CHAPTER I

CODIFICATION OF PRIVATE INTERNATIONAL LAW

1. General Aspects

Codification is the elaboration of a methodic and systematic body that comprises the rules of a specific branch of law. As a process, it involves the unification of those rules which have proven to be effective in regulating specific legal relationships and the development of other rules to fill the gaps or to replace those which have become obsolete.

Codification occurs both in the international and the national spheres of the legislative process. The instruments adopted at these two levels are closely interdependent. They complement each other, yet share a relationship characterized by tension and discrepancies which act as incentives for further improvement.

Codification of private international law has the same characteristics and fulfils objectives similar to those of general codification, but concerns the normative aspects that regulate cases containing elements of foreign law. From the inception of the codification movement, international private relations have been regulated both within the States in which they are created or produce their effects, and within the international community by way of policies and principles acceptable to all the legal systems to which the international private relationship may be connected.

The desire for universal regulation of international private relations has not precluded the development of national processes of codification as a necessary complement, gap-filler and a source of influence upon the former. In the national sphere, these processes of codification have led to the preparation of special draft laws in several countries of the Americas and Europe, some of which have received legislative approval[4]. In the elaboration of these draft laws a considerable amount of effort has been directed toward reconciling clarity and conceptual stability with the flexibility required for the solution of increasingly complex private international law cases. Another standard commonly adopted in processes of national

codification has been to allow justifiable gaps, rather than to force solutions concerning issues which are not ripe for codification[5]. In addition, existing international instruments and modern doctrinal and jurisprudential trends have been taken into account, so as to permit a satisfactory integration – not always successfully achieved – between the national and the international spheres. Regarding this important balance, the Report on the Draft on Conflict of Laws of the Benelux countries contains the fitting recommendation that national legislators draft "legal provisions of private international law in such a way that they are not discordant with rules at the international level"[6].

Notwithstanding the expediency of national codification, it is obvious that this unilateral process is not sufficient to provide an adequate solution to private international cases. Instead, as Aguilar Navarro points out, the development of national codification alone results in accentuating "the differences between the various systems of private international law of the States which comprise the international community"[7]. He underscores the theory that an emphasis on national codification to the detriment of international codification may complicate the necessary co-ordination of the national legal system[8].

Battifol has observed:

> "No matter how the national sources are developed, there is no doubt that they are insufficient to respond to the needs of positive law . . . if one admits the existence of an international community and that the community has postulated an order defined by rules of law, it is not surprising that as a result of the inevitable course of events, the sources of private international law have emerged[9]."

Savigny brought out the need to establish workable universal principles by sustaining that in conflict-of-law cases similar legal relations should give rise to similar decisions, even when these decisions are rendered in different States[10]. Some writers, such as Vitta, have interpreted Mancini so as to find an implicit aspiration to universality, in that he considers the Italian rules on conflict of laws as a specific manifestation of universally workable principles. From this perspective, conflict-of-law solutions should be "not only the most satisfactory, but also substantially uniform"[11].

2. Arguments For and Against Codification

Several arguments have been used to challenge the need for and suitability of the codification of private international law, particularly conventional codification. On the other hand, cogent arguments have been used in support of the view that private international law reaches perfection through unification. Without attempting to exhaust the discussion of this topic, which has profound doctrinal implications, we shall briefly present the arguments for and against codification[12].

The objection made to most of the solutions supplied by codified rules – especially those dealing with conflict rules – is that they prevent the appropriate treatment of specific cases according to justice and equity. The judge-made doctrine required by such a view contradicts the very concept of codification. In fact, since Cavers' theories have become known, a school of thought particularly prevalent in the United States has emphasized the need for a choice-of-law system largely related to the values of justice on a case-by-case basis[13]. This notion of justice, and not the conflict rule, would determine the applicable law in each instance. The conflict rule, therefore, would be deprived of its neutral character on which predictability and certainty – factors promoted by codification – are based[14].

