Summary

The Hague Principles, the OAS Guide and the New Paraguayan Law on International Contracts[1]

José Antonio Moreno Rodríguez

I. Introduction

Countless transactions flow daily boosting worldwide commerce through international contracting. A central issue regarding them relates to applicable law. Inconceivably, this matter lags appropriate regulation. Only Europe has managed to advance a regional document, currently in vigor in most of the countries of the Union. The Americas, in turn, proposed in recent decades a praised regulation, which failed in attracting a substantial number of ratifying countries. The situation worsens in other regions, where no initiatives have come to fruition.

This scenario can change dramatically after the formal approval, in 2015, of a global instrument on applicable law in international contracting advanced by the Hague Conference on Private International Law, undisputedly the most prestigious global codifying organization of the field in the world. Paraguay has been the first country to implement its solutions via legislation, and currently, the Organization of American States (OAS) is preparing a Guide which expectedly will make conditions ripe for reforms in the same direction in other countries of the continent.

After a short historical note, this presentation will describe these recent developments and argue how they can inspire legal reform efforts in other regions and countries of the world.

II. Two Centuries of Mischief

As an unfortunate legacy of developments that unfolded during the nineteenth century, choice of law in international contracts has become a chaos, characterized by conflicting solutions around the world.

Nationalistic movements in Europe and the Americas laid to rest the idea of a universal law and took a direction far from what had been enshrined in

the medieval-consolidated *ius commune* and *lex mercatoria*. Throughout civil law jurisdictions, nation-states sanctioned civil and commercial codes, while common law jurisdictions furthered their own national precedent-based laws. This, in turn, provided impetus for the development of private international law as a discipline destined to solve the puzzle of *conflict of laws* in times when national solutions that attempted to address the problem were alarmingly contradictory.[2] Place of execution, place of performance and other formulas were proposed to solve, for instance, matters regarding the law applicable to international contracts.

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The German jurist Savigny was very influential in the mid-nineteenth century with his idea of unifying these formulas in an international treaty that would bind all ratifying nations.[3] This proposal led to the inauguration of a Hague Conference on Private International Law in 1893 under the leadership of the Dutch jurist Asser.[4] However, more than a hundred years would pass before the Hague Conference - converted into a permanent body in 1955 - would address the issue of choice of law in international contracts.

In the meantime, the Americas took the lead. One of the Montevideo Treaties of 1889, signed in the city so-named, specifically addresses the issue of choice of law, albeit with highly controversial solutions regarding absence of choice and silence in relation to party autonomy.[5] These early Montevideo treaties remain binding on Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. In 1940, new treaties were signed in Montevideo (ratified by only Argentina, Paraguay and Uruguay) that reaffirmed the earlier solutions regarding absence of choice of law and a general rule - with exceptions - of the applicability of the law of *the place of performance*. Furthermore, these later treaties provided that each state should determine for itself the acceptance - or not - of the principle of party autonomy, an issue that, in

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the absence of clear provisions to that effect in domestic legislation, became very controversial in Brazil[6], Paraguay[7] and Uruguay[8].

Many other states in the continent, such as Brazil, Chile and Venezuela, did not incorporate the Montevideo Treaties, but instead ratified the so-called Bustamante Code of 1928 which was adopted as a result of the Sixth Pan-American Conference that took place in La Habana, Cuba, in 1928. This Code offers a different solution in the absence of choice of law, namely, that the law *of the place of execution* shall be applicable; it has also raised many questions as to whether or not party autonomy is endorsed.

By the mid-twentieth century, there was a general feeling that the above-mentioned documents adopted in the Americas were highly unsatisfactory, firstly, due to the questionable solutions they proposed, and secondly, because of the divergences among them. To make matters worse, there were states in the continent that had not ratified any of these instruments, notably, from the common law world.

