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**INTERNATIONAL CONTRACT LAW, „LOIS DE POLICE“
AND SELF-APPLICATING RULES:
AN ARGENTINE OUTLOOK**

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INTERNATIONAL CONTRACT LAW, "LOIS DE POLICE" AND
SELF-APPLICATING RULES: AN ARGENTINE OUTLOOK

I.

1.1. Recently, it has been contended that coordination and cooperation for common purposes required by every society takes the form of two co-existing principles in reciprocal tension: plan and contract (1). Plan presumes the existence of state issuance and enforcement of norms and directions addressed to individuals regardless of their personal wishes, though not necessarily implying (at least in democratic societies) a contradiction with the majority of individual wishes, while contract resides on the will of self-reliant individuals who establish in an autonomous way and using their own initiative the norms that shall govern their conduct.

1.2. At present, legal thinkers also point out the social function played by contract, - not running behind that of planning. Contract satisfies the regulatory ends of organized communities as much as planning does; however, in the case of contract, there is an express or implied delegation of law-creating powers made by the state to individuals with the conviction or in the belief that in certain areas, the independent actions of individuals can better serve the ends of organized society than planning (2).

1.3. This modern and functional vision of contract has rendered obsolete less recent tendencies which gave paramount importance to the free will of the parties in the modelling of contracts, without attributing any relevance to the impact of contract norms and contractual decision making on society, or to the necessary compatibility between contract and social ends and objectives of the organized community. Such tendencies, which have been characterized as superficial or distorted interpretations of the principles of economic liberal thinking (3), have been rightly criticized by both western and eastern legal thinkers, as they imply a unilateral of contract based upon the identification of contract and the will of the parties (4), a major misstatement if one realizes that contract plays a social function and that its role and effects once the parties have instilled life in it is

to be judged from the viewpoint of the whole legal and social framework where it is inserted. This means that contract has an objective existence of its own, independent of the will of those who created it, and that its meaning and normative and social effects are limited and qualified by its objective existence, which brings about juridical effects by itself not always controlled by contracting parties and originated in the legal system taking into account such objective existence in order to submit contract to the system's rules (5).

II.

2.1. Conflicting philosophies of contract and planning also reverberate in the field of private international law. Freedom of contract has its counterpart in freedom of the parties to choose the law applicable to the international contract. According to its widest expression, parties to an international contract are free to establish its substantial contents and to submit it either to any national law or to a body of transnational usages and practices with a parallel exclusion of the application of all national laws (Lex mercatoria). Even more extreme views purport that international contracts are ruled by their own normative contents and not subject to any national or anational juristic system. This latter position denies any social role to contract, as its only "raison d'être" would be the will of the parties that created it ("pacta sunt servanda") isolated from the context of any socially created set of rules, either national or anational (6).

2.2. Planning is present in its turn in the general theory of private international law through several devices whose common core would be that they impose the predominant application of state law of a certain forum in spite of the opposition or neglect of the parties to an international or "internationalized" legal relationship (7).

The public policy limitation to the application of "foreign" law or "rules" is the most clear cut example of this type of device, and implies an effort by the judge to interpret the legal system of the forum in order to determine the essential social and economic principles underlying it which are infringed by the contents of the international contract

or by the legal rules chosen by the parties to govern it. Therefore, the classical function of public policy is to command the application of the forum's rules with a simultaneous exclusion of incompatible foreign laws or contractual clauses.

"Fraude à la loi" - another planning mechanism - is based on an objective conception of contract and on the desire of ensuring the application of the imperative internal rules of the forum. Contract is considered in its external elements: place of performance and execution; will of the parties (but only as expressed in contractual clauses themselves), etc. The consideration of all these circumstances leads to the determination of the legal order most closely connected with each specific contract, the application of whose imperative rules - and not really of the general principles underlying the forum's legal order as a whole - are to prevail over any contradicting rules of the law selected by the parties or introduced as contractual clauses.