It would appear to be a true conflict of values in which the interests of justice become subordinate to the needs of certainty, but as Loussouarn points out, justice and equity continue to be fundamental principles of adjudication in civil law systems and the proper use of the conflict rule has contributed to attaining both in most cases[15]. Without ignoring the valuable contribution made by this doctrinal trend, nor the operational deficiencies of the conflict rules, one must admit that conflict rules continue to be an indispensable instrument for the regulation of international private relations, and that the codification of such rules improves their operation.

Other arguments against codification are fundamentally concerned with the negative effects that conventional unification may have on the quality of the rules adopted and their possible counterproductive impact on national systems. It has been said that the different levels of development of the legal systems of the countries participating in the unification process hamper the adoption of

adequate rules for all, thereby reducing the effectiveness of the process. Moreover, it is also felt that the substance of the unified rule may lack the necessary clarity as a result of compromise between systems that reflect deep-rooted doctrinal traditions[16]. It is argued that political factors may outweigh technical factors in the adoption of rules.

It is also contended that international unification may impair the unity of the national system, because the slow pace of domestic legislative processes prevents a coherent integration of conventional rules originating from various sources (subregional, regional and universal).

A traditional criticism aimed at codification in general, though at international codification in particular, is that normative uniformity implies a rigidity that may impair interpretation and curb the adjustment of the legal system to the requirements of social dynamics[17]. Allegedly, this may be especially burdensome in private international law, a branch of law with extraordinary adaptability, and which has achieved its most important solutions through the use of alternative sources, including, in particular, general principles of law. Arguably, a rigid unification with express solutions for each and every issue, far from facilitating judicial decisions, could trigger an abusive use of the negative mechanisms of private international law to reach solutions in accord with the *lex fori.*

Although rigidity is a real drawback of codified systems, it is, however, a relative one. While it is true that the inherent empiricism of the common law system lends itself to creative decision-making and is, therefore, apparently more flexible than codified systems, the facts have not always supported this assertion. Thus, for instance, in British jurisprudence, the classification between personal and real rights found in the decedent's estate law of Lord Kingsdown's Act of 1861, has not yet been replaced by the modern general division between real and personal property. More arresting solutions, however, are found in French jurisprudence in connection with the construction of Article 3 of the Napoleonic Code; in German jurisprudence which transformed a very specific article concerning "renvoi"[18] into a rule of general applicability; and in Dutch jurisprudence, in which the principle of unity of testamentary succession including real property was applied in spite of the contrary provisions of the law[19]. It follows that it is not necessarily accurate to assert that national or international codification implies

a restriction of the power of the judiciary to interpret the law. In this regard, the United States jurist Bodenheimer recently stated that:

> "In view of the multiplicity of possible approaches to statutory and judge-made law, it is not possible to give a general answer to the question as to which of the two systems exhibits a greater degree of flexibility[20]."

The arguments used to justify the need to codify the rules of private international law, both in the national and in the international spheres, basically relate to legal certainty and predictability of results, values which the codification process tends to protect. In addition, the systematization of the rules which codification involves contributes to the realization of these values. This is particularly important for legal systems such as those found in Latin America, in which the rules of private international law are scattered among various legal instruments[21]. Furthermore, it is maintained that as conventional codification stems from a broader international perspective, it is therefore more appropriate for the determination of cases which embrace foreign elements. In contrast, methods of national codification seem insufficient due to their narrower scope[22]. The consideration of only two issues, extensive international trade and migration, is sufficient to show the need for dynamic and unified solutions[23]. Finally, efforts to codify private international law are likely to result in a higher quality of conventional rules because the conferences or meeting of experts held to advance conventional unification benefit from the participation of highly qualified jurists.

It is also maintained that normative unification overcomes the reciprocity requirement still entrenched in the legislation of many countries, especially American and socialist nations. Furthermore, the unification of rules is deemed an important element of the regional and subregional integration processes[24], because by affording those processes the necessary stability, it fosters the development of international private relations, one of its objectives.

