasCARDENAS, Sara, “Prelación de fuentes del derecho internacional privado en el nuevo Código”, La Ley-2015-846. DreyzinDREYZIN de KlorKLOR, “Las disposiciones...”, *supra*.

¹⁴ DreyzinDREYZIN de Klor, “Las disposiciones...”, *supra*.

¹⁵ FeldsteinFELDSTEIN de CárdenasCARDENAS, Sara, “La aplicación del derecho extranjero en el Código Civil y Comercial. Una mirada crítica”, La Ley, 31/03/2016, p. 1.

¹⁶ FeldsteinFELDSTEIN, “La aplicación...”, *supra*- p. 14. The principle *iura novit curia* would apply, always under strict conditions.

Comentado [SB18]: AQ: Could this be changed as: Outline of the Private International Contents of the New CCC: The General Provisions

Comentado [UCB19R18]: Fine. I changed section 3 accordingly.

Comentado [SB20]: AQ: Please consider rephrasing as: The sharp spirit of the legislator has to provide a flexible and open regulation

Comentado [UCB21R20]: Fine!

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Cursiva

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente: Cursiva, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente: Cursiva, Español (Argentina), Resaltar

Con formato: Fuente: Cursiva, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente: Cursiva, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Fuente: Cursiva

If there were several international systems converging on the same international relationship, applicable law is determined by the rules in force within the State to which this law pertains, or by application of the law that is closest to the international relationship (Article- 2595, b). The convergence will be solved by a dialogue between legal sources, that will establish a reasonable motive to apply the more coherent legal system.

Finally, if there is convergence of several applicable laws to different aspects of a juridical situation, the plurality of laws has to be harmonized by the judge, adapting each legal system according to the ends of each of them (Article- 2595, c). Here, the legislator chose a flexible coordination of normative systems, with a finalist interpretation of the norms. Applicable law is constructed by a dialogue of legal sources.¹⁷

Autonomy makes its entrance to the stage, interacting with more traditional principles.

The rules for “renvoi” are as usual: if a foreign law applies, its PIL is applied. Therefore, if its PIL sends back to the first legal system, the latter will apply. Renvoi applies also to choose of law: if the parties choose a certain foreign law, it is understood that they chose the material laws of that State.

One of the most interesting features of current PIL is the “exception clause.”¹⁸, worded by the ~~art.~~ Article 2597. According to this clause, a conflict rule shall not be applied, “when by the factual circumstances of the case,” it is evident that the situation has little link with such law, and conversely, it presents close links with the law of other state, which application is foreseeable, and “under which rules the relationship has been validly established.” The exception clause does not apply when parties chose the applicable law for the case. Article- 2653 provides for an

¹⁷JaymeJAYME, Erik, “Identité culturelle et intégration: le droit international privé postmoderne”, *Course general de droit international privé*, Collected Courses of the Hague Academy of International Law, Vol. 251, ps. 60.

¹⁸Article 2597. “Cláusula de excepción. Excepcionalmente, el derecho designado por una norma de conflicto no debe ser aplicado cuando, en razón del conjunto de las circunstancias de hecho del caso, resulta manifiesto que la situación tiene lazos poco relevantes con ese derecho y, en cambio, presenta vínculos muy estrechos con el derecho de otro Estado, cuya aplicación resulta previsible y bajo cuyas reglas la relación se ha establecido válidamente.”

Comentado [R22]: AU: Please provide the opening quote.

Comentado [UCB23R22]: provided

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Francés (Francia)

Con formato: Francés (Francia)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

exception clause applicable to contract law: exceptionally, and if the parties ask for it, taking into account objective and subjective elements of the contract, a judge may apply the closest legal system to the case, except when the parties chose the applicable law.

There are other provisions that establish a certain flexibility in terms of the application of law, but for other reasons than “closeness.”¹⁹ When it comes to alimony, parental responsibility or rules concerning the challenge of paternity,¹⁹ applicable law is decided to take into consideration higher interests, like the interests of the creditor or the interests of the child. The latter would be explained more on the account of the hierarchy of international treaties on human rights and material values that stem from them, than on any other theory within the field of PIL.

Private autonomy and choice of law are now further recognized in Argentinian [Civil and Commercial Code](#). This right does not apply equally to all matters.²⁰ The choice of jurisdiction and arbitration was already recognized since 1976 in Argentina, yet only to patrimonial and international matters. Nowadays, this forum choice is expressly recognized in [Article](#)- 2605 (“agreement of choice of jurisdiction”).

[Article](#)- 2607 establishes that the choice of forum may be either explicit or tacit. A tacit choice of forum can be proven by any means of written proof. The choice is also proven when the plaintiff files in a certain jurisdiction, and also when the defendant responds without a plea. Choice of forum is possible only there, where it is not forbidden ([Article](#)-2605).

