"BASIS FOR LEGISLATIVE HARMONIZATION ON CONTRACTUAL MATTERS WITHIN THE MERCOSUR: BETWEEN HOPE AND AN UTOPIA"[1]

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ABSTRACT:
PRELIMINARY WORDS. I.SOME SPECIFICATIONS. PAPER STRUCTURE. II. FIRST PART: DOMESTIC INTERNATIONAL PRIVATE LAW. ARGENTINE LAW. BRAZILIAN LAW. PARAGUAYAN LAW. URUGUAYAN LAW.. VENEZUELAN LAW. III. SECOND PART: TREATIES. 1940 MONTEVIDEO TREATY. IV. THIRD PART: CONVENTION OF ROME ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS AND ROME I REGULATION. ANALYSIS. V. FOURTH PART: INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS. VI. LEGISLATIVE HARMONIZATION OPTIONS. VII. CONCLUSIONS.

PRELIMINARY WORDS

This paper refers to an area of law which, due to its daintiness and relevance, calls the attention of those who study Private International Law. I am referring to contractual obligations. This paper aims at establishing minimum basis for legislative harmonization on contracts within the MERCOSUR. I am aware of the risks one assumes when analyzing foreign law. Notwithstanding, I face comparative law having set aside national prejudice and aiming to perfect our own institutions and find new formulas more fit to regulate human life.[3]

I. SOME SPECIFICATIONS. PAPER STRUCTURE.

When facing international contracts, one cannot leave aside globalization, an expression which has been used to name a historical period which, although not new -since it is part of the human development process-, has strengthened during the so called third industrial revolution. Within such special context, like an imperceptible knitting, communications technology, computing, biotechnology and the end of the Cold War and opposing commercial, military, and political blocs[4] come together. In this sense, during the last years of the 20th Century and the beginning of this Century we have witnessed material changes in the world scene which have enabled the rising of this phenomenon which, although not original, presents certain innovative connotations. In this scenario, even the States struggle to belong and some of them are happy with being receivers of the substantial amount of financial flows competing around the world, opening their borders and deregulating their economies.[5] In this line, in the post modern world, it deepens the eagerness for overcoming the economies' and markets' *corsets*, for undermining the sovereignty of the States, for stimulating the displacement of people's movements, assets, services and funds from State levels to international levels. But one cannot disregard that globalization, while generating new opportunities such as the access to new markets, technological innovations and profiting investments, also generates new risks such as the concentration of global power, the diminishing or loss of sovereignty by the States and increase in poverty and social exclusion. Consequently, within this contradictory scenario, international commerce is remarkably intensified creating an exponential increase in private international legal relationships, among which those of contractual obligations stand

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[1] This paper is based on a number of previous papers prepared as Director of UBACyT Projects on Legislative Harmonization on Electronic Contracts in Integrated Spaces with Specific Reference to MERCOSUR" sponsored by the University of Buenos Aires.

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[3] VALLADAO, Haroldo. "Le droit International privé des ëtats américains". R. de C. 81 (1952 II) Page 5.

[4] KAPLAN, Marcos. *Estado y globalización*. México. UNAM, 2002; and of the same author jointly with MANRIQUE, Irma. *Regulación de flujos financieros internacionales,* Instituto de Investigaciones Jurídicas- México. 2000; CARBONELL, Miguel and VAZQUEZ, Rodolfo (comps.) *Estado constitucional y globalización*, México, Porrúa-UNAM, 2001.

[5] LOPEZ AYLLON, Sergio. *Globalización y transición del Estado Nacional. Estado constitucional y globalización*. México, Porrúa UNAM, Page 279, 2001. STIGLITZ, Joseph. *El malestar in la globalización,* México, Taurus, 2002.

up. In this sphere the international contract becomes, for its distinctive features, an irreplaceable legal instrument in the movement of wealth.[6]

In the case of international contracts, the same international operators are those who claim for the States to set clear and precise regulations to enable the execution of international transactions within a framework of legal certainty, security and prevision. If, as it seems to be the case, State laws usually differ from one another, it becomes essential to set sufficiently imaginative rules and to blend those rules in order to prevent the operators to move to or set themselves in other countries within integrated spaces like MERCOSUR which may offer, like showcases, not only return from their investments but also an agile legal system adequate for the development of international transactions.[7]

Throughout this paper, I will analyze the current scenario on the law applicable to international contracts according to the different Private International Laws of MERCOSUR member States, including Venezuela, so as to identify, explore and set minimum basis for legislative harmonization that should be taken into consideration when setting an adequate legal framework. I analyze this topic in furtherance of the commitment undertaken by MERCOSUR member States to harmonize their laws within the relevant areas, as set forth in section 1 of the Asunción Treaty.

In this view, the first two parts of this paper analyze, although not thoroughly, the current situation in MERCOSUR for which I will take into consideration some of its main features such as the characterizations of international contracts and the recognition or rejection of freedom of choice -its scope and limitations- as well as the criteria used for the selection of applicable law in absence of a previous choice of law by the parties to international contracts, the intervention of the *lex mercatoria* and internationally mandatory rules. I shall analyze both domestic rules (first part) and rules agreed on treaties[8] (second part).

The third part of this paper analyzes the same aspects detailed above but in relation to the current situation of the European Union, aiming to make a kind of comparative analysis between the solutions given to those topics by the Convention of Rome on the Law Applicable to Contractual Obligations -dated June 19, 1980 and still in full force and effect- and the Rome I Regulation on the Law Applicable to Contractual Obligations in effect since December 17, 2009.

The fourth and last part of this paper, after analyzing the Inter-American Convention on the Law Applicable to International Contracts -unavoidable for American countries-, outlines the minimum basis for legislative harmonization which may contribute to the drafting of an international treaty setting the legal framework on the law applicable to international contracts in MERCOSUR.

II. FIRST PART: DOMESTIC INTERNATIONAL PRIVATE LAW[9]

A. ARGENTINE LAW

International contracts, specifically its intrinsic validity or substance –i.e. its content-, may be subject to a specific law that might have been previously chosen, whether expressly or implicitly, by the parties or, otherwise, to the law selected by the legislator based on a rigid or flexible criteria.

a) CHARACTERIZATION OF INTERNATIONAL CONTRACTS

[6] FELDSTEIN de CARDENAS, Sara L. *Derecho Internacional Privado*. Ed. Universidad, 2000; *Derecho Internacional Privado y de la Integración*. Colección de Análisis Jurisprudencial. Ed. La Ley, 1ª. Edition, Tercera reimpresión. 2009. *Derecho Internacional Privado*. Editorial Estudio. 2013.
[7] There is not just one characterization of international contracts; it is a concept which varies depending on the different sources of laws.
[8] The treaties I will analyze in the second part link the Republic of Argentina, Paraguay and Uruguay.
[9] FERNÁNDEZ ARROYO, Diego PAGE "El futuro del MERCOSUR: la reglamentación mercosureña in materia de contratos internacionales desde la cosmovisión borgeana", *Revista Mexicana de derecho Internacional Privado*, Número especial, pages 34-39., 2000. This author uses the figure of "Borges' maze" to account for the International Private Law system applicable to international contracts in force in MERCOSUR.

One of the obstacles that one faces when dealing with international contracts is its characterization since there is not a unique or universally accepted definition of such. In fact, the contract, as the irreplaceable legal device for the movement of wealth, has been granted different scopes within civil law and common law. A contract, according to civil law, is the agreement between willful parties aimed at creating, transferring or terminating obligations; and, according to common law, is a one sided act which creates an obligation without need for its acceptance. In this sense, characterizing a given contract as international or not may be difficult and tough since "it is not possible to give just one characterization that may be equally applicable to all contracts without being inaccurate due to the variety and complexity of contracts."[10]

Argentine domestic law does not set forth an autarkic characterization of international contracts, although such may be inferred from treaties adopted by the Republic of Argentina such as, among others, the Wien Convention on Contracts for the International Sale of Goods (1980).

For this reason, it becomes particularly relevant to characterize international contracts, as done by Argentine legal scholars when sustaining that a contract shall be deemed international when "its functional synallagma contacts two or more national markets or there is a real connection between its execution and performance and abroad",[11] or "if the place of execution or the place of performance or the domicile of one of the parties at the time of execution is located abroad",[12] or "as that which from its execution, performance or termination consists of relevant objective international elements from a certain legal system's stand point."[13] Consequently, I have long sustained that the fact that a contract includes one or some international elements is not always enough to turn a domestic contract into an international one, since for a contract to be deemed international the international elements shall be objectively relevant.[14]

b) FREEDOM OF CHOICE

There is no International Private Law rule, principle or axiom whose parenthood has been more disputed that that of freedom of choice. The parties' freedom of choice means "that free will is the source and measure of subjective rights, for which it displays two aspects, a so called material free will, meaning the possibility of the parties to create their own concrete rules which shall be included in the contract and freedom of choice as the power granted to the parties to previously select the law that will govern international contracts.

Although it is true that freedom of choice shines within the area of international contracts, it should not be forgotten that such power does not admit excesses, the paroxysm, and that the parties may be limited in their choice when international public principles, fraud, internationally mandatory rules, legal weak parties, among others, come into scene.

Legal scholars agree when it comes to the reasons backing the implementation of this quasi-universal regulatory criterion. Among them we shall mention the following:

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[10] ROMERO, Fabiola. *Contratos Internacionales*, 2000. In A. Jaffé, C. Madrid, E. Hernández-Bretón y V. H. Guerra (Eds.) *Liber Amicorum. Homenaje ala obra científica y académica de la profesora Tatiana B. de Maekelt* (Volume I) (pages 203-331). Caracas: Facultad de Ciencias Jurídicas y Políticas, Universidad
Central de Venezuela / Fundación Roberto Goldschmidt.

[11] BOGGIANO, Antonio. *Derecho Internacional Privado*, Volume II, 3ª Edition, Abeledo Perrot, Buenos Aires, pages 258 and ss., 1991, in re *Sagemüller, Francisco c. Sagemüller de Hinz, Liesse y otro*, Sala 2da. CC Paraná, Sala II, 10/08/1988, La Ley 1989-E, pages 192 and ss..

[12] GOLDSCHMIDT, Werner. *Derecho Internacional Privado*. Ed. Depalma. Buenos Aires, Page 393, Nº 315, 1982.

[13] FELDSTEIN de CÁRDENAS, Sara L. IbidemFootnote 7.

[14] Section 1 of the Wien Convention on Contracts for the International Sale of Goods (1980) sets its criteria for internationality when -while determining its scope of application- it refers "to contracts of sale of goods between parties whose places of business are in different States;" section 1 of the Convention on the Law Applicable to International Contracts (Mexico, 1994) sets forth that a contract shall be deemed international if "the parties thereto have their habitual residence or establishments in different Member States or if the contract has objective ties with more than one Member State."

1) Preventive legal certainty; since once the parties have shown their intention of choosing a certain law, the parties may adapt to those rules and not be surprised by the judge's choice of law or by the extensive application of the *lex fori*. It is a way of orienting conflicts of law rules.

2) Realization of the parties' material interests; since the parties are the ones better qualified to know which the law that better fits their contractual relationship. This may diminish costs, may enable a certain company to unify the law applicable to all of its international contracts and may result in the choice of a neutral law, among others.

3) It enables the individualization of the applicable law in connection to a certain non-physical reality or contractual obligation, whose subject may not be easily located in physical terms in a certain country. As it has been accurately stated, the use of this connection criterion gives fairer solutions according to the parties' legitimate expectations, which stimulates international commercial relationships.[15]

A number of well-known Argentine legal scholars sustain that the basis for freedom of choice are in the customary use of this principle in Argentina which, in a great number of cases, has accepted foreign jurisdiction and law in financial contracts with international banking institutions.[16]

Based on this argument, in no way naive, I agree with a number of Argentine legal scholars who have characterized this custom used by official State bodies in the seventies as a "famous [process] which has the appearance of a surrealistic play."[17]

It is worth recalling that the choice of the law applicable to the content of a contract, *pactum de lege utenda*, is a contract itself, a contract within a contract; although, strictly speaking, it is a separable transaction independent from the international contract in which it has been included and which validity or invalidity depends on itself. In this sense, it is crystal clear that "the nullity of the clause does not entail the nullity of the contract and viceversa. It is perfectly possible that a choice of law clause may be deemed valid and that, according to the law chosen by the parties, the contract may be deemed null and void. Honestly, if a contract is null and void, so should be the clause on the choice of applicable law and, thus, the law chosen by the parties which derived in determining the nullity of the contract, would not have been applied. It is like a vicious circle. Such an apory is overcome by highlighting the autonomy of the *lege utenda* pact and the provisions applicable to the validity and conclusion of such pact."[18]

Coming back to Argentine law, we shall recall that the Civil Code does not expressly provide for freedom of choice from an international standpoint, which makes reference to the power granted to the parties to previously choose the law to govern international contracts.[19] Particularly, this lack of an express

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[15] Conf. CALVO CARAVACA, Alfonso y CARRASCOSA GONZALEZ, Javier, *Derecho Internacional Privado*. Séptima Edition. Colex, España; FELDSTEIN de CARDENAS, Sara L. *Derecho Internacional Privado. Parte Especial.* Ed. Universidad. 2000.