"Self-applicating rules", "lois d'application immédiate", "lois de police", "peremptory rules of private international law" are some of the diverse ways of referring to another expression of the planning principle in private international law (8). The traditional conflict-of-laws rules based on Savigny's principle that institutions are to be classified according to their nature, and that to each respective category corresponds a "Sitz" or "siège" to which a specific connecting factor is ascribed, is questioned right to its roots. The attention is addressed now to the content of and ends pursued by the substantial rules integrating each national juristic system; if it is concluded that the policies and interests protected by or underlying such rules would be frustrated if their application were not extended to cases with international contacts, the judge is to automatically apply them even if no traditional conflict-of-laws rule built upon a fixed connection factor or a grouping of contacts test commands him to do so. Something similar - though not identical - happens with "self-applicating" rules, which establish their own unilateral application to international cases on account of their international nature.

In continental law systems, the function attributed to this method is a residual one. It ensures the application of national law in certain

fields located in socially vital areas, such as economic law or family law, thus sparing the uncertainty brought about by traditional conflict-of-law rules, which automatically lead - without making any discrimination as to their national origin or content - to the application of internal substantial rules designated by "a priori" stated connecting factors (9). In U.S.A., it enjoys wider acclaim mainly on account of Currie's contributions, though later developments suggest that a combination of grouping of contacts and interest analysis is likely to prevail in the long run (10).

2.3. These three "planning" devices get closely intertwined at one stage or another (11). For instance, in most legal systems it shall not be difficult to conclude that most "self-applicating" rules are the expression of wider principles of public policy in the international sense; or that if the parties choose a certain law to govern their contract in order to evade a "loi de police", the judge will possibly invoke the "fraude à la loi" doctrine to avoid such result, even if most contractual contacts are connected with a national legal system not containing that "loi de police" (12). Moreover, not all these planning devices exclusively bring about restrictions to the free will of the parties; they might also interfere in the normal play of other forum's conflict rules which would otherwise impose the application of foreign substantial rules; as when, for example, the forum's public policy forbids the application of foreign racist laws restricting the legal capacity of individuals despite the fact that the specific forum's private international law norm indicates and even orders the application of such laws.

III.

3.1. Present Argentine doctrine in the field of international contract law evidences still now a marked influence of the "free will" doctrine depicted at 1.3. ut supra. The will of the parties is shown as an "a priori" postulate derived from general principles of natural law, and as such, pre-existent to and superseding contradictory positive legal norms and rulings. The right of the parties to choose the applicable rules to their contract would not practically recognize any limitations but those introduced by "ordre public international", which would be rather based on general principles derived from natural law than on principles deducted from the

national positive legal order considered. Thus, the parties would not be only entitled to displace the application of local internal public policy norms, but also of existing and legally enacted national private international law rules indicating the application of such norms. In consequence, no "fraude à la loi" doctrine is allowed to introduce any limitations to the free will of the parties (13). A derivative position adds to this conception the possibility of restricting the free will of the parties by the action of "lois de police", though it maintains in full - outside the sphere of such laws - the power of the parties to ignore all positive conflict-rules curtailing their autonomy (14).

For this latter position, the role of planning is anyway limited to those exceptional hypotheses where the judge has concluded after examining the contents of internal laws (in the case of "lois de police") or of general jusnaturalistic principles (in the case of "ordre public international"), that enough grounds exist to advance the application of a forum's national rules or basic tenets to the detriment of the rules chosen by the parties. No room is left to the "normal" application to international contracts of internal imperative norms belonging to the national juristic system objectively most closely connected with such contracts on account of their "Sitz", or of the grouping of their contacts, or of their most significant connection.

This derisory attitude towards the classical conflict-of-law method only proves to be a setback for the planning principle, as it jeopardizes the normal application of national imperative norms; the "protective" image of "lois de police" can be, in its turn, a misleading one if the traditional conflictual method is completely left aside, as they reduce the potential sphere of national planning in the international field to exceptional cases, contemplated in rules whose application normally depends on a case-by-case not always predictable judicial interpretation of the policies advanced and interests protected by them. Thus, rather than on the legislator's express will specifically manifested in a conflicts rule, which can be known in anticipation, the application of municipal law can be based on subjective grounds which might not always derive from an objective appreciation of the social issues at stake.