There is also a limited choice of applicable law recognized concerning maintenance agreements ([Article](#)- 2630, second paragraph). Parties may choose the law of the habitual residence of any of the parties at the time of the celebration of the agreement. Matrimonial property agreements also offer the spouses a reduced choice of law: if they move to another country they might choose the application of Argentinian law in the foreign country of their new residence ([Article](#)- 2625).

¹⁹ [Articles](#)- 2629, 2632, 2639.

²⁰ [Fernandez Arroyo](#) FERNANDEZ ARROYO, “Main Characteristics...”, p. 145.

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Francés (Francia)

Con formato: Francés (Francia)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Francés (Francia)

Con formato: Francés (Francia)

When it comes to contracts, parties have freedom of choice concerning applicable law. Choice must be express. Parties can change applicable law at any time, however, this modification may not affect the validity of the contract or the rights of third parties. The elected national law will be applied, except for the conflict of law rules. Parties may create material norms excluding the material laws from the legal system they chose. The choice of laws may not be applied in a way that they violate mandatory norms of the foreign law (case in which the choice of law would not be valid). The election of an international forum does not include the choice of applicable law of that legal system.

Choice of law is limited when there are interests of vulnerable parties at stake. This is the case for consumer law.

2.3- Evasion of the Law (fraude à la loi)

The evasion of law occurs when a party applies foreign law in order to evade the application of the rightful principles of another State Party's law. This means a voluntary evasion or mandatory law, and the alteration of the norm of conflict.

According to Article 2598, in case of fraud, the applicable law will be determined irrespectively of the acts or facts instrumented in order to evade the rightful legal system. E. g. if a party changed residence just to evade the applicable law, this fact will not be taken into account when determining the applicable law. Of course, there is a matter of proof: in some cases the intent to evade might be difficult to ascertain.

Fraud occurs only when mandatory clauses are concerned, and it is these mandatory clauses that the party wants to avoid.

2.4 Mandatory International Laws and Policy Norms

Mandatory international laws prevail over private autonomy of the parties and exclude the application of conflict laws or even the choice of law by the parties. This means that there are mandatory international norms or policy norms that apply disregarding the usual conflict laws.

Article 2599 establishes that in case there were Argentinian mandatory international norms, applicable to the case, they prevail over personal autonomy of the parties or the foreign law indicated by conflict rules. Conversely, when a foreign law is applicable, then also its mandatory

Comentado [SB24]: AQ: Could this be kept in italics?

Comentado [UCB25R24]: yes

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Comentado [SB26]: AQ: Please confirm if as per style, "For example" could be followed at the start of the sentence.

Comentado [UCB27R26]: fine

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

laws are applicable to the case. Moreover, mandatory international laws of foreign State Parties may be applicable if they present a preponderant closeness to the case.

Two kinds of mandatory norms should be distinguished: on the one hand, mandatory norms within private law, that are nonetheless so relevant, so deeply rooted in the values of the State party, that even if there is no express indication that they should be internationally applicable, they end up being applied to international cases.

On the other hand, there are the policy norms. Those are the rules to which the legislator ascribes deliberately and expressly an international character, indicating that they are to be applied in international cases.

2.5- Ordre pPublic iInternational

As in many compared legal systems, the law declared applicable may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy. *Ordre public* acts, thus, as a clause of exception. A State Party that has the jurisdiction of the case by *lex fori*, may exclude the application of the law pointed at by the conflict rule because of this collision with their internal principles of public policy.

Normally, *ordre public* is far more important in those matters that have a clear slant on mandatory regulation: rights in *rem*, marriage, paternity, protection of children, etc. *Ordre public* produces a unification of an international case that might be fragmented in several State laws.

Ordre public applies not only as a strong critierium-criterion to apply or disregard international law, but also when it comes to recognize foreign court decisions.

Comentado [SB28]: AQ: Could this be "applied"?

Comentado [UCB29R28]: You are right!

Comentado [SB30]: AQ: Could this term "ordre public" be kept in italics?

Comentado [UCB31R30]: sure

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

A decision based on the *ordre public* in Argentinian PIL implies also an integration of international sources, especially international human right treaties, according to [Article](#)- 2594 and [Articles](#)- 1 and 2 CCC.

The new CCC includes *ordre public* clause in [Article](#)-2600, by which the rules of foreign law are excluded when they imply legal solutions contrary to “the fundamental principles of the *ordre public* that inspire the Argentine legal system.”

The meaning of *ordre public* is not always clear or easy to determine.²¹ Most of all, the exclusion of the applicable law calls for a methodological issue: some understand that the exclusion should occur *a priori*, in a dogmatical manner; others understand that it should be decided on a case by case basis, considering what would be the consequences of the application of foreign law in the concrete international case under analysis.²² The exception of *ordre public* begs the question of ideologies and values concerning the function of the judiciary (between activism and conservatism), so it mostly depends on the attitudes of the Judge who has to decide on the matter.

