CHAPTER IV

INTER-AMERICAN CONVENTION ON GENERAL RULES: CRITICAL ANALYSIS

As was pointed out in the preceding chapters, the legislator's interest in regulating the general rules of private international law surfaced in the Americas for the first time in the Additional Protocol to the Montevideo Treaties of 1889, which was textually adopted as the Additional Protocol to the 1940 Treaties. The Bustamante Code, for its part, includes treatment of certain general rules in its Preliminary Title. None of these instruments, however, contains an exhaustive regulation of the general rules.

The original idea to produce a convention specifically dealing with general rules of private international law was clearly stated for the first time in Resolution 3 of the XIXth Conference of the Inter-American Bar Association[432]. For its part, CIDIP-II analyzed the drafts of general rules presented by the Inter-American Juridical Committee[433], the delegation of Argentina and the delegation of Mexico. A document prepared by J L. Siqueiros and C. Arellano García[434], which provided valuable information on the provisions in force in the legislation of various American countries, was also the subject of consideration. Based on its deliberations regarding these materials CIDIP-II approved the Inter-American Convention on General Rules of Private International Law, the first instrument to deal with most of the general rules of private international law.

This critical analysis of the Convention will include an evaluation of its expediency as an instrument of normative unification in the Americas; its ability to combine legal certainty with sufficient flexibility for the achievement of justice in dealing with specific cases; and its innovative nature, reflected by improved formulations and provisions which fill the existing gaps on either national legal systems or conventional instruments. With respect to its expediency as an instrument of unification, we shall consider whether the Convention conforms with domestic enactments and judicial decisions; we shall also evaluate its conceptual and terminological precision and its consistency with current doctrinal trends in the hemisphere.

1. Scope of Application of the Convention

Article 1 establishes the scope of application of the Convention as follows:

> "*Article 1.* Choice of the applicable rule of law governing facts connected with foreign law shall be subject to the provisions of this Convention and other bilateral or multilateral conventions that have been signed or may be signed in the future by States Parties.
>
> In the absence of an international rule, the States Parties shall apply the conflict rules of their domestic law."

This provision has no precedent in previous codification activities in the hemisphere. From a doctrinal point of view, this provision comports with Savigny's theory, according to which the applicable rule of law is selected on the basis of the legal relationship or factual situation. This may be seen in the first sentence of Article 1: "Choice of the applicable rule of law governing facts connected with foreign law . . ." The territorialist conception, which considers the rule of law an issue of State sovereignty, and uses it in order to determine the legal relations that must be regulated, is thus abandoned.

In addition, Article 1 determines the hierarchical order of the rules that govern issues connected with foreign law. The need for and expediency of including this article in the Convention were extensively debated during the drafting process. On the one hand, some alleged that the content of the rule was self-evident and thus, no express treatment was required; on the other hand, it was argued that its inclusion was relevant in a convention on matters of international treaties, but not in one such as that under discussion. Nevertheless, the prevailing opinion was that its inclusion was warranted on the grounds that it contained an appropriate guiding precept, useful for those non-specialists who deal with private international law[435].

In our view, this provision has far greater importance, for it tends to ensure the uniform application of private international law in the hemisphere by proclaiming the primacy of international conventions over domestic law. This conforms with present trends in international law, which have induced the partial abandonment of the dualist conception that the application of domestic law is the

direct result of state sovereignty, which does not permit the subordination of national law to the provisions embodied in international conventions.

We concur, therefore, with Goldschmidt, for whom Article 1 embodies the monist principle[436], and with Parra Aranguren who asserts that the article reaffirms the rule *generi per speciem derogatur*, since international conventions constitute special laws of preferential application[437].

2. Content of the Convention

(a) *The Application of Foreign Law*

The much-discussed issue of the nature of the applicable foreign law has given rise, as mentioned above[438], to an abundant source of jurisprudence and doctrine. The Convention deals with this topic in Article 2 which provides:

> "*Article 2.* Judges and authorities of the States Parties shall enforce* the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked."

The history of this article may be traced back to Articles 1 and 2 of the Additional Protocol to the Treaties on Private International Law (Montevideo 1889 and 1940), which provide for the application *ex officio* of foreign law and establish the power of the parties to "plead and prove the existence and content of the law invoked". A similar provision is contained in Article 408 of the Bustamante Code.

The first distinction that should be highlighted between the article under consideration and its predecessors in the aforementioned international instruments, is the replacement of the term "the laws", which in a civil law system includes only the enactments of legislative bodies. This term was changed to "the foreign law" (in Spanish "el derecho extranjero") which allows for the inclusion, in addition to statutory law, of custom and jurisprudence, which are of special

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* For purposes of this work, the term "application of foreign law" will be used in place of the term "enforcement of foreign law".

significance in the common law system. This formula, therefore, represents an effort to bring both systems closer.

The second distinction is the elimination of the term "*ex officio*". As previously pointed out[439], the *ex officio* application of foreign law is a controversial issue between those who consider it a question of fact which must be proven and those who consider it a question of law.

During the debates concerning Article 2, it was deemed inexpedient to include the term *ex officio* expressly for two reasons: first, it was held that it dealt with procedural principles which have a close connection with State sovereignty; second, arguably such term was redundant since the article already established the duty to apply foreign law ("shall enforce the foreign law")[440]. We share this interpretation, which, in addition, coincides with the antecedents contained in the existing inter-American instruments (Montevideo Treaties and Bustamante Code), with the trends reflected by domestic doctrine and jurisprudence and with the formulas established in the modern European instruments[441]. We also feel that the broad expression "foreign law" includes the mandatory application of the foreign private international law rule, when appropriate, although it does not necessarily imply acceptance of renvoi[442].

In this connection, Mexico, when signing the Convention, made an express reservation to Article 2, since according to that country's interpretation, Article 2 "only creates an obligation when the existence of the foreign law has been proven before the judge or authority, or its terms are known to them in some other manner"[443]. Mexican legislation, doctrine and jurisprudence, as indicated in Chapter III[444], require proof of foreign law. It follows then, that the expression used in the last part of the reservation "or its terms are known to them in some other manner", signals a departure from the rigid formulas used in that legal system, in favour of a flexible posture which grants the judge an active role in the application of foreign law.