[16] GOLDSCHMIDT, Werner. *Transactions between States and public firms and foreign private firms. A methological study*, *Recueil des Cours*, Volume 136, II, pages 203 and ss., 1972.

[17] SAMTLEBEN, Jürgen, "Cláusulas de Jurisdicción y legislación aplicable in los contratos de endeudamiento externo de los Estados americanos". *Revista del Derecho Industrial.* Año 11, N° 32, 363/390, mayo/agosto de 1989. Ed. Depalma. Buenos Aires, Argentina. According to this author, "In the late years of the military regime, which in 1983 -some time before the civil elections- tried to negotiate the conversion of the Argentine foreign debt, the conversations with creditors and the International Monetary Fund in New York resulted in the "guaranteed refinancing model" that foresaw the irrevocable submission of the debtor to New York or Argentine courts, at the creditors' discretion. This news was heard in the Patagonia by Federal Judge Pinto Kramer who was hearing in Río Gallegos in the south region of the Republic of Argentina. This judge ruled against its own government, by setting a stayed injunction so that the government could not signed this kind of provisions in refinancing contracts. The Argentine Central Bank's president was forced to come back to Buenos Aires, he was arrested in the same airport and transferred to the penitentiary of Río Gallegos where he was questioned by the judge. The judge's intervention ended by the rendering of two rulings of the Federal Court of Appeals of Comodoro Rivadavia which declared that the injunction was inadmissible and denied jurisdiction to the judge. Meanwhile, the negotiations on the conversion of the foreign debt had failed." Also see *Dictámenes de la Procuración del Tesoro de la Nación* N°12, marzo de 1986, pages 193 and ss. and 208 and ss.

[18] FERNANDEZ ROZAS, José Carlos y SÁNCHEZ LORENZO, Sixto. *Derecho Internacional Privado*. Cuarta Edition. Thomson. Madrid, Civitas. 2007.

[19] BOGGIANO, Antonio. IbidemSo as to justify the admission of freedom of choice by domestic Argentine law, this author bases his theory on two provisions, section 1212 of the Civil Code and section 1 of the Argentine Procedural Civil and Commercial Code. He sustains that, pursuant to section 1212 of the Civil Code, the parties are empowered to choose the place of performance of the contract, and thus can indirectly choose the applicable law since the place of performance is the connecting point foreseen in sections 1209 and 1210. Regarding section 1 of the Argentine Procedural Civil and Commercial Code, he believes that the fact that the parties may choose jurisdiction entails an implicit choice of the International Private Law of the country of the court since each court applies its own law. This choice of court means to completely move the applicable Argentine international private laws. If the parties are entitled to

provision considerably enhanced the imagination of both legal scholars and case law giving rise to two trends. On the one side, the affirmative theories which sustain the admissibility of freedom of choice within domestic law and, on the other hand, the negative theories which reject the admissibility of said principle. Both theories are based on different provisions of Argentine law. In this sense, those who advocate the admissibility of the principle base their argument on section 1197 of the Civil Code;[20] while those who reject the admissibility of the principle base their argument on the 1940 Montevideo Treaties on Civil International Law and specifically, in its Additional Protocol (section 5).

Another important issue, as polemic as the last one and connected with the scope given to freedom of choice -whether broad or restricted,- is the admission or rejection by Argentine law of the enigmatic *lex mercatoria*. As generally known, the *lex mercatoria* is a subterfuge to which international business operators resort to free themselves from the State laws' *corset*, enabling them to be part of a scenario characterized by *contracts without law*, unbalance and disruptions of international contractual systems.[21] A reveling antecedent in this line is the decision rendered in the case on Serbian-Brazilian loans, which was the first time that the Permanent Court of International Justice highlighted the necessary connection that there is between international contracts executed among States and State law.[22]

c) APPLICABLE LAW IN ABSENCE OF CHOICE

Sections 1205 through 1214 of the Civil Code set forth the provisions applicable to international contracts. Sections 1205, 1209 and 1210 set forth provisions on the applicable law, providing that international contracts shall be governed by the laws of the place in which the contract was executed (section 1205) and by the law of the place of performance of the contract (sections 1209 and 1210). This contradiction arises from the different sources used by Dr. Dalmacio Vélez Sársfield who, in the drafting of the Civil Code, resorted to authors who adopted different positions in the matter, such as Savigny and Story. In fact, Savigny concludes that the law which shall govern international contracts is that of the place of performance of the contract and Story sustains that it shall be that of the place of execution or termination of the international contract. Given this legislative scenario, a number of legal scholars have characterized these provisions of the Argentine Civil Code of 1869 as a labyrinth of mysterious provisions.[23]

Additionally, this scenario enabled the rise of different interpretations. There are those who sustain that the key to conciliate these provisions is to determine if the contract has original links with the Argentine Republic or not. In this sense, they sustain that if the contract has had a link with our country since the beginning, then sections 1209 and 1210 shall apply and thus, the law of the place of performance shall govern the international contract. Otherwise, if the contract has not had *ab inicio* links with the Argentine territory, then it shall be governed by section 1205, that is to say, by the law of the place of its execution.[24] Other has interpret this provisions based on the understanding that the place of execution of an international contract is a distinctive element which shall determine the application of one or another provision; and, thus, if an international contract has a specific place of performance or if such place can be individualized, sections 1209 and 1210 shall apply and, therefore, the contract shall be governed by the law of the place of its performance. If, to the contrary, the place of performance of the

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choose the International Private Law that will govern the contract, they can also directly choose the private law applicable to the contract, since the latter shall be determined by International Private Law.

[20] Section 1197 of the Civil Code: The agreements made in contracts shall be deemed for the parties as binding as the laws itself.

[21] FELDSTEIN de CÁRDENAS, Sara L. y LEONARDI de HERBON, Hebe. *El Arbitraje*. Ed. Lexis Nexis. 1998.

[22] BOGGIANO, Antonio. *Derecho Internacional Privado. A.D. 2000*. Ed. La Ley. Page 742. 2000, ALBORNOZ, Jorge R. y ALL, Paula María. *Crédito Documentario*. Ediciones Jurídicas Cuyo. 2002; FELDSTEIN de CARDENAS, Sara L. *Contratos internacionales*, Ed. Lexis Nexis, Buenos Aires, 1995. Particularly, the chapter on *Lex Mercatoria*. pages 137 through 214.

[23] RABEL, Ernst . *Die UNIDROIT-Prinzipien der internationalen Handelsverträge: Eine neue Lex Mercatoria?, Zeitschrift für Rechtsvergleichung,* page 152, 1996. FELDSTEIN de CARDENAS, Sara Lidia, ibidem, pages 93 and ss.

[24] GOLDSCHMIDT, Werner. *Derecho Internacional Internacional Privado*. Quinta Edition. Ed. Astrea; BOGGIANO, Antonio. *Contratos Internacionales*. Ed. Depalma, 1990; MARZORATI, Osvaldo. *Derecho de los Negocios Internacionales*. Volume I, Astrea, 2003; FELDSTEIN de CARDENAS, Sara L. *Derecho Internacional Privado. Volumen 18 Colección Reformas al Código Civil. Colección dirigida por los Doctores Atilio A. Alterini y Roberto López Cabana,* Abeledo Perrot. 1994.

international contract may not be individualized, then section 1205 shall apply and, therefore, the contract shall be governed by the law of the place of its execution. All legal scholars agree that domestic Argentine law tends to use rigid connecting points. Notwithstanding, a number of the legal scholars and Argentine case law, based on the Civil Code, definitely advocate for the use of connecting points derived from the principle of proximity, such as the most significant connection theory and the characteristic performance theory.

This theory sustains that it is necessary to individualize and identify the obligation that differentiates one type of contract from another, granting such contract an *a priori* nature that makes a certain obligation more important and significant that the others, in a way that such obligation may determine the applicable law.

According to this theory, the following two laws may govern international contracts: a) the law of the place of performance of such significant obligation, meaning the place in which the obligation shall be physically performed; or b) the law of the place in which the party who shall perform the more significant obligation is domiciled or the place where it normally resides or the place where its business is set.

In particular, the element which constitutes the basis of this theory is one of the most problematic issues that the interpreter shall solve since it is not easy to identify the characteristic performance in a contract in cases in which, for instance, both obligations have the same standing or nature (as in the case of countertrade agreements, exchange of services agreements –specially wireless-, reciprocal checks accounts agreements, alternate exchange of currency agreements, joint venture agreements, among others). Of course, it is less difficult to individualize the characteristic performance in one-sided contracts since usually the characteristic performance may be the same as the one performed by the sole obligated party.

At this stage, it cannot be denied that the characteristic performance theory in international contracts has been subject to heated debates between those in favor and those against. Those against the characteristic performance theory sustain that its recognition entails the consolidation of the controlling party, specially in contracts executed between exporting businesses located at industrialized countries and importing businesses located at developing countries or third-world countries. They also argue that this theory not only strengthens the position of the party with greater negotiation power but also disregards the fact that, in the current economy, the non-characteristic obligation –as for example the payment of the price- in many cases determines the type of contract we are dealing with (such as a lease agreement, an exchange agreement, or an international sales agreement). Those in favor of the characteristic performance theory sustain, based on economic or legal reasons, that the application of this theory results in the application of the law of the State in which the party required to effect the characteristic performance normally operates, which he knows. The knowledge of the applicable law can potentially diminish information costs enhancing international transactions and it entails greater security in determining the law applicable to the contract. This can be clearly seen in those international contracts consisting of scattered elements in which it is really difficult to set the country with closest ties to the contract. It gives a harmonious solution between traditional rigid rules and the American, more flexible (although less predictable) ones.[25]

Argentine case law has sustained both versions of the characteristic performance theory. In this sense:

[25] The characteristic performance criteria is known to Argentine legal operators. In the Argentine Republic the characteristic performance theory has been extensively developed - mainly by legal scholars and case law - since the seventies. In the last years, the criteria of respectable Argentine legal scholars specialized in international law has stood out. Based on this criterion, in the III Argentine Workshop on International Private Law (*III Jornadas Argentinas de Derecho Internacional Privado*) held in Rosario, between November 18 and 19, 1994, they sustained, making reference to the inter-American convention, that "the lack of assumptions and clear guidelines makes it difficult to individualize the applicable law."

- *In re* "*Estudios Espíndola c/ Bollati, Cristóbal. J.*", Pannel III of the Peace Court of Appeals of the City of Buenos Aires (*Cámara de Paz de la Capital Federal, Sala III*) sustained, in 1970, that as the parties had made no choice of law, the Chilean law shall govern the contract since the characteristic performance (in the case, the registration of the trademark) was to be executed in Chile.

- *In re* "*Transportes Mabellini S.A. c/ Expofrut S.R.L.*", the Commercial Court No. 13 (*Juzgado Nacional en lo Comercial N°13*) sustained, on July 29, 1977, that: "...when the parties to an international contract have not indicated the place of performance that shall determine the law applicable to the contract (section 1210), we shall consider the nature of the obligation and the place of execution of the contract if the latter matches the debtor's domicile at the time of execution (section 1212) [...] If the parties have not expressly indicated the place of performance of the international contract, the domicile of the party required to effect the characteristic performance shall be regarded as the place of performance. [...] In an international carriage agreement, the place in which the goods are shipped is the place in which the contract performance starts: such is the place where the shipping party hands the goods to the bearer, which are accepted by the latter. Thus, the law of such place shall be the one to govern all situations arising from the contract provided that they have not arisen from a different one..."

- *In re* "*Banco de Río Negro c/Independencia Transportes Internacionales*", Pannel E of the Commercial Court of Appeals (*Cámara Nacional en lo Comercial, Sala E*) sustained, on October 20, 1981, that the law applicable to the contract was the Argentine one, since the party required to effect the characteristic performance (in the case, a bank) was domiciled in the City of Buenos Aires at the time of execution (section 1212).

- *In re* "*Cicerone José c/Banco de Entre Ríos s/ Sumario*", the court sustained, on February 19, 1982, that, in the case of an international banking contract –specifically, commercial agency for banking collection-, such contract was to be governed by Argentine law since the place of performance matched the domicile of the party required to effect the characteristic performance (i.e. the domicile of the bank in charge of collecting the monies in Argentina).

- *In re* "*Deutsches Reiseburo c/Speter, Armando s/Ordinario*", Pannel E of the Commercial Court of Appeals (*Cámara Nacional en lo Comercial, Sala E*) sustained, on February 27, 1984 –among other issues such as the application of domestic substantive law to govern debt assumptions under Argentine law and German law- that the accommodation contract under analysis was to be governed by the Argentine law which was the law of the domicile of the party required to effect the characteristic performance (i.e. the accommodation of spectators).

- *In re* "*Arrebillaga, Arturo E. Y otra c/ Banco de Santa Cruz*", the court sustained, on March 1, 1984, that in an international brokerage contract, Argentine law shall be applied since such was the law of the broker's domicile being the law of the domicile or place of business of the party required to effect the characteristic performance.