2.6- Matters Expressly Subject to Ordre Public Clauses

Typical *ordre public* matters are the protection of concurrence law, transfer of technology contracts, and *i. g.* the regulation of markets and capitals.²³

Rights in rem have a special rule by which the law of situation of the immovables determines the applicable right ([Article](#)-2667). The same applies to registrable movables ([Article](#)- 2668). This article creates an exception on probate proceedings, that are usually connected to the law of the last domicile of the defunct. If that succession would include immovables in a country other than the one of the last domicile, probate proceedings should be opened in the country of situation of the immovables.

²¹²⁴ [Basset](#)BASSET, Ursula C., “Peculiaridades del orden público en el régimen argentino. Estudio comparativo de las fuentes francesas y de los matices singulares del orden público en el Código argentino”, *Revista de Derecho Privado y Comunitario*, 2007, III, pp. 419–254.
²²²² [Dreyzin](#)DREYZIN de [Klor](#)KLOR, “Las disposiciones...”, *supra*cit.
²³²³ These are mostly in the following special Acts: [Law](#) 25.156 on the defense of concurrence, [Law](#) 22.426 on transference of technology, [Law](#) 21.526 on financial institutions ([Arts.](#)- 9, 11, 14); [Law](#) 20.081 on insurance companies; [Law](#) 20.094 on Navigation ([Art.](#)- 604), and [Law](#) on Commercial Companies, 19.550.

- Con formato: Fuente: Negrita
- Con formato: Fuente: Negrita
- Con formato: Fuente: Negrita
- Con formato: Fuente: Negrita
- Con formato: Fuente: Negrita
- Con formato: Fuente: Negrita
- Con formato: Fuente: Negrita
- Comentado [SB32]: AQ: Please confirm if “i. g” could be deleted.
- Comentado [UCB33R32]: Fine
- Comentado [UCB34R32]:
- Con formato: Fuente: Sin Cursiva
- Con formato: Fuente de párrafo predeter., Fuente: 10 pto
- Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)
- Con formato: Español (Argentina)
- Con formato: Fuente de párrafo predeter., Fuente: 10 pto
- Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)
- Con formato: Español (Argentina)
- Con formato: Fuente: Cursiva, Español (Argentina)
- Con formato: Español (Argentina)
- Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Article 2609 ensures the exclusive jurisdiction of Argentinian judges in rights in rem located in Argentina, in the matter of the validity or annulment of the registration of Argentine registries and on the matter of the registration of patents and trademarks, designs or industrial models in Argentine registries.

Con formato: Fuente: Sin Cursiva

Concerning probate proceedings, Article 2644 establishes that the applicable law is the last domicile of the defunct, except in respect of the immovables located in Argentina. However, the jurisdiction could be that of the last domicile or that of the situation of the immovables. A peculiar outcome might take place: a possible interpretation is that Article 2644 is a mandatory internal rule. The international judge by application of the law of the last domicile might choose not to apply it. However, in the proceedings in order to get Argentine courts to recognize the foreign decision in local registries, it might be rejected by invocation of the Argentine *ordre public*.

Other clear *ordre public* rules can be found in labor law, consumer law, social security law, etc.

2.7. International Jurisdiction

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Cursiva

~~Even if we referred above to international jurisdiction (see Sections a) and b), it is imperative that a special section is consecrated to international jurisdiction.~~

Argentine judges may issue provisional and injunctions if they are acting in the main proceedings, when the proceedings are about a decision of a foreign judge that will be executed in Argentina or on demand of a foreign judge.

International *lis pendens* covers a situation in which there are two pending judicial proceedings pending between the same parties with the same object and cause of action, one initiated in Argentina, and another previously initiated in a different state. In principle, each court will determine its jurisdiction according with conflict rules that may be dissimilar. In these circumstances, the new code provides that the Argentine judge shall suspend the local proceedings if it is foreseeable that a judgement is to be issued in the foreign previously initiate law suit and this law judgement may be recognized by an Argentine judge in the future.

Con formato: Fuente: Sin Cursiva

A judge may resume the process if the foreign judge declines its jurisdiction, if the foreign process terminates without a decision on merits of the disputes or if the foreign judgement cannot be recognized in Argentina (Article 2604).

The new Code contains general principles relating to international cooperation and procedural assistance. Article 2611 creates a duty of international cooperation between Argentine judges and foreign judges, beyond international conventions. Article 2612 orders Argentine judges to comply with procedural and evidentiary measures by foreign judges. Such measures shall not be executed if they are contrary to the *ordre public*. Argentine judges may communicate directly with foreign judges in the state in which such practice is accepted, as long as due process rules are kept. Judges may communicate through rogatory letters.

3. Special Provisions The Special Provisions

In this section, we will deal with special provisions to be found in the Argentine Civil and Commercial Code CCC. The CCC has a section called “special provision”. This section deals with the PIL rules to be applied to the specific legal institutions.