The formula adopted for the application of foreign law, "in the same way as it would be enforced by the judges of the State whose law is applicable", allows the conclusion that, in addition to the statutes, the judge of the forum ought to consider all other elements that would be used by the judge of the State whose law is applicable. The construction of the foreign rule of law, therefore, must be undertaken within the context of the legal system to which it

pertains[445]. This position is in conformity with the provisions of the Inter-American Convention on Proof of and Information on Foreign Law – also adopted at CIDIP-II – which makes reference to "the text, validity, meaning and legal scope" of the foreign law.

The formula adopted also implies that case law will either serve as a binding precedent or as a guiding principle, depending on its character within the system to which the law being applied belongs. In addition, it ensures the legislative creativity of the judge, an indispensable element if existing gaps in the law are to be filled, and determines that the extensive or restrictive use of discretion is dependent on the manner in which the judge of the other State would have disposed of the matter.

Article 2 follows the Montevideo Treaties and the Bustamante Code in recognizing the right of the parties to "plead and prove the existence and content of the foreign law invoked". This right has been established with the objective of providing the judge with the assistance that he may require from the parties in acquiring information on the content and scope of the foreign law[446].

It should be noted, however, that "proof" in the terms of Article 2 is of a different character than that required to prove the existence of factual issues. Therefore, the article refers to ". . . the parties' *being able* to plead and prove . . .", thus recognizing their right rather than imposing a duty, which would only be proper with reference to issues of fact upon which the application of foreign law will rest (property *situs,* place of execution of an act, etc.)[447].

Article 2 responds to the doctrinal evolution taking place in the countries of the hemisphere and is a valuable precedent to confirm national jurisprudence which considers foreign law as a question of law. Furthermore, it reflects the position sustained in the draft laws on private international law and the liberal trend of recent legislation of some states of the United States and rules adopted for the Federal courts[448]. In this respect, it should be mentioned that the way was paved for the formula adopted in Article 2 by the provisions of the Montevideo Treaties and the Bustamante Code, which triggered a strong momentum to overcome the traditional conceptions in force at the time of drafting the civil codes of some American countries.

Therefore, this article contributes to the normative unification of private international law in the hemisphere. Such unification is strengthened by the improvement in the terminology used, as

reflected in formulas which allow a rapprochement between the civil and the common law systems, while still maintaining the necessary conceptual precision. Similarly, the formulas used, particularly the one referring to "foreign law", endow the rule with the necessary flexibility to ensure just and equitable results in specific cases[449].

(b) *Procedural Appeals*

The Convention provides the following concerning admissible appeals regarding the application of foreign law:

> "*Article 4.* All the appeals provided for in the procedural law of the place where the proceedings are held shall also be admissible for cases in which the law of any of the other States Parties is applicable."

The direct forerunner of this rule may be found in Article 3 of the Additional Protocol to the Montevideo Treaties of 1889 and 1940, which embody a similar formula. The Bustamante Code, for its part, established in its Article 412 the appeal for annulment (cassation) with respect to foreign law, although it limits it to the contracting States where such appeal exists.

Article 4 of the Convention proclaims the principle of procedural non-discrimination with respect to the foreign law, according to which "the judge applies the foreign law maintaining with the latter a relation to the same degree as that maintained with his own law"[450].

It is widely known that there has been an extensive doctrinal debate on the availability of the appeal for annulment when foreign law is to be applied. During the debates concerning this article, objections were voiced regarding the validity of the rule with respect to this remedy. It was understood that the purpose of such remedy is twofold: to limit the power of the judge to its strictly jurisdictional aspects – preventing him from becoming a legislator through abusive interpretation of the law – and to achieve the unification of domestic jurisprudence. It was held that the two functions of the remedy refer to the judge's domestic law, and to allow it in the case of foreign law was incompatible with the nature of the remedy and with the purposes for which it had been created[451].

Various arguments were adduced to justify the inclusion of the appeal for annulment under the provisions of Article 4. Thus, it

was asserted that the expression "all the appeals" is sufficiently clear and broad to cover the appeal for annulment. Furthermore, it was suggested that the relation between the trial judge and the foreign law is the same as that he would have with his own law, and that, therefore, the remedy should be admissible.

It was also considered that the availability of the above-mentioned remedy should depend on the domestic law; if the latter permits it solely with respect to the domestic law, then it would not be available when foreign law was to be applied; if the legal system allows it with respect to any legal rule, the remedy would then be appropriate. It was held, therefore, that the problem was basically one of interpretation of the national legislation[452].

It has been interpreted, however, that

> "it seems unquestionable that the intent of the rule is not to surrender to the legislation of each one of the States parties the determination of admissibility of the appeal for annulment on the grounds of a violation of the foreign law and, in that the rule's terms equate foreign law and domestic law with respect to the various aspects relating to the operation of this remedy. It would not be proper, therefore, that different treatment be established *ad libitum* in each one of the States bound by the Convention[453]".

A special problem arose with respect to the common law system. As was pointed out, this system traditionally considered the foreign law a question of fact. In the United States under the common law the interpretation of foreign law was treated as a question of fact which could not be reviewed by the higher courts, especially by the State and federal supreme courts[454]. Nevertheless, the classical view in that country had evolved to the extent that if the finding of the jury in matters of foreign law conflicted flagrantly with the evidence produced by the parties, the finding may have been set aside by the higher court[455]. The circumstances have carried further with the new Rule 44.1 of the Federal Rules of Civil Procedure[456] which, in reference to foreign law, provides that "The court's determination shall be treated as a ruling on a question of law". On the basis of this provision, appeals would be available against decisions concerning the application of foreign law, although it would be wise to keep abreast of the jurisprudential developments in this matter.

