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# International Contracts in Latin America: History of a Slow Pace towards the Acceptance of Party Autonomy in Choice of Law\*

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ABSTRACT. The right of the parties to choose the law to govern international contracts, has been historically denied in Latin America due to the principle of territoriality of laws that has imbued national conflict provisions. Several regional and national attempts to authorize party autonomy have been disregarded on the grounds of protecting national sovereignty. Some jurisdictions have recently amended their laws to accept it. This acceptance has not meant a departure from their legal tradition, but an enhancement of the principle of contractual freedom, that has always pervaded their contract rules.

KEYWORDS: Choice of Law Clauses, Party Autonomy, Latin American Private International Law, Territorialism, Contractual Freedom.

## **Contratos internacionales en Latinoamérica: historia de un lento avance hacia la aceptación de la autonomía de la voluntad en la elección de la ley**

RESUMEN. El derecho de las partes a elegir la ley que gobierna sus contratos internacionales ha sido históricamente denegado en Latinoamérica, debido al principio de

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territorialidad de la ley. Varios proyectos regionales y nacionales para autorizar la autonomía de la voluntad han sido desechados argumentando la necesidad de proteger la soberanía nacional. Recientemente, algunos países han modificado sus leyes para aceptar esta autonomía. Esta modificación no les ha apartado de su tradición jurídica, sino que ha perfeccionado el principio de libertad contractual, que históricamente ha inspirado su derecho contractual.

**PALABRAS CLAVE:** cláusulas de elección de la ley, autonomía de la voluntad, derecho internacional privado latinoamericano, territorialismo, libertad contractual.

**SUMMARY.** Introduction. i. The concept and justification of party autonomy. ii. The early Latin American domestic conflict rules on contracts and party autonomy. iii. The Latin American treaties on contracts and party autonomy. iv. The statutory acceptance of party autonomy in the Latin American domestic conflict rules on contracts. Conclusions. References.

## Introduction

The possibility of recognising the validity of choice of law clauses in international contracts, namely, of party autonomy, has been widely discussed in Latin America for more than 130 years. It has, however, only been recently statutorily sanctioned in the domestic conflict rules of some Latin American countries: Peru (1984), Cuba (1987), Mexico (1988), Guatemala (1989), Panama (2014), Argentina (2014), Dominican Republic (2014) and Paraguay (2015)<sup>1</sup>. Other Latin American countries either reject it –this is the case in Brazil and Uruguay<sup>2</sup>– or, still have no clear rules in respect of it, as happens in Bolivia, Chile, Colombia and Ecuador. This longstanding active or passive resistance towards the acceptance of party autonomy in international contracts has historical grounds, which merit to be analysed in order to throw light on the possible ways to surmount them.

Specifically, this paper intends to analyse the principles that inspire the Latin American conflict rules on contracts in order to assess if they can be reconciled with the acceptance of the principle of party autonomy. It is structured in four sections. The first section provides a definition and brief justification of party autonomy in the conflict of laws. The second and third sections analyse the genesis of Latin American

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- 1 Art. 2095 Peruvian Civil Code (CC) (1984), art. 17 Cuban CC (1987), art. 13 v Mexican CC for the F.D and Federal Matters (1988), art. 31 Guatemalan Decree 2-89, art. 29 Venezuelan Private International Law Act (PILA), art. 77 Panamanian Code of Private International Law (CPIL), art. 58 Dominican Republic PILA, art. 4 Paraguayan Law 5393, art. 2651 Argentinian Civil and Commercial Code.
  - 2 BASEDOW, J., *The Law of Open Societies - Private Ordering and Public Regulations in the Conflict of Laws*, The Hague, Brill Nijhoff, 2015, 117-120.

conflict rules on contracts and their acceptance of autonomy. And the fourth section, examines the change of paradigm that led to the statutory acceptance of autonomy in some Latin American jurisdictions, in order to advocate for its acceptance in the remaining Latin American jurisdictions.

This acceptance of autonomy in all Latin American jurisdictions is urgently needed, since choice of law clauses are commonly included in international contracts connected to these jurisdictions and some national courts vacillate as to upholding them. Nowadays, there is significant juridical uncertainty about the efficacy of these choices in some Latin American countries. Additional techniques are necessary to secure their acceptance by courts; such as the choice of a forum where autonomy is accepted, or the submission of the case to arbitration. The efficacy of these techniques are, however, relative since the choice of forum might be challenged and not upheld by courts, or the arbitral award might be denied enforcement in a given Latin American jurisdiction. Thus, the universal acceptance of autonomy in cases submitted to judicial adjudication in Latin America would eradicate this uncertainty and help to harmonize conflict rules on contracts with respect to most countries.

The acceptance of autonomy is also needed to minimize the legal uncertainty caused by the diversity of conflict rules on contracts between Latin American jurisdictions. Hence, some jurisdictions submit the contract primarily to the law chosen by the parties, others to the law of the place of making of the contract<sup>3</sup>, others to either the place of performance, or that of making of the contract<sup>4</sup> and others to the place of performance determined by irrebuttable presumptions<sup>5</sup>. This diversity of conflict rules makes it difficult to predict the governing law of contracts connected to these jurisdictions. It also increases legal risks and costs for the parties, since courts might apply to a contract an unforeseen law, or a law whose proof demands specialized and costly legal assistance. The consolidation of autonomy would guarantee that the chosen law governs the contract in any of these jurisdictions. It would also harmonize national conflict rules with rules on arbitration, which permit upholding choice of law clauses<sup>6</sup>.

## I. The concept and justification of party autonomy

Party autonomy in the conflict of laws of contracts is understood to mean the right of the parties to choose the governing law of a contract<sup>7</sup>. That is, their power to de-

3 Art. 9 Brazilian Introductory Law to the CC.

4 Art. 16 Chilean CC; art. 20 Colombian CC; art 15 Ecuadorian CC.

5 Art. 2399 Uruguayan CC.

6 VIAL, M. I., "Party Autonomy in Latin America: A Pending Task", in *Revista Chilena de Derecho*, Pontificia Universidad Católica de Chile, n.º 45-2, 2018, 458-459.

7 SCOLES, E.; HAY, P.; BORCHERS, P. and SYMEONIDES, S., *Conflict of Laws*, 4<sup>th</sup> Ed., St. Paul, Minnesota, Thomson West, 2004, 948; KASSIS, A., *Le nouveau droit européen des contrats internationaux*, Paris, LGDJ, 1993, 187.

termine the law that is the *causa causans* of the contract<sup>8</sup>; the law that provides the rules to determine the existence, substantive validity and effects of the contract and those rules which the parties cannot displace. Hence, when autonomy is exercised the conflict rule of the forum submits the contract to the chosen law and the parties are bound by this law<sup>9</sup>.

Party autonomy permits the parties to determine the extent and scope of application of State law to their contracts. It grants them an essential legislative prerogative. “It allows private parties to determine the distribution of private law authority themselves, thus essentially, privatising an important allocative function of global governance”<sup>10</sup>.

Party autonomy is justified on several grounds. A philosophical one is that autonomy is founded on the principle of the liberty of the individual, which is a human right applicable to both, his personal and economic sphere<sup>11</sup>. In accordance, the parties should be free to enter into a contract and to stipulate the terms and conditions of that contract<sup>12</sup>. They should be free also to choose the governing law of their contract as they might have valid reasons to do so. For instance, they might want to choose a law that is well developed and well suited to their contract, or one they know well, or one they consider “neutral”, or one, they have used in an earlier transaction or in another contract related to the present one<sup>13</sup>. Autonomy recognizes and guarantees contractual freedom for the parties<sup>14</sup>. Thus, autonomy should be accepted subject to certain limits, set to guarantee fundamental values of the State and the protection of the weaker party to a contract.

Party autonomy is also justified because of its ability to determine a suitable governing law for international contracts. Hence, international contracts do not always accommodate well with a governing law determined by the conflict rules of the forum without having regard to the special characteristics of these contracts. When this is the case, autonomy can help the parties to exclude an inappropriate law that would otherwise govern their contract. Also it allows them to choose a more convenient law to govern the whole or a part of it<sup>15</sup>. Thus, the flexibility given by autonomy overcomes the rigidity of domestic conflict rules, which might submit a

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8 NYGH, P., *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, 1.

9 LANDO, O., “The Conflict of Laws of Contracts. General Principles”, *Académie de Droit International de La Haye*, Recueil des Cours n.º 189, The Hague, 1985, 255.

10 MILLS, A., *Party Autonomy in Private International Law*, Cambridge, Cambridge University Press, 2018, 3.

11 BASEDOW, J., *Rapport 4ème Commission, Droits de l’Homme et Droit International Privé*, Institut de Droit International, Sessions 2019, La Haye, 6, 40.

12 NYGH, *Autonomy*, cit., 2.

13 LANDO, “The Conflict of Laws” cit., 285.

14 HOOK, M., *The Choice of Law Contract*, Oxford, Hart Publishing, 2016, 59.

15 MAYER, P., *Droit international privé*, 7<sup>th</sup> Ed., Paris, Montchrestien, 2001, 471-472.

particular contract to an inappropriate governing law<sup>16</sup>. This has a clear economic and legal advantage for the parties. In sum, autonomy presupposes that parties to a contract “are the best judges of their own self-interest”<sup>17</sup> and that “they may be in the best position to determine which set of legal principles is most suitable for their transaction”<sup>18</sup>.

Besides, autonomy allows certainty and predictability in respect of the governing law of a contract<sup>19</sup>. A contract requires certainty, and certainty is ensured when the parties are able to predict the law that is to govern it with as much accuracy as possible<sup>20</sup>. In fact, the law governing an international contract is difficult to predict. An international contract is connected to several jurisdictions and the determination of its governing law depends on the conflict rules of the forum called upon to solve the disputes arising from it. Thus, the parties have no certainty about this law before proceedings are brought. This uncertainty can be lessened if a choice of law is made and the jurisdictions connected to the contract accept it. Further, a choice of law permits submitting the contract to a law while negotiation is in course, granting the parties, in advance, significant certainty and predictability in respect of its governing law<sup>21</sup>. This legal certainty constitutes a human right in a world of multiple jurisdictions and open frontiers<sup>22</sup>.

Additionally, in international commerce “the parties are competitors not only with regard to the goods and services but also with regard to the legal system they may offer”<sup>23</sup>. Thus, an adequate legal framework for international contracts fosters international commerce and economic integration between countries. Party autonomy contributes to providing this adequate legal framework and, hence, seems fundamental to develop a global market economy<sup>24</sup>.

Further, party autonomy is consistent with the conception of an international community of justice, implicit nowadays in most national systems of conflict laws. For this “suppose not only the existence of separate national laws but also their integration in a common legal order serving the needs of international commerce”<sup>25</sup> and protecting equivalent standards of fairness and justice.

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16 KASSIS, A., *Le nouveau droit européen des contrats internationaux*, Paris, LGDJ, 1993, 190.

17 HAYWARD, B., *Conflict of Laws and Arbitral Discretion*, Oxford, Oxford University Press, 2017, 14.

18 Hague Conference on Private International Law, *Principles of Choice of Law in International Commercial Contracts*, The Hague, HCCH Permanent Bureau, 2015, 23.

19 *Ibid.*

20 NYGH, *Autonomy*, cit., 2-3.

21 LANDO, “The Conflict of Laws”, cit., 84.

22 BASEDOW, *Rapport 4ème*, cit., 640.

23 LANDO, “The Conflict of Law”, cit., 285.

24 PLENDER, R. and WILDERSPIN, M., *The European Contracts Convention*, 2<sup>nd</sup> Ed., London, Sweet & Maxwell, 88.

25 YNTEMA, H., “‘Autonomy’ in Choice of Law”, in *American Journal of Comparative Law*, ASCL, n.º 1-4, 1952, 358.

In sum, from a law and economics perspective, party autonomy “is efficient; enforcing a contractual choice of law can eliminate inconsistency, clarify the applicable law, promote jurisdictional competition in the ‘law market’, and ultimately lead to legal evolution”<sup>26</sup>. From a theoretical approach, party autonomy is justified by a focus on individuals, as the main subjects of Private International Law<sup>27</sup>. It is consistent with giving them a primary role in regulating their private interests and with restricting their own regulation only when needed to protect justice or a fundamental public interest. Hence, allowing autonomy means accepting that the parties are in the centre of the conflicts problem: “they are allowed to choose the applicable law because it is their dispute that is in question”<sup>28</sup>. Because of this, it has been stated that “the parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations”<sup>29</sup>.