3.1. Law of Persons

Lex domicilii applies to legal capacity of human persons. Once legal capacity has been acquired it may not be lost (Article 2616). The lack of legal incapacity may not be invoked against a juridical act celebrated in a State for which the person had full legal capacity. It also applies to the name, at the time of its imposition. Because of the axiological closeness between *lex fori* and *lex causae*, connecting factors and choice of law coincide²⁴. It is always a statute of a person at stake, and not a relational statute, that is why it is logical to fix it to the ~~domieledomicile~~ domicile. Because of this, the sole exception to the *lex domicilii* is the capacity to marry, which is regulated by the *lex locus celebrationis*.

²⁴²⁴ SotoSOTO, Alfredo, *Código Civil y Comercial Comentado. Tratado Exegético*. La Ley, Buenos Aires, 2016, Commentary to Art. 2616.

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

The Argentine CCC introduces its own characterizations and definitions on these matters (“qualifications”). The domicile of a minor is that of those who have parental responsibility over them. If several persons have parental responsibility on the child and they live in different States, the domicile is there, where they have their habitual residence (Article 2614). The same rationale applies to persons without full legal capacity. Also the Treaty of Montevideo of 1889 and the Treaty of Montevideo of 1940 had included direct qualifications when it came to determine the concept of domicile.

3.2- Law of Marriage

Once again, as in most matters concerning personal and family status, *lex fori* and *lex causae* coincide. And, as it happened with the domicile in the *status personae*, Argentina chooses to qualify unilaterally the concept of conjugal home (the place of indisputable common residence of the spouses).

Lex fori and *lex causae* for annulment, dissolution of marriage, as for the effects of marriage is the last conjugal domicile or before the habitual residence of the respondent.

Jurisdiction and applicable law to decide the capacity to marry, the form of marriage, its existence, the proof of the existence of marriage, its validity is the law of the State where marriage was celebrated. However, for reasons of public order, marriage contracted in a foreign country in violation of the impediments of Argentinian law, will not be recognized in Argentinian law (Article 2622).²⁵

Jurisdiction and applicable law to personal effects of marriage is the law of the conjugal home. Applicable law to patrimonial effects of marriage like prenuptial agreements is the law of the first conjugal home. To further marital agreements, *lex loci celebrationis* applies.

In case that spouses should change their domicile, they may opt to apply Argentine law to their new domicile (Article 2625).

Jurisdiction and applicable law to divorce and dissolution of marriage is the law of the last conjugal domicile.

²⁵ Kinship, previous marriage, attempted crime against.

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Argentina was one of the last countries in the world to have a matrimonial property regime based on the community of property. Until the last ~~Civil and Commercial Code~~CCC, spouses could not choose their property regime by a marital agreement. Most countries in Latin America had ever since had a plurality of eligible matrimonial property regimes. The Treaty of Montevideo of 1889 established that marital agreements (autonomy) regulate patrimonial relationships between spouses. In the absence of marital agreements, they are covered by the law of the conjugal home they had decided in common before marriage. And if they had not decided their domicile before marriage, it will be regulated by the domicile of the husband by the time of the celebration of marriage. If there is a movable conflict, the change of jurisdiction does not alter the original connecting factor.

The Treaty of Montevideo of 1940 establishes that marital property agreements are regulated by the law of the first conjugal home, except for rights in rem. A change of domicile may not alter the applicable law.

Within the Mercosur (Common market of the South) the Agreement between the Members States of Mercosur about jurisdiction and competence (58/2012²⁶) established the jurisdiction of the courts of the conjugal home or the courts of the domicile of the plaintiff or the respondent (Article- 3). Article- 9 establishes that personal relations between spouses are regulated by the law of the last conjugal home, and subsidiarily by the place of celebration of marriage. As for patrimonial effects of marriage, Article-10 establishes the principle of autonomy: they are regulated by marital agreements. In the absence of those, the law of the first domicile. As in the Treaty of Montevideo of 1940, rights in rem are regulated by their special rules, according to the *lex loci rei sitae*. The change of domicile does not change the applicable law. Article- 11 regulates divorce by the law of the last conjugal home, in the absence of this by the law of the last conjugal home if there is at least one spouse living in that State, and in the absence of the latter, the law of the plaintiff or the respondent (the competent judge decides).

²⁶26. Acuerdo Entre Los Estados Partes Del Mercosur Y Asociados Sobre Jurisdicción Internacionalmente Competente, Ley Aplicable Y Cooperación Jurídica Internacional En Materia De Matrimonio, Relaciones Personales Entre Los Cónyuges, Régimen Matrimonial De Bienes, Divorcio, Separación Conyugal Y Unión No Matrimonial, 2012, *See*: <http://www.loa.org.ar/legNormaDetalle.aspx?id=22432>.

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Fuente: Cursiva, Español (Argentina)

Con formato: Español (Argentina)

Código de campo cambiado

Con formato: Español (Argentina)

Also within the Mercosur, there is a special provision concerning the recognition of same sex marriages. Article 7 of the said Agreement establishes that reasons of public policy may be applied to reject the recognition of same sex marriages contracted in a State party that recognizes them. Currently, only two countries recognize same sex marriage by law in Latin America: Argentina (2010) and Uruguay (2013). Brazil (2011) and Colombia (2016) have had rulings by their Supreme Court and Constitutional Court respectively. By 2013, the National Justice Council of Brazil decided to legalize same sex marriage²⁷.