In our opinion, Article 4 contemplates the availability of the appeal for annulment. The formula "all the appeals" is sufficiently clear and broad to include it within its terms. Furthermore, the above-mentioned precedent, Article 412 of the Bustamante Code, allows one to conclude that the intent of the Latin American countries was to include it among the pertinent remedies with respect to the application of foreign law. Finally, the legal character of foreign law inferred from Article 2 of the Convention reaffirms the availability of the appeal for annulment in the application of foreign law.

Article 4 may also be considered useful in the process of normative unification in the Americas. The formula adopted allows for the use of the procedural remedies of the forum, thus facilitating flexible proceedings depending upon the specific characteristics of each case. Although Article 4 does not represent an innovation in conventional rules in the hemisphere, its inclusion effectively complements Article 2 of the Convention.

(c) *The Unknown Institution*

With respect to the exception of the unknown institution, the Convention fills a gap in the national systems and in the existing inter-American instruments. The reason for its inclusion may be found in the need for regulating those international private cases which are simultaneously related to both systems, civil law and common law.

The Convention on General Rules dealt with the problem of the unknown institution and established the following provision:

> "*Article 3.* Whenever the law of a State Party has institutions or procedures essential for its proper application that are not provided for in the law of another State Party, this State Party may refuse to apply such a law if it does not have any like institutions or procedures."

None of the previous codifying endeavours in the hemisphere include a provision which can be considered strictly equivalent to that contained in the above article. Nevertheless, some situations that have a certain analogy with the institution under examination have been considered. Thus, the Montevideo Treaty on International Commercial Overland Law (1940) refers in Article 9 to the "partner-

ships or corporations created in a given State, in a form unknown to the laws of another State", allowing them to do business subject to the local laws.

The unknown institution constitutes one of the exceptions to the application of the foreign law together with public policy *(ordre public)* and fraud on the law. On its most extreme interpretation, this exception prevents the application of the foreign law when the institution established therein does not exist in the legal system of the trial judge in an exactly analogous fashion. As was pointed out[457], this strict construction of the unknown institution would be an offshoot of the territorialist theory with a view to limit the application of foreign law excessively.

Arguably, the exception of the unknown institution becomes apposite when the legal category which is to be applied is contrary to the public policy of the forum; yet, it may be considered that in that case, it is the public policy issue which leads to the rejection of the foreign law and not the fact that the institution is unknown[458].

During the debates held on this article, an effort was made to provide for justifiable grounds for rejecting foreign law when the institution under consideration was unknown, without introducing too broad an exception that would excessively reduce the application of foreign law. The formula finally adopted meets both requirements. In the first place, it authorizes the forum to determine whether or not it is justifiable to admit the exception in a specific case; it is, therefore, an exception of permissive application ("may refuse to apply"). Second, it limits the exception only to those cases in which it is not feasible to apply institutions of the forum analogous to the foreign unknown institution. The provision, therefore, takes on a broader perspective that allows a positive use of adaptation. However, because the article basically refers to those cases in which there is a technical or factual obstacle to the application of a foreign law, the scope of the applicability of the exception is somewhat restricted.

Article 3 marks, in our opinion, a significant advance in the hemisphere codification process. Its innovative nature is obvious, since the exception of the unknown institution had not been considered in prior conventional instruments and its treatment in the national legal systems is practically non-existent[459]. With respect to its intrinsic structure, the rule is clear from a terminological point of view and conceptually precise in specifying the cases in

which the exception may be invoked. Furthermore, the permissive character of its application allows the judge the necessary flexibility to determine its applicability in specific cases. We feel, therefore, that the rule embodied in Article 3 has become a significant tool of conventional unification of private international law in the hemisphere.

(d) *Public Policy*

As mentioned in a preceding section[460], an evolution has taken place in the area of public policy, evidenced by the departure from firmly territorialist views towards the conception of public policy as an exception to be used restrictively. The doctrinal development in the hemisphere has played an important role in the process, in that it has allowed a consensus on the formula established in Article 5 of the Convention, which provides:

> "The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy *(ordre public).*"

The Additional Protocol to the Montevideo Treaties of 1889 and 1940, in Article 4, proscribes the application of foreign laws when they are contrary to "the political institutions, laws of public order, or good morals of the forum". With respect to the execution of foreign judgments, the Treaties on International Procedural Law (Montevideo, 1889 and 1940), establish in Article 5 that they will have extraterritorial validity as long as they do "not conflict with public order in the country of their enforcement".

It has been repeatedly stated that the Bustamante Code has given broad scope to the concept of public policy[461]. The basic articles of the Code which refer to this institution define the laws of international public order as those "binding alike upon all persons residing in the territory whether or not they are nationals" (Art. 3, II), and establish that "constitutional precepts are of an international public order" (Art. 4), as are "All rules of individual and collective protection, established by political and administrative law" (Art. 5).

The first element of the Bustamante Code that should be underlined is the direct connection between the above-transcribed provision found in Article 3, II, and the Mancini doctrine, according to

which the concept of international public policy is used to designate those laws or territorial rules that are applied exclusive of any foreign law and that bind both nationals and foreigners. As may be noted, this conception of public policy is expansive making it the rule rather than the exception through its *a priori* application. The Mancinian conception found in the Bustamante Code possesses a certain doctrinal timeliness, as may be seen from Article 6 of the draft inter-American convention on general rules prepared by the Inter-American Juridical Committee[462].

The broad scope given to public policy has led to its erroneous identification with public law. This is partly evidenced by the terms used by the Bustamante Code in its Articles 4, 5, and 423, section 3, the first two of which were incorporated verbatim by the Inter-American Juridical Committee into its draft convention. The folly of identifying public policy with public law is evident given that public policy is an institution of private law, applicable within the ambit of the rules of private law capable of extra-territorial application.

It follows that the formula proclaimed by the Bustamante Code in its Article 4 – "constitutional precepts are of an international public order" – is partly accurate, i.e., with respect to certain principles of public and private law whose importance is fundamental for the State; it is inaccurate with respect to other constitutional provisions lacking any connection with the relationships that could arise between individuals and that, therefore, are alien to the public policy exception. Such a broad conceptualization of public policy does not belong in a code of private international law.