- *In re* "*Expreso Mercurio S.A. c/Maupe S.A.*", the court sustained, on May 7, 1984, that in a contract for land carriage of goods between Brazil and Argentina, the actions taken by the parties within the judicial proceeding determined the application of Argentine law to this contract. Notwithstanding, if the parties had not chosen this law, the contract would have been governed by the law of the haulage contractor's domicile (i.e. the Brazilian law).

- *In re* "*Sagemüller, Francisco*", Panell II of the Second Court of Appeals of Paraná (*Cámara Segunda de Paraná Sala II*), sustained, on August 10, 1988, that in an international stock purchase agreement, a bilateral contract, the characteristic performance shall prevail (i.e. that which, within the economic function of the contract, is the adjudication action that better satisfies the economic aim of the transaction). Specifically, "in order to individualize the characteristic performance in an international stock purchase agreement one should not consider the physical transfer of the shares but rather the transfer of the corporate holdings... Consequently, the issue shall be analyzed according to Argentine law [...]"[26]

In all, there is a clear trend in the Argentine Republic towards the acceptance of flexible criteria, such as the characteristic performance theory, for the determination of the applicable law in international contracts where the parties have made no choice of law. I cannot conceal my skepticism in cases where the parties involved in the transaction have no equal negotiation power.[27]

d) CONTRACT MADE *INTER ABSENTES*

Under Argentine international contracts law, unlike under domestic contracts law, there is no provision on applicable law that supports any of the theories on the exact moment in which the contract is deemed executed, such as the declaration theory (*teoría de la declaración*) or the recognition theory (*teoría de la agnición*). In these regards, section 1214 sets forth that: "If a contract has been made *inter absentes* by means of a private instrument, signed in several places, or by agents, or by mail, and no place of performance has been specified, the effects of such contracts shall be governed, with respect to each of the parties, by the law of each of the parties' domicile. If the place of performance has been specified, the effects of such contract shall be governed by the law of the place of performance, or the law of each of the parties' domicile."

The Civil Code solves this delicate issue by resorting to the "place of performance" connecting point when such has been specified by the parties. This shows that Argentine law acknowledges how difficult it is to specify the place of performance in *inter absentes* international contracts. As a last resort, among others, the Argentine law adopts a sort of legal *dépeçage* providing that each of the parties' obligations shall be governed by the law of their respective domiciles.

e) LIMITS TO THE APPLICATION OF FOREIGN LAW

As regards the limits to applicable law, both Argentine case law and legal scholars are inclined to recognize restrictions deriving from international public policy rules and the application of internationally mandatory rules within the international contract sphere.[28] See in the figure below the solutions on international contracts law matters proposed by the different Civil Code Reform Bill.

B. BRAZILIAN LAW

a) CHARACTERIZATION OF INTERNATIONAL CONTRACTS

Most respectable legal scholars from the Federative Republic of Brazil have correctly sustained that: "*O que caracteriza a internacionalidade de um contrato é a presença de um elemento que o ligue a dois ou*

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[26] FELDSTEIN de CÁRDENAS, Sara L. *Derecho Internacional Privado. Parte Especial*, Ed Universidad, Buenos Aires, 2000, pages 360 to 364.

[27] Such is the case, for example, of contracts executed through Internet between businesses and consumers (*business to consumers or* B2C); between banks and clients, between insurance companies and insured parties; between consumers and professionals, between workers and employers; between travel agencies and tourists, among others.

[28] VITTA, Edoardo. *Cours Général de droit international privé*. R. des C., Volumen 167, pages 2 to /243. This author states that internationally mandatory rules are based on the legislative policy principles of a certain State and are intended to be applied to all type of situations, including international ones. FERNANDEZ ROZAS, José C. and SANCHEZ LORENZO, Sixto. *Derecho Internacional Privado*, ibidem pages 179 to 182. These authors sustain -referring to these types of rules- that those policy values and interests are attained by imposing the correct, concrete solution, from the State legislator's point of view, to that international situation and not allowing the application of any other different solution that may eventually arise from the application of a different law, the State law governing the content of the contract.

mais ordenamentos jurídicos. Basta que uma das partes seja domiciliada em um país estrangeiro ou que um contrato seja celebrado em um país, para ser cumprido em outro".[29] In this vein, it steams clear that legal scholars, and not legislators, have been the ones to characterize international contracts.

b) FREEDOM OF CHOICE

Freedom of choice has been recognized by a number of Brazilian legal scholars based on section 13 of the Introductory Law to the Civil Code (1916), which provided that: *"Regulará, salvo estipulação em contrário, quanto a substancia e aos efeitos das obrigações, a lei do lugar onde forem contraídas…"*[30] It clearly shows that the basis for accepting freedom of choice are in the terminology used in the transcribed rule when saying "*salvo estipulação em contrário*."

It is worth highlighting that the only amendment to the above provision of the Introductory Law to the Civil Code was the deletion of the phrase "*salvo estipulação em contrário*," which derived in a great number of legal scholars interpreting this deletion as a clear and overall prohibition to freedom of choice.[31] Although most legal scholars and Brazilian case law have sustained that Brazilian law rejects freedom of choice based on this domestic provisions, a number of respectable legal scholars have sustained its admission.[32]

One trend sustains that, on the one hand, "…the proper solution would be to substitute section 9 of the Introductory Law to the Civil Code for the provisions of the Inter-American Convention on the Law Applicable to International Contracts (1994) - signed by Brazil -, which would become provisions applicable not only to international contracts between American countries, but also as a general rule on conflicts of law applicable to all international contractual relationships;" and, on the other hand, "although Brazilian main connecting point is the "place of execution", the "place of performance" has been gaining preponderance within case law, since it has been sustained that, aside from the law of the place of execution, the requirements of the place of performance shall also be considered "*sendo mais comum ocorrerem os litígios no local da execução (lugar onde o devedor tem seu domícilio, bens e estabelecimento comercial, e onde é mais fácil obter o pagamento, a lei brasileira é invariavelmente a applicable.*"[33]

Nowadays, authors believe that the issue around freedom of choice has not been properly solved in Brazil. Legal scholars have tried over time to provide enough technical support to admit this principle; and they have succeeded on that although without being able to completely convince about it. Brazilian case law has not done the same which, in many cases, seems contradictory. But, the truth is that section 9 of the Introductory Law to the Civil Code does not leave much room for interpretation. Moreover, the *Projeto de Lei Complementar* No. 243 (2002), also known as *Projeto Moreira Mendes*, does not uphold the efforts made by Brazilian legal scholars during decades and, even less, the Mexico Convention signed by Brazil,[34] since sections 31 through 35 do not specifically provide for freedom of choice.

c) APPLICABLE LAW

Brazilian domestic International Private Law regulates this issue on section 9 of the Introductory Law to the Civil Code which provides that "face-to-face executed international contracts shall be governed by the law of the place of execution of the obligation."

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[29] DE ARAUJO, Nadia. Nadia. *Direito Internacional Privado. Teoria e Prática Brasileira.* 4ta. Edition. Ed. Renovar, 2008.

[30] SERPA LOPES, Miguel M. de. *Comentários a Lei de Introdução ao Codigo Civil,* Río de Janeiro, Volumen II, pages 199 and 200, 1952. VALLADAO, Haroldo. *Direito Internacional Privado*, Volumen II, page. 366, 1980; TENORIO, Oscar. *Direito Internacional Privado,* Volumen II, page 176, 1976.

[31] VALLADÄO, Haroldo, ibidem, page 186.

[32] GRANDINO RODAS, João, "Elementos de conexão do Direito Internacional Privado Brasileiro relativamente as obrigações contratuais". Contratos Interaccionáis. Revista dos Tribunais, Sao Paulo, Page 32, 1985. This author sustains that "due to the limited enumeration included in section 9 of the Introductory Law ithe existence of freedom of choice in the determination of the governing law under Brazilian Private International Law cannot been asserted".

[33] DE ARAUJO, Nadia. Ibidem, page 395.

[34] HERNANDEZ-BRETON, Eugenio. "Propuesta de actualización de los sistemas latinoamericanos de contratación internacional", Suplemento de Derecho Internacional Privado y de la Integración. Revista Jurídica El Dial, Ed. Albremática. 2006.

Notwithstanding, I cannot disregard Augusto Texeira de Freitas' words in his monumental work who, when referring to the law applicable to the content of contracts, sustained that section 1962 of the *Esboço,*[35] as well as sections 409 and 410 of its "Consolidation of Civil Laws", adopts the place of performance for determining the governing law. Afterwards, in section 1963 he defines the place of performance in a similar way to section 1212 of the Argentine Civil Code.

In turn, section 1965 provides that "*No prevalece lo dispuesto en el artículo (es decir el principio del lugar de ejecución): 1. Quando as partes no respectivos instrumentos, ou em instrumento posterior, houverem convencionado que o contrato seja julgado pelas leis do Império ou pelas de um país estrangeiro determinado y 2. Quando as partes nos respectivos instrumentos, ou em instrumento posterior se tiverem obrigado a responder pelo contrato no Império, ou num país estrangeiro determinado.*"[36] In international contracts Brazilian Law has not hesitated in accepting freedom of choice, and, in case such has not been exercised, the place of execution.

d) CONTRACT MADE *INTER ABSENTES*

Second paragraph of section 9 sets forth that, in the case of contracts made *inter absentes*, the obligation shall be deemed executed in the place of residence of the offeror. Symmetrically, section 435 of the Civil Code provides that the contract will be deemed executed in the place in which it was offered –meaning not only the initial offer but the offer finally accepted.

C. PARAGUAYAN LAW

Previously to the passing of the Civil Code in 1985, the Republic of Paraguay had adopted the Argentine Civil Code, giving effect to a kind of unification or legal homogenization. For that reason, I will not analyze this period[37] and will only devote this section to analyze contractual law after such date.

a) FREEDOM OF CHOICE

As in the case of Argentine domestic law, there is no provision in the current Paraguayan Civil Code that expressly recognizes freedom of choice in international contracts. Notwithstanding, section 32 of Law No. 1879/02 on Arbitration and Mediation shows, form my point of view, a material change in the Paraguayan perspective. Specifically, such section widely recognizes freedom of choice as a regulating criteria for selecting the law governing the content of an international, commercial arbitration proceeding.[38]

b) APPLICABLE LAW TO INTERNATIONAL CONTRACTS

In these respects, we shall mention two provisions. On the one hand section 14 of the amended Civil Code which provides that the intrinsic validity of legal acts –including contracts- shall be governed by the law of the place of performance; and, on the other hand, section 26 that provides that the formal validity of legal acts shall be governed by the law of the place of execution, although it provides for certain exceptions.

D. URUGUAYAN LAW

a) CHARACTERIZATION OF INTERNATIONAL CONTRACTS

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[35] MEIRA, s. *Texeira de Freitas: o jurisconsulto do Império*, Rio de Janeiro, 1ª. Ed.. 1979.
[36] SAMTLEBEN, Jürgen. "Texeira de Freitas e a autonomia das partes no direito internacional privado latino americano", Revista de Informação Legislativa, a.22, N°85, pages 267 and ss., 1985.
[37] SAPENA PASTOR, Raúl. *Derecho Internacional Privado*. Parte General. Derecho Civil Internacional. Volume I, Buenos Aires, 1944.
[38] This provision follows the directives set forth by section 28 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

There is no provision in the Uruguayan Civil Code that characterizes international contracts. In facing the difficulty that characterizing international contracts entails, highly respectable Uruguayan legal scholars have chosen to characterize them *contrario sensu*, sustaining that international contracts are those "which consist of elements that are not all national,"[39] or "in which the performance of the obligations arising from the contract affects more than one national economy."[40]

b) FREEDOM OF CHOICE[41]

The Oriental Republic of Uruguay is a steely bastion against the acceptance of freedom of choice in international contracts. In fact, most Uruguayan legal scholars have rejected this principle. This trend "has been unanimously followed by Uruguayan case law and upheld in both domestic law and treaties."[42] Uruguayan case law has been without hesitation on this issue -unlike (legal scholars of) Argentina- and, in its initial stages, has influenced the firm position adopted by legislators against the recognition of freedom of choice in determining the applicable law and jurisdiction. The Commercial Code (1865) provided in section 1270, when regulating transportation contracts, that a charter company on a foreign ship which shall be executed in the Republic shall be governed by the provisions set forth in this Code, regardless of the fact that the contract has been executed within or without the Republic.[43]

Notwithstanding, the passing of the General Bill on Private International Law in the Oriental Republic of Uruguay (*Proyecto de Ley General de Derecho Internacional Privado para la República Oriental del Uruguay*) would be a material change in this trend. In fact, sections 45 through 50, chapter I, title IX on Obligations, is devoted to contractual obligations. This Bill begins by characterizing international contracts providing that an international contract is "that in which the parties thereto have their habitual residence or principal place of business in different States, or that which has sufficient relevant legal links with more than one State."

Section 50 innovates when allowing the application "where necessary, of uses, practices and principles of international contractual law generally accepted or recognized by international entities". Regarding applicable law, in particular, the Bill differentiates between two situations: a first one in which the parties to an international contract have made a choice of law; and a second one in which the parties have made no choice of law. In the first case, section 46 innovates -with respect to existing solutions and aligning with international unanimous tendencies- and accepts freedom of choice in a broad sense, although it clarifies that the choice of a certain jurisdiction by the parties does not necessary entail the choice of such law. Section 47 on the law governing obligations in case the parties have made no choice of law, adopts the criteria followed in the 1940 Montevideo Treaty on Civil Law , which, as we shall analyze below, provides that the contract shall be governed by the law of the place of performance and, in case it cannot be specified according to the Treaty's criteria, by the law of the place of execution.