3.2. Argentine conflicts rules in the field of contract - mostly found in the 1869 Civil Code - cannot be considered, on the other hand, expressions of what we have called "the free will doctrine".

Art. 1205 Civil Code establishes that the law governing the validity, obligations and "nature" of a contract is determined by the place where the contract was executed. Arts. 1209 and 1210, Civ. Code, on the contrary, proclaim that these aspects shall be ruled by the law of the contract's "place of performance". The most acceptable conciliation of this contradiction is inspired on the main source of these articles, Joseph Story (15), who inclines himself for the prevailing application of the law of the place of performance when it does not coincide with the contract's place of execution. The remaining source of these articles - Freitas (16) and Savigny (17) - are also favourable to the submission of contractual "obligations" to the law of the place of their performance. The same can be said of 1889 and 1940 Civil International Law Montevideo Treaties, both ratified by Argentina, though in coincidence with the norms contained in the Argentine Civil Code, these Treaties submit the "contract" itself, and not contractual "obligations" isolately considered, to the law of the contract's "place of performance" (18).

3.3. It is important, in our opinion, to fully realize the implications of distinguishing between the "place of performance" of the contract and that of contractual obligations from the viewpoint of private international law. An obligation has a place or places of performance of its own, which corresponds to the place of performance of its object: the "prestation" or human action whose accomplishment implies the obligation's performance (19).

A contract, in its turn, has no "place of performance" of its own, and it cannot be said that its "place of performance" is the summation of the places of performance of each contractual obligation. In this and many other senses, contract is an organized structure of a minimal human community of at least two persons implying a coordination of human interests and activities, which is not confined to the obligations that compose the contract's object. Contract is also a source of obligations, and it would be an unforgivable simplism if for the purpose of determining the applicable law, the source and its offsprings were considered identical.

In consequence, the expression "contract's place of performance", if taken in its literal sense, is deprived of detectable semantic content (20), unless we provide it with an specific conventional meaning. That this exercise is necessary is proved by the fact that Argentine legal provisions heretofore considered refer to the "contractual place of performance".

3.4. The clue to these intricacies is to be found in Savigny's original idea of "Sitz" based in its turn on the notion of "Natur der Sache", but considered rather from a concrete, than a metaphysical, perspective (21). The "Natur der Sache" of each contract is to be determined case by case, taking into account all its objective aspects (and not merely the place of performance of its obligations), which shall include, among others, the parties' domicile and nationality, the contract's place of execution, the choice-of-law and choice-of-forum clauses contained in the contract, and also, - already at this stage - the substantial contents of the national legislations indicated by the grouping of these contracts. Unlike Savigny's system, there is no abstract "nature" "a priori" ascribed to contract, but a "concrete" nature derived from the objective contractual context. Therefore, there is no abstract contractual "Sitz" determining the applicable law, but a specific centre of gravity to be concluded case-by-case from (i) the grouping of contacts; (ii) the contents of the legal substantial rules belonging to the national system indicated by this objective contact grouping.

However, Savigny's main idea - to create an image or concept evidencing a link between a situation and a juristic system (22) - is preserved. What changes is the "situation" under analysis: it does not consist of the obligations isolately or hierarchically considered, but of the contract as a whole. For this reason, the "place of performance" of the contract also becomes an image adapted to the new reality to be apprehended; its stands - within the purview of private international law - for the localization of the diverse contractual elements in order to determine the applicable law.

3.5. The method depicted in 3.4. remains conflictual, as it is based upon a grouping of contacts taken as a localising connecting factor; but it also has functional ingredients, as it requires that attention be paid to the contents of the substantial rules of the national legal system thus indicated.

For instance, if the grouping of contacts or any subsidiary connecting factors (23) indicate the application of a legal system containing substantial norms not "interested" - on account of the policies embodied in them - in extending their sphere of influence to international contracts, there is no reason to displace the application of a different legal system chosen by the parties and not corresponding to the contract's center of gravity. The principle shall be that in such hypothesis there is no "fraude à la loi", and that the will of the parties shall prevail even if the law they have chosen has no contact with their contract, provided, of course, that the forum's "ordre public international" does not object.