In the Montevideo Treaties, as well as in the conventions adopted in the CIDIPs – in particular Article 5 of the Convention under consideration – public policy clearly operates as an exception to the application of foreign law. In this way it comes closer to Savigny's doctrine and to the *a posteriori* application of the exception, that is, once the national rule of private international law has been applied, and the effects of the applicable foreign law have been determined, its effects are analyzed in order to determine its conformity with the public policy of the forum.

The formula incorporated in the conventions adopted at CIDIP-I deals with the power of the State to refuse to carry out a procedure or to apply a rule when it is "manifestly contrary to its public policy

(ordre public)"[463]. Article 5 of the Convention makes inroads in determining the limits of the public policy exception, in that the clash of the effects of the foreign rule with the public policy of the State in which it must be applied, in addition to being *manifest,* must impinge upon the *principles* of that public policy. It excludes, therefore, mere opposition of the foreign law to the domestic rules that embody such principles[464].

The basic discussions concerning the adoption of the formula designed to regulate the public policy exception were held during CIDIP-I[465]. The outcome was the previously mentioned term – "manifestly contrary to its public policy *(ordre public)*" – included in almost all the conventions adopted at that conference. This formula is repeated in the Conventions of CIDIP-II and has been improved upon in Article 5 of the Convention on General Rules through the express reference to the "principle" of public policy of the country in which the foreign law determined by the conflict rule must be applied.

The provision under examination does not define public policy nor does it refer to its substance. This is in keeping with the position adopted of considering public policy as an exception that eventually provokes the rejection of the foreign rule as the result of a comparative process between the effects of the latter and the principles embodied in the former. Likewise, it may be observed that the term "international" is eliminated, although it would have been preferable to retain the text "international public policy", which in the technical language of this branch of law refers in a precise manner to the exception under consideration, in contrast to domestic policy which is designed to safeguard the fundamental rules and principles of a legal system with respect to the acts performed by individuals who are subject to it. This was Uruguay's position as set forth in the declaration submitted at the time of signing and ratifying the Convention[466].

It should also be noted that Article 5 is silent regarding the manner in which the judge is to proceed once the incompatibility of the foreign law with the public policy of the forum is determined. It may be inferred that preference was given to consolidating the areas of agreement concerning public policy, thus avoiding the introduction of new controversial elements that could jeopardize the consensus. This is one of the areas in which alternatives designed to improve the general rules incorporated in the Convention

must be explored. In this regard, there are some interesting precedents, such as the formula used by the Portuguese civil code of 1967, which provides in such a case for the application of "the more appropriate rules of the competent foreign law", and if the latter is not possible, the application of the domestic Portuguese law. A similar formula is adopted in the Argentine draft code on private international law[467]. On the other hand, the adaptation of rules of the same legal system as that eliminated on grounds of public policy would find support in Article 9 of the Convention.

As previously mentioned, Article 5 improves upon the formula used in order to restrict the scope of the exception. This gives greater flexibility in specific cases. Its doctrinal orientation is clear and responds to the trends of thought in the continent. It also jibes with recent jurisprudential practice in the majority of the countries studied herein[468] and with the special draft laws on private international law[469]. For these reasons, this article may be considered useful towards achieving conventional unification in the hemisphere. Nevertheless, the role of public policy on private international law remains a sensitive issue, especially for those countries with a strong territorialist tradition, and continues to be a significant obstacle in the unification process in the continent[470].

(e) *Fraud on the Law (Fraudulent Evasion of the Law)*

With respect to fraud on the law[471], we indicated that there is a gap in the regulation of this institution as a general rule of private international law. In fact, as drawn from the previous discussion on this topic, fraud on the law is contemplated only with respect to specific subject-matters (marriage, contracts, etc.), and in other cases its specific application is the result of an extensive interpretation of the concept of fraud or abuse of law as used in civil law. Furthermore, it should be noted that fraud on the law has no history in the hemispheric activity[472]. For this reason, it is particularly important that this institution was included in Article 6 of the Convention, which provides:

> "The law of a State Party shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded.
>
> The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties."

Article 6 establishes fraudulent evasion of the law as an exception to the application of foreign law. The exception operates when there is a "fraudulent evasion of the basic principles of the law of another Party". The basic element of this formula is the deliberate displacement of the connecting factor of the conflict rule in order to induce the application of another foreign law more favourable to the interests of the parties. It should be noted, that although, on the one hand, the expression "basic principles of the law" broadens the possibility of using the exception, on the other hand, it makes it more difficult to put into practice.

This difficulty increases due to the requirement of proof of another element: the fraudulent intent of the parties. This formula, set forth in the second paragraph of the article under consideration, was harshly criticized in the debates conducted during the drafting process[473].

In this connection, some advocated that judges cannot determine such intent, which should instead be inferred from external manifestations, and that the expression used in the article was an embodiment of the subjective theory concerning fraud on the law, presently superseded by the objective theory of external manifestations.

In order to solve the problems posed by the reference to the fraudulent intent of the interested parties, it was proposed that the language "to determine the fraudulent character of the evasion" be used; however, it was not accepted, and the original terminology was maintained. One of the arguments put forth in favour of that language was that today, fraud on the law should be focused more towards those evasions stemming from economic interests, in particular, the incorporation of companies with the view to avoiding a stricter domestic law. It was reasoned that adoption of this language would be a step towards the modernization of private international law because it would empower a judge to determine, in all cases, the intent of the parties in entering into certain legal acts of an economic nature.

This article may be improved upon in the future. It is not clear, for example, if the rule assumes the principle *fraus omnia corrumpit,* thus embracing the fraudulent act *per se,* as well as negating all the legal consequences. Nor does the provision specify which law is the subject of fraudulent evasion. This provision has been interpreted[474] as not only referring to fraudulent evasion of the *lex fori* but also

of the laws of another State party which are applicable by reason of the forum's conflict law. It would, therefore, be desirable to adopt alternative language which provides guidelines in order to solve this murky issue.