The establishment of the OAS in 1948 spawned strong hopes that the situation finally would be resolved. After careful evaluation, the OAS decided against the notion of developing a general code such as Bustamante's, but instead, to work towards *gradual* codification of particular topics in the field of private international law.[9]

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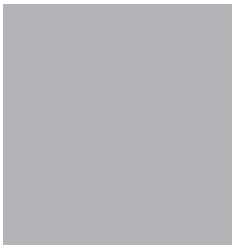
This idea started fruition in 1975 with the first Inter-American Specialized Conference on Private International Law (CIDIP) that had been convened to adopt certain instruments in topics such as arbitration and commercial law, among others. To date, seven CIDIPs have been convened that have resulted in the adoption of twenty six international instruments (including conventions, protocols, uniform documents and model laws).[10]

It was not until CIDIP V took place in Mexico City in 1994 that the issue of choice of law in international contracts was addressed. The resulting instrument is the *Inter-American Convention on the Law Applicable to International Contracts*, commonly known as the "Mexico Convention." It clearly recognizes party autonomy and in the absence of choice, adopts the formula of "the closest connection", which can lead either to the application of national law or non-State law[11].

Even though it was welcomed by relevant legal scholars,[12] the Mexico Convention itself has so far only been ratified by Mexico and Venezuela, unlike other continental instruments which enjoy widespread reception. Speculation is rife as to why the Convention was not ratified by more countries. Some writers state that the legal establishment in the region was not sufficiently prepared to receive its solutions,[13] or that perhaps there was ignorance of other modalities for its reception besides ratification. Regarding the latter, an alternative would be, for instance, simply copying its provisions into a national law on the matter, as done for instance in Venezuela.[14]

The comparable European instrument on choice of law, known as the *Rome Convention of 1980*[15], has enjoyed a different fate. This document was adopted by several European states and, in 2008, was converted into a European Regulation which made it applicable - initially with some exceptions - to the whole of the European Union. The Rome instrument - just as the Mexico Convention - settles the issue in favor of party autonomy. In the absence of choice, the European regulation adopts controversial solutions in favor of the place of characteristic performance[16]. Direct applicability of Non-State law is discarded in the Rome instrument. It can only be incorporated by reference in the contract[17].

The Rome Convention became relevant not only because of its adoption



by the European block, but also due to its influence in the drafting of the Mexico Convention in the Americas and, more recently, in the preparation of an instrument that addresses the issue on a global scale.

III. Towards Universal Solutions: The Hague Principles

Success of the Rome Convention led the Hague Conference on Private International Law to undertake feasibility studies in the early 1980s regarding the possible adoption of a similar instrument on a global scale. This endeavor was discarded after considering the difficulties of obtaining massive ratification of the proposed instrument, lack of which would make the endeavor a failure.[18] However, in recent years the matter was resumed and feasibility studies that took place between 2005 and 2009 indicated that perhaps a different type of instrument could prove successful and effective.[19]

Accordingly, a Working Group was convened in 2010[20], which advanced the idea that rather than targeting adoption of a treaty or "hard law" instrument, to develop instead a "soft law" document, inspired as to drafting technique by the highly-praised UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles address substantive law issues while the Hague Principles - as they are commonly known - are limited to choice of law issues, specifically in relation to party autonomy.

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Absence of choice is not addressed, perhaps because this would have made the project too ambitious, and perhaps also because it makes little sense to regulate these issues in a "soft law" instrument[21]. Given that the Hague Principles - just as the UNIDROIT Principles - are not intended to be formally adopted by states, their applicability will normally derive as a result of their having been selected by the parties in the exercise of party autonomy.

Of course, additional uses are also envisaged for the Hague Principles, notably as an interpretative tool for judges and arbitrators and as a model for legislators.