The legitimacy of respecting party autonomy is not seriously questioned today. It is accepted almost ubiquitous with the exception of some Latin American and Middle East countries<sup>30</sup>. The development of this principle, however, is recent; it took place mainly in the mid 19<sup>th</sup> and 20<sup>th</sup> centuries<sup>31</sup>. The acceptance of the principle was, initially, a matter of controversy in some countries<sup>32</sup>. It was argued that granting the parties the right to choose the governing law of a contract infringed national sovereignty or was equivalent to permitting the parties to legislate themselves outside the reach of the territorially applicable law<sup>33</sup>. Nowadays, objections to autonomy have faded and the principle is currently embodied in the private international laws of most countries<sup>34</sup>. Autonomy is so widely accepted that it is considered to belong to “the common core of the legal systems”<sup>35</sup> and to represent a rule of international customary law<sup>36</sup>. “It has acquired the status of a self-evident proposition ... virtually nobody is against it and most commentators enthusiastically endorse

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26 HAYWARD, *Conflict of Laws and Arbitral*, cit., 14.

27 *Ibid.*

28 LEHMANN, M., “Liberating the Individual from Battles between States - Justifying Party Autonomy in the Conflict of Laws”, *Vanderbilt Journal of Transnational Law*, Vanderbilt University, n.º 41-2, 2008, 415.

29 Recital 11, Regulation (EC) n.º 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, Rome I, *OJEU* L 177, 4-VII-2008, 6.

30 BASEDOW, *The Law of Open*, cit., 117-120.

31 NYGH, *Autonomy*, cit., 3-14; SYMEONIDES, S. “Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple”, *Brooklyn Journal of International Law*, n.º 39, 3, Brooklyn Law School, 2014, 1123-1128.

32 LANDO, “The Conflict of Laws”, cit., 256-284; NYGH, *Autonomy*, cit., 8-13.

33 NYGH, *Autonomy*, cit., 9-10; YNTEMA, “‘Autonomy’ in Choice”, cit., 342.

34 BASEDOW, *Rapport 4ème Commission*, cit., 39.

35 LANDO, O., *International Encyclopedia of Comparative Law*, Vol. 3, Ch. 24, The Hague, Mouton, 1976, 3.

36 NYGH, *Autonomy*, cit., 45.

it”<sup>37</sup>. Moreover, the acceptance of the principle is now extended beyond the field of contracts, to matters of succession, torts, marital property, property rights and some issues of family law<sup>38</sup>. The Institut de Droit International in its Draft Resolution of 2019 on Human Rights and Private International Law has declared that party autonomy is a general principle of Conflict of Laws and that States should ensure that party autonomy is respected<sup>39</sup>. A similar statement has been made by the Inter-American Juridical Committee (CJI) in its Guide on the Law Applicable to International Commercial Contracts in the Americas, 2019<sup>40</sup>.

Several international instruments have adopted autonomy and thus, have contributed to the universal acceptance of this principle. Amongst these, the Convention on the Law Applicable to Contractual Obligations, Rome 1980 (“Rome Convention”)<sup>41</sup> is the most relevant. This Convention consolidated autonomy within the EU countries and has now been transformed into the Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, Rome I (“Rome I Regulation”)<sup>42</sup>. Besides, this Convention served as a model for the Inter American Convention on the Law Applicable to International Contracts (CIDIP V) Mexico, 10-III-1994 (“Mexico Convention”) which intended to consolidate autonomy in Latin America<sup>43</sup>. More recently, an important instrument of soft law, the Hague Principles on Choice of Law in International Commercial of 2015, has confirmed the importance and wide acceptance of the principle.

It seems, however, that Latin American lawmakers –especially those of Brazil and Uruguay and of those countries following the model of the Chilean Civil Code– are hesitant to sanction autonomy and amend their old conflict rules. These lawmakers seem to consider autonomy as a principle alien to their legal systems and against their legal tradition. It is appropriate then, to analyse their conflict rules and the strength of this reasoning.

## II. The early Latin American domestic conflict rules on contracts and party autonomy

The Latin American domestic conflict rules have been traditionally included in the national Civil Codes and have changed little throughout the years. These rules have

37 SYMEONIDES, S., “Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple”, *Brooklyn Journal of International Law*, Brooklyn Law School, n.º 39-3, 2014, 1123-1124.

38 BASEDOW, *The Law of Open*, cit., 153-273; SYMEONIDES, “Party Autonomy”, cit., 1127.

39 Art. 13 Draft Resolution Human Rights and Private International Law, 2019, Institute de Droit International Privé.

40 CJI/RES. 249 (XCIV-O/19), 21-II-2019, n.º 7.

41 OJ L 266, 9-X-1980, 1.

42 OJE L 177, 4-VII-2008, 6-16.

43 Text and status in: [www.oas.org/juridico/spanish/tratados/b-56.html](http://www.oas.org/juridico/spanish/tratados/b-56.html) [visited on 28-01-2019].

been inspired in common principles, doctrines or works or, have adopted the same or similar text<sup>44</sup>. Thus, to study the acceptance of autonomy in them, it is relevant to analyse the influence that the doctrine of some authors and legal sources have had on them. Namely, that of Andrés Bello, Joseph Story, Carl Friedrich von Savigny and the French Civil Code.

### A. Andrés Bello and the Latin American conflict rules on contracts

Andrés Bello is one of the most influential Latin American legal writers on international law<sup>45</sup>. His work “Principios de Derecho de Gentes”, firstly published in Santiago of Chile in 1832, was re-published in several Latin American countries<sup>46</sup>. Besides, his Code, the Chilean Civil Code of 1855, is the model of several Civil Codes in Latin America and its influence in the region has been considered like that of the French *Code Civil* in Europe<sup>47</sup>.

The Chilean Civil Code was adopted by El Salvador in 1859, Ecuador in 1860 and by Colombia in 1873 with almost no amendment. It is still in force in these countries. This Code also influenced the conflict provisions of the Civil Codes of Honduras (1880,1906), Nicaragua (1867), Panamá (1860, 1916), Uruguay (1868) and Venezuela (1862, 1942) and to a lesser extent those of the Civil Codes of Argentina (1869), Costa Rica (1887), Guatemala (1877) and Mexico (1870, 1928)<sup>48</sup>.

This Code was the first original civil code in Latin America<sup>49</sup>. According to Bello its conflict provisions received the influence of the French *Code Civil*, the Louisiana *Code Civil* (1825), the Austrian *Allgemeines bürgerliches Gesetzbuch* (1811)

44 FERNÁNDEZ, D., *La codificación del derecho internacional privado en América Latina*, Madrid, Beramar, 1994, 300-320; SAMTLEBEN, J., *Derecho internacional privado en América Latina. Teoría y práctica del Código de Bustamante*, Buenos Aires, De Palma, 1983, Vol. 1, 4-7, 273-285; VALLADÃO, H., “Le droit international privé des États américains”, in *Académie de Droit International de la Haye, Recueil des Cours*, The Hague, Vol. II, 1952, 5-110.

45 GUZMÁN, A., *Andrés Bello codificador. Historia de la fijación y codificación del derecho civil en Chile*, Santiago of Chile, Universidad de Chile, 1982, Vol. 1, 466-469; SAMTLEBEN, J., “A influência de Andrés Bello no direito internacional privado latino-americano”, *Libro Homenaje a Haroldo Valladão*, Caracas, Universidad Central de Venezuela, Facultad de Ciencias Políticas y Jurídicas, 1997, 65-76, and “La relación entre derecho internacional público y privado en Andrés Bello”, *Andrés Bello y el derecho latinoamericano*, Caracas, La Casa de Bello, 1987, 159-169.

46 SAMTLEBEN, J. “La relación”, cit., 162. Successive editions of this work were titled “Principios de Derecho Internacional” (Valparaíso, 1844; Paris, 1864).

47 GUZMÁN. *Andrés Bello codificador*, cit., 468; SAMTLEBEN. “La relación”, cit., 162-163.

48 GUZMÁN, *Andrés Bello codificador*, cit., 467-468; SAMTLEBEN, J., “El territorialismo de leyes en América Latina”, *Primer Seminario Nacional de Derecho Internacional Privado*, México D.F., Universidad Autónoma de México, 1979, 182-184; VALLADÃO, “Le droit international privé”, cit., 45-53.

49 VALLADÃO, *Derecho internacional privado*, cit., 194.



and the *Cours de Code Civil* (1829) of Delvincourt<sup>50</sup>. These provisions, however, provide original solutions, which are a creation of Bello<sup>51</sup>.

The main principle that inspires the conflict provisions of the Code is that of territoriality of laws, under which Chilean law governs every person, asset, act or contract located, made or performed in the country, but not those outside the country. Therefore, Chilean law has priority over foreign law in all those issues connected to Chile. Further, foreign law is only applicable in Chile to those issues not connected to the country or to those that, exceptionally, Chilean law submits to it<sup>52</sup>.

The principle of territoriality of laws was not new in the legal systems of the region. It inspired the Spanish law that was in force in Latin American countries during colonial times and, after their independence, it was preserved in their national laws as a way of building up and protecting national sovereignty<sup>53</sup>. The Chilean Civil Code has been a vehicle for perpetuating this principle in the conflict laws of these countries.

In respect of the law governing contracts, Bello considers that every contract is governed by the law of the country where it is made unless it is to be performed in a different country, in which case, the law of the country of performance applies<sup>54</sup>. This view is expressed in art. 16 of the Chilean Civil Code that states that contracts validly made abroad are binding for the parties, though when they are to be performed in Chile, their effects are governed by Chilean law.

Bello recognizes the binding value of contractual clauses and a great freedom to the parties in determining the content of a contract. In “Principio de Derecho de Gentes” he states that courts should determine the contractual obligations of the parties in accordance with the clauses of the contract and the laws incorporated into it<sup>55</sup>. In his Civil Code, he adds that every contract legally made is binding on the contracting parties and cannot be declared null unless by their mutual agreement or by a legal cause; besides, he states that the intention of the parties is paramount in construing the clauses of a contract<sup>56</sup>. Thus, it seems that Bello recognizes that the parties are free to stipulate within the limits allowed by the governing law of the contract, but not that they are allowed to choose which is to be this law<sup>57</sup>. This conclusion is

50 See Bello’s notes on arts. 14-18 Chilean CC, in *Repertorio de Legislación y Jurisprudencia Chilena. Código civil y leyes complementarias*, 3<sup>rd</sup> Ed., Santiago of Chile, Jurídica de Chile, 1996, Vol. 1, 107, 109, 112, 118, 120.

51 GUZMÁN, Andrés Bello codificador, cit., 421-427; VALLADÃO, H., *Derecho internacional privado*, México D.F., Trillas, 1987, 194-199.

52 Art. 14 Chilean CC.

53 SAMTLEBEN, “El territorialismo”, cit., 173-209.

54 BELLO, A., *Principios de derecho de gentes*, Madrid, 1843, 73.

55 *Ibid.*

56 Arts. 1545, 1560 Chilean CC.

57 SAMTLEBEN, J., “Teixeira de Freitas e a autonomia das partes no direito internacional privado latino-americano”, *Scientia Juridica*, Universidade do Minho, n.º 33, 1984, 345.

backed-up by the provisions of his Code that require the mandatory application of Chilean law to any contract being performed or made in Chile<sup>58</sup>.

Later doctrine and case law have been at variance in respect of the acceptance of autonomy by this Civil Code. While authors in Chile, Colombia and Ecuador tend to affirm that the Code accepts choices of law by the parties, courts tend to apply the principle of territoriality of laws by accepting choices of national law and rejecting choices of foreign law, when contracts are to be performed or have been made in the country<sup>59</sup>.