With respect to the rule under discussion, it should be stressed that the Government of Uruguay, following the predominant trend in its national doctrine and jurisprudence, made an express reservation to Article 6, in that it felt that article introduced "a new exception to the standard application of the competent foreign law" as well as "a subjective element which is hardly perceptible". Uruguay also indicated that the article in question would, in many cases, adversely affect the autonomy of the parties as to choice of law, and that, therefore, it would only be applicable when the country's interests were harmed and "not in the case of strictly private relations". The reservation also asserts that the fraudulent establishment of the connecting factor "would actually not be fraud on the law but rather fraud, and consequently, the connecting factor would not have been properly established"[475].

Article 6 has been the subject of harsh criticism. We conclude, therefore, that its expediency as a unifying instrument might be curtailed. The reference to the intent of the parties to determine the existence of fraud on the law does not promote legal certainty, in that it gives the judge excessive leeway to exercise discretion. Furthermore, the formula adopted, although clear from a conceptual point of view, is open to debate. The merits of the article in question stem from, as indicated previously, the fact of having entered into an area which was heretofore untouched in the inter-American sphere and not very well-established in the national legal systems. For this reason, this rule may be considered more as a point of departure, rather than as a final goal, within the process of elaboration of conventional instruments in the Americas[476].

(f) *Vested Rights*

As we have seen[477], the concept of vested rights has been treated in the national systems only in connection with very specific cases. The Convention provides:

> "*Article 7.* Juridical relationships validly established in a State Party in accordance with all the laws with which they

> have a connection at the time of their establishment shall be recognized in the other States Parties, provided that they are not contrary to the principles of their public policy *(ordre public).*"

The Montevideo Treaties do not contain any provision similar to the foregoing. Reference to vested rights in those treaties is limited to the capacity of individuals and to their rights with respect to personalty[478]. The Bustamante Code, for its part, established the extraterritorial validity of "the rights acquired under the rules of this Code"[479], provided that their effects or consequences are not in conflict with a rule of international public order.

Article 7 of the Convention varies the traditional treatment concerning vested rights, thus improving the formula under which they are recognized. In the first place, the rule uses the expression "juridical relationships" in place of "vested rights", which was the term used in the draft convention prepared by the Inter-American Juridical Committee. During the debates, it was deemed that the term finally adopted has a broader scope and therefore covers a set of situations such as occurrences having legal consequences[480].

In the second place, it should be noted that the rule under consideration contains the condition that the "juridical relationship" be validly established in a State party "in accordance with all the laws with which they have a connection at the time of their establishment". With the adoption of this formula, the old "vested rights" theory, which had been taken both from the Siqueiros-Arellano proposal and the draft of the Inter-American Juridical Committee[481], which required that the rights be validly acquired according to the law of the State in which they arose, was abandoned. The "Inter-American Convention adopts a different perspective: it does not proclaim the doctrine of vested rights according to *'the'* competent law but according to *'all'* the competent laws"[482].

During the debates, it was observed that the adoption of the formula set forth in the draft convention of the Inter-American Juridical Committee

> "for all practical purposes means that a country forego its private international law, since a right is considered as validly acquired according to a foreign legal system, even though it would not be validly acquired according to its own private international law . . . If it is said that the legal relationship is

> to have been validly acquired according to all the laws connected to the case, then, either one's own legal system has a connection too, since the legal relationship has been validly acquired according to one's own private international law, or such law does not claim competence over the legal relationship and, consequently, it is possible to admit it as having been acquired[483]."

Goldschmidt has argued that the formula originally proposed corresponds to the theory of vested rights that

> "upholds indirect rules of universal validity so that if someone validly acquires a right according to the competent legal system by virtue of the indirect rule of universal validity, all the other States must inevitably recognize it[484]".

According to Parra Aranguren, the formula adopted by the Convention was appropriate because it permits the solution of those cases in which "a particular relationship has a connection with a law that declares it valid and . . . with another which declares it invalid"[485]. He added that the accepted formula

> "merely constitutes an exception to the normal operation of the conflict rule: the law which it designates as competent shall not be taken into consideration when it refuses to recognize a legal relationship validly created in accordance with all the legal systems to which it was connected at the time it arose; an aspect of particular practical importance in those cases involving legal relationships with a relative international character, that is, created within a single legal system, but which subsequently transcend national borders[486]".

This rule does not expressly establish whether it deals with legal relationships validly created in accordance with the substantive laws of the States parties or whether it is sufficient that they be acquired in accordance with their conflict rules. In our view, the latter interpretation is more liberal and more fitting in light of the purposes of private international law. It should be observed that this interpretation finds support in European doctrine and in the Benelux draft (1951:1960)[487].

The public policy exception as it relates to vested rights has been specifically included in the article under examination. Unfortu-

nately, the condition that such rights be "manifestly" contrary to the principles of public policy, as set forth in the previously examined Article 5, was not retained. Its effect would have been to further limit the public policy exception with respect to vested rights, thus surrounding them with greater certainty and stability.

The formula adopted in Article 7 possesses the requirements of conceptual and terminological precision necessary for legal certainty. Furthermore, it is in keeping with the doctrinal and jurisprudential trends in the hemisphere and improves upon the formula used in the Bustamante Code. The broad reference to "juridical relationship" takes in issues that might have been excluded if the expression "vested rights" had been used, thus allowing for greater flexibility in the disposition of specific cases. For these reasons, this article may also be considered a positive contribution to the process of conventional unification of private international law in the hemisphere.

(g) *Preliminary or Incidental Question*

On the subject of the preliminary or incidental question, the Convention makes inroads in an area that has not yet been expressly regulated in national systems. In this respect, the Convention establishes:

> "*Article 8.* Previous, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue."

Neither the Montevideo Treaties nor the Bustamante Code contain provisions concerning the preliminary or incidental question of private international law[488]. Nor may similar provisions be found in the Siqueiros-Arellano proposal nor in the Inter-American Juridical Committee's draft.