It is worth mentioning that section 49 of the Bill, forllowing the Urugayan trend, sensitive towards international transactions involving consumers, provides for one statute to the determination of de applicable law.

c) APPLICABLE LAW. REGULATING CRITERA.

The Uruguayan delegate in the Montevideo Treaties proposed, following a totally coherent legislative perspective, to harmonize domestic law and treaties including an Appendix to the Civil Code, Law No.

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[39] ALFONSIN, Quintín. *Régimen Internacional de los Contratos*. Biblioteca de Publicaciones Oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de la República. Montevideo, page 7, 1950.

[40] HARGAIN, Daniel y MIHALI, Gabriel, *Circulación de bienes in el MERCOSUR*, ed. BdF, page. 212, Buenos Aires, 1998.

[41] TALICE, Jorge R. *Derecho comercial internacional, apuntes de clase*, 1979, MATEO de OTEIZA, Vivien. "La compraventa internacional de mercaderías", Revista de Derecho Comercial y de la Empresa, N°35/36, page. 11 and ss., 1985. TELECHEA BERGMAN, Eduardo "La autonomía de la voluntad in la contratación jusprivatista internacional contemporánea". Revista de Derecho Comercial y de la Empresa. page 89, 1984, SANTOS BELANDRO, Ruben B. ibidem, page. 96.

[42] VARELA, Pedro. *Apuntes de Derecho Internacional Privado*, Montevideo, 1911; ALFONSIN, Quintín, *Régimen Internacional de los Contratos*, Montevideo, 1960; VARGAS GUILLEMETTE, Álvaro. *Codificación Nacional de Derecho Internacional Privado*. Montevideo 1943.

[43] FRESNEDO de AGUIRRE, Cecilia. *La autonomía de la voluntad in la contratación intern*acional, ibidem, page 67.

10084 dated December 3, 1941. Vargas Guillemette -its author- sustained, based on the idea that the contract is a social element, that the law is mainly social and, thus, impassive to social interaction. Consequently, the legal system does not protect freedom of choice but freedom in the determination of the contract's content and objectives, that is to say, the power of wanting or the fact that it translates into a social interest. The parties' freedom of choice can only exist within the limits set by social orders, in turn set by the governing law, meaning the freedom to negotiate, set a price, a term, terms on payment, formal aspects, time of delivery and any other rights and obligations of the parties and not the freedom to chose the governing law. José Pedro Varela, following Brocher, von Bar and Dreyfus, sustains that "the freedom theory is accurate within the domestic legal system, but non-legal within Private International Law.[44]

In furtherance of the above section 2399 sets forth the law of the place of performance as governing law and expressly remits to the interpretation rules set forth in sections 34 through 38 of the Montevideo Treaty on Civil Law. Additionally, section 2403, conforming to the treaties, expressly rejects freedom of choice when providing that "the parties may not modify the rules on applicable law and jurisdiction set forth herein", adding that the parties' freedom of choice "may only be exercised within the framework set by applicable law." Therefore, according to this provision, if a contract shall be performed in Uruguay, it shall be governed by Uruguayan law and Uruguayan courts will have jurisdiction over the matters deriving from such contract (sections 2399 and 2401) and the parties may not modify the rules on applicable law since the applicable law does not allow such thing (section 2403).[45] Uruguayan law sets forth a rigid connecting point.
Notwithstanding, a number of legal scholars have highlighted both the advantages and disadvantages of the characteristic performance theory[46].

E. VENEZUELAN LAW[47]

The Venezuelan Law on International Private Law (1998) regulates "conventional obligations" in three provisions of Chapter VI. This law –in effect since February 6, 1999- was finally passed after 30 years and is based on the Roberto Goldschmidt, Joaquín Sánchez Covisa and Gonzalo Parra Aranguren Bill submitted in 1963-1965. Venezuelan legal scholars have sustained, on the one hand, that "this Law on International Private Law will close and open new chapters in the history of Venezuelan law"[48] and, on the other hand, "that it leaves behind ancient section 8 of the Civil Procedure Code used as an excuse by Venezuelan judges for rejecting the application of foreign law."[49]

Sections 29, 30 and 31 uphold the principles of the CIDIP V (1994) and the *lex mercatoria*, in order to avoid differences between domestic law and treaties and "create a more favorable legal context for contracts and, therefore, for international commerce."[50]

a) CHARACTERIZATION OF INTERNATIONAL CONTRACTS

There is no express characterization of international contracts in the Law on International Private Law. Notwithstanding, legal scholars sustain that such characterization may be inferred from section 1 and the Motivation of the Law.

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[44] VARGAS GUILLEMETE, Álvaro, Criterio de solución de los llamados conflictos de leyes in su relación con los Tratados de Montevideo de 1889. Buenos Aires, 1938.
[45] FRESNEDO de AGUIRRE, Cecilia. *La autonomía de la voluntad in la contratación intern*acional. Pages 64/73, Ed. Fundación de Cultura Universitaria. Primera Edition, Montevideo, Uruguay, November 1991. This author includes an interesting description on Uruguayan case law.
[46] SANTOS BELANDRO, Ruben B. *El derecho aplicable a los contratos internacionales. Con especial referencia al contrato de transferencia de tecnología.* Facultad de Derecho Universidad de la República. Fundación de Cultura Universitaria. 1st Edition. Montevideo, Uruguay.
[47] It refers to domestic law since both Venezuela and Mexico have signed the Inter-American Convention on the Law Applicable to International Contracts approved in the context of the V Specialized Conferences on Private International Law (OAS, 1994). For further detail see DE MAEKELT, Tatiana B. "Ley de Derecho Internacional Privado Venezolano: Comentarios Generales". Revista de la Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, 117, Caracas. Venezuela, 2000; HERNANDEZ BRETON, Eugenio. "Nueva Ley venezolana de Derecho Internacional Privado", Revista de la Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Número 111, http://www.zur2.com/fcjp/111/comleydpagehtm. 1998.
[48] HERNANDEZ BRETON, Eugenio. Ibidem footnote above.
[49] DE MAEKELT, Tatiana B, Ibidem footnote above, 2000.
[50] Exposición de Motivos de la Ley de Derecho Internacional Privado de 1998.

On the contrary, section 1 of the Inter-American Convention on the Law Applicable to International Contracts –signed by Venezuela- includes a characterization of international contracts.

b) FREEDOM OF CHOICE

Regarding freedom of choice, section 29 of the 1998 law sets forth that "Conventional obligations shall be governed by the law chosen by the parties." Clearly, this provision upholds freedom of choice as the governing criteria in international contracts.

We shall highlight that the legislator refers to conventional obligations and states that such shall be subject to the law chosen by the parties. The use of this terminology suggests, on the one hand, its intention of encompassing all aspects regarding the creation of contracts -such as preliminary conversations, among others-, and, on the other hand, its support to freedom of choice in its broad sense, conforming to the Mexico Convention (1994).

I personally incline myself towards the consideration of the term "law" limited to a State's legal system, a State law, rejecting the possibility of preselecting the *lex mercatoria* which is inaccessible and unsecured.[51]

c) APPLICABLE LAW IN ABSENCE OF A CHOICE

Section 30 and 31 of the Venezuelan Law on International Private Law set forth the following: "Section 30: In absence of a valid indication, conventional obligations shall be governed by the law to which they directly relate. In order to determine the applicable law, the court shall consider both objective and subjective elements deriving from the contract. The court will also consider commercial general principles of law accepted by international organizations." "Section 31: Aside from the provisions included in the above sections, rules, customs and international commercial law principles, as well as generally accepted commercial uses and practices, shall govern, if applicable, conventional obligations aiming to attain just and equitable solutions for each case."

Venezuelan law chooses, on the one hand, a flexible criteria to govern international contracts in which the parties have made no choice of law, leaving to the court's discretion the determination of the applicable law and, on the other hand, allows the *lex mercatoria* in the determination of such law.

d) LIMITS TO THE APPLICATION OF FOREIGN LAW

Among the limits to the application of foreign law we shall mention, for its importance, the restrictions deriving from international public policy rules and the application of internationally mandatory rules in international contracts.[52]

III. SECOND PART: TREATIES. 1940 MONTEVIDEO TREATY[53]

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[51] FELDSTEIN DE CARDENAS, Sara L. *Contratos Internacionales*. Lexis Nexis, 1995.

[52] VITTA, Edoardo. *Cours Général de droit international privé*. R. des C., Volumen 167, Page 21/243, quien in la page 217/219. This author sustains that "imperative provisions are based on legislative policy principles of and its answer aims at being projected to all kind of circumstances, including international situations. FERNANDEZ ROZAS, José C. y SANCHEZ LORENZO, Sixto. *Derecho Internacional Privado,* Ibidem, pages 179 to 182. This author, when referring to this type of provisions, explain that the protection of these legislative policy values and interests is perused by imposing in International situations the answer that the legislator believes to be adequate and denying in all cases any different answer that may eventually derive from the application of a different law, the State law governing the content of the contract.

[53] CIURO CALDANI, M. A. "Derecho Internacional Privado de los contratos in general in el MERCOSUR", *Investigación y Docencia* Nº 24, Rosario, Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, Fundación para las Investigaciones Jurídicas, page 37, 1994. This author believes that it shall be carefully analyzed if these Treaties, created for and International Private Law "between separate States" are still in force under the MERCOSUR. He sustains that we are undergoing a process that materially changes the reality and that the solutions included in the Treaties –rejecting the freedom of choice of the parties regarding the choice of law and based in the place of performance connecting point- do not match the new situation we are living; from the same author, see "Bases para el Régimen de los Contratos in el MERCOSUR", *Investigación y Docencia* Nº 31, Rosario, Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, Fundación para las Investigaciones Jurídicas, page 19, 1998; PALLARÉS, Beatriz. "Comentario a las normas de los Tratados de

Three of the four countries part of MERCOSUR -Argentina, Paraguay and Uruguay-[54] have signed the Montevideo Treaties; specifically, the Treaty on International Civil Law (sections 36 through 42) which sets forth the law applicable to general aspects of legal acts, including international contracts. Notwithstanding, we may find in other Montevideo Treaties certain specific rules such as the Treaty on International Commercial Law (sections 12, 14 and 18); Treaty on Commercial International Navigation Law (sections 20, 25 through 28 and 32); among the most important. We shall recall that, the Federative Republic of Brazil has not signed these international treaties, although it has adopted the 1928 Bustamante Code which was not adopted by either of the remaining MERCOSUR countries. This is a key sign as to the current situation on legislative harmonization.

a) CHARACTERIZATION OF INTERNATIONAL CONTRACTS

The Treaty does not include a characterization of international contracts although, as we will see below, we can infer it from the solutions given by the Treaty which considers the following to be international elements: the place of performance and, subsidiarily when it cannot be individualized according to the rules set forth in the Treaty, the place of execution of the contract.
A characterization according to the Treaty could be "A contract shall be deemed international if the place of its performance, which shall be individualized according to the rules set forth in the Treaty, is located in a Member State and, in case the place of performance cannot be individualized, when the contract was executed in a Member State."

b) FREEDOM OF CHOICE

In connection to the upholding or rejection of freedom of choice, we shall recall that section 5 of the Additional Protocol of the 1940 Montevideo Treaty expressly provides that: "The jurisdiction and applicable law according to each treaty may not be modify by the parties except to the extent permitted by such law."

We cannot understand this provision unless we understand the historical background in which the Treaties were signed. We shall analyze the debates transcribed in the Minutes and Reports submitted by the representatives of the intervening States who chose to follow the prevailing trend and reject freedom of choice. The underlying idea was to limit the exacerbation and burst that freedom of choice had experienced in times of legal individualism.