In sum, Andrés Bello did not develop a doctrine on party autonomy in his works. His Code allows different constructions regarding its acceptance that depend mainly on the strength given to the territoriality principle inspiring it.

## B. Joseph Story and the Latin American conflict rules on contracts

The American scholar, Joseph Story, had a substantial influence on the conflict laws of Argentina (1869), Paraguay (1889<sup>60</sup>) and the provisions of the Treaty on International Civil Law of Montevideo, 1889<sup>61</sup>.

The drafter of the first Argentinian Civil Code (1869), Dalmacio Vélez Sarsfield, took inspiration from Story's book, "Commentaries on the Conflict of Laws"<sup>62</sup>, for drafting the conflict provisions of his Code. Many of its provisions are translations of the principles included by Story in his book, particularly those on contracts<sup>63</sup>. Following Story's doctrine, the Code submitted international contracts either to the law of their place of making, or that of their place of performance<sup>64</sup>.

Story's views on the law governing contracts bear some similarity to those of Bello. He affirms that a contract shall be governed by the law of its place of making, if it is made and performed in the same place<sup>65</sup>. If the contract is made in one place to be performed in another, it shall be governed by the law of its place of

58 Arts. 14, 16 Chilean CC.

59 SAMTLEBEN, "Teixeira de Freitas", cit., 360-361; OREJUDO, P., "El derecho internacional privado colombiano ante la Ley Modelo OHADAC", *Anuario Español de Derecho Internacional Privado 2013*, Iprolex, t. XII, 686-688; VIAL, M. I., "La autonomía de la voluntad en la legislación chilena de derecho internacional privado", *Revista Chilena de Derecho*, Pontificia Universidad Católica de Chile, n.º 40-3, 2013, 891-927.

60 Paraguay adopted the text of the first Argentinian CC in 1889 but replaced it afterwards.

61 VALLADÃO, "Le droit international privé", cit., 28-29, and "The Influence of Joseph Story on Latin-American Rules of Conflict of Laws", *The American Journal of Comparative Law*, ASCL, n.º 3, 1954, 40-41; SAMTLEBEN, "Teixeira de Freitas", cit., 363.

62 STORY, J., *Commentaries on the Conflict of Laws*, 4<sup>th</sup> Ed., Boston, Little Brown, 1852.

63 SAMTLEBEN, "Teixeira de Freitas", cit., 346, 361-363; VALLADÃO, "Le droit international privé", cit., 21-29; "The Influence of Joseph Story", cit., 27-41, and *Derecho internacional*, cit., 183-187.

64 Arts. 1209-1210 Argentinian CC, 1869.

65 STORY, *Commentaries*, cit., §242, §263.

performance<sup>66</sup>. Story mentions that the ground for the application of these laws is commonly considered to be the silent or presumed consent of the parties<sup>67</sup>. However, he then clarifies that the law of the place of making is not applicable because of their choice, but in virtue of the general sovereignty possessed by every nation<sup>68</sup>. It seems that the same applies to the law of the place of performance<sup>69</sup>. In sum, his solution appears to be based on the principle of territoriality of laws rather than on the autonomy of the parties.

In practice, the possibility of the parties to determine the applicable law of a contract under Story's doctrine is indirect; it only lies in the possibility of choosing the place of performance of the contract, but not its applicable law<sup>70</sup>. Thus, it does not accept the principle of party autonomy, which was unknown to Story<sup>71</sup>.

Applying Story's principles, the conflict provisions on contracts of the Argentinian Civil Code (1869), in force until 2015, gave no role to the parties in determining the governing law of a contract. Some Argentinian doctrine, however, construed these provisions as accepting autonomy with arguments that failed to be conclusive due to the lack of provisions of the Code on this issue<sup>72</sup>.

### **C. Carl Friedrich von Savigny and the Latin American conflict rules on contracts**

The doctrine on contracts of Carl Friedrich von Savigny weighed much amongst Latin American jurists. It influenced the Argentinian (1869)<sup>73</sup> and Chilean<sup>74</sup> civil codes, the Treaty on International Civil Law of Montevideo, 1889 and the work of the Brazilian A. Teixeira de Freitas<sup>75</sup>. Savigny sees the place of performance of the contract as the true seat of the obligation and as the special forum to solve the disputes arising from it. This place of performance is to supply the territorial law governing the obligation<sup>76</sup>. Thus, a contract is to be governed by this law. However, this place of performance is always determined by the express or tacit intention

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66 Ibid., § 280.

67 Ibid., § 261, § 280.

68 Ibid., § 261.

69 SAMTLEBEN, "Teixeira de Freitas", cit., 346-347.

70 NYGH, *Autonomy*, cit., 6.

71 SAMTLEBEN, "Teixeira de Freitas", cit., 346-347.

72 Ibid., 362-363.

73 VALLADÃO, "Le Droit International Privé", cit., 27.

74 GUZMÁN, *Andrés Bello Codificador*, cit., 425.

75 SAMTLEBEN, "Teixeira de Freitas", cit., 350-353.

76 VON SAVIGNY, C., *A Treatise on the Conflict of Laws, and the Limits of their Operation in respect of Place and Time*, W. Guthrie (trans.), Edinburgh, T&T Clark/Stevens & Sons, 1869, § 369, § 370, § 372.

of the parties and so, the parties have a role in determining the governing law of a contract<sup>77</sup>.

There is no doctrinal consensus as to the acceptance of party autonomy by Savigny<sup>78</sup>. For some, the role he assigns the parties in determining the governing law of a contract is indirect and restricted to their possibility of choosing the place of performance of the contract<sup>79</sup>. For others, this role is major and allows the parties to choose a governing law different to that of the place of performance of the contract. Hence, they understand that he accepts party autonomy<sup>80</sup>. This latter opinion, however, was not received in the Argentinian and the Chilean Civil Codes; nor in the Treaty on International Civil Law of Montevideo, 1889.

Savigny's views were adopted by the Brazilian scholar Augusto Teixeira de Freitas<sup>81</sup> in his Draft for a Civil Code or *Esboço*<sup>82</sup>. Teixeira developed Savigny's doctrine further by acknowledging the value of choices of law by the parties<sup>83</sup>. The chosen law, according to Teixeira, could displace the law of the place of performance of the contract. Thus, Teixeira was the first Latin American author who accepted party autonomy. Regrettably, his *Esboço* was never enacted as law and his doctrine found no practical support in Latin America<sup>84</sup>.

#### **D. The French “Code Civil” and the Latin American conflict rules on contracts**

The French *Code Civil* (1804) inspired several Civil Codes in Latin America, amongst which are the Chilean (1855), Peruvian (1852<sup>85</sup>) and Mexican (1870<sup>86</sup>) Civil Codes<sup>87</sup>. These codes adopted some of the conflict rules of the *Code Civil* but adapted them to their national context with originality. Regarding contracts, Latin American Codes adopted from the *Code Civil* the principle of contractual freedom, which has provided the doctrinal foundation for the acceptance of party autonomy

77 *Ibid.*, § 369, § 370.

78 SAMTLEBEN, “Teixeira de Freitas”, cit. 349; TAKESHITA, K., “Critical Analysis of Party Autonomy: From a Theoretical Perspective”, *Japanese Yearbook of International Law*, International Law Association of Japan, Tokyo, Vol. 58, 2015, 206-214.

79 NYGH, *Autonomy*, cit., 6-7. TAKESHITA, “Critical Analysis”, cit., 206-214.

80 SAMTLEBEN, “Teixeira de Freitas”, cit., 349-350.

81 SAMTLEBEN, “Teixeira de Freitas”, cit., 344-366; VALLADÃO, “Le droit international privé”, cit., 63-80.

82 TEIXEIRA DE FREITAS, A., *Código civil, Esboço*, Rio de Janeiro, Laemmert, 1860.

83 *Ibid.*, art. 1965.

84 SAMTLEBEN, “Teixeira de Freitas”, cit., 353-357, 362.

85 Promulgated on 29-XII-1851.

86 Promulgated on 20-XII-1870.

87 VALLADÃO, “Le droit international privé”, cit., 7-20, 53-59, 86-87.

in these jurisdictions<sup>88</sup>. Thus, the *Code* adopts the view that “a contract is primarily an agreement based on the intention of the parties and that is their will which creates the legal obligation” by stating that: “*Les conventions légalement formées tiennent lieu de loi à ceux qui les on faites*”<sup>89</sup>. Hence, the *Code* ascertains the binding effect of the parties’ agreement and stresses that their subjective intention is paramount in determining the extent and content of their legal obligation and the construction of its terms<sup>90</sup>. By so doing, the *Code* permits to infer that it is mostly concerned with what rules the parties intend to govern their contract and that these rules should be principally determined by them, with very limited exceptions. Thus, the *Code* conceives the contract as a private horizontal legal relationship between the parties, that creates binding rights and duties for them. Therefore, most of its provisions on contracts are supplemental rules, to be applied in the absence of the parties’ agreement on an issue.

The *Code* sees contracting parties as exercising a law-making authority and a certain sovereignty. “The French expression for party autonomy, *autonomie de la volonté*, pointedly suggests such a foundational role for the will of the parties”<sup>91</sup>. Following this view, French courts ruled that the chosen law was not necessarily subject to subsequent changes in that law<sup>92</sup>, understanding that the parties somehow froze or incorporated it into the contract by their choice.

To sum up: the early Latin American Civil Codes were highly influenced by the principles of territoriality of laws and contractual freedom. Territoriality was reflected in the priority given in these Codes to the application of the conflict rules and the law of the forum to international contracts, and in the minimum role given to the parties in determining their governing law. Besides, these Codes either made no reference to party autonomy or, exceptionally allowed it to a very limited extent, when the choice of law was that of the forum<sup>93</sup>. At the same time, these Codes were influenced by the principle of contractual freedom, which gave an important role to the parties in determining the content and obligations arising from their contracts, but within the legal framework determined by the conflict rules of the forum. This situation persists today. The territoriality principle still inspires several Codes in force and still has a negative effect on the acceptance of autonomy in Latin America<sup>94</sup> but,

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88 Art. 1134 of the French CC was included in several Latin American Codes. For Peru see VALLADÃO. “Le droit international privé”, cit., 19. For Chile, see GUZMÁN, *Andrés Bello codificador*, cit., 421-427.

89 Art. 1134 French CC. ATIYAH, P., *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979, 420.

90 Arts. 1101, 1156 French CC.

91 MILLS, *Party Autonomy*, cit., 9.

92 NYGH, *Autonomy*, cit., 35.

93 Peruvian CC 1852; Brazilian Introductory Law to the CC, 1916; Mexican CC 1870, 1884.

94 SAMTLEBEN, “Teixeira de Freitas”, cit., 357.

at the same time, the parties' contractual freedom is still a fundamental underlying principle of these Codes.

### III. The Latin American treaties on contracts and party autonomy

The early drafting of several Latin American Treaties on contracts opened the debate in respect of autonomy but did not result in its universal acceptance within Latin American jurisdictions.

These jurisdictions showed early interest at unification of conflict rules and made several attempts to do so. The first attempt was made in the Congress of Lima of 1877-1878, where a Treaty was agreed between Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela<sup>95</sup>. This Treaty submitted contracts to the law of the place of making or to that of the place of performance, following the doctrines of Bello and Story<sup>96</sup>. Its success though, was hindered by the 1879 Pacific War, and it had almost no application<sup>97</sup>.

Other unification attempts were made through the Montevideo Treaties of 1888-89 and 1939-40, the Bustamante Code (1928), and the Mexico Convention (1994), which are worthy of further analysis.

#### A. The Montevideo Treaties of 1888-89 and 1939-40

The "Montevideo Treaties" were drafted within two South American Congresses that took place in Montevideo in 1888-89 and 1939-40. The First South American Congress on Private International Law, Montevideo (1888-89<sup>[98]</sup>) was attended by delegates from Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay; who drafted eight treaties and an additional protocol<sup>99</sup>. These treaties were ratified by Argentina Bolivia, Paraguay, Peru and Uruguay. They entered into force in 1892 and are still widely applied. Other South American and European States acceded to them afterwards<sup>100</sup>. Brazil and Chile signed some treaties but never ratified them<sup>101</sup>.