3.6. The provisions on applicable law to international contracts contained in arts. 1205 and 1209/1210 Argentine Civil Code correspond to the guidelines set out at sections 3.4 and 3.5. ut supra. For the determination of the contract's "place of performance", art. 1212 Argentine Civil Code gives preference to the will of the parties and the "nature" of the obligation. But according to the Argentine legal system, the will of the parties is not an unfettered and independent variable: it has to be exercised within the limitations traced by the positive legal order, and in this sense, it cannot be used for illicit or abusive purposes (arts. 953, 1071 Arg. Civ. Code), nor can it be unreasonably manipulated (23 bis). The public policy norms "strictu sensu", that is, those whose benefits cannot be renounced neither before nor after the moment in which the respective right has been acquired, remain a clear boundary to the parties' autonomy even at the level of international contracts (arts. 18, 21 and 872 Arg. Civil Code) (24).

Therefore, the will of the parties in the international sphere is but an element among others designating the contract's "place of performance", which is to be taken, as already shown, as in image for con-

tractual localisation and center of gravity; and it is in this sense that arts. 1209, 1210 and 1212 Civ. Code are to be interpreted.

This is confirmed by the fact that the "nature" of the "obligation" (read: of the contract) also mentioned in those articles is to be considered in the process of determining the applicable law as a reference to the "Sitz" of the contract; in other words, to its center of gravity as indicated by the grouping of contacts and the balance of interests between the state legislations showing contacts with the contract under analysis.

3.7. The preceding interpretation is confirmed by the fact that the Argentine Civil Code (arts. 1207 and 1208) condemns "fraude à la loi propre et étrangère" attained by a choice of law made by the parties in order to evade the laws of the Argentine Republic or of a foreign state.

It is obvious that the recognition of "fraude à la loi" by the Civil Code (25) implies the existence of objective criteria not controlled by the parties which can lead to the application of either foreign or national legal systems irrespective of contractual clauses or legal norms selected by contractors.

Those criteria can only be derived from the center of gravity analysis we have already described, which on the hand was underlying the Argentine legislator's purposes when introducing contractual private international norms in the Civil Code, on account of the influence exercised by Freitas and Savigny, who were firm advocates of the "Sitz" theory (26).

Nevertheless, even deeply entrenched legal postulates must modify their rigidity in face of modern needs and trends, and thus, it can be contended that there shall not be "fraude à la loi" according to Argentine private international law if national or foreign substantial norms indicated by the center of gravity or by the subsidiary connecting factors mentioned hereunder deny their own application to the international sphere on account of the policies and interests they seek to advance (27).

Only if the judge is unable to determine the contract's "Sitz" - perhaps because the contacts with different legal systems are so equally

balanced that it is impossible to give preference to any of them - shall the Argentine Judge have recourse to the subsidiary connecting factors referred to at articles 1212, 1213 and 1214 Argentine Civil Code: the debtor's domicile at the moment of execution of the contract, the debtor's domicile at the point of start of the legal suit; and in contracts by correspondence, the domicile of each party, which shall determine the applicable law to contractual "effects" (not to contractual validity).

3.8. Advocates of the free will theory pretend that there exists a firm tendency expressed through administrative practice and court decisions favourable to their position. A "customary" rule of "national" law would thus establish a private international law norm providing that the parties are free to choose the applicable law to their contract, and that only in absence of such a choice subsidiary attention is to be paid to arts. 1205, 1207, 1208, 1209, 1210, 1212, 1213, 1214 Arg. Civ. Code to determine the applicable law.

Such a reasoning raises at least two objections. The first one is based on the fact that the large majority of opinions and court decisions maintains that the Argentine legal system does not allow custom to derogate contradictory imperative written law provisions (28); in consequence, the fact that in certain court decisions and international agreements to which the Argentine State is a party the contractor's choice-of-law has been made or recognized without paying attention to written conflict rules, does not imply derogation of these rules. On the contrary, such derogation would infringe basic provisions of the national legal system.