IV. The Paraguayan Example

The Paraguayan Law on international contracts is in vigour since January 2015[22]. The law comprises 19 Articles. Its first part, regarding choice-of-law, basically reproduces the Hague Principles, with minor modifications[23]. The following provisions mostly deal with the applicable law in the absence of choice, replicating almost literally the Mexico Convention of 1994[24]. Finally, the Law incorporates norms regarding public policy in line with the Hague Principles[25] and derogations.[26]

The Statement of Motives of the Paraguayan law notes that after possessing one of the most antique regimes of the world in matters of cross-border contracting, Paraguayan legislation becomes forward-looking and could even inspire other texts that might be adopted elsewhere in the world, given that it sets a path showing how actually to embody the Hague Principles in a national legislative text[27].

Some highlighting features of the Paraguayan enactment are the following: In line with the Hague instrument, the party autonomy principle is amply admitted[28]. In Paraguay, scholarly opinions were divided regarding the solution adopted by the Civil Code[29] until recently, when the Supreme Court decided in favor of party autonomy.[30] However, Paraguay is a civil law system country and precedent does not have the same binding effect that it has in common law jurisdictions. The need for a law to settle this issue was pressing.

Broad acceptance of party autonomy in the new Paraguayan law is reflected, for instance, in that no connection is required between the law chosen and the parties or their transaction. This is still a requirement in some systems, such as the US in its Restatement

(Second) of Conflict of Laws, Article 187(2)(a).[31] However, there exists a tendency towards its abandonment, as reflected in recent international instruments[32], among them Rome I[33], the Mexico Convention and the Hague Principles.[34]

Party autonomy is recognized to a maximum extent in the Paraguayan enactment when granting formal status to non-State law, becoming the first law in the world to do so openly, for the purpose of court proceedings[35] This solution levels "the playing field" between arbitration and litigation, at least in countries that have adopted the UNCITRAL Model Law[36]. It is no longer necessary to include an arbitral clause to assure that the choice of non-State law will be respected.

The Paraguayan law also includes other forward-looking provisions included in the Hague instrument. For instance, choice of law is not in principle subject to any requirement of form[37]. Thus, the agreement on choice of law can be oral or made via electronic communication. Also, the choice of law clause is considered independent from the contract containing it[38]. This separability principle is aligned with Rome I, and in jurisdictional issues with the Hague Choice of Court Convention of 2005,[39] as well as, in arbitration, with the UNCITRAL Model Law[40]. The Paraguayan Law also transcribes the innovative provision of the Hague Principles providing for solutions regarding conflicting standard terms[41].

In absence of choice, the law follows the solution of the closest connection contained in the Mexico Convention[42], and discards the previous highly-criticized solution of the "place of performance" followed by the Montevideo Treaties, ratified by Paraguay and also adopted by the national Civil Code.[43] Since in the Paraguayan enactment the term Law is equated to Non-State law, if adjudicators find that transnational rules are more appropriate and thus more closely connected to the case than national law, they will apply them directly.[44]

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Under the title "equitable harmonization of interests", Article 12 of the Paraguayan Law copies Article 10 of the Mexico Convention. Accordingly, it states the following: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usages and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case." This equitable or corrective formula will apply both when the law was chosen and in the absence of choice.

In the Americas, a similar corrective formula has been accepted for many years through Article 9 of the 1979 OAS Inter-American Convention on General Rules of Private International Law, ratified by several countries in the region.[45] In the arbitral world, Article 28(4) of the UNCITRAL Model Law, copied in many arbitral regulations in the Americas, also includes a corrective formula.[46]

Regarding the highly-contested notion of public policy, as do the Hague Principles, the Paraguayan Law attempts to clarify this mess and to simplify the terminology.[47] In relation to the so-called *lois de police*, it states that the parties' choice of law does not forbid the judge to apply the mandatory norms of Paraguayan Law which, according to the latter, should prevail even in the presence of a choice of foreign law. The judge may or may not take into consideration the mandatory norms of other States closely connected with the case, taking into account the consequences of its application[48]. In relation to public policy as a defensive mechanism, the judge may exclude the application of a provision of the law applicable if and to the extent that the result would be manifestly incompatible with the notion.[49]

In a balance, Paraguayans need no longer be ashamed. After suffering one of the more anachronistic regimes in the world in the field of international contracting, they are now reaping the benefits of an apt regulation. The Hague Principles have given the world a formidable model upon which to craft legislation. Paraguay has taken advantage of this with its new Law. Hopefully, other countries will soon follow suit.