3.3. “Uniones e Convivenciales”

The “*uniones convivenciales*” are monogamous *de facto* cohabitations for more than two years. *Lex fori* is the law of the effective domicile of both cohabitants. Applicable law is the law of the State in which they are invoked.

Article 5 of the Agreement between the State parties to the Mercosur establishes that the connecting factor to extra-marital unions are the courts of the State party in which they are invoked (same rule as the CCC).

3.4. Alimony

Lex fori for alimony suits is quite ample. The plaintiff can choose between the judges of their domicile, of their habitual residence, or that of the domicile of habitual residence of the respondent, or before the judge that has decided the dissolution of marriage. If it were reasonable according to the circumstances of the case, the suit could be filed in the courts where the defendant has goods to seize.

When alimony suits are between spouses or cohabitants, *lex fori* is determined by the last domicile or the habitual residence of the defendant or before the judge who decided the dissolution of marriage.

²⁷ See *abovesupra*.

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Sin Cursiva

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente: Cursiva

If the source of the obligation of alimony was an agreement, the suite might be filed before the judge in which the obligation must be paid or where the agreement was celebrated if it coincides with the residence of the respondent.

Applicable law is the law of the domicile of the creditor, of the debtor or the most convenient law in the interest of creditor according to the competent authority or court (Article 2630). Applicable law to agreements about alimony is the law of the domicile or habitual residence of each of the parties at the time of the celebration of the agreement. Otherwise, the law for alimony becomes applicable.

Alimony between spouses is governed by the law of the last conjugal home or last common residence or of the law of the State applicable to the dissolution of marriage.

The Interamerican Convention on Alimony (CIDIP IV) establishes that the creditor may choose the *lex fori* from: the domicile or the habitual residence of the creditor, the domicile or the habitual residence of the debtor, the courts of the country to which the debtor has personal ties such as the possession of goods, income or economic benefits (*forum patrimonii*). As to the amount of alimony, the qualities of creditor and debtor, the amount of the alimony, the terms and conditions required for the right of alimony are regulated by the law more favorable to the interest of the creditor. The competent court chooses between the law of the domicile or habitual residence of the creditor or of the debtor.

There was an interesting case decided in a matter of international abduction of a child who was brought to Argentina. The abductor suit a file for alimony against the parent that had, in turn, sued for restitution of the abducted minor, and that, therefore, did not consent to the Argentinian jurisdiction on alimony. The Argentinian judge, applying the new CCC decided that he was competent to decide on alimony, since alimony is not covered by the Hague convention, and its urgency plus the connecting factors allow the competence of the local judge.²⁸

3.5- Filiation “by Nature” and by ART

The plaintiff may choose to file its suit to determine or contest filiation before the courts of the domicile of the plaintiff or the domicile of the respondent. In case of paternity proceedings

²⁸28. Court of Appeal 1 for Mendoza, 19/8/2015 “F v. K.”;

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

concerning the recognition of a child competent courts are those of the domicile of the person who recognizes the child or those of the recognized child or those of the place of birth.

Applicable law to paternity proceedings is the law of the domicile of the child at the time of birth or the domicile of the parent or parent-to-be at the time of birth or the law of the State in which marriage was celebrated. The authority shall choose the law most satisfactory to the interest of the child. The law governing the recognition of the child is that of the domicile of the child at the time of birth or at the time of the act of recognition of the child or the domicile of the parent who recognized the child at the time of recognition. The legal capacity to recognize is governed by the *lex domicilii*. The solemnities required to recognize a child are governed by the law of the act or by the law of the substantive law that governs recognition.

As for the recognition of filiations established abroad, Argentinian law establishes that they must be recognized according to the principles of public order, especially those who impose the judge to prioritize the best interest of the child (Article- 2634). Implicitly, this section hints on surrogate motherhoods and other controversial issues. The legislator wanted to make sure that the child will be protected whatever the decision about their parents-to-be. As a matter of fact, it is common understanding that whilst Argentinian *ordre public* might repeal surrogate motherhood, an Argentinian judge might have to enforce a foreign decision or public deed of filiation of the child to guarantee his right to the establishment of paternity.

The legislator wanted to make sure that rules about ART are above all other forms of filiation. So they made them part of public order (Article- 2634). This unusual provision is attached to the peculiar nature of the regulation of ART in Argentina, in many respects, disadvantageous for children if compared with adoption an “filiation by nature” (biological filiation). The legislator states that any decision taken on these matters should comply with the best interest of the child standard.²⁹

²⁹ A follow-up on case law criteria can be found in [ScottiSCOTTI](#), Luciana B. “El interés superior del niño en la jurisprudencia argentina: una mirada desde el derecho internacional privado”, DFyP, 2014 (Agosto), p. 26.