95 Signature: 9-XI-1878. Accession of Guatemala and Uruguay: 5-XII-1878. Text: *Pandectas Brasileiras* 1927, 10-13. See FERNÁNDEZ, *La codificación*, cit., 90-95.

96 Art. 4 Treaty of Lima, 1878.

97 SAMTLEBEN, *Derecho Internacional Privado*, cit., 13.

98 Beginning 25-VII-1888, ending 18-II-1889.

99 i. Treaty on Procedural Law (11-01-1889); ii. Treaty on Literary Artistic Property (11-01-1889); iii. Treaty on Patents (16-01-1889); iv. Treaty on Trade-Marks (16-01-1889); v. Treaty on International Criminal Law (23-01-1889); vi. Convention on the Exercise of the Liberal Professions (4-02-1889); vii. Treaty on International Civil Law (12-02-1889); viii. Treaty on International Commercial Law (12-02-1889), and an Additional Protocol (13-02-1889).

100 Colombia acceded to treaty vi on 1917, to treaty I on 1920 and to treaties vii and viii on 1934. Ecuador acceded to treaty i on 1928. Austria, Belgium, France, Germany, Hungary, Italy and Spain acceded to treaty ii.

101 Treaties i, ii, iii, iv and viii.

The Second South American Congress on Private International Law, Montevideo 1939-40 took place on the 50<sup>th</sup> anniversary of the First Congress to update the treaties of 1889. It was divided into two phases: 1939 and 1940. Delegates from Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay worked in both phases; delegates from Brazil and Colombia joined in the second phase<sup>102</sup>. They drafted eight treaties and an additional protocol<sup>103</sup> that received less signatures and ratifications than those of 1889<sup>104</sup>. They never came into force between the parties to the Bustamante Code; amongst them, Brazil and Chile, expressed in the Conference their preference for the principle of territoriality of laws to determine the applicable law in conflict cases<sup>105</sup>.

The Montevideo Treaties address the problem of the law governing international contracts in the Treaties on International Civil Law of 1889 and 1940<sup>106</sup>. Both treaties provide that the law of the place of performance is to govern an international contract and all matters related to it<sup>107</sup>. The determination of this law, however, is to be done by specific provisions of the Treaties that presume the place where different types of contracts are normally performed<sup>108</sup>. This “system of presumptions” cannot be disregarded in any case<sup>109</sup>.

The acceptance of autonomy was widely discussed in 1889 and 1940; and in both cases rejected. In the Congress of 1889, the Uruguayan professor Ramírez proposed that contracts should be governed by the law chosen by the parties<sup>110</sup>. His proposal was rejected on the ground that party autonomy should always be limited by public policy. The delegates argued that public policy should be necessarily de-

102 *Segundo Congreso Sudamericano de Derecho Internacional Privado, de Montevideo*, Buenos Aires, Ministerio de Relaciones Exteriores, República Argentina, 1940, 493-501.

103 i. Treaty on Asylum and Political Refuge (4-08-1939); ii. Treaty on Intellectual Property (4-08-1939); iii. Convention on the Exercise of the Liberal Professions (4-08-1939); iv. Treaty on International Commercial Navigation (19-03-1940); v. Treaty on International Procedural Law (19-03-1940); vi. Treaty on International Criminal Law (19-03-1940); vii. Treaty on International Terrestrial Commercial Law (19-03-1940); viii. Treaty on International Civil Law (19-03-1940) and an Additional Protocol to the Treaty on International Civil Law (19-03-1940).

104 Uruguay ratified all treaties on 12-XI-1942 and Paraguay on 29-I-1958. Argentina ratified Treaties iv, v, vii, viii and the Additional Protocol on 18-VI-1956 and Treaty iii on 29-03-1963.

105 *Segundo Congreso Sudamericano*, cit., 500-501.

106 Arts. 32-37 Treaty on International Civil Law, 1889; arts. 36-38, 40-42 Treaty on International Civil Law, 1940.

107 Art. 33 Treaty on International Civil Law, 1889; art. 37 Treaty on International Civil Law, 1940.

108 Arts. 34-38 Treaty on International Civil Law, 1889; arts. 38-42 Treaty on International Civil Law, 1940. See *Actas de las Sesiones del Congreso Sud-Americano de Derecho Internacional Privado*, Buenos Aires, Imprenta de Juan A. Alsina, 1889, 392-446; RAMÍREZ, G., *El derecho procesal internacional en el Congreso Jurídico de Montevideo*, Montevideo, Imprenta Central, 1892, 168.

109 ALFONSÍN, Q., *Régimen internacional de los contratos*, Montevideo, Universidad de la República, 1950, 105-106.

110 RAMÍREZ, G., *Proyecto de código de derecho internacional privado*, Buenos Aires, Félix Lajouane, 1888, 26, 110; *Actas de las Sesiones del Congreso*, cit., 113-131.

terminated by a certain law and decided, quoting the authority of Savigny, that this law should be that of the place of performance of the contract<sup>111</sup>. They then agreed that contracts should always be governed by this law and not by that chosen by the parties. Notwithstanding this agreement, the Treaty on International Civil Law of 1889 contains no express prohibition of choices of law by the parties.

This absence of prohibition has been construed in different ways in Argentina, Peru and Uruguay<sup>112</sup>. In Argentina, it has been construed as an acceptance of party autonomy and courts have disregarded the provisions of the Treaty when a choice of law has been made. In Peru and Uruguay, the Treaty has been construed as rejecting autonomy. Uruguayan doctrine has been adamant to declare that its provisions are mandatory and should be construed according to the principles that inspired the First Congress of Montevideo, amongst which was the rejection of party autonomy<sup>113</sup>.

The Uruguayan rejection of autonomy was strongly expressed in the Second Congress of 1939-40, though in different terms. The delegate of Uruguay, Vargas Guillemete, argued that the legislative and jurisdictional competence of a sovereign State could not be subordinated to the will of the parties. According to him, a conflict rule was allocative of legislative and jurisdictional competence and was, therefore, beyond the scope of party autonomy. He remarked that: "It has been a mistake of international doctrine not to realize that the notion of party autonomy is completely parasitic to Private International Law and inapplicable to solve conflicts of laws, which are conflicts of sovereignty". Accordingly, he proposed to include in the Additional Protocol to the Treaty of International Civil Law of 1940 a provision forbidding choices of law and forum by the parties<sup>114</sup>.

The Uruguayan proposal was contested by the Argentinian delegates who, unsuccessfully, proposed that party autonomy should be accepted<sup>115</sup>. Finally, the proposal of Vargas Guillemete was accepted, but with a final phrase added by the Argentinians that intended to moderate its effects: "The jurisdiction and applicable law determined in accordance with the pertinent Treaties cannot be modified by the will of the parties, except to the extent authorized by such law"<sup>116</sup>.

111 *Actas de las Sesiones del Congreso*, cit., 483-510.

112 BRICEÑO, J., "Reflexiones sobre la codificación del derecho internacional privado en América Latina", *L'unificazione del diritto internazionale privato e processuale. Studi in Memoria di Mario Giuliano*, Padova, Cedam, 1989, 184; FRESNEDO, C., *La autonomía de la voluntad en la contratación internacional*, Montevideo, Fundación de Cultura Universitaria, 1991, 50-54; OPERTTI, D. and FRESNEDO, C., *Contratos comerciales internacionales*, Montevideo, Fundación de Cultura Universitaria, 1997, 17-18.

113 ALFONSÍN, *Régimen internacional*, cit., 31; OPERTTI and FRESNEDO, *Contratos comerciales*, cit., 16.

114 *Segundo Congreso Sudamericano*, cit., 166.

115 *Ibid.*, 158.

116 Art. 5 Additional Protocol, Treaty on International Civil Law, 1940. See *Segundo Congreso Sudamericano*, cit., 500; BUSTAMANTE RIVERO, J., *El Tratado de Derecho Civil Internacional de 1940*, Montevideo, Chiesino, 1942, 168-170.



Vargas Guillemete, the reporter of the commission which drafted the Treaty on International Civil Law, 1940, wrote: “it could be affirmed that amongst the commissioners, the principle that denies party autonomy any legitimate power to rule on a conflict of laws issue, triumphed”<sup>117</sup>. Bustamante i Rivero, the Peruvian delegate, added: “The idea was accepted that, in the international order, the protective and organizational power of the States should prevail over the conventions subscribed to by private parties. There was also a consensus on the convenience of the Treaties fixing unequivocally the competent law and jurisdiction in order to avoid the uncertainty and change of the parties’ intentions... and to prevent the most powerful party from imposing unfair conditions to the weaker party through the choice of a more favourable law or forum”<sup>118</sup>.

This decision had a significant and longstanding effect in Uruguayan conflict rules. After the Montevideo Treaties of 1940 were enacted, Uruguayan doctrine unanimously rejected party autonomy<sup>119</sup>. By the same time, Vargas Guillemete drafted the bill of Law 10.084, which amended the Uruguayan Civil Code adding an Appendix of conflict rules, modelled on the Treaties<sup>120</sup>. Thus, Law 10.084 included an express rejection of party autonomy, which is still in force in Uruguay<sup>121</sup>.

## B. The Bustamante Code

The “Bustamante Code” is an annex to the Convention on Private International Law agreed on 20th February 1928 at the Sixth Pan-American Conference in Havana<sup>122</sup>. This Conference was convoked by the Pan-American Union<sup>123</sup> to vote on a draft of a code on Private International Law to be enforced in all the countries of America. The draft was prepared mainly by the Cuban Professor Antonio Sánchez de Bustamante y Sirvén and was approved, with little amendments, by the delegates to the Conference<sup>124</sup>. It was then ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican

117 *Segundo Congreso Sudamericano*, cit., 158.

118 BUSTAMANTE I RIVERO, *El Tratado*, cit., 168-170.

119 SANTOS, R., *El derecho aplicable a los contratos internacionales: con especial referencia al contrato de transferencia de tecnología*, 2<sup>nd</sup> Ed., Montevideo, Fundación de Cultura Universitaria, 1998, 66.

120 Arts. 2393-2405 Uruguayan CC.

121 Art. 2403 Uruguayan CC.

122 Text in *League of Nations Treaty Series*, n.º 86, 1929, 111.

123 The Pan-American Union is the predecessor of the OAS General Secretariat.

124 FERNÁNDEZ, *La codificación*, cit., 133-157; SÁNCHEZ, A., *El código de derecho internacional privado y la Sexta Conferencia Panamericana*, La Habana, Imprenta Avisador Comercial, 1929; *La Comisión de Jurisconsultos de Río de Janeiro y el Derecho Internacional*, La Habana, Cultura, 1927, and *Proyecto de Código de Derecho Internacional Privado*, La Habana, Imprenta El Siglo XX, 1925; SAMTLEBEN, *Derecho Internacional*, cit., §1 Ch III.; VALLADÃO, *Derecho Internacional*, cit., 245-252.

Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela, and is in force in all these countries<sup>125</sup>.

The Bustamante Code, however, has not unified significantly the conflict laws of these countries<sup>126</sup>. Thus, Bolivia, Costa Rica, Chile, Ecuador and El Salvador ratified it with a general reservation giving priority to their domestic provisions over those of the Code, and other countries ratified it with special reservations on certain provisions<sup>127</sup>. As a result, the Code has been less applied than expected, though its doctrinal importance has still been significant<sup>128</sup>.

The Code contains some general provisions on contracts and other specific to certain types of contracts<sup>129</sup>. These provisions are somehow difficult to understand and apply<sup>130</sup>. Thus, they either exempt certain matters from the governing law of the contract or, point to a certain governing law for specific contracts by way of supplementation of the will of the parties<sup>131</sup>.

The acceptance of autonomy in this Code is a matter of debate since it has no provisions clearly authorizing or prohibiting it<sup>132</sup>. Some doctrine construes arts 166, 185 and 186 of the Code<sup>133</sup> as authorizing autonomy but other doctrine rejects this construction<sup>134</sup>. However, the proper construction of these provisions needs to consider the opinion of Bustamante.

