

INTRODUCTION

A course on the general rules of private international law in the Americas presents a stimulating challenge indeed. The subject is highly controversial as reflected in the doctrine; the diversity of legal systems in the hemisphere creates additional risks in tackling the systematization of the basic problems of this discipline; and access to national sources in order to analyze similarities and differences in the treatment of those rules further complicates a task which is, to begin with, quite complex from a scientific perspective. The significance, however, of having achieved in the Americas the unification of a substantial part of the general rules in a single instrument acts as an incentive to attempt the task.

Before embarking upon an examination of the general rules we are compelled to pose several questions: Is it fitting to speak of general rules of private international law at a time when their value is frequently challenged, particularly by United States jurists, who deem that the application of such rules to the primary institutions of private international law – characterization, renvoi, preliminary or incidental question, public policy, fraud on the law, adaptation, and vested rights – leads to barren exercises which are of little or no use at all in solving specific cases, particularly for justice to be done?¹ In the light of these criticisms, is it justifiable to persist in the codification of the general rules? Why is it that in spite of the widespread uncertainty in the American Continent, consensus for their unification was achieved? Several reasons may be advanced in response to these questions.

In the first place, the answer may be found in the long-standing codifying tradition of the American countries. Two concepts that would play a significant role in the hemisphere: integration and legislative unification, may be identified as far back as the dawn of independence of the American republics in the 19th century. The first treaty on private international law was discussed at Lima, Peru, in 1877. This was a difficult subject even for the more advanced European legal systems. What motivated such an endeavour? One may speculate that it was due to the deep-rooted sentiments of independence from a colonial system, reflected in the adoption by most Latin American countries of the territorialist doctrine, symbol

of the possession of one's own territory, which also led to the search for independent solutions. Perhaps it was due to the constant desire in the Americas to overtake Europe; or, possibly, because the hemisphere has offered a fertile environment, similar to the one that inspired Bartolo to ask the question as to what law would be applied in Modena to a citizen of Bologna. The extensive inter-American relations carried out at the personal, commercial and political level consolidated this initial concern and have been reflected in the processes of continental codification. For this reason, the codification process is part of the evolution process of the Americas and is an unseverable element of its development.

Prior to the Inter-American Convention on General Rules of Private International Law, codification in the hemisphere, by way of the Montevideo Treaties and the Bustamante Code, had gradually refined the normative provisions to regulate international private cases, particularly concerning institutions of the special part and the connecting factors. Nevertheless, the general rules of private international law had not yet been fashioned in a precise and systematic manner through a single conventional instrument. Therefore, the support given by long-established and solid American doctrine, the experience obtained by a method of codification which combined certainty through the adoption of clear and precise rules with the flexibility required for an appropriate disposition of private law cases, and the influence of the modern solutions developed by European legal thought², all contributed to the desirability of adopting that Convention³.

The fundamental purpose of this course is to undertake a critical analysis of this convention. It requires that we examine certain aspects associated with the process of codification of private international law; observe the evolution of the codification process in the Americas; make use of the comparative method in order to analyze the formulas through which the general rules have been dealt with in legislation, the doctrine and jurisprudence of the American countries; and define the international context in which the Convention is embodied. Finally, with a view towards preventing the Convention from becoming an inoperative instrument, we shall refer to certain mechanisms designed to ensure its effective application by the legal systems of the American States.