In the Final Treaty on Civil International Law, the informing member, Dr. Álvaro Vargas Guillemette, said: "It is clear that the sovereign jurisdiction of the State, both in its legislative and judicial aspect, over international legal relationships located in its civil or economic environment, may not be subject to the parties' discretion who may want to vary the applicable law or jurisdiction by choosing other laws or other judges than those of the country of prevailing effects or even exclusive. The parties' free will may not exceed the limits or autonomy determined by the applicable law. As within the domestic law of a State, it cannot exceed the framework of activities set by such law. Then, it has been a mistake made by a great number of international legal scholars of all times to not wholly understand that freedom of choice is absolutely parasitic in the development of our branch of law and that it has nothing to do with conflicts of law; that being conflicts of sovereignties, interested in the development of international legal relationships, they are above the parties' freedom of choice. I have sustained, and I have been supported in these regards by the Institute on International Law of Montevideo and the Delegation representing my country in this Congress, that the Additional Protocol shall appear, due to its important, as a rule for the interpretation of the doctrines included in the different Treaties; that in no case may the parties'

Montevideo" in: J. Mosset Iturraspe/ M. A. Piedecasas (dir.), *Código Civil Comentado. Contratos. Parte general*, Santa Fe, Rubinzal-Culzoni, pages 487 to 494, 2004.
[54] It was ratified by Argentina (06/18/1956), Paraguay (01/29/1958) and Uruguay (11/12/1942).

freedom of choice in legal relationships alter or vary the normal course of applicable laws and courts by them determined. The conflicts of law rule which, due to its essence and aim, is a rule that distributes applicable law and jurisdiction among the different States, is above the parties' freedom of choice who have no possibility of understanding the limits to reciprocal States' sovereignties. I do not disregard the historic nobility of this principle which is based on the old statuaries theory and begins with the first of those authors. I want to clarify that, due to a mistake, that principle reached an extraordinary development within the limits of particular laws of the States and was translated to the Private International Law sphere when the influences of the individualistic theories of the 18th Century became more intense. Nowadays, the acceptance that once had such principle, which was upheld as an undisputed dogma, has greatly disappeared since the individualistic theories of the 18th Century mixed with the economist school principles, in a regime that was accurately called by Haurion as '*le debordement du contrat*'. Even within the social limits of the laws of a particular State, the recommendable interest that the law protects sets just limits to the parties' freedom of choice empire to set the law applicable to contracts."

This dissertation of the informative member was given when analyzing the provisions on pecuniary aspects deriving from marriage and when dealing with legal acts he sustained that: "What I have sustained when dealing with matrimonial property regimes and the respective assets, rejecting the parties' freedom of choice to chose the applicable law, also applies here."[55]

Given the aims of this paper, it is worth highlighting that during the debate the proposal from the Argentine delegation, presided by Dr. Carlos María Vico, was dismissed. Such proposal consisted of the inclusion in section 33 of the following wording: "the law of the place of performance shall govern the contract, notwithstanding the parties' freedom of choice, in particular its effects, consequences and performance."[56] He stated that "most legal provisions of each State's domestic law on contracts are applicable in the absence of an express or a confusing regulation by the parties. Imperative rules are limited to assuring basic conditions to the validity of contracts. But when the contract moves to the international sphere, the parties are given the possibility to avoid imperative rules by resorting to a more favorable law although with less or none jurisdiction over the legal relationship and against such which claims better rights to govern it. That is to say, the law of the country with existing legal and economic links."[57]

In connection to the Argentine proposal, the informative member sustained that "*Our Commission dismissed the proposal for considering that the parties' freedom of choice, leaving its scope to the applicable law, was no longer an International Private Law problem but rather a problem similar to that existing in every contract within the domestic law of each country. It can be ascertained that (...) the theory denying any standing to freedom of choice was generally sustained by our Commission, and upheld as a provision to regulate conflicts of laws."*[58]

A number of well-known Uruguayan legal scholars sustained, referring to the 1940 Montevideo Treaties, that: "It predominated the idea that within the international sphere the tutelary interest that organizes States takes priority over agreements between individuals. We considered the convenience of clearly individualizing in the Treaties, in the most possible unequivocal way, the applicable law and jurisdiction,

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[55] *Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo*, 1939-1940. Imprenta de la Universidad, Buenos Aires, pages 276 to 289, 1940.

[56] And the informative member of the Montevideo Treaty on International Civil Law of 1940 continued saying that "The informative member did not attend the Commission's meeting in which professor Vico brightly sustained his delegation's point of view. But from his words it is clear that such inclusion had no relation with the elements of the contract which are not subject to the people's free will, and that it could only be applied within the lawful framework set by the applicable law in the international sphere. It was not in any way improper the proposal submitted by the Argentine delegation, but in any case our Commission dismissed such proposal for considering that the parties' free will, leaving its scope to the applicable law, was no longer an International Private Law problem but rather a problem similar to that existing in every contract within the domestic law of each country. It can then be ascertained that, based on the words and clarifications made when debating the issue, the theory denying any standing to freedom of choice was generally sustained by our Commission, and upheld as a provision to regulate conflicts of laws."

[57] Memorandum submitted by the Aggregate to the Argentine Delegation, Dr. Doctor Hugo REPPETO SALAZAR on the Works done by the International Civil Law Commissions. In Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo. Buenos Aires, Ed. Universitaria. 1940.

[58] FELDSTEIN de CÁRDENAS, Sara L. *Contratos Internacionales. Contratos celebrados por ordenador. Autonomía de la Voluntad. Lex Mercatoria.* Pages 99/102, Abeledo Perrot, 1995.

leaving aside the uncertainty and versatility that characterizes freedom of choice. Regarding contracts, we considered the duty of the State in preventing that, under certain in-fashion manners (such as standard form contracts) the party who represents the predominating personal element imposes repulsive limitations to the other party's law, by means of clauses whereby such party waives certain protective laws or submits to certain jurisdictions."[59]

In this vein, Dr. Quintín Alfonsín sustained in connection to section 5: "This provision (referring to section 5 of the Additional Protocol) was also a compromising solution between the Uruguayan opinion, which whished to completely ban the parties' freedom of choice from the Treaties regarding choice of jurisdiction and regulations on international relationships, and the Argentine opinion, which whished to uphold freedom of choice."[60]

He continued to say that: "This section imposes the parties the application of the law indicated by the Treaties to regulate relationships, unless the State whose law was to be applied in the case includes a domestic provision accepting the freedom of choice principle; if that were to be the case, the parties could choose the applicable law provided that it is allowed under such law." From this we may infer, following the reasoning of this distinguished Uruguayan scholar, that if the key is to find a domestic provision upholding or rejecting freedom of choice principle, as none of the States that had signed the 1940 Montevideo Treaty have a domestic provision upholding freedom of choice, then freedom of choice becomes inadmissible. To the contrary, there is a provision rejecting freedom of choice in section 2403 of 1941 Vargas Guillemette Law of the Uruguayan Civil Code.

In order to emphasis this theory, with which I agree, we shall not disregard the words of the informative member of the 1940 International Commercial Navigation Treaty regarding section 27 of such treaty which sets forth the entire nullity of any clause included in a contract of affreightment or of carriege of goods or persons that provides for a different jurisdiction than that of the place of performance or, to the plaintiff's discretion, of the domicile of the defendant. This provision, although it refers to jurisdiction, also applies to freedom of choice and shows the ideas of the time that influenced the adopted solutions. González Gowland, based on the above mentioned provision, argued that: "Freedom of choice, which has been sustained to uphold the validity, is in this case inacceptable since, being these a standard form contract whose clauses are imposed by the ship-owner, it lacks the freedom needed to negotiate the terms of the contract, affecting the party's consent and, thus, the validity of the legal act. Those clauses put consignees in an evident inferior position, breaking the equilibrium of the contract, since they are obliged to resort to the courts of the ship owner's domicile in order to request enforcement of those obligations and liabilities arising from the contract, affording all the inconvenient and costs that distance may cause. To the contrary, the ship-owner, in the improbable case of initiating legal actions –I say improbable since the ship-owner imposes the consignee the obligation to pay the affreightment when loading the goods-, will do so before the judges of its own jurisdiction benefiting from all the advantages that derive from such fact. The tyranny exercised over the consignees by powerful entities, such as the current navigation companies, before which consignees are abandoned and disarmed, has made laws and case law to uphold the nullity of jurisdiction clauses." And he ended saying that: *"Argentina, whcih has always sustained its validity, has definitly sustained its nulity on the Supreme Court of Justice decision dated November 16, 1936, and thefederal courts of the United States of Brazil has followed the same direction."*

Beyond Dr. Antonio Boggiano's interpretation,[61] and agreeing with the interpretation of Dr. Quintín Alfonsín and other prestigious Uruguayan authors, I believe that international contracts under the scope

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[59] BUSTAMANTE I RIBERO, José Luís. *El Tratado de Derecho Civil Internacional de 1940 (Gestación, glosas, interpretación),* Delegado del Perú, page 144. 1942.

[60] ALFONSIN, Quintín. *Régimen Internacional de los Contratos. Facultad de Derecho*. Sec. II .LIV. Montevideo 1950. "La teoría de la autonomía de la voluntad aplicada al régimen internacional de los contratos". XI. Revista de Derecho Público y Privado. Page 257, 1949,

[61] BOGGIANO, Antonio. *Curso de Derecho Internacional Privado*. Abeledo Perrot. 1993, and against my position see: BOGGIANO, Antonio. *Contratos internacionales*, page 18. In this book, the author sustains that: "Secton 5 of the Additional Protocol to the Montevideo Treaties seems to recognize freedom of choice provided that the applicable law as determined by the treaties recognizes it. In this way, e.g., if the applicable law is the Argentine one then the

of the 1940 Montevideo Treaty are governed by section 36 which sets forth that "the law of the place in which the contracts shall be performed shall govern a) its existence; b) its nature; c) its validity; d) its effects; e) its consequences; f) its performance; g) in all, all aspects on contracts." Otherwise, the contract shall be governed by the law of the place of execution. Regarding the limits to the application of the foreign law, section 4 of the Additional Protocol sets forth that "The laws of the remaining States shall never be applied against the political institutions, public policy rules and good customs of the place in which the legal proceeding is taking place." [62].

Figure I. Domestic law of MERCOSUR member States:[63]

	ARGENTINE LAW
FREEDOM OF CHOICE	There is no provision in the Civil Code that expressly upholds freedom of choice in the international sphere. Those in favor of the application of this principle base their arguments on section 1197 of the Civil Code. Those against it base their arguments on the Montevideo Treaties, particularly in the 1940 Montevideo Treaty.
APPLICABLE LAW	Section 1205 of the Civil Code provides that contracts shall be governed by the law of the place of its execution. (Story) Sections 1209 and 1210 provide that contracts shall be governed by the law of the place of its performance. (Savigny) Most legal scholars understand that if the contract has *ab initio* links with the Argentine Republic, sections 1209 and 1210 (law of the place of performance) shall apply. If the contract does not have *ab initio* links, section 1205 (law of the place of execution) applies.
CONTRACT MADE *INTER ABSENTES*	We shall distinguish between those contracts which do have a specific place of performance from those which do not. If it has a specific place of performance, it shall be governed by the law of the place of its performance. If it does not have a specific place of performance, it shall be governed by the law of each of the parties' domicile. (based on section 1214)

	BRAZILIAN LAW
FREEDOM OF CHOICE	There is no provision that expressly upholds freedom of choice in the international sphere. Most legal scholars and case law have traditionally rejected freedom of choice based on domestic law provisions. Nowadays, a number of legal scholars encourages its acceptance.

parties may chose the applicable law, since Argentine International Private Law allows it. Also see, FERNANDEZ ARROYO, Diego y FRESNEDO, Cecilia, *Derecho Internacional Privado de los Estados del MERCOSUR*. Obra coordinada por FERNANDEZ ARROYO, Diego. Page 990/991. Ed. Zavalía.

[62] Law construed as State law.

[63] I appreciate the valuable contribution of Doctor Luciana Beatriz Scotti in the drafting of the figures included in this paper.

APPLICABLE LAW	Pursuant to section 9 of the Introductory Law to the Civil Code, international face-to-face executed contracts shall be governed by the law of the place of performance of the obligation.
CONTRACT MADE *INTER ABSENTES*	Pursuant to section 9 of the Introductory Law to the Civil Code, if the contract is made *inter absentes,* the obligation shall be deemed concluded in the offeror's place of residence.

	PARAGUAYAN LAW
FREEDOM OF CHOICE	There is no provision in the Paraguayan Civil Code that expressly upholds freedom of choice in international contracts.
APPLICABLE LAW	Pursuant to section 14 of the Civil Code, as amended, the intrinsic validity of legal acts, including contracts, shall be governed by the law of the place of its performance. Section 26 provides that the extrinsic validity of legal acts shall be governed by the law of the place of its execution, save for those acts executed abroad before diplomatic or consulate empowered officers which shall be governed by the provisions included in the Code.

	URUGUAYAN LAW
FREEDOM OF CHOICE	Section 2403 of the Uruguayan Civil Code expressly rejects freedom of choice by providing that "the parties may not modify the rules on applicable law or jurisdiction set forth herein", adding that the parties' freedom of choice is "limited within the frame set by applicable law."
APPLICABLE LAW	Section 2399 of the Civil Code sustains the application of the law of the place of performance and expressly directs to the interpretation guidelines included in sections 34 through 38 of the 1889 Treaty on International Civil Law.

	VENEZUELAN LAW
FREEDOM OF CHOICE	Section 29 of the Venezuelan Law on Private International Law expressly upholds freedom of choice when providing that "conventional obligations shall be governed by the law chosen by the parties."

APPLICABLE LAW	Section 30: "In absence of a valid choice of law, conventional obligations shall be governed by the law to which they directly relate. In order to determine the applicable law, the court shall consider both objective and subjective elements deriving from the contract. The court will also consider commercial general principles of law accepted by international organizations." Section 31. "Aside from the provisions included in the above sections, rules, customs and international commercial law principles, as well as generally accepted commercial uses and practices, shall govern, if applicable, conventional obligations aiming to attain just and equitable solutions for each case."