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125 Status in: <http://www.oas.org/juridico/spanish/firmas/a-31.html> [visited on 30-01-2019].

126 GARRO, A. "Unification and Harmonization of Private Law in Latin America: Background, Trends and Perspectives", in *Perméabilité des Ordres Juridiques. Rapports Présentés à l'Occasion du Colloque-Anniversaire de l'Institut Suisse de Droit Comparé*, Zürich, Schulthess, 1992, 238-240; SAMTLEBEN, *Derecho internacional*, cit., 173-189, 222-223.

127 FERNÁNDEZ, *La codificación*, cit., 149-154; SAMTLEBEN, *Derecho internacional*, cit., 100-111.

128 FERNÁNDEZ, *La codificación*, cit., 155-158; PEREZNIETO, L., "Las influencias recíprocas entre la codificación interamericana y los sistemas de derecho internacional privado", *El Derecho Internacional Privado en el Umbral del Siglo XXI. Sextas Jornadas de Profesores de Derecho Internacional Privado (Segovia 1-2 Diciembre, 1995)*, Madrid, EUROLEX, 1997, 250-251; SAMTLEBEN, *Derecho Internacional*, cit., 177- 189.

129 Arts. 164-219 Bustamante Code.

130 VALLADÃO, *Derecho Internacional*, cit., 244.

131 SAMTLEBEN, *Derecho Internacional*, cit., 228-229, 237-238.

132 RABEL, E., *The Conflict of Laws. A Comparative Study*, Chicago, University of Michigan Law School, 1947, Vol. 2, 372.

133 Art. 166: "Contractual obligations are binding for contracting parties and shall be fulfilled in accordance with the terms of the contract unless limited by the provisions of this Code".

Art. 185: "Aside from the rules already established and those which may be hereafter provided for special cases, in contracts of adhesion, the law of the one proposing or preparing them is presumed to be accepted, in the absence of an expressed or implied consent".

Art. 186: "In all other contracts and in the case provided for in the preceding article, the personal law common to the contracting parties shall be first applied, and in the absence of such law there shall be applied that of the place where the contract was concluded".

134 Understanding it accepts autonomy, see: ALBÓNICO, F., *Manual de derecho internacional privado*, Santiago de Chile, Jurídica de Chile, 1950, Vol. 2, 101; GARCÍA, C., *Derecho internacional privado*, 2<sup>nd</sup> Ed., Lima, Gil, 1930, 226; GRIFFITH, P., *American-Brazilian Private International Law. Bilateral Studies in Private International Law, n.º 9*, New York, Oceana, 1959, 54; LOMBARD, R., *Bila-*

Bustamante prefers the term “personal autarchy” to that of party autonomy<sup>135</sup>. He affirms that the Code accepts personal autarchy and submits contracts to the law expressly or tacitly chosen by the parties. In the absence of choice, the Code presumes other laws as accepted by them<sup>136</sup>. This statement permits the conclusion that the Code recognizes party autonomy in wide terms. This, however, is not accurate since in Bustamante’s view the scope of the law chosen by the parties is greatly limited by the “territorial law”<sup>137</sup>. He considers that the parties can freely stipulate in their contracts whatever is permitted within the limits of the territorial law, but are unable to exempt themselves from the fulfilment of its mandatory rules; amongst which are the mandatory rules of the forum, those governing the object and essential requisites of a contract, and the validity of consent<sup>138</sup>. Hence, in truth, Bustamante only accepts a restricted party autonomy, equivalent to contractual freedom in the domestic sphere<sup>139</sup>. It seems that he did not intend to grant the parties the right to choose the governing law of a contract, though the wording of his Code is not clear on this issue<sup>140</sup>.

Finally, the Code has not played a substantial role in respect of autonomy in its enacting countries and has had no major influence in their domestic conflict provisions on contracts.

### C. The Mexico Convention, 1994

The efforts to unify conflict provisions in Latin America continued. As an attempt to reconcile in a comprehensive legal instrument the Montevideo Treaties, the Bustamante Code and the First United States Restatement of Conflict of Laws failed, a new approach for a gradual unification of conflict laws was adopted<sup>141</sup>. The OAS,

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*teral Studies in Private International Law*, Venezuelan Private International Law n.º 4, New York, Oceana, 1965, 62-63; VALLADÃO, H., *Direito internacional privado*, 4<sup>th</sup> Ed., Rio de Janeiro, Freitas Bastos, 1974, Vol. 1, 353. *In contra*, see: GARCÍA, M., *Derecho internacional privado*, Lima, Universidad Nacional Mayor de San Marcos de Lima, 1969, 247; HERNÁNDEZ-BRETÓN, E., “Contratación internacional y autonomía de las partes: anotaciones comparativas”, *Revista de la Fundación Procuraduría General de la República*, La Procuraduría, n.º 12, Caracas, 1995, 75-76; REVOREDO, D., Código civil VI. Exposición de motivos y comentarios. Derecho internacional privado, Lima, Diagramación, 1985, 1010; SAMTLEBEN, *Derecho Internacional*, cit., 224-225.

135 SÁNCHEZ, *La Comisión*, cit., 119.

136 SÁNCHEZ, A., *Derecho internacional privado*, La Habana, Carasa, 1931, Vol. 1, 271-273, Vol. 2, 227-228.

137 Territorial law is that that binds in equal terms all the residents of a territory: art. 3 Bustamante Code. See SAMTLEBEN, *Derecho Internacional*, cit., 216-223.

138 SÁNCHEZ, A., *Manual de derecho internacional privado*, La Habana, Carasa, 1939, 278-281.

139 SAMTLEBEN, “Teixeira de Freitas”, cit., 365-366; VEGA, J., “Los contratos en derecho internacional privado”, *Revista de Jurisprudencia Peruana*, n.º 48-49, Lima, 1948, 465.

140 SAMTLEBEN, *Derecho internacional*, cit., 224-226.

141 FERNÁNDEZ, *La codificación*, cit., 176-282; GARRO, A., “Unification and Harmonization of Private International Law in Latin America”, *The American Journal of Comparative Law*, ASCL, n.º 40-3, 1992, 592-598; SAMTLEBEN, *Derecho internacional*, cit., 76-84.

through its CJI, focused on drafting Inter American conventions dealing with conflict issues, to be approved in specialized Private International Law conferences, known as CIDIP<sup>142</sup>.

As to party autonomy, the Mexico Convention, 1994 (CIDIP V) is mostly relevant. The signature of this Convention was preceded by extensive preparatory works, which began in 1987<sup>143</sup>. In 1988, a working group set up by OAS, decided that the Convention should focus on party autonomy in contracts for the international sale of goods<sup>144</sup>. Then, OAS requested a study on the issue, which concluded that there was an increasing trend to accept autonomy in Latin America, even in those legal systems which had no provisions on it, or rejected it in their conflict rules. This trend was evidenced by new draft bills, legal practice and the fact that many Latin American countries had participated in the negotiation of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, 1986, (“Hague Convention”), where autonomy had been unanimously accepted. The study recommended OAS countries to sanction autonomy to harmonize laws on contracts, foster international trade and grant legal predictability to the parties. It also suggested CIDIP IV to use the Rome Convention, the United Nations Convention on Contracts for the International Sales of Goods, 1980 (“Vienna Convention”) and the Hague Convention as models to harmonize rules on contracts within the region<sup>145</sup>.

CIDIP IV (Montevideo, 9-15 July 1989), approved certain “Bases” or basic guidelines for the drafting of an Inter-American convention on the law applicable to contracts. These “Bases” determined that the starting point of the future convention should be the acceptance of autonomy. All the delegates –including those of Brazil and Uruguay– agreed that an Inter-American convention would be the appropriate instrument to consolidate the principle within the region<sup>146</sup>.

Subsequently, a questionnaire was sent to OAS countries to inquire about their conflict rules on contracts. The answers reflected that they were divided between those that accepted autonomy –Argentina, Canada, Chile (restrictedly), Honduras,

142 See: [http://www.oas.org/dil/esp/derecho\\_internacional\\_privado\\_conferencias.htm](http://www.oas.org/dil/esp/derecho_internacional_privado_conferencias.htm) [visited on 28-01-2019]; SAMTLEBEN, *Derecho internacional*, cit., 35-44.

143 OAS, CP/Res. 486 (717/87), 23-X-1987. See also: JUENGER, F., “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons”, *The American Journal of Comparative Law*, ASCL, n.º 42, 1994, 381-393; PARRA-ARANGUREN, G., “The Fifth Inter-American Specialized Conference on Private International Law, Mexico City, 14-18 March, 1994”, *E Pluribus Unum. Liber Amicorum George A. L. Droz*, The Hague, Kluwer Law International, 1996, 299-320.

144 OAS/Ser. K/XXI.5, CIDIP-V/doc.9/93, 29-X-1993, 2.

145 BOGGIANO, A., “Study on International Contracts Requested by The Organization of American States”, OAS/Ser. K/XXI.5, CIDIP-V/doc.9/93, 29-X-1993, 27-28, 30-33, 125.

146 OEA/Ser. K/XXI.5, CIDIP-V/10/93, 30-XII-1993; OEA/Ser. K/XXI.5, CIDIP-V/11/93, 30-XII-1993, 17-18; CIDIP IV/Res. 2/89, Final Act.

Mexico, United States of America and Venezuela— and those denying it —Brazil, Colombia, Costa Rica and Uruguay<sup>147</sup>.

OAS then asked the CJI to prepare a preliminary draft of a convention. This Draft considered the “Bases” approved in CIDIP IV and the contents of the Rome Convention, the Hague Convention and the Vienna Convention<sup>148</sup>. In presenting the Draft, the CJI insisted on the need for updating the Latin American conflict rules to foster international trade and commercial integration<sup>149</sup>.

This Draft was corrected by a group of experts in Tucson, Arizona, in November 1993<sup>150</sup>. The Tucson Draft was presented to CIDIP V and revised by a special committee<sup>151</sup>. The Convention was then approved, with slight corrections, by the delegates in Plenary Session of 17-III-1994 and became the first Inter American Convention where party autonomy is expressly accepted.

Hence, the Convention states that “the contract shall be governed by the law chosen by the parties”<sup>152</sup>. This law is only limited by the public policy and the mandatory rules of the forum and, discretionally, by the mandatory rules of another State connected to the contract<sup>153</sup>. Besides, the Convention seems to accept choices of the *lex mercatoria* by the parties, and thus, grants them greater freedom than its models<sup>154</sup>.

It appears from the drafting process of the Convention that consolidation of autonomy within Latin America seemed paramount to OAS’ member States to develop regional integration and foster international trade. It was evident from the “Bases” approved in CIDIP IV that the Convention was to be drafted to achieve this purpose<sup>155</sup>. The importance of the adoption of autonomy in Latin America was confirmed in all the stages of the drafting of the Mexico Convention. Further, this conviction was shared even by those countries that do not accept autonomy in their domestic conflict provisions, such as Brazil and Uruguay, which participated actively in the debate and were amongst the few signatories of the Convention<sup>156</sup>. It was never contested either

147 OEA/Ser. K/XXI.5, CIDIP-V/11/93, 30-XII-1993.

148 Draft in: OEA/Ser. Q, CJI/RES. II-6/91, 31-VII-1991.

149 OEA/Ser. K/XXI.5, CIDIP-V/12/93, 28-XII-1993.

150 OEA/Ser. K/XXI.5, CIDIP-V/14/93, 30-XII-1993; Tucson Draft in OEA/Ser. K/XXI.5, CIDIP-V/15/93, 23-XII-1993.

151 OEA/Ser. K/XXI.5, CIDIP-V/ Doc. 46/94, Vol II, 25-I-1996 and OEA/Ser. K/XXI.5, CIDIP-V/doc.32/94 rev. 1, 18-III-1994.

152 Art. 7 Mexico Convention.

153 Arts. 11, 18 Mexico Convention.

154 NYGH, *Autonomy*, cit., 62, 187-188; SAMTLEBEN, J., “El enigma del artículo 30 de la Ley de Derecho Internacional Privado”, *Libro Homenaje a Gonzalo Parra-Aranguren. Addendum 2001*, Caracas, Tribunal Supremo de Justicia, 2002, 354-371.