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

As for the conventional source, the Treaties of Montevideo of 1889 and 1940 establish that the law presiding the celebration of marriage determines the in wedlock filiation. The questions derived from rights and obligation of ~~an out-of-wedlock~~ paternity are governed by the law of the State in which they have to be made effective.

3.6- Adoption

Argentina has strong feelings about adoption, because of the harsh political times during military governments in which children of “disappeared” parents were registered as biological children to adoptive parents, thus suppressing a part of their identity and biography. Further, Argentina resents the fact that poorer families might not be able to raise their own children only because of economic problems. Argentina has also been accused of trafficking of children: selling children from poorer families to rich families, that later on register the children as their own or fake that parents gave up children to parents in a better position to raise them, when they are actually selling them.³⁰ Because of this peculiar cultural scenario, Argentina is strongly against international adoption of Argentine children, and this prohibition is included in our Constitutional Law (it is that important³¹).

So, an international adoption settled abroad must be enforced in Argentina when it has been accorded by the judges of the domicile of the adopted child at the time of adoption. Adoptions conferred in the State of adoptive parents have to be enforced in case that the adoption could also be enforced in the country of the adoptee. To annul or revoke an adoption, competent courts are those of the domicile of the adoptee or of the place of the adoption. Argentina may invoke the *ordre public* to reject the recognition of an international adoption only if the interest of the child is compromised and the adoption has close ties to Argentina.

In general, connecting factors and applicable law to adoptions is the law of the domicile of the adoptee at the time of adoption. This law governs the requisites and defects of adoption. The annulment of an adoption is governed by the domicile at the adoption or the domicile of the

³⁰30. These are the allegations made by the Interamerican Court of Human Rights in the Case “Fornerón vs. Argentina”, 27/4/April 27, 2012.

³¹31. It is coined as a reservation to Art. 24 of the International Convention on the Rights of the Child, and the ICRC is a part to our Constitution (Art. 75.22).

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

adoptee. Conversion of an adoption *minus plena* into a full adoption is admitted in Argentina if the requisites of Argentine law are met and if adoptive parents and children give their consent. Because of the said cultural frame of adoption in Argentina, Argentina imposes that the judge appreciates on a case by case basis the convenience of an open adoption (to maintain the links with the biological family).

The Treaty of Montevideo of 1940, in which *lex causae* and *lex fori* are the domicile of adoptive parents and adoptive child if they are the same and they are expressed in a public instrument. For annulment or revocation, *lex locus celebrationis* or the domicile of the adoptive child.

Argentina has also signed to the UN Nations Convention on the Recovery Abroad of Maintenance (1956) and the Interamerican Convention on Support Obligations (1989). It never signed the Hague Convention of 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

3.7- Parental Responsibility

Everything concerning parental responsibility is logically covered by the law of the habitual residence of the child once the conflict arises. Once again superior principles interfere with strict PIL criteria. The principle *favor minoris* may be considered in order to decide the applicable law if the child has close ties with the law of another State. This once again an exemption clause, in order to protect higher values.

Tutorship and curatorship are centered on the domicile of minors or persons with restrictions to their legal capacity.

The competent authority in the case that urgent measures need to be taken, shall take them applying its own law, if they are to protect children or persons with restricted capacity (their persons or their patrimony) while they dwell in that country. Competent authorities of the domicile or nationality of the affected persons have to be given notice. If the urgent measures are for refugees, law for refugees apply.

The Treaties of Montevideo of 1889 and 1940 have a different approach. The 1940 Treaty regulates everything relating to parental responsibility according to the law of the domicile of he who has parental responsibility.

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Argentina signed the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measure for the Protection of Children (Law 27.237), yet Argentina did not ratify this Convention, it is not yet in vigor.

Comentado [R35]: AU: Please confirm whether we can use " " as separator for Law numbers.

Comentado [UCB36R35]: In Argentina we use a dot, but if we wish to...

3.8- Return of Children

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Argentina is signatory to the Interamerican Convention on the International Return of Children of 1989 (CIDIP IV), Interamerican Convention on International Traffic in Minors (Mexico, 1994) and The Hague Convention on the Civil Aspects of the International Abduction. It has also signed the bilateral Treaty between Argentina-Uruguay about international protection of minors.

The new ~~Civil and Commercial Code~~CCC introduced Article -2642, under the title of "general principles and cooperation"; according to which in the matter of displacement, retentions or abduction, of minors, that are followed by request of localization or international return, the conventions in vigor apply. In absence of them Argentine judges must try to adapt to the principles of such conventions, ensuring the best interest of the child.

The judge who is competent to decide the return of a child must supervise the secure return of the child, striving to convince the parties to comply voluntarily.

At the request of an interested party or the competent foreign authority, the Argentine judge may take preventative measures to ensure the protection of a child or the accompanying adult who are expected to enter the country.

Most part of children abductions are resolved applying The Hague Convention, and only some of them, by the Interamerican Convention.³² The main problem seems to be, it still takes too much time until the return order is issued. This triggered a number of controversial cases, in

³²³², AllALL, Paula and RubajaRUBAJA, Nieve, "El protocolo de actuación para el funcionamiento de los convenios de sustracción internacional de menores" La Ley, 14/06/2017, p. 1.