V. What Now in the Americas?

The Hague Principles were highly influenced by solutions proposed by both the Rome Convention and the

Mexico Convention. More than twenty years have passed since the approval of the Inter-American instrument and, of course, the Hague Principles also incorporated subsequent developments that paved the way for solutions to some new issues, such as, for instance, severability of the choice of law clause from the main contract. Furthermore, this soft law instrument has been better able to solve issues that, in the development of the Mexico Convention had been subject to compromise solutions due to the complexity of negotiations that lead to adoption of a treaty; this is particularly so regarding non-state law.

Now, what's next for the Americas? Will the region insist on the ratification of the Mexico Convention? Should the Convention be amended, taking into consideration new developments? Perhaps a model law should be prepared? The latter question has gained particular momentum after the enactment of the new Paraguayan law on international contracts.

Recently, the Inter-American Juridical Committee of the OAS analyzed all these alternatives after circulating a questionnaire to OAS Member States and prominent private international law specialists. Responses reflect the perception that, evidently, the Hague Principles have gone further than the Mexico Convention and its provisions could serve to amend the Inter-American document.[50]

However, considering that the Mexico Convention which dates from 1994 has received only two ratifications, the real question is whether a process leading to a new revised convention would be worth the effort. One possible answer is that such a revised document may be much better received by the legal community within the Americas and also that this may provide an opportunity to correct the English translation of the original instrument, which has been criticized by anglo-speaking jurists.

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But the process of negotiating and approving a convention is very complicated and costly, while other kinds of

instruments - such as model laws and legislative guides - have proven to be highly effective means to harmonize private international law solutions. Ultimately, it would be far more effective for Latin American states to adopt national laws in accordance with best practices endorsed by the OAS and by the Hague Conference, applicable to all international transactions, rather than to promote the adoption of treaties like the Mexico Convention and its eventual amendment, which would only affect contracting parties in ratifying states.

So, a model law or a legislative guide may be a good idea. But why just a *legislative* guide? Why not a guide that could also be useful to judges, arbitrators, contracting parties and academics? In response, the Inter-American Juridical Committee has entrusted one of its members to draft a guide on the law applicable to international contracts with support from the OAS Department of International Law[51]. This guide will later be subject to formal approval by the Committee as a whole.

This proposal combines the best of all worlds: Firstly, the guide will serve as an instrument that will educate. This is not a minor thing, considering that one of the reasons why the Mexico Convention has met strong resistance is attributed to misinformation as to its content and implications. A guide can overcome this obstacle.

Secondly, the guide will be a tool available to legislators that takes into account recent developments enshrined in the Hague Principles and that also covers matters not addressed therein but that were regulated in the Mexico Convention, specifically regarding absence of choice.

Thirdly, the guide can take advantage of the fact that UNIDROIT, UNCITRAL and The Hague Conference are envisaging the drafting of a document explaining the interplay between the UNIDROIT Principles, the Vienna Convention on Sales and The Hague Principles. Reference to this interplay can be made, in turn, at the OAS document.

Finally, the guide could be a powerful *interpretative* tool in the hands of judges, arbitrators and parties, considering the alarming uncertainties that still persist in the subject of international contracting. The instrument will illuminate solutions based on common-sense and highly debated that are contained in both the Hague Principles and the

Mexico Convention, explaining their intricacies and comparing them, when appropriate, with the response of other instruments such as the Rome I Regulation.