155 OEA/Ser. K/XXI.5, CIDIP-V/11/93, 30-XII-1993, 17-18.

156 Signatories: Bolivia (17-III-1994), Brazil (17-III-1994), Mexico (27-XI-1995), Uruguay (17-III-1994) and Venezuela (17-III-1994).

that an international convention was the appropriate tool to achieve this consolidation. Paradoxically, this consensus has led to only two ratifications of the Convention and it is doubtful that more countries are to ratify it in the future<sup>157</sup>. A CJI's survey on the reasons for this lack of ratifications, cited, amongst others: a) that its acceptance of party autonomy meant, in 1994, a radical shift from the traditional conflict laws of some Latin American countries; b) that its reference to the *lex mercatoria* was too broad and unclear; and c) that there was no political will to enact it, due to the lack of awareness of its potential benefits<sup>158</sup>. Other authors point to deficiencies in its text and its need to be supplemented with adequate domestic conflict rules, currently inexistent in some Latin American jurisdictions<sup>159</sup>.

This Convention, however, has been important. It has revived the discussion on the acceptance of autonomy in Latin America, which had receded since 1940<sup>160</sup>. Besides, it has had a positive influence on the acceptance of autonomy in some countries. It has inspired the Venezuelan Private International Law Act (1998)<sup>161</sup>, the Dominican Republic Private International Law Act (2014), the Paraguayan Law 5393 on the Law Applicable to International Contracts (2015), the OHADAC Draft-Model Law on Private International Law (2014)<sup>162</sup> and some draft bills in Brazil<sup>163</sup> and Uruguay<sup>164</sup>. It has also reflected an OAS official policy towards promoting the consolidation of autonomy within its member States<sup>165</sup>. Thus, the importance of the Convention consists in having been used as a model for drafting domestic conflict rules on contracts, rather than in its actual implementation within Latin America. Considering this, the CJI Guide on the Law Applicable to International Commercial Contracts in the Americas, 2019; recommends all OAS' countries to incorporate the Convention's rules in their domestic conflict rules, but considering the subsequent developments contained in the Hague Principles on Choice of Law, 2015 and other international instruments<sup>166</sup>.

157 Ratifications: Mexico (20-VIII-1996) and Venezuela (22-IX-1995). See: VIAL, "Party Autonomy", cit., 453-478.

158 CJI/RES. 249 (XCIV-0/19), 21-22.

159 VIAL, "Party Autonomy", cit., 463-468.

160 HERNÁNDEZ-BRETÓN, E., "Autonomía conflictual en América Latina. Tendencias actuales", *Anuario Hispano-Luso-Americano de Derecho Internacional*, Vol. 16, Madrid, IHLADI, 2003, 455-456.

161 *Ibid.*, 455.

162 See: <http://www.ohadac.com/textes/5/anteproyecto-de-ley-modelo-ohadac-relativa-al-derecho-internacional-privado.html> [visited on 18-01-2019].

163 Projeto de Lei n.º 4.905, 1995, shelved in 1996, and Projeto de Lei do Senado n.º 269, 2004, shelved in 2010.

164 The Uruguayan Bills for a General Law of Private International Law, 2004, shelved in 2005, and 2009, still under discussion by Parliament.

165 OAS CP/Res. 486 (717/87).

166 CJI/RES. 249 (XCIV-0/19), 6-7.

#### **IV. The statutory acceptance of party autonomy in the Latin American domestic conflict rules on contracts**

The statutory acceptance of autonomy in the Latin American domestic conflict rules on contracts has been gradual, recent and limited to certain countries. It is interesting to highlight, however, that this progressive acceptance has not been an isolated process in these countries. It has been fostered by a shift of paradigm in Latin American conflict laws. This new paradigm considers that the parties are the principal actors in conflict of laws on contracts; and that their will and needs are to be taken into consideration because they are, somehow, more important than the jurisdiction or policies of the State<sup>167</sup>. Thus, it comprises a reduction of the role of the State in determining the governing law of international contracts and a recognition of a major role of the parties in this issue. It is a shift from a State-sovereignist perspective to a party-centred perspective in the conflict laws on contracts<sup>168</sup>. This shift has been expressed by the enactment of new domestic conflict laws in some Latin American countries, the drafting of the Mexico Convention, the lobby of OAS and that of national legal practitioners and scholars.

The idea, so strongly expressed in the discussions of the Montevideo Treaties, that party autonomy is alien to private international law, has been superseded by the conception that autonomy is central to the foundations of this law. It has remained clear, however, that the State is still free to limit autonomy through mandatory provisions or the protection of public policy. Thus, that ultimately, the extent of autonomy is in the State's hands. Authorizing autonomy does not reduce the sovereignty of the State, because it is the State who allows the parties to choose the applicable law and sets the conditions for their choice<sup>169</sup>. Under this doctrine, some Latin American jurisdictions have managed to reconcile territorialism and contractual freedom in their conflict rules.

In fact, territorialism and contractual freedom might collide with each other when applied to conflicts law. Territorialism might restrict contractual freedom in international contracts if too strictly sanctioned. This happens when a legal system forbids autonomy and mandatorily submits the contract to the State's conflict or substantive rules. Territorialism, however, might be less strictly sanctioned in order to permit a broader contractual freedom. This happens when a legal system adopts party autonomy as a domestic conflict rule that authorizes the parties to choose the governing law of an international contract. Both options are possible, but only the second reconciles territorialism and contractual freedom to a reasonable extent. This second option has been adopted by the Latin American jurisdictions that have ac-

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167 LEHMANN, "Liberating", cit., 417, 429.

168 LEHMANN, "Liberating", cit., 413-434; MILLS, *Party Autonomy*, cit., 5-11.

169 MILLS, *Party Autonomy*, cit., 5-6; LEHMANN, "Liberating", cit., 417, 419, 423, 425, 429.

cepted autonomy in their laws. They have preserved the prerogative of the State as lawmaker but, at the same time, have broadened the contractual freedom of the parties.

The statutory acceptance of autonomy in Latin America began during the decade of the 80's, when the priority of the principle of territoriality of laws started to fade and to be progressively replaced by the priority of the principle of contractual freedom in some jurisdictions. This phenomenon occurred in parallel with the consolidation of autonomy in Europe through the signing and enactment of the Rome Convention and the discussions of the Hague Convention.

Peru was the first Latin American country to accept autonomy in wide terms in its new Civil Code of 1984<sup>170</sup>. The enactment of this Code changed the Peruvian legal tradition on autonomy. In fact, the first Peruvian Civil Code of 1852 allowed a restricted party autonomy permitting the parties to choose Peruvian law in contracts made abroad but prohibited other choices of law<sup>171</sup>. The second Civil Code of 1936 made no reference to party autonomy and authors mostly concluded that it prohibited autonomy, even when the chosen law was that of Peru<sup>172</sup>. This prohibition ended with the Code of 1984<sup>173</sup>, which draw inspiration from European sources and the Venezuelan Draft-bill of Private International Rules of 1965<sup>174</sup>.

The second country to statutorily accept autonomy in international contracts was Cuba in its first Civil Code of 1987, under the influence of some European Civil Codes and the preliminary draft of the Peruvian Civil Code of 1984<sup>175</sup>.

Mexico accepted autonomy next by amending the Civil Code for the Federal District in January 1988<sup>176</sup>. The previous texts of this Code, of 1870 and 1884, provided that contracts made abroad were governed by Mexican law, if performed in Mexico. Exceptionally, they granted some autonomy to foreign parties to choose the law to govern the validity of a contract made abroad concerning movables<sup>177</sup>. An attempt to introduce wider autonomy was made in a Bill of 1928, but the Code enacted that year opted for a stronger territorialism by submitting the effects of all contracts to be performed in Mexico to Mexican law<sup>178</sup>. Legal practice, however, begun to in-

170 Law-Decree 295, 24-VII-1984.

171 Art. 40 CC, 1852.

172 Art. VII Preliminary Title CC, 1936. VEGA, "Los contratos", cit., 626-627; REVOREDO, D., "La ley aplicable al contrato internacional entre particulares en el Proyecto de título preliminar del código civil peruano", *Derecho*, Pontificia Universidad Católica del Perú, n.º 33, 1978, 23-26.

173 Arts. 2095-2096 Peruvian CC.

174 REVOREDO, "La Ley", cit., 29, and *Código civil*, cit., 1005, 1010.

175 Art. 17 Cuban CC. See PÉREZ, L., "Tras las huellas del legislador del código civil de los cubanos", *Estudios de derecho civil cubano*, Madrid, Colegio de Notarios de España, 2002, 5-43.

176 Until the year 2000 the provisions of the CC for the Federal District were applicable in common matters in the Federal District and in federal matters in all Mexican States.

177 Arts. 17-18 CC, 1870; arts. 16-17 CC, 1884.

178 Art. 13 CC, 1928, DO 26-V, 14-VII, 3 and 31-VIII-1928. See VÁSQUEZ, F., *El nuevo derecho internacional privado mexicano*, México D.F., Themis, 1990, 24-25.



clude choice of law clauses in international commercial contracts arguing that these clauses were valid under the provisions of the Commercial Code<sup>179</sup>. Authors and legal practitioners fostered a new amendment to this Code in 1988<sup>180</sup>. This amended Code abandoned territorialism and allowed party autonomy<sup>181</sup>. It also permitted the ratification of the Mexico Convention in 1996. In the year 2000, this Code became the Federal Civil Code and a partially amended Civil Code for the Federal District came into force. Both Codes contain similar provisions authorizing autonomy<sup>182</sup>.

Guatemala accepted autonomy the following year in the Judicial Body Act, Decree n° 2-1989<sup>183</sup>.

Subsequently, Venezuela ratified the Mexico Convention in 1995<sup>184</sup> and enacted the 1998 Private International Law Act to update the Venezuelan conflict provisions<sup>185</sup>. The Act accepted autonomy in similar terms to those of the Convention<sup>186</sup>. However, autonomy was accepted in Venezuela prior to these enactments in case law, legal practice and doctrine but without a sole and clear legal basis<sup>187</sup>.

Sixteen years later, in 2014, Panama, Dominican Republic and Argentina authorized autonomy in their laws, under the influence of the Mexico Convention and the Rome I Regulation. The Panamanian Code of Private International Law<sup>188</sup> authorized autonomy demanding a connection of the chosen law with the contract and prohibiting autonomy in certain contracts<sup>189</sup>. The Dominican Republic Private International Law Act<sup>190</sup> authorized the choice of any law to govern the contract and regulated autonomy with more detailed rules than the previous Latin American laws<sup>191</sup>.

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179 Art. 78 CCom. See LÓPEZ, R., "Derecho aplicable en materia de contratos internacionales", *Revista Mexicana de Derecho Internacional Privado*, AMEDIIP, n.º 5, 1998, 40-43.

180 VÁSQUEZ, *El nuevo derecho*, cit., 46.

181 Art. 13 V CC for the Federal District.

182 Art.13 V Federal CC, *DO* 29-V-2000; art. 13 v CC for the Federal District, *GO* 25-V-2000.

183 Art. 31 Judicial Body Act, Decree n° 2-89.

184 *GO* 22-IX-1995.

185 *GO* 6-VIII-1998.

186 Art. 29 Venezuelan PILA. See "Ley de Derecho Internacional Privado. Exposición de Motivos", n.º 3: Objetivos, letra c) and n.º 6: Normas de Derecho Civil Internacional; DE MAEKELT, T., *Ley Venezolana de Derecho Internacional Privado. Tres años de su vigencia*, Caracas, Academia de Ciencias Políticas y Sociales, 2002, 137-149; HERNÁNDEZ-BRETÓN, E., "Las obligaciones convencionales en la Ley de Derecho Internacional Privado", in *Ley de Derecho Internacional Privado de 6 de agosto de 1998. Libro Homenaje a Gonzalo Parra-Aranguren*, Caracas, Tribunal Supremo de Justicia, 2001, Vol. 2, 326.