Figure II. Treaties:[64]

	MONTEVIDEO TREATY ON INTERNATIONAL CIVIL LAW OF 1940
FREEDOM OF CHOICE	Section 5 of the Additional Protocol expressly sets forth that "Jurisdiction and applicable law according to each treaty may not be modify by the parties except to the extent permitted by such law."
APPLICABLE LAW	International contracts shall be governed by the law of the place of its performance (sections 36 and 37). Subsidiarily, section 40 provides that if the place of performance of acts and contracts cannot be individualized, they shall be governed by the place of its execution.
CONTRACT MADE *INTER ABSENTES*	The conclusion of the Contract is subject to the law of the place from which the offer has been sent (section. 42). The law of the place of performance shall govern all remaining aspects.

IV. THIRD PART: CONVENTION OF ROME ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS AND ROME I REGULATION. ANALYSIS.

A. CONVENTION OF ROME

The Convention of Rome sets forth, in section 1.1, that it shall apply to contractual obligations in any situation involving a choice between the laws of different countries; in other words, to International contractual obligations. That is to say, that it shall apply if a situation consists of one or more foreign elements, regardless of which are those elements, its nature, intensity or relevance.

a) APPLICABLE LAW. FREEDOM OF CHOICE.

Regarding the law governing the content of the contract, we shall highlight that the Convention of Rome uses connecting points in a way of a cascade. In this sense, the contract shall be governed, first, by the law chosen by the parties pursuant to section 3; and second, if the parties have made no choice of law or if such choice is invalid, by the law of the country with which it is most closely connected. Subsections 2

[64] We refer to this treaty, although we are aware that Brazil, Chile and Venezuela are part of the Bustamante Code.

through 4 of section 4 of the Convention of Rome set forth certain presumptions that the courts must consider in determining which is the country with which the contract is most closely connected.

The general principle is set forth in section 3.1 which provides that "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." The first criteria for determining the applicable law is freedom of choice. That is to say, the power of the parties to chose the law that shall govern the contract to which they are parties. We shall then differentiate this freedom from the so called "content freedom" which means the power of the parties to freely set the agreements and clauses of a contract, regulating concrete aspects of such contract; all of which shall be done within the legal framework set by a certain legal system.

After setting the general principle, the Convention differentiates two situations, a first one in which the parties have equal standing –meaning that the parties have equal negotiation powers (sections 3 and 4)-, and a second one in which one of the parties is weaker than the other, more vulnerable than the other/s, such as consumers and workers (sections 5 and 6).

Last part of section 3 allows, in a broad sense, the parties' possibility of choosing the law applicable to the whole or a part only of the contract, allowing a kind of voluntary *dépeçage*. Notwithstanding the broad scope granted to freedom of choice by the Convention, the Convention does not enhance nor encourage the freedom of choice festival in the international sphere since it uses the word law (*ley*) and not law (*derecho*),[65] excluding the possibility of the *lex mercatoria*.

In this sense, the treaty forbids:

a) The "contract without law" or "self-regulated contract", meaning a contract with a great number of precise clauses that tries to be "self-sufficient" aiming at separating the contract from any and all State laws.

b) The contract exclusively governed by "non-State laws", such as the *new lex mercatoria*, regulations from international commercial institutions, Public International Law, etc.

c) The contract governed by "vague legal references", such as general principles of law, contractual good faith, legal principles common to a number of legal systems, among others.

d) The contract including "stabilization clauses", meaning clauses that set forth that the law chosen by the parties is not subject to eventual legislative reforms, i.e. clauses which create a pretrification of the applicable law and derive in a self-regulated "contract without law."[66]

The next paragraph of section 3 sets forth that the parties may at any time agree to subject the contract to a certain law –whether before, during or after its execution. Moreover, it allows the parties to modify the previously chosen law and change or even disregard the choice made. In this last case, the international contract shall be governed by the default law, that is to say the law set by the legislator in case the parties had made no choice of law pursuant to section 4. Following the limits to the freedom of choice festival, although the Convention allows the parties to change the applicable law, such modification may not derive in the formal invalidity of the contract or affect third party's rights.

b) APPLICABLE LAW IN ABSENCE OF CHOICE

[65] Translator's note: Please note that in Spanish the Word "*ley*" and "*derecho*" (which are both translated into English as "law") have different meanings. "*Ley*" means a special rule issued by the applicable empowered state body while "*derecho*" refers to such a set of rules regardless if such rules were issued by state bodies or other competent bodies, organizations and/or operators.

[66] CALVO CARAVACA, Alfonso Luis y CARRASCOSA GONZALEZ, Javier. *Derecho Internacional Privado*. Volumen II. Ed. Comares. Séptima Edition. Granada, Pages 337 to 396. 2006.

In case the parties have made no choice of law, section 4 sets forth the law that shall govern the contract:

a) The contract shall be governed by the law of the country with which it is most closely connected (section 4.1).

b) It shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of execution of the contract, his habitual residence, or, in the case of legal entities, its principal place of business (section 4.2).

c) To the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated (section 4.3.).

d) A contract for the carriage of goods is presumed to be most closely connected with the country in which the carrier has his principal place of business it such is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is located (section 4.4).

e) The presumptions set forth in section 4.2, 3 y 4 shall not apply if it appears from the circumstances as a whole that the contract is more closely connected with another country. The presumption set forth in section 4.2 shall not apply if the characteristic performance cannot be determined (section 4.5). This last has been called a closing or escape clause that applies in case contracts do not have a characteristic performance, there is uncertainty on the principal place of business of the party required to effect the characteristic performance at the time of execution of the contract, as the case in which such is temporal, the place of situation of the property cannot be specified, or the parties reside in the same country and this is not the place in which the property is located.

The proximity rule on which this Convention is based, a flexible connecting criteria, is without doubt an English-style solution that requires a case-by-case analysis. A number of legal scholars have sustained that this entails great difficulty since there is no legal certainty as to the law governing an International contract until the court so determines it, and even when it has been determined by the court nobody can guarantee that the court will apply the solutions given in the same or similar cases. For this reason, it has been argued that these provisions have serious defects since the solution adopted by section 4.1 "is unsatisfactory and problematic for it leaves open the solution of the case until last moment, depending also on the judge's or arbitrator's and, thus, the result that may derive from such criteria may vary from those based on geography and theology."[67]

c) LIMITS TO APPLICABLE LAW

Section 7 provides a limitation to applicable law when regulating the so called mandatory rules ("*normas de policía*"). This section sets forth that mandatory rules of the law of the forum may be given effect if under such law those rules must be applied, whatever the law applicable to the contract, and empowers judges to do the same regarding mandatory rules of other States.

Section 7.2. requires for the application of internationally mandatory rules that: a) the internationally mandatory rule shall apply to the case –the contract needs to be under the scope of application of such

[67] JUENGER, F. "El derecho aplicable a los contratos internacionales", *Jurídica, Anuario del Departamento de Derecho de la Universidad Iberoamericana*, Nº 23,pages 50 to 53, 1994. This author criticizes the characteristic performance theory, arguing that "it is a mysterious concept, even mystic, that is no other than a non-convincing conclusion derived from guessing rather than from investigation." JUENGER F., "La Convención europea sobre el derecho aplicable a obligaciones contractuales: algunas observaciones críticas desde la perspectiva estadounidense", *Anuario del Departamento de Derecho de la Universidad Iberoamericana*, Nº 14, pages 201 to 204, 1982; CALVO CARAVACA, Alfonso L. and CARRASCOSA GONZALEZ, Javier, ibidem, page 382. These author highlight that the characteristic performance is a "legal undetermined concept" ... that requires a great case-law development in which the court's sensitivity plays an important role in individualizing the closest connection and in determining the criteria to enable such individualization; VIRGÓS SORIANO, M. "Obligaciones contractuales", in *Derecho Internacional Privado. Parte especial*, Sexta Edition, Madrid, Eurolex, pages 178 to 188, 1995.

rule-; and b) the rule needs to have an imperative and obligatory content, meaning that the interests protected by such law shall only be guaranteed by means of its application.

Among other restrictions, we shall highlight section 16 which provides that the application of a rule of the law may be refused if the application of foreign law is manifestly incompatible with the public policy of the forum.

In summary, this international legal instrument upholds the parties' freedom of choice to chose applicable law, although it does not allow the parties to chose a non-State law; and, in absence of a parties' choice of law, the contract shall be governed by the law of the country most closely connected with the contract, adopting a flexible connoting point. It also includes specific provisions on international contracts in which there are weak parties (contracts executed by either consumers or workers).

B. ROME I REGULATION

The Rome Regulation on the Law Applicable to Contractual Obligations (hereinafter, the "Rome I Regulation") sets forth the rules on conflict of laws on contractual obligations. Since the Rome I Regulation came into effect on December 17, 2009, it replaced the Rome Convention dated June 19, 1980, and it shall apply to contracts executed eighteen months alter the date of effect, which, in turn, takes place twenty days after it is published in the European Union Official Gazzette.[68]

At first glance, we see that, among other differences, the new legal framework is a typical legal instrument for integrated spaces based on sections 61 and 65 of the Treaty establishing the European Community, which were included by the Treaty of Amsterdam. In fact, the Treaty of Amsterdam grants community entities the power to pass regulations on judicial cooperation on civil matters. It includes the following measures:

1) Those aimed at improving and simplifying the system for cross-border service of judicial and extrajudicial documents, cooperation in the taking of evidence and the recognition and enforcement of decisions in civil and commercial cases.

2) Those aimed at promoting the compatibility of the rules applicable in Member States concerning conflict of laws and jurisdiction.

3) Those aimed at eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in Member States.

Under section 65 of the Treaty of Amsterdam a "communitization of Private International Law" have occurred. This phenomena has been studied by a great number of legal scholars such as F. Pocar, Th.M. de Boer, H. Gaudemet-Tallon, J. Basedow, K., Boele-Woelki, M. Helmberg, H.U.Jessurun d'Oliveira, S. Knöfel, Ch. Kohler, S. Leible, A. Staudinger, E. Pérez Vera, and K. Siehr. Then, since the Treaty of Amsterdam came into effect on May 1, 1999, International Private Law isses are an attribution of the European Community.[69]
In fact, the so called "communitization of Private International Law" increases Private International Law protagonism in community law, and shows that the better way of implementing it is by community regulations.[70]

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[68] GARCIMARTIN ALFEREZ, Francisco J. "El Reglamento Roma I sobre ley aplicable a las obligaciones contractuales: ¿Cuánto ha cambiado el Convenio de Roma de 1980?". *Diario La Ley,* Nº 6957, Sección Doctrina, Año XXIX, La Ley. Madrid, España, May 30, 2008.
[69] CALVO CARAVACA, Alfonso Luís., "El Derecho Internacional Privado de la Comunidad Europea*". Anales de Derecho*. Universidad de Murcia, No. 21, pages 49 to 69, 2003.
[70] Regulation 1346/2000, dated May 29, 2000, on insolvency proceedings, Regulation 1348/2000, dated May 29, 2000, on the service of documents in civil or commercial matters, Regulation 1347/2000, dated May 29, 2000, on matrimonial matters -replaced by Regulation 2001/2003, dated November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matters and the matters of parental responsibility (DOUE L 338 dated December 23, 2003)-, Regulation 44/2001, dated November 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and

This change in its legal nature –i.e. from a convention to a regulation, from a traditional international treaty to a community treaty- entails that, on the one hand, Private International Law will have the same attributes than any other community regulation (section 249 of the Treaty establishing the European Community) such as the direct and immediate application as well as its direct, vertical and horizontal effect; and, on the other hand, community courts, such as the European Court of Justice in Luxembourg, shall have jurisdiction over the interpretation of such rules, thus, attaining uniformity.[71]

Rome I Regulation do not apply to Denmark who is not bound by it due to its position towards Title IV of the Treaty establishing the European Community (whereas 46). In this sense, the Convention of Rome shall continue to be applicable with respect to Denmark. United Kingdom and Ireland also have a particular position since they are allowed to opt-in (section 69 Treaty establishing the European Community) meaning, to adhere to community regulations. So far, Ireland have showed its interest to adopt the Rome I Regulation since the beginning, as evidenced by whereas 44 of the Rome I Regulation. Finally, the Rome I Regulation shall not apply to French overseas department and Dutch overseas territories (section 24.1).

Pursuant to section 1, the Rome I Regulation applies to civil and commercial matters, including employment contracts. The Rome I Regulation does not introduce important reforms with respect to its direct antecedent, the Convention of Rome.

The Rome I Regulation does not apply, although with certain exceptions, to certain obligations related to civil status or legal capacity of individuals, obligations arising out of family relationships including matrimonial property regimes, obligations arising under negotiable instruments other than bills of exchange, cheques and promissory notes-, the exclusion only applies to obligations deriving from the negotiable nature-, arbitration agreements and agreements on the choice of court; questions governed by the law of companies and trust, and formal aspect on agency.