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Con formato: Español (Argentina), Sin Resaltar

Con formato: Español (Argentina)

which the length of the stay in Argentina implied that the return was sometimes contrary to the best interest of the child. The child had developed for certain years his life in Argentina (illegitimately, but the child would not understand such terms). By the time he would have to return, he would have to leave friends and family and a life he grew into. This is why Argentina, in collaboration with The Hague Convention Office in Latin America and Argentine authorities a protocol was issued by ~~12/12/~~December 12, 2016.

The Protocol to apply the conventions on child abduction³³ applies to all abducted minors younger than 16. The interest of the child is paramount, and the child has a right to be heard and to take part in the procedures. He has a right to receive adequate information according to his age. Mediation should be promoted. The whole proceeding should be decided in six weeks.

The Central Authority in Argentina is the Office of International Juridical Assistance, from the Ministry of Justice of Argentina.³⁴ They provide assistance and help to any procedures.

3.9. Inheritance Law

Connecting factors and choice of law coincide: it is the last domicile of the defunct. There is, however, a concurrent jurisdiction: *lex rei sitae*, that applies to the immovables in the country in respect to them.

The solemnities of the testament issued abroad are regulated by the law of the place in which the testament was issued, the law of the domicile, of usual residence, or of the nationality of the testator at the time in which the testament was written or by Argentine law. The principle *favor testament* applies.

The legal capacity to testate is covered by the law of the domicile of the testator at the time of the writing to the testament (Article 2647).

³³ Protocolo De Actuación Para El Funcionamiento De Los Convenios De Sustracción Internacional De Niños, available at: http://www.cnaj.gob.ar/cnaj/archivos/2017/ARC_675.pdf.
³⁴ The site is available: <http://www.menores.gob.ar/autoridades-centrales>.

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Código de campo cambiado

Con formato: Español (Argentina)

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

The applicable law to a succession of a person who dies intestate without heirs in a foreign country, does not apply for the goods in Argentina which will pass to the Argentinian State, the City of Buenos Aires or the Province in which they are located.

The Treaties of Montevideo of 1889 and 1940 also choose the split jurisdiction (*lex domicilii, lex rei sitae*).

3.10. Solemnities of Juridical Acts

The solemnities are regulated by the *lex loci celebrationis*. This way form and substance of the act might be split.³⁵ Interestingly, powers of attorney are regulated by the Interamerican Convention on the Powers of Attorney to be used abroad (CIDIP-I, 1975).

k) Contract Law

Contract law is regulated by the jurisdiction and choice of law of the parties. But if they did not choose, the plaintiff may decide between: (a) the judges of the domicile or habitual residence of the respondent. If there are several respondents, the domicile or habitual residence of any of them, the judge of the place of performance of the contractual obligation or the judge of any of the branches of the company of the respondent, as long as it was involved in the negotiation or celebration of the contract.

The choice of law is regulated by private autonomy. However:

- (a) Choice must be express or result in a clear manner from the terms of contract or the circumstances of the case.
- (b) At any time, parties may change their agreement on applicable law. However, this modification may not affect the validity of the contract or the rights of third parties.
- (c) The elected national law will be applied, except for the conflict of law rules.
- (d) Parties may create material norms excluding the material laws from the legal system they chose.
- (e) The choice of laws may not be applied in a way that they violate mandatory norms of the foreign law (case in which the choice of law would not be valid).
- (f) The election of an international forum does not include the choice of applicable law of that legal system.

³⁵ SotoSOTO, *Código Civil y Comercial...*, “Comentario al Art. 2649”:

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Comentado [R37]: AU: Please confirm whether we can set this as set head level "3.10.1 Contract Law".

Comentado [UCB38R37]: Actually it should be 3.11

Con formato: Sin Resaltar

Con formato: Para group head

Con formato: Sin Resaltar

Con formato: Fuente de párrafo predeter., Fuente: 10 pto

Con formato: Fuente de párrafo predeter., Fuente: 10 pto, Español (Argentina)

Con formato: Español (Argentina)

Of course, consumer law is excluded since there are higher principles of equality to protect consumer.

If the parties did not select the applicable law, the contract is regulated by the laws or customs of the country of the place of performance of the obligation. If it is not designated, it is understood that the law of the domicile of the debtor of the most important performance of the contract. In the case that even this could not be determined, the contract will be regulated by the law and customs of the State of celebration of the contract. Contracts between absent parties is governed by the law of the State in which it was accepted.

There is also a clause of exception for contract law: Exceptionally and at the request of a party, and taking all objective and subjective elements into account, the judge may order the application of the law of the State with which the “juridical relation” presents the closest ties. The exception clause is also residual (it applies only if the parties did not choose otherwise).