187 GIRAL, J., *El contrato internacional*, Caracas, Jurídica de Venezuela, 1999, 30-64; HERNÁNDEZ-BRETÓN, "Contratación Internacional", cit., 15-94.

188 Law n.º 7, 8-IV-2014, *GO* n.º 2753, 8-V-2014.

189 Arts. 74-77, 94-96 Panamanian CPIL.

190 Law 544-14, 15-X-2014, *GO* 18-XII-2014.

191 Arts. 58-60, 62-65.

The Argentinian Civil and Commercial Code of 2014<sup>192</sup> confirmed the authorization of autonomy in Argentina<sup>193</sup>. Before, rather than by statutory provisions, autonomy was validated there by a customary practice, which was accepted by case law<sup>194</sup>.

Paraguayan law embraced autonomy in 2015 by the enactment of Law N° 5393 on the Law Applicable to International Contracts<sup>195</sup>, modelled on the Hague Principles on Choice of Law in International Commercial Contracts, 2015. Thus, it became the first country in the world to enact these Principles as statutory law and to extend their scope of application to civil international contracts<sup>196</sup>.

In 2014, the Organization for Business Law in the Caribbean, OHADAC, prepared a Draft-Model Law on Private International Law that accepts autonomy and might be adopted by some Caribbean country<sup>197</sup>. Recently, the CJI's Guide on the Law Applicable to International Commercial Contracts in the Americas, 2019, has strongly encouraged the remaining Latin American legislators to adopt autonomy in their domestic conflict rules on contracts to harmonize laws within the region<sup>198</sup>.

As seen, the enactment of statutes authorizing autonomy in Latin America began thirty years ago but it is still an ongoing process. The debate on adopting autonomy in Latin American jurisdictions, which began in Montevideo 130 years ago, has not been completely settled and the reasons that prevented its adoption in 1889 and 1940 still weigh much in some jurisdictions.

Some of these jurisdictions have prepared draft bills authorizing autonomy but they have faced an active or passive resistance to their enactment by Parliament, who has delayed substantially their discussion or shelved them; this is the case in Brazil and Uruguay<sup>199</sup>. Brazilian Parliament seems reluctant to depart from the provisions of the Brazilian Introductory Law of the Civil Code, 1942 and Uruguayan Parliament from those of the Appendix of the Civil Code inspired on the Montevideo Treaties of 1940 that reject autonomy<sup>200</sup>. Other jurisdictions, as Chile, Colombia and Ecuador, remain faithful to the provisions of their old Civil Codes, which render priority to the application of their territorial law to international contracts made or

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192 Law 26.994, 1-X-2014, *BO* n° 32.985, 8-X-2014.

193 Art. 2651 Argentinian CCM.

194 BOGGIANO, A., "International Contracts in Argentina", *Rebels Zeitschrift*, Max Planck Institute for Private Law, n.º 47, Hamburg, 1983, 434, 473; GOLDSCHMIDT, W., *Derecho internacional privado*, 5<sup>th</sup> Ed., Buenos Aires, Depalma, 1985, 198.

195 Law n.º 5393, 14-I-2015, *GO* n° 13, 20-I-2015.

196 Art. 1 Law n.º 5393.

197 Art. 45 OHADAC, Draft-Model Law. See: <http://www.ohadac.com/textes/5/anteproyecto-de-ley-mod-elo-ohadac-relativa-al-derecho-internacional-privado.html> [visited on 18-01-2019].

198 CJI/RES. 249 (XCIV-0/19), 21-II-2019.

199 For Brazil see Projeto de Lei 4.905, 1995 and Projeto de Lei do Senado 269, 2004; for Uruguay Bill for a General Law of Private International Law 2004 and 2009.

200 VIAL, "Party Autonomy", cit., 466-470.

performed in the country<sup>201</sup>. In all these jurisdictions national legislators seem not fully convinced on the convenience of embracing autonomy.

However, the general acceptance of autonomy worldwide and the spread customary practice of including choice of law clauses in international contracts, is pressing national legislators to amend their conflict provisions to validate these clauses. The lobby of legal practitioners and national authors and some incipient case law, in conjunction with the authorization of autonomy in national arbitration laws and international instruments of hard and soft law; might convince lawmakers of abandoning legal territorialism in favour of the principle of contractual freedom guaranteed by autonomy<sup>202</sup>. This has happened in the Latin American jurisdictions that have statutorily authorized autonomy. These jurisdictions have understood that party autonomy is not alien to their legal systems since the parties' contractual freedom has always been protected by their rules on contracts. Authorizing autonomy has not been a drastic change in their legal tradition but has been a further development of the power given to the contracting parties by their national laws.

Besides, and most important, these jurisdictions have understood that arguing that party autonomy might prevent the enforcement of their national laws is an anachronism nowadays. Latin American countries are no longer in need of building up and protecting national sovereignty by securing the application of their territorial law; as they were in the early days after their independence, when their first Civil Codes were enacted. Territorialism was considered useful then to preserve the existence of Latin American countries as independent States but seems archaic in today's global world where economic and commercial integration are paramount<sup>203</sup>. Hence, preserving territorialism should no longer prevent Latin American countries from amending their conflict laws on contracts to accept autonomy.

The adoption of autonomy should not be a difficult challenge for Latin American courts. The judiciary in some countries, as Brazil and Uruguay, have a long-standing experience in applying foreign law to contracts. In others, less used to apply this law, as Colombia, Chile or Ecuador, the good quality of the legal profession and the internationalization of law firms will make it perfectly feasible.

Moreover, to circumvent the mistrust on autonomy based on its potential ability to attempt against national fundamental values; it should be remarked that the exer-

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201 VIAL, "La Autonomía", cit., 895-900.

202 ALBORNOZ, M. M., "Choice of Law in International Contracts in Latin American Legal Systems", *Documento de Trabajo CIDE n.º 36, Julio 2009*, México D.F., cide.edu, 2009.

203 See FABRES, J., *Obras completas de don José Clemente Fabres. Derecho internacional privado*, Santiago de Chile, Imprenta Cervantes, 1908, Vol. 1, 114-123; LEÓN, A., "Hacia una reforma del derecho aplicable en el sistema chileno de derecho internacional privado", *Estudios sobre reformas al código civil y código de comercio. Segunda parte*, Santiago de Chile, Jurídica de Chile, 2002, 202-203, and "Reforma del sistema chileno de derecho internacional privado", KLEINHEISTERKAMP, J. (COORD.), *Avances del derecho internacional privado en América Latina: Liber Amicorum Jürgen Samtleben*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Montevideo, Fundación de Cultura Universitaria, 2002, 184; SAMTLEBEN, *Derecho internacional*, cit., 5.

cise of autonomy will never preclude the protection of these values. Any chosen law attempting against them can always, and in any forum, be departed from by reason of public policy.

The rationale that allowing autonomy endangers the jurisdiction of national courts, should be also disregarded. Nowadays, choices of law and choices of forum, though somehow related, are independent issues governed by different conflict rules<sup>204</sup>. Hence, allowing autonomy does not mean, by itself, allowing the parties to evade the jurisdiction of national courts, especially, in those cases where they have exclusive jurisdiction.

In sum, the amendments of national laws to authorize autonomy in the remaining Latin America jurisdictions should be presented as a necessary proposal for sound law reform that will solve the problems and deficiencies of the old laws in force<sup>205</sup>. But, at the same time, will preserve and enhance the principle of contractual freedom that has historically inspired them, while leaving untouched national jurisdiction.

## Conclusions

The gradual acceptance of autonomy in Latin American jurisdictions has demanded abandoning the principle of territoriality of laws in their conflict provisions. It has, however, not opposed totally their legal tradition; since these provisions have also been historically imbued by the principle of contractual freedom that justifies autonomy. Preserving territorialism and denying autonomy under the argument of protecting national sovereignty is today a legal anachronism. The Latin American countries that have statutorily authorized autonomy have understood this. Besides, they have decided in favour of correcting and updating their conflict provisions as a way of enhancing contractual freedom, harmonizing their laws with those of most countries and fostering international commerce. They have also understood that mistrusting autonomy due to the potential risk that the chosen law conflicts with the fundamental values of the State is untenable, since it can always be disregarded on the grounds of public policy. The same applies to trespasses of the jurisdiction of their courts, which can always be controlled by other legal rules or techniques. Thus, it seems that the historical legal reasoning against the adoption of autonomy in Latin America has been superseded by the legal convenience of authorizing it and that the remaining Latin American jurisdictions should follow suite.

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204 Art. 7 MC, art. 4 Hague Principles, art. 2651 Argentinian CCC, art. 59 Dominican Republic PILA, art. 6 Paraguayan Law 5393.

205 GARRO, "Unification and Harmonization of Private International Law", cit., 612-613.

## References

- ALBÓNICO, F., *Manual de derecho internacional privado*, Santiago of Chile, Jurídica de Chile, 1950, vol. 2.
- ALBORNOZ, M. M., “Choice of Law in International Contracts in Latin American Legal Systems”, Documento de Trabajo CIDE n.º 36, julio 2009, México D.F., 2009.
- ALFONSÍN, Q., *Régimen internacional de los contratos*, Montevideo, Universidad de la República, 1950.
- ATIYAH, P., *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979.
- BASEDOW, J., *The Law of Open Societies - Private Ordering and Public Regulations in the Conflict of Laws*, The Hague, Brill Nijhoff, 2015.
- BASEDOW, J., *Rapport 4ème Commission, Droits de l’Homme et Droit International Privé*, La Haye, Institut de Droit International, Sessions 2019.
- BELLO, A., *Principios de derecho de gentes*, Madrid, 1843.
- BOGGIANO, A., “International Contracts in Argentina”, *Rabels Zeitschrift*, Max Planck Institute for Private Law, n.º 47, 1983, 431-477.
- BRICENO, J., “Reflexiones sobre la codificación del derecho internacional privado en América Latina”, en *L’unificazione del diritto internazionale privato e procesuale. Studi in Memoria di Mario Giuliano*, Padova, Cedam, 1989, 157-191.
- BUSTAMANTE I RIVERO, J., *El Tratado de Derecho Civil Internacional de 1940*, Montevideo, Chiesino, 1942.
- DE MAEKELT, T., *Ley Venezolana de Derecho Internacional Privado. Tres años de su vigencia*, Caracas, Academia de Ciencias Políticas y Sociales, 2002.
- FABRES, J., *Obras completas de don José Clemente Fabres. Derecho internacional privado*, Santiago of Chile, Imprenta Cervantes, 1908, vol. 1.
- FERNÁNDEZ, D., *La codificación del derecho internacional privado en América Latina*, Madrid, Beramar, 1994.

- FRESNEDO, C., *La autonomía de la voluntad en la contratación internacional*, Montevideo, Fundación de Cultura Universitaria, 1991.
- GARCÍA GASTAÑETA, C., *Derecho internacional privado*, 2<sup>nd</sup> Ed., Lima, Gil, 1930.
- GARCÍA CALDERÓN, M., *Derecho internacional privado*, Lima, Universidad Nacional Mayor de San Marcos de Lima, 1969.
- GARRO, A., “Unification and Harmonization of Private International Law in Latin America”, *The American Journal of Comparative Law*, ASCL, n.º 40-3, 1992, 587-616.
- GARRO, A., “Unification and Harmonization of Private Law in Latin America: Background, Trends and Perspectives”, *Perméabilité des ordres juridiques. Rapports présentés à l’occasion du Colloque-Anniversaire de l’Institut Suisse de Droit Comparé*, Zürich, Schulthess, 1992, 235-263.
- GIRAL, J., *El contrato internacional*, Caracas, Jurídica de Venezuela, 1999.
- GOLDSCHMIDT, W., *Derecho internacional privado*, 5<sup>th</sup> Ed., Buenos Aires, Depalma, 1985.
- GRIFFITH, P., *American-Brazilian Private International Law*, Bilateral Studies in Private International Law, n.º 9, New York, Oceana, 1959.
- GUZMÁN, A., *Andrés Bello codificador. Historia de la fijación y codificación del derecho civil en Chile*, Santiago of Chile, Universidad de Chile, 1982, vol. 1.
- Hague Conference on Private International Law, *Principles of Choice of Law in International Commercial Contracts*, The Hague, HCCH Permanent Bureau, 2015.
- HAYWARD, B., *Conflict of Laws and Arbitral Discretion*, Oxford, OUP, 2017.
- HERNÁNDEZ-BRETÓN, E., “Contratación internacional y autonomía de las partes: anotaciones comparativas”, *Revista de la Fundación Procuraduría General de la República*, La Procuraduría, n.º 12, Caracas, 1995, 15-94.
- HERNÁNDEZ-BRETÓN, E., “Las obligaciones convencionales en la Ley de Derecho Internacional Privado”, in *Ley de Derecho Internacional Privado de 6 de agosto de 1998. Libro Homenaje a Gonzalo Parra-Aranguren*, Caracas, Tribunal Supremo de Justicia, 2001, vol. 2, 325-341.