Notwithstanding, unlike its predecessor, the Regulation does not exclude insurance contracts from its scope of application aiming at avoiding disperse regulations on the matter.[72]

Although the main structure of the Rome Convention is not modify by the Rome I Regulation, the new legal framework is more complex in terms of methodology, since, first, it sets a general regime (sections 3 and 4) and then, it sets certain specific rules for contracts in which one party is weaker that the other, such as transport contracts (section 5), consumers contracts (section 6), insurance contracts (section 7) and employment contracts (section 8).

a) APPLICABLE LAW. FREEDOM OF CHOICE

Freedom of choice is the basic rule on applicable law. International contracts under the scope of the Rome I Regulation shall be governed by the law chosen by the parties, making no amendments to its direct antecedent. Among others, one of the most controversial issues at the time of the drafting of the Rome I Regulation was the one relating to the presumption on the tacit choice of law when the parties

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commercial matters and Regulation 1206/2001, dated May 28, 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Regulation on the applicable law to non-contractual obligations (Rome II), dated July 31, 2007.

[71] In MERCOSUR the issue is different since there is a Permanent Court with the power of issuing opinions (*opiniones consultivas*). There is no Justice Court as in the case of the European Community. FELDSTEIN DE CÁRDENAS, Sara L. "El MERCOSUR: una mirada al futuro", in *Suplemento mensual de Derecho Internacional Privado y de la Integración Nº 18, Diario Jurídico el Dial*: www.eldial.com, Ed. Albremática, published on March 31, 2006.

[72] GARCIMARTIN ALFEREZ, Francisco J., ididem. This author sustains that "the Rome I Regulation eliminates the exclusion regarding insurance contracts that the Convention of Rome did include. In this contractual sphere, the Convention of Rome had given raised to a rather complex regime in which three types of situations were individualized: in the first place, the Convention of Rome applied to re-insurances and to insurance contracts relating to risks located in third States *(vid.* sections 1.3 and 1.4 of the Convention of Rome *a contrario)*. Secondly, regarding (i) risks located within a Member State, including the States in the European Economic space; and (ii) covered by companies from such States, the space directives had introduced a harmonized regime of conflicts of laws rules (2). Finally, the insurance contracts relating to risks located within the Community but covered by companies form non-member States were not only excluded from the scope of application of the Convention, but also from the directive. (iii) The Convention of Rome did apply to insurance contracts covering risks located outsider Europe. The new Rome I Regulation puts an end to these scattered regulations and set a legal framework applicable to all insurance contracts and substitutes, its scope of application, the directives.

have chosen a certain court. The commission chose not to include this presumption for considering that if the parties really want to subject a contract to a certain law then they must expressly say so. Otherwise, it shall be presupposed that the parties did not want to make a choice of law in such international transaction. This presumption, that was expressly included in the Convention of Rome, appears as just one more presumption in whereas 12 of the Rome I Regulation.

Moreover, as in the case of the Convention of Rome, the Rome I Regulation does not allow the parties to chose a non-State law since the Rome I Regulation keeps the word "law" (*ley*) in section 3. In this sense, the parties may not chose the *lex mercatoria*, as a set of rules, principles, uses and customs created aside from State law. I believe this to be the correct solution since the *lex mercatoria* is mysterious, uncertain and disturbing. Even if one was in favor of the possibility of choosing the *lex mercatoria* we cannot disregard that statistical research conducted on the topic shows that, although being possible to chose the *lex mercatoria* in arbitration, only 1% of the parties chose it to govern the contract.

b) APPLICABLE LAW IN ABSENCE OF CHOICE

Section 4 of the Rome I Regulation, unlike the Convention of Rome that used the "most closely connected" criteria, sets forth eight specific guidelines to determine the applicable law in case the parties have made no choice of law, or if such choice has become unenforceable or invalid. Such guidelines are set distinguishing between the type of contract (sales of goods, provision of services, contracts relating to *in rem* rights in immovable property, franchise contracts, distribution contracts, contract for the sale of goods by auction, contracts executed in financial markets). The Regulation only maintains the "most closely connected" criteria as a escape clause, that shall be exceptionally applied, providing that the law indicated by the guidelines, whether general or specific, shall not apply when the contract is most closely connected to another legal system.

Regarding carriage contracts, unlike the Convention of Rome which includes a specific rule in absence of the parties' choice of law, the Rome I Regulation unifies all carriage contracts (section 5) maintaining the distinction between contracts for the carriage of goods from contracts for the carriage of persons.Contracts for the carriage of goods shall be governed by the law chosen by the parties, otherwise, by the law of the country in which the carrier resides provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country:. Otherwise, the law of the place of delivery as agreed by the parties shall apply. In the case of contracts for the carriage of persons, the Rome I Regulation introduces an innovative rule when providing that, in the first place, the law chosen by the parties shall apply, but limited to a number of possible laws, which shall be the law of either the place of habitual residence of the passenger, the law of the habitual residence of the carrier when such is the same as the place in which the ticket was bought, or the law of the place of destination. In both hypotheses of carriage contracts, whether of goods or persons, the escape clause also applies.

Section 6 regulates the law applicable to consumers contracts including a rule in favor of consumers' protection, with two main innovations. One of such is that the rule shall apply to any contract executed between a consumer and a professional, characterizing passive consumers according to section 15 of the Brussels I Regulation. For that to apply, the professional shall pursue his/her commercial or professional activities in the consumer's country, and shall conclude such contract by means of such activities. Consumers' protection is attained by the adoption of a rule that provides that the applicable law is that of the country where the consumer has his habitual residence.

Regarding insurance contracts, aside from certain specific differences, an insurance contract covering a large risk shall be governed by the law chosen by the parties, or otherwise by the law of the country where the insurer has his habitual residence, except if the contract is most closely connected to another country (section 7.2). To the contrary, if the parties have made no choice of law, the contract shall be

governed by the law of any member State where the risk is situated at the time of execution of the contract.

In the case of employment contracts, the parties may choose the law applicable to individual employment contracts. Notwithstanding, this choice of law may not deprive the employee from the protection awarded to him by provisions that cannot be derogated by agreement under the law that, in the absence of choice, would have been applicable. In other words, freedom of choice is only possible if such favors the employee. In case the parties had made no choice of law, the contract shall be governed by the law of the State in which the employee habitually carries out his tasks (section 8.2).

c) LIMITS TO THE APPLICATION OF FOREIGN LAW

Section 9, as provided in the Convention of Rome, regulates overriding mandatory provisions providing that regardless of the law that should have governed the contract according to the rules on conflict of laws, mandatory provisions included in the law of the forum shall be applied. Mandatory provisions included in the law of States shall also apply although in this case certain conditions need to be met so as to apply this law over the law that should have governed the contract according to the rules on conflict of laws.[73]

V. FOURTH PART: INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS.[74]

Following the structure of the Inter-American Convention on the Law Applicable to International Contracts, section 1 provides that the Convention aims at determining the applicable law to international contracts (whether civil or commercial) between private individuals or entities (entities, companies or businesses). It is worth mentioning that it also applies to contracts entered into or contracts to which States or State agencies or entities are a party, unless the parties to the contract expressly exclude some or all categories. However, any State Party may, at the time of its signing, ratifying or adhering to this Convention, declare that it shall not apply to all or certain categories of contracts to which the State or State agencies and entities are a party. Following a similar technique to the one used in other treaties in which this Convention has been inspired, such as the Convention of Rome, the Convention does not apply to the following matters: issues arising from marital status of individuals, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties; contractual obligations intended for estates of deceased issues, wills, marital arrangements or those deriving from family relationships; obligations deriving from securities; obligations deriving from

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[73] GARCIMARTIN ALFEREZ, Francisco J. This author highlights that the new wording of section 9.3 cannot be but a compromising solution between both positions. On the one hand, it keeps the possibility of "giving effect" to third State's mandatory provisions, but limiting the third State's law that shall be taken into consideration to the following: a) just the law of the country/ies where any of the obligations arising out of the contract shall be performed, and b) also, provided that those overriding mandatory provisions render the performance of the contract unlawful (although this provision shall be construed in the broad sense, not only the performance but also the contract itself). The judges' criteria so as to decide weather to give effect or not to such law is the same as the one of the Convention of Rome; the judge must consider the nature and subject of the provisions, as well as the consequences that would derive from its application or non-application.

[74] During the IV Specialized Conferences on Private International Law at Montevideo (1989), although the Mexican delegation submitted a draft from Lic. Leonel Pereznieto which was supported by the Uruguayan delegation, but it was only possible to adopt the proposed basis proposed for a future study on the matter. Precisely, Mexican legal scholar José Luís Siqueiros was asked to prepare a convention, which draft was discussed and revised in the experts' meeting at Tucson, Arizona in November 1993 and directed by Professor Boris Kozolchyk. This draft was used as starting point for discussions at the CIDIP V which took place in the Ministry of Foreign Relationships at the Plaza de las Tres Culturas, where it was finally approved in full session on March 18, 1994. The CIDIP V was directed by Licenciado José Luis Siqueiros, who was chosen by the delegations of the Member States and it included in its agenda conventions on traffic of minors and on the law applicable to international contracts. Two commissions were opened to discussion which were presided by Professors Gonzalo Parra Aranguren from Venezuela and Didier Opperti Badán from Uruguay. 19 countries attended the Mexico Conference, including the delegations of the United States and Canada, which evidences the active participation of the two legal American families (both civil law and common law.) JÜENGER, Fredrick K. "The Lex Mercatoria and Private International Law", *Uniform Law Review*, page 185, , 2000-1; VEYTIA , H. "La Convención interamericana sobre derecho aplicable a los contratos internacionales", *Jurídica*, Anuario del departamento de derecho de la Universidad Iberoamericana, Nº 25, pages 388/390, 1995-II; NOODT TAQUELA, María B. "Convención Interamericana sobre Derecho aplicable a los contratos internacionales" in: *El Derecho internacional privado interamericano in el umbral del siglo XXI, Sextas Jornadas de Profesores de Derecho Internacional Privado*, Segovia, December 1 and 2, 1995, Madrid, Departamento de Derecho Internacional Público y de Derecho Internacional Privado, Universidad Complutense de Madrid/ Eurolex, Page 100, 1997; FELDSTEIN de CÁRDENAS, Sara L. *La Convención Interamericana de Derecho Aplicable a los contratos internacionales: Una mirada desde el derecho internacional privado argentino. Libro Homenaje a Gert F. Kummerow Aigster*. Colección de Libros Homenaje N°16, Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Caracas, Venezuela, 2004

securities transactions; agreements of the parties concerning arbitration or selection of forum; issues regarding companie's law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general (section 5).

a) INTERNATIONAL CONTRACT

According to this Convention, a contract shall be deemed international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party. From this section 1, it is clear that it has followed an objective criterion of internationality since the determination of internationality of the contract is independent from the will of the parties. It includes an autarkic characterization of international contracts which can be bi-folded: on the one hand, it adopts a strict criteria in the first part of subsection 2, section 1 providing that "a contract shall be deemed international if the parties thereto have their habitual residence or establishments in different States Parties"; on the other hand, it adopts a broader criteria since the internationality of the contract will depend on the contract's objective ties with more than one State Party

b) APPLICABLE LAW. FREEDOM OF CHOICE. ITS SCOPE. LEX MERCATORIA. DEPEÇAGE.

The law applicable to international contracts shall be that chosen by the parties or, otherwise, the law of the State with which it has the closest ties. Section 7 sets forth that "the contract is governed by the law chosen by the parties" granting the parties the power to chose the law applicable to the international contract. It is a quite new solution in treaties currently in force that follows an evolution towards accepting freedom of choice in contracts, both by laws and by case law around the world.[75] Notwithstanding, although it is true that the upholding of freedom of choice is a landmark in the Inter-American space,[76] its scope is restricted since the characterization of the contract as international do not depend on the parties' free will but on objective elements.

After recognizing that the parties may chose the applicable law by express or tacit means, the Convention specifies that forum selection (jurisdiction) do not necessarily entail the choice of law. In fact, this reference is really clarifying since in some States there is the practice of overlapping both matters – applicable law and jurisdiction– notwithstanding the assertion on the independence and autonomy of both matters. Precisely, during the Conference, the delegates from the United States, Canada and Uruguay proposed to include the word "necessary" to indicate that forum selection itself is not enough to infer that the parties have agreed on the applicable law. In other words, forum selection is just one more of the elements that shall be taken into consideration in order to determine the existence of a tacit choice of law; but never the only one.[77]

Section 1 uses the word law *(derecho)* instead of law *(ley)* which, according to a number of legal scholars, shall be construed in a broad sense. They understand that, under the Convention, the parties' freedom of choice enables them to chose a set of rules that do not strictly constitute a legal system created by a State's legislator. From my point of view, within the same, the text of the Convention we can find arguments against this broad position in section 17 when providing that "For the purposes of this

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[75] FELDSTEIN de CÁRDENAS, Sara L. *Contratos Internacionales. La autonomía de la voluntad*, Abeledo Perrot. Buenos Aires. 1995. 2001.

[76] OPPERTI BADÁN, speaking about its own law, sustained that, without discussing the recognition of this principle –which is now generally accepted -, the first reactions was to sustain the urgent need for a reform of Uruguayan International Private Law. Other prestigious Uruguayan legal scholar, TELLECHEA BERGMAN, agreed with this idea and sustained –as clear as always- that provided that broad freedom of choice only applies to international private cases, does not affect international public policy rules of the place where the proceeding is taking place, does not derive in an abusive imposition, even economic, of one of the parties over the other and there is a reasonable international link between the law chosen by the parties and the case being governed, we are attending to the most relevant innovation of the work under analysis. We believe in this sense that, although it is true that in 1989 the international context was not willing to recognize this principle, which only allowed to set minimum basis for a future harmonization on the matter, it is also true that section 7 of the Inter-American Convention on the Law Applicable to International Contracts could not be different to the existing one due to the maturity reached in 1994 by the American States laws.