On the other hand, the impact of international unification on national legislation serves as an incentive for the revision of traditional concepts which are often overtaken by the dynamism of international relations. Thus, for example, UNCITRAL's "Convention on Contracts for the International Sales of Goods" abandoned,

at the request of the common law countries, the classical doctrine on "consideration"[25]. The most important multilateral codifications in the Americas have solved the much-debated problem concerning the nature of foreign law by establishing the obligation of the judge to apply it even without request, with the collaboration of the parties.

International conventional unification has had, in many instances, positive effects not only on national legislation[26], but also on prior international instruments[27].

Furthermore, the positive effects on the processes of codification, both domestic and international, in the scientific development of private international law, particularly its general part, should not be overlooked. In this respect, during his lecture at the Hague Academy of International Law, Nolde stated:

> "From the end of the XVIIIth century onward, codification, both national and international, has played an extremely significant role in the general evolution of private international law. The efforts towards systematization that it requires have exerted a tremendous influence on the very substance of the rules of law. These efforts have contributed to define better the guiding principles of the practice and to redirect their development. The search for logically coherent formulas led to an identification and filling of gaps, to a better understanding of the correlation between rules, and to an easier determination of principles. It would not be improper to assert that the history of modern private international law is intertwined with the history of its codification. The new methodology has given rise to a new law[28]."

Similarly, Aguilar Navarro states that "from the point of view of legal technique, codification was the turning point from which the doctrinal refinement of our discipline stems"[29]. Aguilar Navarro considers general problems a logical and functional response to the codification of private international law.

In our opinion, an analysis of the arguments for and against codification, particularly conventional codification, tilts the balance in favour of the former. While the reasons for opposing codification of private international law are grounded on real problems, it is nevertheless true that, in most cases, these can be solved through careful planning and execution of preparatory groundwork for the international conferences convened to adopt the rules. For its part,

the benefits of codification promote a great advance of our discipline and an improvement of the mechanisms through which it seeks to achieve its objectives. That explains why today, in spite of its limitations, the codification movement continues in full force.

3. Scope of International Codification

The processes of international codification, as characterized above, are carried out at the universal level, at the regional level, in the field of subregional activities and also within the scope of bilateral relations. Although the universal unification of the substantive rules of private international law appears to be the ideal solution[30], it is not, despite the headway made, in the offing. This explains the tendency among countries that share specific geographical regions or whose particular subregional links so require, to adopt common bodies of rules. The history of Europe and the Americas is particularly rich in this kind of achievement at the regional and subregional levels[31]. These two levels acquire particular relevance as a result of the adoption of various modalities of economic integration, which have had a significant impact on private international law.

The advantage of these codification processes is that with a smaller number of participating countries which share more homogeneous legal traditions there are less marked conceptual differences. While it is true that the variety of institutions involved in these codification processes has resulted in differing styles of drafting, negotiation and adoption of conventions, it is also true that these processes have given these conventions the characteristics dictated by the realities of each region[32].

Finally, codification has also been carried out within the scope of bilateral relations, a process that has been of particular importance to Eastern European countries, which have established a network of bilateral treaties embracing a number of issues concerning private international law. Likewise, some American countries have recently adopted bilateral treaties in a process parallel to multilateral activities[33].

It should be pointed out, however, that this diversification of conventional sources of private international law rules may provoke a breakdown in their application to specific cases. This would weaken one of the main objectives of codification of private inter-

national law rules which is to give certainty and predictability to the resolution of private international law cases. It is encouraging, therefore, to note that some corrective measures have already been adopted, such as the agreement entered into by the Council of Europe and the Hague Conference, by which the latter assumed exclusive competence for the treatment of subjects related to the unification of private international law[34].