VI. Conclusion

Two recent developments are key for the future of international contracting regulation in the Americas: the adoption of the Hague Principles and the enactment of the new Paraguayan law on international contracts. The latter serves as a model of how the Principles can be incorporated into national legislation. Driven by these accomplishments, the OAS is preparing its *Guide for the Americas on the Law Applicable to International Contracts*. Perhaps the new Paraguayan law, together with the Inter-American guide –that will develop intricacies of choices available to regulators–, can pave the way and ease reformist efforts in the Americas and other regions of the world.

[1] This presentation is drawn upon the papers prepared for the "Global Forum on Private International Law China" (Wuhan, China, September of 2017), organized by the China Society of Private International Law with the support of the Hague Conference on International Private Law; and for the Congress "Towards a Global Framework for International Commercial Transactions" (Lucerne, Switzerland, September, 2016), organized by the University of Lucerne and the the Hague Conference on International Private Law. It also excerpts material included in the following article: Moreno Rodríguez, José Antonio, The New Paraguayan Law on International Contracts: Back to the Past? (2016). Eppur si muove: The Age of Uniform Law - Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday, VOLUME 2, ISBN: 978 88 86 44 93 66 . Available at SSRN: https://ssrn.com/abstract=2958771

[2] In fact, the discipline stands as an independent branch just since the XIX century (G. Kegel, International Enciclopedia of Comparative Law, Chapter 3, Fundamental Approaches, J. C. B. Mohr (P. Siebeck)/ Tübingen/ and Martinus Nijhoff Publishers/ Dordrecht/ Boston/ Lancaster, 1986, p. 5).

[3] M. F. C. de Savigny, Sistema de Derecho Romano Actual, Tomo Sexto, Segunda Edición, Centro Editorial de Góngora, Madrid, p. 137.

[4] In 1881, the Italian jurist and politician Mancini tried to move forward a conference on Private International Law, which did not happen. The initiative was resumed by the Dutch jurist Asser, and under his influence his countries' government invited European States to a conference regarding international codification in the field in 1892 (M. Wolff, Derecho Internacional Privado, Traducción española de la segunda edición inglesa por Antonio Marín López, Barcelona, Editorial Bosch, 1958, p. 44). This constitutes the genesis of the Conference on International Private Law.

[5] Regarding critics, see, for example, D. Hargain/ G. Mihali, Régimen Jurídico de la Contratación Mercantil Internacional en el MERCOSUR, Montevideo/ Buenos Aires, Julio César Faira Editor, 1993, p. 31, p. 39. On the issue of the autonomy of the will in the Treaties of 1889, see in: R. Santos Belandro, El Derecho Aplicable a los Contratos Internacionales, 2ª Ed., Montevideo, Editorial Fundación de Cultura Universitaria, 1998, pp. 55-56.

[6] N. de Araújo, Contratos Internacionais, 2ª Ed., Río de Janeiro, Libraría e Editora Renovar Ltda., 2000, pp. 320-324.

[7] See my article on "Autonomía de la Voluntad en el Derecho Internacional Privado Paraguayo", in the book Homenaje a Tatiana Maekelt, CEDEP, Asunción, 2010, pp. 409 y siguientes.

[8] Can be seen in total account in: C. Fresnedo de Aguirre, La Autonomía de la Voluntad en la Contratación Internacional, Montevideo, FCU, 1991. Currently, there is an important shift on this topic, analyzing in a broader perspective in the following excellent work: D. Opertti Badán, "El Derecho Internacional Privado en tiempos de globalización", en Revista Uruguaya de Derecho Internacional Privado, Año VI, Nº 6, Montevideo, Editorial Fundación de Cultura Universitaria, 2005.

[9] See, for example, in: J-M. Arrighi, "El proceso actual de elaboración de normas Interamericanas", en Jornadas de Derecho Internacional, Córdoba, Argentina, organizadas por la Universidad Nacional de Córdoba y la Secretaría General de la Organización de los Estados Americanos, Subsecretaría de Asuntos Jurídicos, Washington, D.C., 2001.; E. Villalta, "El De-

recho Internacional Privado en el Continente Americano", en Los servicios en el Derecho Internacional Privado, ASADIP y Programa de Pos-Graduacao em Direito da Universidade Federal de Rio Grande do Sul, Porto Alegre, Brasil, 2014, pp. 23 and following.