The formula of Article 8 prevailed over a proposal made by the Argentine delegation, which adopted the doctrine of equivalence, referring to "the rules of private international law of the forum", and which solved the problem of internal inconsistency that could arise by authorizing the judge to adapt the laws in issue in order to achieve a reasonable solution[489]. The article under consideration was proposed by the Venezuelan delegation[490].

The text finally adopted does not solve the problem concerning the conventional unification of opinions related to the preliminary question. In fact, the formula used authorizes each judge to continue applying to preliminary issues either the conflict rules of the forum or the private international law of the *lex causae,* in accordance with his own theories.

It has been interpreted that by establishing that incidental issues "need not *necessarily* be resolved in accordance with the law that governs the principal issue", the formula adopted suggests a certain tilting towards the hierarchical doctrine (application of the *lex causae*)[491]. Likewise, the expression used in the article: "in accordance with the law that governs . . .", should be construed as referring to the pertinent rule of private international law, unless it deals with a preliminary question of a substantive nature[492]. As clearly pointed out by P. Lalive, the problem of the incidental question is not that of the applicable law, but of the private international law whose rules will determine such applicable law[493].

The above-mentioned shortcomings prevent the rule embodied in Article 8 from being considered a definitive step in the process of codification in the hemisphere. For this reason, it is advisable that a study be undertaken on the need to improve the formula used in order to surround it with the necessary clarity and effectiveness.

(h) *Adaptation*

By including adaptation in the text of the Convention, progress has been made toward filling an existing gap in the national legal systems, as well as in the inter-American instruments. This represents an advance influenced by the continental doctrine towards a more effective treatment of international private cases. With respect to adaptation, the Convention states:

> "*Article 9.* The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case."

With respect to this article, which was proposed by the Venezuelan delegation[494], there are no precedents in hemispheric activity. It proclaims a workable policy for the solution of problems arising from the application of substantive rules from different legal systems, as activated by the conflict rules in a specific case.

The terms adopted are sufficiently broad so as to overcome what Kegel refers to as logical contradiction or antinomy *(Seinswiderspruch)* or inadequate outcome *(Sollenswiderspruch)*[495]. Regarding the first type of problem, the article under examination establishes the concept of harmonious application of the different provisions; in the second hypothesis, the rule asserts the necessity of solving the problem in accordance with justice or equity in each specific case[496].

The doctrinal and practical position adopted coincides likewise with G. van Hecke's opinion that in those cases of simultaneous application of rules originating in different legal systems, they must be applied in accordance with the criteria of justice and reciprocal adaptation, which also inspire the legislator and the judge in purely domestic cases[497].

As previously pointed out,

> "the Inter-American Convention pursues the necessary balance between formal justice, sought by the conflict rules, and substantive justice, which must be accomplished by way of the specific solution in the individual case[498]".

By including the rule under consideration, the jurists at CIDIP-II also intended to bring about the approximation of the common law and the civil law systems, taking into account that adaptation is more suitable to the former due to the characteristic flexibility of that system.

Article 9 makes no reference to cases of adaptation when adaptation deals with conflicts involving issues subject to successive laws. This is one aspect of the Convention which could be improved in the future.

The rule under consideration represents a positive advance in the codification process in the continent. The terminological and conceptual precision ensures a correct application of the rule, which will be facilitated, in addition, by its conformity with the growing doctrinal trends in matters of adaptation in the countries of the

hemisphere. Furthermore, the rationale of this institution is the need to confer upon the judge the required flexibility for the disposition of specific cases, an objective which is accomplished by the formula adopted. In addition, the article reflects a necessary and suitable innovation in conventional private international law in the hemisphere, fills an existing gap, and represents a valuable precedent for national doctrine and jurisprudence[499].

3. General Rules not Included in the Convention

During the debates held at CIDIP-II no consensus could be reached concerning the adoption of general rules on characterization and renvoi. This is not surprising. Within the countries, there are no express rules concerning those institutions[500], nor even a consensus in the doctrine and jurisprudence. Nevertheless, the Bustamante Code sets forth the definition of characterization in accordance with the *lex fori* (Art. 6); however, it is silent concerning renvoi. The Montevideo Treaties make no reference to either of the two institutions.

As Goldschmidt has pointed out, the decision not to venture into the issue of characterization and renvoi was wise, because "it was better not to solve a problem than to adopt a deficient solution"[501]. Neuhaus is in agreement[502], indicating the advantage of not yielding to the euphoria usually prevalent in international conferences, which often leads to compromise on open issues with the result that formulas adopted never become operative.

In so far as characterization is concerned, the silence of the Convention confers upon the judge greater discretion, which we would like to construe as promoting the judge's independent characterization. This is a positive step, in so far as it tends to grant a more active role to jurisprudence and even to doctrine, thus fostering a ripening of this topic as part of an essential process to arrive at more refined conventional formulas[503].

As for renvoi, some take the position that it would be applicable if provided for in the private international law rules of the controlling legal system as indicated by the conflict rule. This position finds support in Article 2 of the Convention which prescribes the application of the foreign law "in the same way as it would be enforced by the judges of the State whose law is applicable . . ."[504] Similarly, Goldschmidt considers that through the adoption in the

Convention of the theory of legal usage, although renvoi has not been adopted in a prescriptive manner, it has been accepted sociologically[505]. On the other hand, Neuhaus is reluctant to adhere to such construction[506]. Our view is that it was not the intent of the legislator to include renvoi in this Convention, either directly or indirectly. Therefore, it would be desirable to adopt a specific rule, perhaps as a result of future work in the hemisphere[507].