It would be worthwhile to examine the possibility of establishing co-ordination in the Western Hemisphere among the different organizations whose work may lead to the adoption of rules of private international law. In spite of the opinions expressed by some writers, such as Kropholler, who consider that the moment has not yet arrived for the codification of private international law in Latin America[35], it is important to underscore that a considerable juridical base deriving from both the regional codification tradition and the processes of economic integration undertaken within the region already exists. In this regard, it is important to keep in mind the work of the Organization of American States, within which a substantial part of the hemisphere's codification efforts have taken place.

4. Method of Conventional Codification

The situation briefly outlined above leads us to consider several aspects of the method used to bring about conventional unification of the rules of private international law. These aspects relate to the elaboration of the preparatory works, the implementation of international conferences, the composition of delegations to the conferences, and the substance of the conventions. The fundamental element of any process of codification, however, continues to be the political will to adopt mutually acceptable rules. No method, regardless of its perfection, could replace the will generated by a clear understanding of the benefits derived from a fluent and proper development of international private relations, which in turn requires a common normative framework.

Preparatory works are essential to the drafting of conventions on private international law and require extensive material groundwork, highly qualified personnel and a long gestation period. This is indispensable for the preparation of those documents which will serve as the basis for the content of the conventional instruments.

Success of conventional unification depends to a great extent on the quality of these documents, the preparation of which requires great efforts due to the repeated and necessary references to comparative law[36].

In the Americas, international conferences are attended mainly by governmental representatives. The participation of observers, experts, or representatives of international organizations that deal with private international law depends on the conference's rules of procedure[37].

The most complex aspect of the methodology to be used in the unification of rules in this field of law involves the content and the internal structure of the conventions. It is particularly difficult to determine the elements that these conventions should contain in order to make unification effective, to fulfil the objective of giving security to the interested parties and at the same time to apply justice and equity to specific cases.

One of the first decisions faced by the codification movement from its inception during the last century was whether to pursue a comprehensive approach to the basic issues of private international law by integrating them into a single instrument, or a gradual and progressive process of codification through the adoption of conventions on specific subjects.

The comprehensive approach to codification did not receive any concrete acceptance in Europe[38]. In the Americas the process was different. The 1878 Lima Treaty attempted a comprehensive structuring of uniform rules of private international law. Later, the 1889 Montevideo Treaties formed a set of instruments which comprise some general rules of this discipline, contained primarily in the Additional Protocol, which deal with international civil, commercial, procedural and penal law. The most refined expression of the comprehensive approach was reached with the adoption of the Bustamante Code in 1928. Its influence was felt up until the 1960s, at which time the Inter-American Juridical Committee undertook the task of attempting to unify the Montevideo Treaties and the Bustamante Code, also taking into account the Restatement of the Law of Conflicts of Laws of the United States. Thus, the comprehensive approach was finally abandoned in favour of a methodology for the gradual and progressive codification by specific subjects.

The latter procedure was employed by the Hague Conference and its use was recommended in the Americas on different occasions.

However, it was not until the holding of the first Inter-American Specialized Conference on Private International Law, in 1975, that it began to be followed consistently in this hemisphere. This methodology is better suited to the increasing complexity of international private relations because it permits consideration of those issues which are ripe for international regulation. Furthermore, it permits a gradual approximation of the legislation of the countries involved in the codification process, facilitating compromises otherwise difficult to achieve due to the weight of different doctrinal and jurisprudential traditions. This last aspect was an important factor in the limited force and effect that the Bustamante Code has had as an instrument of unification. In addition, this procedure makes a convergence between different legal systems more feasible, permitting the adoption of rules common to all. It also allows for a gradual approximation in our hemisphere between the civil law systems of the Latin countries and the common law systems of the United States and the English speaking countries of the Caribbean.

Another important element of the procedure to be followed in the adoption of conventions on private international law concerns the nature of the rules to be codified. The question arises as to whether it is preferable to include only conflict rules or substantive rules as well[39]. The inclusion of the latter is expedient in many cases. However, due to the continuing implementation of the conflict method used for regulating most instances of international private relations, conflict rules continue to predominate. A consequence is the current trend to integrate conflict and substantive rules in international instruments, depending upon the particular nature of the subject under consideration.