HERNÁNDEZ-BRETÓN, E., “Autonomía conflictual en América Latina. Tendencias actuales”, *Anuario Hispano-Luso-Americano de Derecho Internacional*, Vol. 16, Madrid, IHLADI, 2003, 441-471.

HOOK, M., *The Choice of Law Contract*, Oxford, Hart, 2016.

Inter-American Juridical Committee, CJI/RES. II-6/91, 31-VII-1991.

Inter-American Juridical Committee, CJI/RES. 249 (XCIV-O/19), 21-II-2019, n.º 7.

JUENGER, F., “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons”, *The American Journal of Comparative Law*, ASCL, n.º 42, 1994, 381-393.

KASSIS, A., *Le nouveau droit européen des contrats internationaux*, Paris, LGDJ, 1993.

LANDO, O., *International Encyclopedia of Comparative Law*, Vol. 3, The Hague, Mouton, 1976.

LANDO, O., “The Conflict of Laws of Contracts. General Principles”, in *Académie de Droit International de la Haye*, Recueil des Cours n.º 189, The Hague, 1985, 229-447.

League of Nations. *League of Nations Treaty Series*, n.º 86, 1929.

LEHMANN, M., “Liberating the Individual from Battles between States - Justifying Party Autonomy in the Conflict of Laws”, *Vanderbilt Journal of Transnational Law*, Vanderbilt University, n.º 41-2, 2008, 381-434.

LEÓN, A., “Reforma del sistema chileno de derecho internacional privado”, in KLEIN-HEISTERKAMP, J. (coord.), *Avances del derecho internacional privado en América Latina: Liber Amicorum Jürgen Samtleben*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Montevideo, Fundación de Cultura Universitaria, 2002, 179-189.

LEÓN, A., “Hacia una reforma del derecho aplicable en el sistema chileno de derecho internacional privado”, *Estudios sobre reformas al código civil y código de comercio. Segunda parte*, Santiago of Chile, Jurídica de Chile, 2002, 196-216.

LOMBARD, R., *Bilateral Studies in Private International Law*, Venezuelan Private International Law n.º 4, New York, Oceana, 1965.

- LÓPEZ, R., “Derecho aplicable en materia de contratos internacionales”, *Revista Mexicana de Derecho Internacional Privado*, AMEDIP, n.º 5, 1998, 37-79.
- MAYER, P., *Droit international privé*, 7<sup>th</sup> Ed., Paris, Montchrestien, 2001.
- MILLS, A., *Party Autonomy in Private International Law*, Cambridge, Cambridge University Press, 2018.
- NYGH, P., *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999.
- Organization of American States, OAS, OAS CP/Res. 486 (717/87), 23-X-1987.
- Organization of American States, OAS, OEA/Ser. Q, CJI/RES. II-6/91, 31-VII-1991.
- Organization of American States, OAS, OAS/Ser. K/XXI.5, CIDIP-V/doc.9/93, 29-X-1993.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/10/93, 30-XII-1993.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/11/93, 30-XII-1993.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/12/93, 28-XII-1993.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/14/93, 30-XII-1993.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/15/93, 23-XII-1993.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/ Doc. 46/94, Vol II, 25-I-1996.
- Organization of American States, OAS, OEA/Ser. K/XXI.5, CIDIP-V/doc.32/94 rev. 1, 18-III-1994.
- OPERTTI, D. and FRESNEDO, C., *Contratos comerciales internacionales*, Montevideo, Fundación de Cultura Universitaria, 1997.
- OREJUDO, P., “El derecho internacional privado colombiano ante la Ley Modelo OHA-DAC”, *Anuario Español de Derecho Internacional Privado 2013*, XII, pp. 681-697.
- PARRA-ARANGUREN, G., “The Fifth Inter-American Specialized Conference on Private International Law, Mexico City, 14-18 March, 1994”, *E Pluribus Unum. Li-*



*ber Amicorum George A. L. Droz*, The Hague, Kluwer Law International, 1996, 299-320.

PÉREZ, L., “Tras las huellas del legislador del código civil de los cubanos”, *Estudios de derecho civil cubano*, Madrid, Colegio de Notarios de España, 2002, 5-43.

PEREZNIETO, L., “Las influencias recíprocas entre la codificación interamericana y los sistemas de derecho internacional privado”, *El Derecho Internacional Privado en el Umbral del Siglo XXI. Sextas Jornadas de Profesores de Derecho Internacional Privado (Segovia 1-2 Diciembre, 1995)*, Madrid, EUROLEX, 1997, 240-259.

PLENDER, R. and WILDERSPIN, M., *The European Contracts Convention*, 2<sup>nd</sup> Ed., London, Sweet & Maxwell, 2001.

RABEL, E., *The Conflict of Laws. A Comparative Study*, Chicago, University of Michigan Law School, 1947, Vol. 2.

RAMÍREZ, G., *Proyecto de Código de Derecho Internacional Privado*, Buenos Aires, Félix Lajouane, 1888.

RAMÍREZ, G., *El derecho procesal internacional en el Congreso Jurídico de Montevideo*, Montevideo, Imprenta Central, 1892.

Repertorio de Legislación y Jurisprudencia Chilena. *Repertorio de Legislación y Jurisprudencia Chilena. Código civil y leyes complementarias*, 3<sup>rd</sup> Ed., Santiago de Chile, Jurídica de Chile, 1996, Vol. 1.

REVOREDO, D., “La ley aplicable al contrato internacional entre particulares en el Proyecto de título preliminar del código civil peruano”, *Derecho*, Pontificia Universidad Católica del Perú, n.º 33, 1978, 19-37.

REVOREDO, D., *Código civil vi. Exposición de motivos y comentarios. Derecho internacional privado*, Lima, Diagramación, 1985.

SAMTLEBEN, J., “El territorialismo de leyes en América Latina”, *Primer Seminario Nacional de Derecho Internacional Privado*, México D.F., Universidad Autónoma de México, 1979, 171-209.

SAMTLEBEN, J., *Derecho internacional privado en América Latina. Teoría y práctica del Código de Bustamante*, Buenos Aires, Depalma, 1983, Vol. 1.

- SAMTLEBEN, J., “Teixeira de Freitas e a autonomia das partes no direito internacional privado latino-americano”, *Scientia Juridica*, Universidade do Minho, n.º 33, 1984, 344-366.
- SAMTLEBEN, J., “La relación entre derecho internacional público y privado en Andrés Bello”, *Andrés Bello y el derecho latinoamericano*, Caracas, La Casa de Bello, 1987, 159-169.
- SAMTLEBEN, J., “A influência de Andrés Bello no direito internacional privado latino-americano”, *Libro Homenaje a Haroldo Valladão*, Caracas, Universidad Central de Venezuela, Facultad de Ciencias Políticas y Jurídicas, 1997, 65-76.
- SAMTLEBEN, J., “El enigma del artículo 30 de la Ley de Derecho Internacional Privado”, *Libro Homenaje a Gonzalo Parra-Aranguren. Addendum 2001*, Caracas, Tribunal Supremo de Justicia, 2002, 355-371.
- SÁNCHEZ, A., *Proyecto de código de derecho internacional privado*, La Habana, Imprenta El Siglo xx, 1925.
- SÁNCHEZ, A., *La Comisión de Jurisconsultos de Río de Janeiro y el derecho internacional*, La Habana, Cultura, 1927.
- SÁNCHEZ, A., *El código de derecho internacional privado y la Sexta Conferencia Panamericana*, La Habana, Imprenta Avisador Comercial, 1929.
- SÁNCHEZ, A., *Derecho internacional privado*, La Habana, Carasa, 1931, Vol. 1-2.
- SÁNCHEZ, A., *Manual de derecho internacional privado*, La Habana, Carasa, 1939.
- SANTOS, R., *El derecho aplicable a los contratos internacionales: con especial referencia al contrato de transferencia de tecnología*, 2<sup>nd</sup> Ed., Montevideo, Fundación de Cultura Universitaria, 1998.
- SCOLES, E.; HAY, P.; BORCHERS, P. and SYMEONIDES, S., *Conflict of Laws*, 4<sup>th</sup> Ed., St. Paul Minnesota, Thomson West, 2004.
- STORY, J., *Commentaries on the Conflict of Laws*, 4<sup>th</sup> Ed., Boston, Little Brown, 1852.
- SYMEONIDES, S., “Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple”, *Brooklyn Journal of International Law*, Brooklyn Law School, n.º 39-3, 2014, 1123-1143.

- TAKESHITA, K., "Critical analysis of party autonomy: from a theoretical perspective", *Japanese Yearbook of International Law*, International Law Association of Japan, Tokyo, Vol. 58, 2015, 196-222.
- TEIXEIRA DE FREITAS, A., *Código civil, Esboço*, Rio de Janeiro, Laemmert, 1860.
- Treaty of Lima, 1878. *Pandectas brasileiras*, Rio de Janeiro, Empresa Brasileira de Publicações, 1927, 11-13.
- Treaties of Montevideo, 1889, *Actas de las Sesiones del Congreso Sud-Americano de Derecho Internacional Privado*, Buenos Aires, Imprenta de Juan A. Alsina, 1889;
- Treaties of Montevideo, 1889, *Actas y tratados celebrados por el Congreso Internacional Sudamericano de Montevideo*, Montevideo, El Siglo Ilustrado, 1911.
- Treaties of Montevideo, 1940, *Segundo Congreso Sudamericano de Derecho Internacional Privado, de Montevideo*, Buenos Aires, Ministerio de Relaciones Exteriores, República Argentina, 1940.
- VALLADÃO, H., "Le droit international privé des États américains", *Académie de Droit International de La Haye*, Recueil des Cours, The Hague, Vol. II, 1952.
- VALLADÃO, H., "The Influence of Joseph Story on Latin-American Rules of Conflict of Laws", *The American Journal of Comparative Law*, ASCL, n.º 3, 1954, 27-41.
- VALLADÃO, H., *Direito Internacional Privado*, 4<sup>th</sup> Ed, Rio de Janeiro, Freitas Bastos, 1974, Vol. 1.
- VALLADÃO, H., *Derecho Internacional Privado*, México D.F., Trillas, 1987.
- VÁSQUEZ, F., *El nuevo derecho internacional privado mexicano*, México D.F., Themis, 1990.
- VEGA, J., "Los contratos en derecho internacional privado", *Revista de Jurisprudencia Peruana*, Lima, n.º 48-49, 1948, 626-756.
- VIAL, M. I., "La autonomía de la voluntad en la legislación chilena de derecho internacional privado", *Revista Chilena de Derecho*, Pontificia Universidad Católica de Chile, n.º 40-3, 2013, 891-927.

VIAL, M. I., “Party Autonomy in Latin America: A Pending Task”, *Revista Chilena de Derecho*, Pontificia Universidad Católica de Chile, n.º 45-2, 2018, 453-478.

VON SAVIGNY, C., *A Treatise on the Conflict of Laws, and the Limits of their Operation in respect of Place and Time*, W. Guthrie (trans.), Edinburgh, T&T Clark/Stevens & Sons, 1869.

YNTEMA, H., “‘Autonomy’ in Choice of Law”, *The American Journal of Comparative Law*, ASCL, n.º 1-4, 1952, 341-358.