4. Evaluation of the Convention

An evaluation of the entire Convention tips the balance to the positive side with respect to its intrinsic structure and content as well as with respect to the role that it may play as an instrument of conventional unification of private international law in the hemisphere. The adoption of the monist principle (Art. 1), by establishing the supremacy of the Convention over international law, ensures its uniform application throughout the continent; the recognition of the legal nature of foreign law and its equality with that of the forum (Art. 2) favours the accurate application of the foreign rule, which is strengthened by establishing the principle of procedural non-discrimination (Art. 4); the improvement of the formula used in the areas of public policy (Art. 5) and vested rights (Art. 7) contributes to the correct application of foreign law, and is also in keeping with the current doctrinal and jurisprudential trends throughout the continent; the innovation of including the exception of the unknown institution (Art. 3) and the resort to adaptation (Art. 9) fills a significant gap in national systems and in conventional law in the hemisphere, ensuring, particularly with the last-mentioned institution, an appropriate application of foreign rules in the interest of justice and equity.

Remaining for future improvement are the formulas adopted to regulate fraud on the law (Art. 6) and the preliminary question (Art. 8).

Similarly, the issues of characterization and renvoi remain open. The determination as to whether these institutions should be regulated internationally will be the task of future Specialized Conferences. This will require a special effort at formulating doctrine, which, undoubtedly, will be supported by the governments of the region and by the private international law interest groups in the Americas.

5. Accession by Non-OAS Member States

Article 12 of the Convention addresses the possibility of accession by States that are not members of the Organization of American States. Such eventual accession is also governed by the provisions of Article 13, which stipulate that reservations may be made provided they concern specific provisions and are not incompatible with the "object and purpose of the Convention"[508]. In view of the traditional tendency of legislators throughout the Americas to open conventional instruments to States outside of the region, we shall briefly consider the possibilities for accession by some nonmember States.

Article 1, referred to above, would not seem to present an obstacle for the accession by European countries, since the formula used is sufficiently broad in establishing, with respect to the determination of the applicable foreign law, the validity of "this Convention and other bilateral or multilateral conventions that have been signed or may be signed in the future . . .".

The legal nature of foreign law as prescribed by Article 2 conforms to the modern European trends reflected in recent instruments[509]; therefore, it follows that this provision would not present a difficulty for the accession of the countries of that continent. Article 4, on the other hand, by establishing equality of treatment between national and foreign law, could raise problems with respect to the appeal for annulment. In this connection, the practice of the European courts[510] varies greatly. Nevertheless, the accession by countries in which the appeal for annulment is not accepted with respect to foreign law could be made feasible by way of entering an appropriate reservation.

Article 3, concerning the unknown institution, is sufficiently flexible in its application and precise in its conceptual formulation so as not to create an impediment to the accession by other countries. The same holds true for Article 5, which embodies the formula for public policy in a manner similar to that used in the Hague Conventions, thus conforming to the prevailing European trends.

Article 6, which regulates fraud on the law, is similar to the rule adopted by the Portuguese civil code[511]. We feel, however, that the position taken with respect to this article might not be shared by some countries, and for that reason accession would be made feasible through the making of an appropriate reservation[512]. Article 7,

on the other hand, regulates vested rights more broadly through the formula "in accordance with all the laws . . .", and thus, accession by other countries would be feasible.

Article 8, concerning the preliminary question, demonstrates, as previously mentioned, shortcomings that prevent it from becoming a useful tool for conventional unification. Thus, potential accessions to the Convention with reservations to this article would not be surprising. This is not the case with respect to Article 9 concerning adaptation, the formulation of which constitutes a clear doctrinal and legislative advance, which may encourage non-member States of the OAS to accede.

For the above reasons, we concur with Neuhaus[513] in considering accession to the Inter-American Convention on General Rules by other countries, particularly European, as both feasible and desirable.

6. Proper Application of the Convention. Special Jurisdiction[514]

As indicated in Chapter II with respect to the evolution of the codification process in the hemisphere, the application of conventional instruments to specific cases comes up against various obstacles[515]. In Chapter III we noted that the national jurisprudential practice leads, in many cases, to an abuse of the *lex fori*. Therefore, it is possible to identify at both levels a series of distortions which impinge upon the proper application of the conflict rule. It follows then that it would be desirable to explore alternatives to correct such defects and prevent these valuable instruments, as in our case, the Convention on General Rules, from non-enforcement.

It is advisable to proceed gradually toward the objective of uniform application of the rules of private international law, which process entails a few co-ordinated measures. The first step could be the creation of a body responsible for providing information on foreign rules and on conventional instruments in the hemisphere[516]. In addition to the corresponding legal texts, this body would gather information on national jurisprudence with respect to domestic private cases in order to follow up on the manner in which the national legislation and conventional instruments are being applied[517]. This follow-up on the judicial practice with respect to inter-American conventions, particularly the Convention on General Rules, would be especially important because it would provide the basic

information for an accurate evaluation of the practical effectiveness of conventional unification of private international law in the hemisphere.

At a second stage, an institution of a pre-judicial nature could be created to assist in preserving the cohesiveness of the legal order through a unitary interpretation. This stage is particularly significant because the Convention on General Rules provides for the validity of the "other bilateral or multilateral conventions that have been signed or may be signed in the future by the States Parties" (Art. 1). This could lead to an overlapping of international rules called upon to regulate a specific case, a situation in which it would be necessary to overcome potential contradictions by way of uniform interpretation. Such uniform interpretation would also be important in those cases in which the application of international instruments were to vary from country to country[518]. This process of developing institutions for the uniform application of the Convention could culminate in the establishment of an international jurisdictional entity, with binding authority and competence in cases involving the application of rules of conventional private international law. On the national level, it would also be desirable to create special courts to hear cases involving foreign elements governed by rules of domestic private international law.

(a) *International Jurisdiction*

The idea of creating an international jurisdictional entity is not new. It requires the participating States to relinquish their jurisdiction over certain legal matters to a mechanism created by the international community, to which international disputes may be submitted. Moreover, it involves a reconciliation of the classic concept of sovereignty with the need to rely on a stable, independent and supranational mechanism.

The first attempt to create a permanent organism having competence to decide disputes through binding judgments originated at the Hague Conference of 1907. The proposal to establish a permanent international court failed due to the States' demands to be represented in their entirety. Contemporaneously, the Central American Court, which managed to function for only a brief time, was established[519].