The second objection is that many examples brought forward to justify the free will doctrine in the field of contracts rather prove that the choice of law of the parties was considered correctly made because the same result would have been attained by the strict application of the conflict rules of the Civil Code (29). In other cases, the sympathy shown by the judge towards absolute party autonomy was just an "obiter dictum", as the parties had remained silent about the choice of law, and the applicable law was finally determined through the written traditional conflict rules, or the contractual clause concerned was valid under Argentine law (30). There are also cases where the judges did not care to check whether the chosen law had been correctly selected or not because there was not any

"true conflict" between the legal substantial systems having contacts with the contract, as they all led to the same solution of the case (31). Finally, an attempt has also been made to justify the parties' ample autonomy in choice-of-law by referring to a precedent deprived of relevance as it did not concern an international contract and therefore, the application of different national legal systems was not at stake (32).

IV.

4.1. Though Argentine Private International Law in the field of contracts cannot be considered, as we have seen, to reject the traditional conflictual method, it would be unrealistic to pretend that it excludes completely the "direct" application of municipal substantial rules to international cases.

An example of this is article 14, section 4 of the Argentine Civil Code providing the application of Argentine substantial law if it proves more favourable to the validity of a juristic act than the foreign law otherwise applicable.

This norm determines the application of national law in order to advance a policy favouring the validity of contracts cherished by the national forum. Therefore, in face of a contract that on account of the normal play of argentine conflict rules would be governed by a foreign substantial law invalidating it, the argentine judge would have to address his attention to argentine substantial norms concerning contractual validity in order to confirm if such norms consider the contract under analysis as valid.

Though this mechanism implies a remarkable exception to the classical conflictual conception, as it necessarily requires the close analysis of the substantial contents of national and foreign municipal norms at stake in order to decide on the applicable law, it is not wholly alien to the traditional conflictual method. This is so because the argentine judge needs, first of all, to determine the applicable law to contract through the general conflict-of-law rules, and only after-

wards is he required to compare the contents of the substantial norms thus indicated, with the forum's municipal rules. This evidences a definite difference with "lois de police" and self-applicating rules, which become directly applicable without considering the contents of any other foreign rules also claiming application.

4.2. "Lois de police" are however expressly reckoned with at articles 1206 and 14 section 1 (1) of the Argentine Civil Code providing the invalidity of contractual clauses incompatible with the "interests" of the Argentine State and its inhabitants. This is clearly a truly "direct" private international law norm proclaiming immediate application of municipal argentine law provisions to an international contract without previously considering the law applicable to it according to the forum's conflict rules. This also implies that the "interests" of the state or its inhabitants to be advanced in spite of any incompatible contractual clauses must be embodied to such an extent in specific municipal rules as to impose the latter's application to international cases. It differs from the public policy "Vorbehalt" contained in article 14 Section (1) "in fine" and section (2) of the Civil Code because the applications of these "lois de police" does not depend on the violation of general principles abstracted from the argentine positive legal system envisioned as a whole, but on the protection of specific interests contained in determined substantial rules. On the other hand, in most cases, the "ordre public international" presupposes the presence of forum's conflict rules rendering possible the application of foreign law wholly incompatible with forum's fundamental principles, while "lois de police" only contemplate their own application (32 bis).

4.3. The admission of "lois de police" as a separate scientific method within the field of private international law is however not unanimous in Argentine doctrine, and it is still now contended that they are an expression of "ordre public international" (33). Even those who show sympathy towards the "direct" method, identify "lois de police" with public policy municipal rules which cannot be renounced by the parties on account of article 21 of the Argentine Civil Code (34), or do not clearly distinguish "lois de police" from other cases of direct application of national rules (35). A "loi de police" becomes applicable

to international cases on account of the interests and policies it seeks to advance and not because it expressly indicates its unilateral application; a "self-applicating rule", on the contrary, already contemplates in its text its projection to the international sphere even though it does not contain any classical conflict-of-laws "rattachement" indicating its application (36).

4.4. The main limitation to overreaching application of "lois de police", "self-applicating norms" or other extraterritorial municipal law rules (as those envisioned at section 4.1. supra concerning contractual validity) is traced, to a certain extent, by rules on international court jurisdiction. In a reasoning similar to "forum non conveniens", Argentine Courts have declared their absence of jurisdiction on cases not showing contacts with Argentina (37).