Another methodological aspect is the selection of terminology to be used in conventions adopted among countries in which different languages are used, particularly with respect to those terms that define specific legal institutions[40]. In the Americas, for example, complications have arisen when an institution such as *derechos adquiridos* has been equated with "vested rights", because the scope of these terms is different depending on whether the context is the civil law system or the common law system. Similar difficulties have occurred with respect to the right to litigate as an indigent *(beneficio de pobreza)* found in civil law systems, which has been matched with *"in forma pauperis"* of common law systems, because the scope of the latter is more limited than that of the former[41].

These difficulties highlight the importance of including in conventions definitions of concepts which otherwise may be interpreted differently[42]. Definitions of an autonomous nature are the most appropriate for international conventions[43]. Such definitions must be clear, so as to permit harmonious domestic and international solutions[44]. Nevertheless, it must be kept in mind that the inclusion of definitions in conventions may be hampered by conceptual or methodological obstacles. It is therefore necessary, as suggested by von Overbeck, that the courts construe such instruments in accordance with the purpose for which they were created, namely the unification of private international law[45].

The solutions prescribed by conventions must be workable for all the countries participating in the international conferences, since the predominance of one or several national views would thwart general unification. Moreover, such solutions must balance the certainty guaranteed by a precise rule with the flexibility necessary to permit equitable judicial solutions in the specific cases in which such solutions are applied.

5. Comparative Law and Conventional Unification of the Rules of Private International Law

Comparative law plays an important role in the processes of conventional codification of this discipline[46], as may be seen both in the elaboration of the preparatory works for international conferences and in the subsequent application of the unified rules to specific cases.

To assure that the codification of conflict rules does not proceed blindly, the preparatory works for conventional unification must rely heavily on comparative law which encompasses not only conflict rules but also substantive rules. It also requires an analysis of national jurisprudence so as to determine the means by which private law rules are applied, as well as a precise understanding of the prevailing doctrinal trends. Furthermore, it demands due consideration of the social, political and economic elements reflected in the legal systems in force, taking into account that any changes affecting such elements may provoke modifications of these systems. The comparative study should also examine international instruments in force so as to avoid contradictions and, whenever necessary, to reduce the likelihood of discrepancies in order to prevent errors of interpretation and application.

Comparative law is also particularly important in the application of the unified rules of private international law. In fact, resort to it allows a proper balance between the range of abstract principles which lead to the application of a conflict rule, and the specific outcome of each case[47]. The correct application of concepts such as characterization, preliminary question, renvoi, public policy and adaptation depends on the utilization of the comparative method and the scope of the interpretation process[48] which, in turn, contributes to the achievement of the fundamental objectives of unified private international law[49].

In spite of its limited regional scope, the comparative method in the Western Hemisphere comes up against several difficulties: the absence of a systematic compilation of substantive and conflict rules, the limited access to the work carried out in universities and the hemisphere's other scientific centres, the lack of current publications, etc. All of these are very real obstacles which make comparative research – an indispensable step in the elaboration of adequate solutions – extremely difficult[50]. It is essential to overcome these deficiencies because recourse to comparative law is of great importance in the Americas, as in any region where different legal systems coexist and the task of conventional unification of private international law rules has begun.

6. Codification of the General Aspects of Private International Law

Traditionally, codification of private international law has emphasized consideration of topics of the special part, without having tackled, at least to the present, a positive systematization of the general part. This shortcoming has had a negative impact on the doctrinal and practical development of this discipline, since, as Goldschmidt has pointed out, "There is no science without findings of general problems and without a method that permits systematization of the entire subject . . ."[51].