[10] See in: http://www.oas.org/dil/esp/derecho_internacional_privado_conferencias.htm

[11] As understood by Juenger, delegate of the United States in the deliberation leading to the Mexico Convention. F.K. Juenger, "The Lex Mercatoria and Private International Law", en 60 Louisiana Law Review, 2000, pp. 1133-1148. The relevance of this opinion is highlighted by Siqueiros, who drafted the Project of said instrument, since Juenger himself proposed the formula used in this article after a heated debate and in a position of compromising. J.L. Siqueiros, "Los Principios de Unidroit y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales", en Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, México, Universidad Nacional Autónoma de México, Universidad Panamericana, 1998, p. 223.

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

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

[14] This was the case of Venezuela (E. Hernández-Bretón, La Convención de México (CIDIP V, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina, in DeCITA 9, Derecho del Comercio Internacional, Temas y Actualidades, Asunción, CEDEP, 2008, p. 170). On the Venezuelan Law, see T.B. de Maekelt / C. Resende / I. Esis Villaroel, Ley de Derecho Internacional Privado Comentada, T. I y II, Caracas, Universidad Central de Venezuela, 2005. In particular, in Volume II, the work of J. Ochoa Muñoz / F. Romero, on the applicable law to international contracting and the lex mercatoria (pp. 739-832).

[15] Denominated as: "Convention on the Law Applicable to Contractual Obligations"

[16] See: G.A. Bermann, "Rome I: A Comparative View", en F. Ferrari / S. Leible (eds.), Rome I Regulation, The Law Applicable to Contractual Obligations in Europe, München, Sellier, 2009, p. 350.

[17] See critics to this in: M. J. Bonell, "El reglamento CE 593/2008 sobre la ley aplicable a las obligaciones contractuales ("Roma I") – Es decir, una ocasión perdida", en Cómo se Codifica hoy el Derecho Comercial Internacional. J. Basedow/ D.P. Fernández Arroyo/ J.A. Moreno Rodríguez (eds..), CEDEP y La Ley Paraguaya, 2010.

[18] See in: M. Pertegás/ I. Radic, "Elección de la ley aplicable a los contratos del comercio internacional. ¿Principios de La Haya?", en Cómo se Codifica hoy el Derecho Comercial Internacional, J. Basedow/ D.P. Fernández Arroyo/ J.A. Moreno Rodríguez (eds.), CEDEP y La Ley Paraguaya, 2010, p. 341.

[19] Access to the preparatory Works can be seen through the site www.hcch.net.

[20] N. B. Cohen (United States); The Hon. Justice Clyde Croft (Australia); S. E. Darankoum (Canada); A. Dickinson, (Australia); A. S. El Kosheri (Egypt); B. Fauvarque-Cosson (France); L. G. E. Souza Jr. (Brasil); F. J. Garcimartín Alférez (Spain); D. Girsberger (Switzerland); Y. Guo (China); M. E. Koppenol-Laforce (Netherlands); D. Martiny (Germany); C. McLachlan (New Zealand); J. A. Moreno Rodríguez (Paraguay); J. L. Neels (South Africa); Y. Nishitani (Germany); R. F. Oppong (United Kingdom); G. Saumier (Canada) e I. Zykin (Russia). The following observers also joined the Working Group: M. J. Bonell (UNIDROIT); F. Bortolotti (International Chamber of Commerce); T. Lemay (UNCITRAL); F. Mazza (Arbitration Court of the International Chamber of Commerce); K. Reichert (International Bar Association) y P. Werner (International Swaps and Derivatives Association). Later on, T. Kadner Graziano (Switzerland) y S. Symeonides (Cyprus) joined the Work Group, with the last member having a long history in North American Law.