However, it should be emphasized that international jurisdiction is also to be considered from a functional approach. The Supreme Court of Argentina has declared that argentine courts must take jurisdiction even if argentine jurisdiction would not exist under general rules of argentine international procedure, when an omission to do so would imply a "dêni de justice" (38). On the other hand, qualified opinions maintain that if the conditions of application of a "loi de police" are fulfilled, this shall necessarily imply the jurisdiction of the courts of the forum enacting such "loi des police" (39). Furthermore, in most cases, the forum to which the "loi de police" belongs generally shows at least minimal contacts with the controverted issue justifying the jurisdiction of the forum's courts (40).

4.5. Finally, the fact that arts. 1207 and 1208 of the Argentine Civil Code accept the existence of "fraude à la loi propre et étrangère" justifies the admission of the application of foreign "lois de police" and "self-applicating norms". However, such application shall be denied if it contradicts (i) the forum's "ordre public international" or the forum's "loi de police" and self-applicating rules; or (ii) the forum's municipal rules whose application has been commanded by the forum's classical conflict-of-law rules.

V.

5.1. Our survey of argentine private international law in the field of contract has shown that the planning principle is present through several technical devices belonging to the traditional conflictual reasoning and to the more recent functional theories.

It is a matter of extreme importance to realize then that the free will theory has no firm confirmation in argentine private international positive law. In fact, the issue at stake is the reciprocal role to be recognized to state law and to private autonomy in determining the substantial legal rules regulating private and semi-private international relations. Many years ago, it was already rightly contended that private international law rules deal with the problems concerning the sources of law, as they decide on how much foreign or national substantial law is applicable by state courts and organs and thus trace the limits of application of the forum's municipal rules. In this order of ideas it was concluded that private international law is closely linked to constitutional law and to the determination of sources of law within each national juristic system, and therefore, that it falls within the realm of public law (41). Therefore, it is obvious that the planning principle is closely concerned by any attempt to exaggeratedly extend private influence on the process of deciding how much foreign or national law is to be applied or recognized by state courts and organs.

5.2. Moreover, sources of law are objective criteria to which community organs or community members have recourse in order to find guidelines directing their conduct: it is in their objective nature that resides their usefulness for enabling collective understanding (42); it is their objectivity that guarantees fairness, predictability and democracy in the law creating process taken as a collective task and not as the work of isolated individuals. For this reason, private autonomy has to remain within the limits traced by planning and cannot aspire to become a source of law, as the free will doctrine finally pretends.

5.3. Furthermore, planning and private autonomy do not imperatively exclude each other and the latter generally plays the role ascribed to it by the purposes of the former: the attainment of economic and social ends carefully identified and pursued is frequently intentionally and necessarily abandoned after careful evaluation to autonomous and self-reliant initiative.

This double-faced reality also reaches the field of private international law: the "direct" method, which is mostly believed to introduce restrictions to the will of the parties can be an ally to private autonomy, as is proved by art. 14 section 4 of the Argentine Civil Code favouring contractual validity through the application of the more benevolent argentine law, or by French case-law authorizing the unilateral application of permissive substantial rules favouring the freedom of the parties to international contracts (43).

5.4. Planning, private autonomy, conflictual theory, "direct method": they are all present in argentine private international law of contracts. This is a proof of its richness and of its vitality, and also, if properly handled, of its proficiency to conciliate public and private interests within the continuously changing reality of international relations.