Various factors help to explain this situation: the relative novelty of institutions traditionally encompassed by the general part; the outgrowth of special topics, a result of the magnitude and diversification of international private relations in the last half century which have, moreover, brought about a closer contact between distinct legal cultures, each with its own traditions and

conceptual peculiarities; and the relatively recent and active participation of the State within the sphere of international private relations, which has helped to obliterate the clear borderline which existed between public international law and private international law.

Therefore, it is not surprising that the identification of and responses to general problems of this discipline, within the framework of comprehensive doctrinal concepts, are still today unfinished tasks. For this reason, it is particularly important to study in depth the elements that comprise the general part of private international law, because that part forms the nucleus and starting point which could be the basis for a body of rules workable for all national legal systems[52]. In fact, doctrinal and methodological agreements that may be reached concerning institutions of the general part, would give shape to normative instruments ensuring a similar or single regulation of international private cases. This would lend stability and certainty to international private relations, thus improving the modalities under which international intercourse is carried out today.

Codification of the general part of private international law is particularly significant in the Americas. As has already been pointed out, three distinct legal systems are found in the Western Hemisphere: the civil law system of the Latin American countries, the common law system of the United States and the common law system of those English speaking Caribbean countries principally inspired by the British legal system[53]. A codification process which purports to develop a workable legislation for all countries of the hemisphere and which reflects the tendency toward integration of the legal systems is underway. Based on existing mutual influences, the process tends to integrate the best characteristics of the above-mentioned legal systems. This integration requires the establishment of solid principles and general institutions which guarantee the positiveness of a scientific system – so dear to the Latin American mentality – and which also include the necessary and wholesome Anglo-Saxon pragmatism.

In this regard, the classical doctrine preserves its unquestionable validity through traditional concepts surviving from the Savigny era[54], in spite of the often repeated "crisis of the conflict rules"[55]. One of the relevant contributions of this doctrine concerns the content which it assigns to the general part: connecting factors and

general institutions[56]. Neuhaus[57], an eminent writer on the classical doctrine, classifies these elements into three groups. The first finds its origin in Savigny, for whom the general part deals fundamentally with the connecting factors which determine the *situs* of the legal relationship[58]. The second group is composed of most of the general institutions which develop as a result of national codification, and which relate to the nature, scope and manner of application of the foreign law: characterization, preliminary question, renvoi, public policy, fraud on the law, and unknown institution. The third group is formed by those institutions directly related to values, which were the subject of an in-depth analysis after the Second World War: acquired rights, weighing of interests and procedural adaptation in order to obtain just results[59].

Most of the general institutions within the second and third groups were codified in the Inter-American Convention on General Rules of Private International Law. This Convention represents the first attempt at the positive systematization of the above-mentioned institutions in the international sphere, which, according to Goldschmidt is "the assurance of the scientific nature of a discipline"[60]. This Convention embraces the most advanced solutions, such as the compulsory application of the foreign law and its procedural parity with the domestic law; restrictions on public policy; the proscription of fraud on the law; the preliminary question and the institutions directly related to values: acquired rights and adaptation. The Conference excluded from the Convention the general rules concerning characterization and renvoi, for which no consensus yet exists.

The content of the Convention provides for the proper balance between a general legal framework and the flexibility for each specific case. It combines a conceptual and an empirical focus, reflects theory and practice, and harmonizes certainty with equity[61]. Purely practical solutions with a "subjective and relative sense of justice" are not acceptable. "Force of law", legal certainty, or "formal" harmony of solutions *per se* – at the opposite end – are also undesirable. The Convention strikes a balance which permits the application of the law using an equitable standard or the confirmation of an often intuitive solution engrafted in the law.

There are two prerequisites for an adequate evaluation of the significance and scope of the general rules included in the Convention. First, the Convention must be properly placed within the

context of the codification process in the Western Hemisphere. Second, the pertinent legislation, doctrine, and national jurisprudence in the Americas must be systematically analyzed. The next two chapters shall satisfy these prerequisites and establish the framework within which an adequate evaluation of the Convention may proceed.