During the discussions on the Bustamante Code in 1928, the

proposal was made that specialized judges be appointed to ensure the correct and continued construction of the Codes' provisions[520]. This proposal was submitted to the member States for their comments, but was not accepted.

With respect to the International Court of Justice, which originated at the United Nations, we may note the influence of the principle of sovereignty as reflected in the basis of its competence, in its make-up, and in the nature of the cases submitted to it. It is interesting to recall the so-called "Affaire Boll", one of the private international law cases (appointment of guardian) submitted to the Court for the purpose of determining the application of the Convention of 1902[521].

The establishment of the European Court has been the most effective step taken toward the creation of a judicial organism, in that the Court constitutes an independent and permanent decision-maker in the international sphere, whose rulings are binding on both the organs of the European Economic Communities as well as on the States or individuals who are parties to international relationships.

After more than 25 years of an economic integration process, there is a conviction in the European Economic Communities that their economic unity which gradually expanded to other areas, would not have been feasible without an adequate and well-defined legal framework. To attain this, common uniform rules have been drafted with the objective of harmonizing the national legislation in force in each of their member States.

This process shows that the classical relationship between the State and the individual, embraced in the traditional concept of sovereignty, has been transformed into a complex scenario in which the interests of nations and individuals, in addition to those of the Community itself, are at play. This tripartite connection, which is regulated by Community law is strengthened by the existence of an independent judicial organ, the Court of Justice. Among the primary functions of this body are the application and interpretation of treaties, the control over the legality of the acts of other organisms, and the rendering of advisory opinions on prejudicial matters[522].

The general principle is that the Court does not have competence to pass judgment on provisions of national law of the member States. Nevertheless, there are specific circumstances which require it to do so.

In matters involving contracts entered into by the Community or by its representatives, and containing clauses granting it jurisdiction, the Court has applied the rules of public or private international law. On the other hand, Community law has to take national rules into consideration in order to determine the status or legal capacity of an individual and to decide whether they are the subjects of rights or liabilities arising from Community law. Such is the case when an action is brought before the Court involving, for instance, a request for the dissolution or liquidation of a commercial company, or, for example, when an advisory opinion is requested from this body on the financial liability resulting from a divorce decree affecting an employee of the Community. Conversely, the national courts can go so far to apply rules of Community law or of law deriving therefrom when, for example, the conventions on jurisdiction or the convention on the validity of foreign judgments, adopted in 1968, are invoked in national courts. National courts will be able to reach this stage only when the integration processes have matured, that is when the sovereignty concept is partially waived for the benefit of community interests, and at such time as the States perceive the need to attain legal security by means of new institutions.

The European Court has not heard many specific cases of private international law. Nevertheless, it could hear them and establish the corresponding jurisprudence, provided that its competence to hear cases including foreign elements[523] was defined more precisely.

The creation of the Court of Justice of the Cartagena Agreement, which has responded to the need to rely on a judicial authority to construe the rules stemming from the Andean Subregional Agreement, is an encouraging American model of a subregional institution for the effective enforcement of community rules.

Arbitration tribunals are of great significance in the field of international business transactions. In the inter-American system, arbitration enjoys a certain degree of popularity, as exemplified by the Inter-American Convention on International Commercial Arbitration, approved in Panama in 1975[524].

The creation of an inter-American court with specific powers to intervene in the solution of cases of private international law would not only ensure the correct application of the rules of such law, but also strengthen the inter-American system and protect individual interests. Obviously, it will not be easy to attain the ideal of an

international jurisdiction. It will be the product of experience and of the legal formulas that have been devised throughout the course of history[525]. In the field of private international law, and specifically within the American regional ambit, it would seem that the States are not yet prepared to accept a supranational scheme in the jurisdictional area. Nevertheless, the prospective consolidation of integration systems may open the door to such a possibility and the integration process may provide more adequate mechanisms in response to the need for harmonization of conflicting interests and the desire to ensure legal equality for persons subject to the law.

(b) *Specialized National Jurisdiction*

There are three options for treatment by the national courts of cases including "foreign elements"[526]. The first would be the referral of "international" matters to special courts. This notion has already been contemplated in the work of Pierantoni, the Italian jurist, who conceived of trial and appeal courts[527].

However, he himself rejected this idea for legal and practical reasons, the most important of which is the undesirable division of matters, which creates a special problem in the area of family law, and bureaucratization of justice resulting from the excessive specialization of judges, and the consequent expansion of the special courts.

A second alternative involves the modification of jurisdiction *rationae loci* in order to confine international procedures to a single jurisdiction, which could be, for example, a court of first resort. The court could be provided with the necessary resources as well as advisers to support the judges' work. The Argentine draft code on private international law provides for the creation of a special jurisdiction in international matters. The article entitled "*Fuero Propio de Extranjería*", provides that the Executive Branch shall organize courts with international jurisdiction to hear cases dealing with private international law[528].

The third alternative, which would not require any legislative amendment, is to assign cases with "foreign elements" to special sections of the competent courts or to certain judges. In this way, judges would attain a certain degree of specialization, thus gaining the necessary experience to deal with difficult matters requiring

the application of rules of private international law. The reform of *Gerichtsverfassungsgesetz* (law of the courts) was similarly conceived within the modification of private international law in the Federal Republic of Germany[529]. Moreover, the possibility of relegating "international" matters to the fewest number of courts ought to be considered[530]. An interesting example is the District Court of Hamburg, which has a Special Division that heard 850 cases in 1975, of which 650 were connected with foreign elements[531]. The advantages of this solution are the possibility that judges acquire greater specialization and therefore, establish more unified criteria, and that the dissemination of judgments becomes facilitated,

> "All of which brings about an awareness of the need to provide adequately for the cases with foreign elements and finally of the importance of private international law in the modern world, in which the individual requires increasing protection[532]",

since

> "[w]ithout a concentration of such cases, the application of foreign law would continue to be very difficult, in that private international law would be composed of mammoth theoretical structures, of little practical effectiveness with respect to the important purposes it must accomplish in the modern world[533]".