3.112. Consumer Law

Argentinian ~~Civil and Commercial Code~~CCC created a special section to deal with consumer contract. The Draft CCC included a similar section for labor contract: the similarity comes from a very peculiar relationship in which contracting parties have a very unequal standing. To protect the consumer, private autonomy is limited. Forum may not be chosen, nor may the applicable law.

There are a number of options as to the available ~~forae~~ forums in order to facilitate the access to justice. Conversely the suit against a consumer may only proceed against the judges of their domicile. As for the applicable law, once again PIL becomes protective of the place of the consumer.

No place for private autonomy. Applicable law is determined by the law of the domicile or habitual residence of the consumer in the following cases: if the celebration of the contract was anteceded by an offer or publicity or an activity in the State of the domicile of the consumer, and he has done all the acts to conclude the contract, if the supplier has received the order in the State of the domicile of the consumer, if the consumer was induced by his supplier to move to a foreign State in order to place his order or if the contracts to travel contract comprise transport and accommodation in the package. In absence of this elements the consumer contract is regulated by

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

the law of the State of the performance. In case this could not be determined, the contract is regulated by the law of the country of the celebration.

3.1213. Tort Law

On jurisdiction, the plaintiff may choose the *forae* of justified closeness with the facts surrounding the tort as the domicile of the respondent or the courts of the place in which the fact that cause the damage has occurred, or where the tort produced its direct damages. This covers a vast spectrum of possible damages.

As for the applicable law, Argentinian law has followed the criteria of comparative legal systems, that find the closes tie to the tort in the place in which it was produced it (*lex loci delicti comissi*). It is the place in which the facts take place, and thus the only law in which the parties might have foreseen to be applicable. However, it is also admitted that if the person whose responsibility for the tort is alleged, and the victim are domiciled or have their habitual residence in the same State, *lex domicilii* is applied. If the circumstances of the case show that the tort has tight links with another law, of another State, this law might be invoked and applied.

3.1314. Securities and eChecks

The jurisdiction for securities is that of the place in which the obligation has to be performed or that of the domicile of the respondent. The plaintiff has the option. For checks it is the domicile of the drawee bank or of the respondent.

Applicable law relies on the autonomy principle that governs exchange obligations, by which each obligation is tied to the law of the State in whose territory the act takes place.

As for the checks, the law of the domicile of the drawee bank determines its nature, its effects, the term of presentation, the person to which it can be made out-, and in general everything regarding checks. (Article- 2662)

3.1415. Rights in Rem

Concerning rights in rem, Argentinian law qualifies unilaterally what a right in rem is.

The jurisdiction on an immovable relies on the State in which the immovable is located. If it is a registrable good, it is the courts of the State in which the good is registered. If it is actions in

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

rem of no registrable goods, the judges of the domicile of the respondent or the place in which the goods are located.

The applicable law on rights in rem on an immovable are governed by the *lex loci rei sitae*.

The contract made in a foreign State to transfer rights in rem on an immovable located in Argentina, are to be recognized as long as they are made in public legalized instruments.

The rights in rem on movables that the owner takes with him are regulated by the law of the domicile of the owner. If the ownership is contested, the law of the situation of the goods will apply.

~~3.1516~~ **Company Law**

Company law is a very complex matter, that still does not have an complete PIL regulation. There are some indications in the General Company Act (19.550). A general rule is that the place in which the society was constituted is a connecting factor (*lex fori*). There is also the State in which the society was registered (Article- 7, 19.550). Article- 124, from the Act 19.550 proposes also the place of the siege of the Company, which work as an exception applicable to formalities of constitution, reforms, etc. This exception explains itself considering that Argentina might want a policy norm.

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Comentado [SB39]: AQ: Could this be "lex"?

Comentado [UCB40R39]: Yes, thank you

~~3.1617~~ **Bankruptcy Law**

Bankruptcy law of internal source is dealt with in the Act. 19.551, modified by the acts 22.917 and 24.522. According to Article- 2, debtors with a domicile abroad may suit and have their debts recognized in Argentina in respect to the goods located in Argentina. For further information, it would be best to consult specific bibliography on these matters (*see below*).

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Cursiva

~~3.1718~~ **Statutes of Limitations**

Applicable law to prescription is the same law that applies to the substantive right.

Short list of publicationsFurther Reading

Dreyzin de KlorDREYZIN de KLOR, Adriana, *Private International Law*, Kluwer, 2016.

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Negrita

Con formato: Fuente: Sin Negrita, Color de fuente: Azul

Con formato: Sin Resaltar

Con formato: Resaltar

[Fernandez Arroyo](#)~~FERNANDEZ ARROYO~~, Diego P. "Main Characteristics of the New Private International Law of the Argentinian Republic", *RebelsZeitschrift*, 80, pp. 130–150 (2016).

[Soto](#)~~SOTO~~, Alfredo, *Código Civil y Comercial Comentado. Tratado Exegético*. La Ley, Buenos Aires, 2016.

[Uzal](#)~~UZAL~~, María Elsa, *Derecho Internacional Privado*, La Ley, Buenos Aires, 2016.