[77] The argument proposed by Profesor Doctor Antonio Boggiano *in re* "Pablo Treviso SA y otros c/Banco Argentino de Comercio" dated August 31, 1976, followed both by legal scholars and case law- is rejected by the convention. I agree with this soluction.

Convention, "law" shall be understood to mean the current in effect law in a State, excluding rules concerning conflict of laws."

Those in favor of the broad position, with which I do not agree, argue to the possibility of the parties of choosing as applicable law to the international contract the *lex mercatoria*. According to this affirmative interpretation, the Convention includes the *lex mercatoria* at least in four legislative moments:

(a) In section 3 when it affirms that "The provisions of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of contracts used as a consequence of the development of international trade."

(b) In subsection 2, section 9 when it includes the lex mercatoria within applicable law when providing that "It shall also take into account the general principles of international commercial law recognized by international organizations."

(c) In section 10 when it provides that "In addition to the provisions in the above sections, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case."

(d) In section 15 when it provides –when referring to agency and representation of companies- that section 10 shall apply to agency contracts, that is to say guidelines, customs, and principles of international commercial law shall apply and not domestic law.

I want to add a fifth legislative moment that is a fundamental stone for those against *lex mercatoria*, which is the abovementioned section 17, pursuant to which the same Convention characterizes law as the law in force and effect in a State excluding rules concerning conflict of laws.

c) APPLICABLE LAW IN ABSENCE OF CHOICE

Section 9 provides that if the parties have made no choice of applicable law, the contract shall be governed by the law of the State with which it has the closest ties. On the one hand, it uses a flexible connecting point based on the principle of proximity which is an innovating element that derives in the displacement of the responsibility of determining the applicable law from the legislator to the Judge or arbitrators. On the other hand, the Convention does not set a criteria nor guideline in determining the applicable law, unlike its source the Convention of Rome. The Convention indicates the court that shall consider all objective and subjective elements to determine the law of the State with which the contract is most closely related. Moreover, pursuant to section 8, the parties have the power to subject the contract, whether in whole or in part, to a different law to that which previously governed the contract, having such choice been made by the parties or not. The modification of law may not alter the validity of the original contract nor third party rights.

It is worth highlighting that in the Oriental Republic of Uruguay most prestigious legal scholars when referring to the Inter-American Convention have insisted on the importance of determining the most closest ties instead of leaving such determination to the court's discretion and highlighted the convenience of presuming that the country most closely connected to the contract is that where the characteristic performance shall be fulfilled. In such sense, they sustain that the rejection of such presumption, based on the apparent argument that such presumption may be different depending on the contracts -Harold Burman's argument (from Tucson)-, ultimately aims at leaving the problem to the courts, following a *common law* orientation in which the parties' and the court's discretion is preferred over the legislator's one when dealing with private interests. This explains why the commission rejected Herbert-Opertti joint proposal of guiding the judges task of deterring the applicable law by considering

applicable the law of the domicile -in case of individuals- and the principal place of business –in the case of legal entities- whenever the place of the characteristic performance cannot be individualized.

d) LIMITS TO THE APPLICATION OF FOREIGN LAW

The Convention includes international public policy rules as a limit to the application of foreign law. Section 18 provides that the law indicated by the Convention may only be excluded when it is manifestly contrary to the public order of the forum. In all, among the most outstanding features, we shall highlight the following: first, the recognition of freedom of choice regarding the determination of the law applicable to international contracts; second, the adoption of flexible criteria to determine the applicable law in absence of the parties' choice of law; third, it does not include the characteristic performance of the contract as a presumption of the closest ties; fourth, it includes the *lex mercatoria* as a guideline for judges and arbitrator; and fifth, it limits the application of foreign law when the law indicated as applicable by the Convention is manifestly contrary to the forum public policy rules.

VI. LEGISLATIVE HARMONIZATION OPTIONS

We shall now analyze which are the possible ways of archiving legislative harmonization in MERCOSUR:

- Amend domestic laws of the Member States.
- Ratify or adhere to the Inter-American Convention on the Law Applicable to Contracts from Mexico (1994); as proponed by Brazilian legal scholars when asserting that "an adequate solution would be to replace section 9 of the Introductory Law to the Civil Code by the rules of the Inter-American Convention on the Law Applicable to Contracts (1994), which was signed by Brazil, which would be useful not only to regulate international contracts between American States but also as rules on conflict of laws for all international contractual relationships" –considering that only the Bolivian Republic of Venezuela has adhered to the CIDACI.
- Draft an instrument, convention, agreement, protocol for MERCOSUR on the law applicable to international contracts, of the same type of and similar characteristics to the Protocol of Buenos Aires on International Jurisdiction dated August 5, 1994, in full force and effect.

The first option, from my point of view, is not easy to attain in the short term. It is extremely necessary so as to strengthen and consolidate the integrated space to have clear rules and, as we have seen, although it is true that two MERCOSUR countries are under review of its domestic rules on conflict of laws applicable to contracts, the other MERCOSUR States have not followed the same path, save for Venezuela that did so in 1998.

The second option of ratifying or adhering to the Inter-American Convention on the Law Applicable to Contracts, is areasonable alternative since we would not be wasting the efforts done so far over which the most prestigious scholars have debated.[78] In this case, if MERCOSUR Member States agree to this

[78] In the XVII National Meetings on Civil Law (*XVII Jornadas Nacionales de Derecho Civil*) in Santa Fe on September, 1999 the Commission No. 7 on International Private Law particularly dealt with the regime applicable to contracts and its integration in MERCOSUR. Among others, they concluded that: "The existence of a common market, as the one intended by MERCOSUR, depends largely on the good decisions taken with respect to contractual solutions. The creation of the integrated market generated a historical lack of regulations in the matter that needs to be properly solved since the legal framework on contracts may favor or damage the integration process. It is necessary to consider the legal signs raised by the market and the trust on such market looking for useful, just, safe and efficient solutions. The solutions given by the current international framework, highlighting the Montevideo Treaties, are not enough mainly because, as it is the case of such treaties, sometimes they do not grant sufficient space to the parties' freedom . An integrated system needs, for having a dynamic market, that the parties be the most important protagonist in its dispute resolution. Aiming at perfecting the international solutions, the Inter-American Convention on the Law Applicable to International Contracts may no be adequate due to the mixture of an excessive flexibility in its solutions and its broad scope of application. The integrating process needs its own rules with a closer and developing spirit which exceeds the mere international level. In this sense, it is possible that the rules on conflict of laws need to be progressively replaced by substantive solutions. A way of getting MERCOSUR law is the harmonization of its substantive and conflict of laws rules. The legal framework applicable to MERCOSUR's contracts shall consider a level of general solutions and other level referred to contracts requiring specific solutions. Avoiding legal transpositions that may ignore MECOSUR particular features, it would be useful to take the European Union example which has gone a long way since the Convention on the Law Applicable to Contractual Obligations and the efforts to perfect it. The VIII Title to the Civil Code Bill –currently being analyzed by Congress- is considered, regarding international contracts, constitute suitable basis for discussing a new domestic legal framework." CIURO CALDANI, Miguel Ángel, "Bases sobre el Régimen de los Contratos in el MERCOSUR",

mechanism there would be a desirable legislative harmonization on international contractual matters. Notwithstanding, I believe there is an obstacle to this harmonization which may apply to any instrument that Member States may intend to adopt. Although it is true that the four countries seem to be willing to expressly uphold the parties' freedom of choice as a main principle on contractual law (although with limited scope), it is also true that they do not seem inclined to accept the determination of applicable law in absence of the parties' choice by flexible criteria based on the proximity principle. In fact, that shall be so since the only MERCOSUR Member State which is familiar with such tendencies is the Argentine Republic which enables to conclude that in the future it would be inclined to accept –given its antecedents, both form legal scholars and case law- flexible criteria such as the closest ties or the characteristic performance while the other Member States are more inclined to adopt rigid connecting points, in particular the place of performance. In these regards, it would be convenient to analyze the existing Reform Bills on Private International Law, except for Venezuela.

The third option, i.e. the drafting of an autonomous set of rules specific for MERCOSUR, is the one with which I sympathize more and I truly encourage it. This option will enable the legislator to create an international legal instrument that, without disregarding the antecedents from domestic International Private Law regimes and treaties, reflects the idiosyncrasy of MERCOSUR Member States.[79] We cannot disregard that the commitment assumed by Member States shall aim at attaining a certain equilibrium between the convenience of overcoming differences and the need to not altering the essence and definitive features of the States and the peoples that belong to MERCOSUR.

VII. CONCLUSIONS

- The development of Private International Law in Latin America may only be explained and fully grasped by resorting to Comparative Law. That is the reason why I have proposed this analysis of MERCOSUR Member States domestic laws. The introspective analysis of our own law and its contrast against foreign law, is not only the best way of self-evaluation but also allows us to reveal the common elements among laws so as to build any legal project.

- The existing coincidences among the Private International Laws of the MERCOSUR Member States, on contractual matters require deepening into legislative harmonization. In that way, the contradictions and dispersions of certain Private International Law rules among the different MERCOSUR Member States and the anachronism between domestic law and treaties would be overcome.

Investigación y Docencia N° 31, Rosario, Centro de Investigación de Filosofía Social, Fundación para las Investigaciones Jurídicas, pages 19 and 20, 1998This author sustained that "Although we have our reservations on ratifying a convention with international scope that, leaving aside continental traditions and replacing them by excessively uncertain solutions and allowing maybe inevitable precisions over judges, leaves so much to the discretion of those who solve cases, we believe that maybe an Additional Protocol or some imperative declaration could have been useful in a context of relative inter-changeability in an integration process such as MERCOSUR, but it would be a severe inconvenient in that the binding effect of the agreement would also apply to MERCOSUR non-Member States." FERNANDEZ ARROYO, Diego. I fully agree with those who have accurately sustained that this Convention "is an unavoidable refrence in the elaboration of any discourse on American Private International Law on contracts. Ibidempage 137; NOODT TAQUELA, María B. "Convención Interamericana sobre Derecho aplicable a los contratos internacionales" in: *El Derecho internacional privado interamericano in el umbral del siglo XXI, Sextas Jornadas de Profesores de Derecho Internacional Privado*, Segovia, 1 y 2 de diciembre de 1995, Madrid, Departamento de Derecho Internacional Público y de Derecho Internacional Privado, Universidad Complutense de Madrid/ Eurolex, Page 100, 1997, This author sustained that "for the first time it has been adopted a framework based in flexible connecting criteria in the Inter-American sphere. It entails an important change in the ideas of Latin-American States with civil-law traditions. Although the results that may arise from practice are not to be necessarily different, it modifies the general perspective: it starts from a flexible principle that appears to be, at first glance, too uncertain and it grants large discretion to the judge." In her point of view, we will need a long time of application of the Convention to enable those who shall apply it to get familiar with this flexible principle. In the meanwhile, there may be fear and uncertainty.

[79] OPPERTI BADAN, Didier. "El estado actual del tratamiento jurídico de los contratos comerciales internacionales in el continente americano" in Frédérique Mestre y Patricia de Seume, Edition, *Los Principios de UNIDROIT: ¿Un derecho común de los contratos para las Américas*. 1998. Furthermore, this prestigious Uruguayan author sustained that MERCOSUR Member States should not restrict themselves to adopt and ratify the Convention of Mexico, but rather to make certain recommendations such as, for example, that freedom of choice would be a possibility in MERCOSUR Member States when the contractual relationships takes place within the integrated space which would at least make more real the presumption of knowledge of the applicable law sustained by those in favor of an autonomous solution. If an agreement cannot be reached within the MERCOSUR in these terms, as in the case of the treaty on jurisdiction, the author recommends adopting a convention or protocol on applicable law. If it were to be a protocol, that would not exclude the possibility of ratifying the Inter-American Convention of the Law Applicable to Contracts.

- The international sphere claims for certainty for its development and peaceful knotting of international transactions. The complexity that characterizes contractual matters should not intimidate MERCOSUR Member States when it comes start working towards legislative harmonization.

- MERCOSUR contractual law is not a mission impossible. Legislators have elements at reach since the basis offered by existing contractual regulations -both in domestic laws and treaties as well as legal scholars and case law- in the four countries, Chile and Venezuela shows a favorable context for reaching consensus.

- It cannot be disregarded that, although it is true that the Convention of Mexico on the Law Applicable to International Contracts (1994) is the most known post-modern expression in International Private Law, it is also true that its mere adoption would not be convenient since there are certain issues related to the domestic International Private Laws of MERCOSUR Member States.

I hope to have reached the main objective in mind. Now we shall hope that this analysis be interpreted by those who have the task of reaching legislative harmonization. It is time to think of the future, not as what is going to happen, but as what we are willing to do. Who is up to it, please raise your hand.