[21] This was widely discussed in the deliberations of the Work Group in the Hague, from which I participated.

[22] Law 5393 "on the law applicable to international contracts". The title in Spanish is: "Sobre el derecho aplicable a los contratos internacionales". See, both in Spanish and English, here: https://www.hcch.net/en/publications-and-studies/details. The law was enacted in January 15, 2015. Published on January 20, 2015, the Law has been in force as from the following day. 4/?pid=6300&dtid=41.

[23] Articles 1-10, as well as Articles 13-14.

[24] Articles 11-12, 15-16.

[25] Article 17.

[26] Article 18. The law derogates several Articles of the Civil Code (Articles 14, 17, 297, 687 and 699 (b), regarding international contracts, most of them containing chauvinistic rules).

[27] Authorship of the law is attributed in the Statement of Motives to Doctor José A. Moreno Rodríguez, a Paraguayan national Member of the Working Group of the Hague Conference on Private International Law and representative, formally appointed by the Ministry of Foreign Affairs, to the Special Committee which approved the text of the Hague Principles which was reproduced almost entirely by the bill.

[28] Article 4 of the Paraguayan Law reproduces Article 2 of the Hague Principles. The Article further opens the doors for dépeçage. The parties may choose if they wish different laws applicable to different parts of the contract, provided that they be clearly distinguished. Also, choice of law may be made or modified at any time.

[29] See the discussion in: J.A. Moreno Rodríguez, Autonomía de la voluntad en el Derecho internacional privado paraguayo, in Libro Homenaje a Tatiana Maekelt, CEDEP, Asunción, 2010. The article is accessible at: http://www.pj.gov.py/ebook/monografias/nacional/internacional-privado/Jos%C3%A9-Antonio-Moreno-Autonomia-de-la-voluntad-en-el-derecho-internacional-privado-paraguayo.pdf.

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

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

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

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

[34] See J. A. Moreno Rodríguez, La Convención de México sobre el Derecho Aplicable a la Contratación Internacional, Publicación de la Organización de Estados Americanos, 2006, III, D, 7. This, in turn, is in accordance with arbitral practice. ICC Case Nº 4145 de 1984, XII (1987) Yearbook Comm. Arb., 97 (101). ICC Case No. 4367 of 1984, XI (1986) Yearbook Comm. Arb., 134 (139).

[35] The Working Group that drafted the Hague Principles, in its deliberations, pondered the question whether it should confine itself to admitting non-State law in arbitration or whether it should go beyond the status quo. L. Gama Jr. / G. Saumier, Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts, in El Derecho internacional Privado en los procesos de integración regional, Jornadas de la ASADIP 2011, San José, Costa Rica, 24-26 November, ASADIP y Editorial Jurídica Continental, San José, 2011, pp. 62-63.

[36] M. Pertegás / B.A. Marshall, Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts, in 39 Brooklyn Journal of International Law, 2014/3, p. 979. Or "bridging the gap (G. Saumier, Designating the Unidroit Principles in International Dispute Resolution (November 8, 2011), in 17 Uniform Law Review, 2012, p. 533. Available at: SSRN: http://ssrn.com/abstract=2012285, p. 547).

[37] Article 7 of the Paraguayan Law, copied from Article 5 of the Hague Principles, states that a choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

[38] Article 9 of the Paraguayan Law, drawn from Article 7 of the Hague Principles.

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

[40] Article 16.

[41] Article 8.2 of the Paraguayan Law transcribes Article 6.2 of the Hague Principles, according to which "if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies;

if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law".

[42] Article 11 of the Paraguayan Law. This provision reproduces in part Article 9 of the Mexico Convention.

[43] Article 37 of the Montevideo Treaties and Article 17 of the Civil Code. The flexibility of this formula of the "closest connection" was in line with the former English notion (up to 1991, when the Rome Convention came into force in England) of the "proper law of the contract" (H.C. Morris, The Conflict of Laws, 7th ed., D. McClean / K. Beevers, Sweet & Maxwell, Thomson Reuters, 2009, p. 352), also in line with Restatement (Second) of "Conflict of Laws" of 1971 (Sections 145, 188) of the United States and the test of the "most significant relationship", prevailing in the majority of States (see S.C. Symeonides / W. Collins Perdue / A.T. von Mehren, Conflict of Laws: American, Comparative, International, Cases and Materials, American Casebook Series, West Group, St. Paul, Minnesota, 1998, p. 139).

[44] As stated by Jürgen Samtleben, there is no justification for insisting on a conflictual method leading to a national law whose connection to the contract may be more occasional than real. J. Samtleben, Avances del Derecho Internacional Privado en América Latina, Liber Amicorum Jürgen Samtleben, Montevideo, Editorial Fundación de Cultura Universitaria, 2002, pp. 26-27. Regarding cyberspace, as stated by Lessig, what before was the exception is now the rule. Conduct was once governed within a jurisdiction or jurisdictions in coordination. Nowadays, it is systematically governed within multiple jurisdictions that are not coordinated (L. Lessig, Code and Other Laws of Cyberspace, New York, Editorial Basic Books, 1999, p. 192).

[45] Argentina, Brazil, Colombia, Guatemala, Paraguay, Ecuador, Mexico, Peru, Uruguay and Venezuela. See in: http://www.oas.org/juridico/spanish/firmas/b-45.html. Article 9 of this Convention states: "The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case." Herbert and Fresnedo de Aguirre have pointed out that said article draws upon American doctrines of Currie (of governmental interests) and Cavers (of equitable solutions), contrary to the abstract and automatic system in place before in Latin America. The adoption of these doctrines has the merit of having left open an ample interpretative field to relax the rigid criteria of the continent up until then (see C. Fresnedo de Aguirre / R. Herbert, Flexibilización Teleológica del Derecho Internacional Privado Latinoamericano, in Avances del Derecho Internacional Privado en América Latina, Liber Amicorum Jürgen Samtleben, Montevideo, Editorial Fundación de Cultura Universitaria, 2002, p. 57. See also R. Herbert, La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales, 1 (1994) RUDIP, pp. 89-90).

[46] This Article corresponds exactly to Article 32 of Paraguayan Arbitration Law 1879 of 2002. The solution was originally included in the European Convention on Arbitration of 1961 (Article VII), and qualified by a leading arbitrator as one of the most significant accomplishments of the XXth century, liberating arbitration of local perceptions. M. Blessing, Choice of Substantive Law in International Arbitration, in 14 Journal of International Commercial Arbitration, 1997/2, p. 54.

[47] Article 17 of the Paraguayan Law adapts Article 11 of the Hague Principles, since the former directly targets the Paraguayan courts and not arbitrators.

[48] This possibility is also contemplated by the Mexico Convention in its Article 11, paragraph 2.

[49] When drafting the Hague Principles, a key consideration for the Working Group was to restrict State interference with party autonomy to a maximum. A consensus was reached that it is impossible to lay down precise guidelines on this matter, except in regards to the restrictive nature of public policy as an exception to party autonomy. http://www.hcch.net/upload/wop/contracts_2012pd01e.pdf.

[50] The Inter-American Convention on the Law Applicable to International Contracts and the Advance of its principles in the Americas, Document prepared by the department of International Law of the Secretariat for Legal Affairs of the Organization of American States, accessible at: www.asadip.org/v2/?p=5535 (last access: September 13, 2016).

[51] Currently Dr. José Moreno Rodríguez. Formerly, members of the Committee working on this matter where Elizabeth Villalta, Gélin Imanes Collot and José A. Moreno Rodríguez. The first report is expected to be delivered at the session of the Committee in October 2016 at Rio de Janeiro (http://www.oas.org/en/sla/iajc/agenda.asp - last access, September 13, 2016).

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