FOOTNOTES

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- (1) VON MEHREN, Arthur T.: "A General View of Contract", chapter 1, "INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW", Vol. VII, page 10 and fol.
- (2) VON MEHREN, op. cit., pages 11/12.
- (3) see, in general, BATIFFOL, Henri: "Les conflits des lois en matière de contrats (Etude de Droit International Privé Comparé)", Sirey, (1938), esp. no. 8, pages 10/11.
- (4) VON MEHREN, op. cit., pages 17/18; EORSI; GYULA; IOFFE; OLYMPIAD, S.; SUCH, Heinz: "Contract in the Socialistic Economy", chapter 5, "INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW", Vol. VII, pages 3/5.
- (5) FERRI, Luigi: "La Autonomia Privada", Madrid, 1969, page 198 and fol.
- (6) A view which has been upheld, for instance, in the field of state contracts. For a general appraisal, see KUUSI, JUHA: "The Host State and the Transnational Corporation", Gower (1981).
- (7) About the ambiguity of these expressions in the field of state contracts see KUUSI, op. cit. supra; in general, see DELAUME, Georges: "What is an international contract? An American and a Gallic Dilemma", I.C.L.Q., Vol. 28, April 1979, page 258 and fol.
- (8) Characterization can also be a planning instrument, especially when it is manipulated in order to bring about the application of the forum's law.
- (9) VON MEHREN, A.T.: "Recent Trends in Choice of Law Methodology", 60 Cornell Law Review (1975), page 962 and fol.
- (10) REESE, Willis L.: "General Course of Private International Law", Recueil des Cours, Vol. 150 (1976-II), page 9 and fol.

- (11) And they can also show unexpected loyalties to the very principles to which they try to introduce exceptions. For instance, the "Vorbehalt" of "ordre public international" which works as an exception to the normal effects of classical conflict rules built upon a connecting factor, bears in itself the main traits of such rules when the forum's public policy principles cannot become applicable if there is not sufficient connection ("Binnenbeziehung") between that forum and the controversy.
- (12) See FRANCESCAKIS, PH: "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit des lois", Revue Critique, 1966-1, page 4 and fol.; SPERDUTI, G.: "Les lois d'application immédiate en tant que lois d'ordre public", Revue Critique, LXVI-1977 No. 2, page 257 and fol.
- (13) GOLDSCHMIDT, W.: "La Autonomia de la Voluntad Intra y Suprapositiva", La Ley, Vol. 148 (1972) page 1268 and fol.
- (14) BOGGIANO, A.: "Derecho Internacional Privado", Depalma (1978), page 457 and fol.
- (15) "El Conflicto de las Leyes" (Spanish Translation by Clodomiro Quiroga) Vol. I, page 388 and fol. and page 450 and fol., 1891 edition.
- (16) FREITAS, Augusto Texeira de: "CODIGO CIVIL, Esboço", Rio de Janeiro, Typographia Universal de Laemmert (1865) Vol. I, Vol. III, arts. 4, 848, 1962, 1963, 1965, "inter alia".
- (17) SAVIGNY, M.F.C.: "Sistema del Derecho Romano Actual" (Trad. Castellana de Jacinto Mesia y Poley), Vol. VI, Madrid (1879), No. 370, 372.
- (18) Arts. 32, 33, 34, 1889 Montevideo Treaty; arts. 36, 37, 38, 1940 Montevideo Treaty.

- (19) GHESTIN, Jacques: "Le Contrat" in "Traité de Droit Civil. Les Obligations", L.G.D.J. (1980) No. 509 and fol.; page 413 and fol.

- (20) ROSS, Alf.: "TO - TO", Abeledo Perrot (1976), pages 19/20.

- (21) On this aspect see JESSURUN D'OLIVEIRA, Hans Ulrich: "Characteristic Obligation in the Draft E.E.C. Obligation Convention" A.J.C.L. Vol. 25 No. 2 (1977), page 303 and fol.

- (22) BATTIFOL, Henri: "Commentary to Neuhaus" "Abschied von Savigny?", Revue Critique, No. 3, Vol. 71 (1982), page 615 and fol. See also in this sense the commented article by Heinrich NEUHAUS at RabelsZ, Heft 1 (1982), page 4 and fol.

- (23) See infra, No. 3.7.

- (23 bis) German Law also seems to require that choice of law be reasonable and that there exist a connection between contract and the chosen law. FIRSCHING, Karl: "INTERNATIONALES PRIVATRECHT. INTERNATIONALES SCHULDRECHT I", Band I b, Schweitzer Verlag, Berlin (1978), page 375, No. 334.

- (24) See GRIGERA NAON, H.: "Les Contrats Internationaux en Argentine", Droit et Pratique du Commerce International, Vol. 7, No. 3 (1981), page 427 and fol.

- (25) "Fraude à la loi" doctrine has been accepted with a certain ambiguity by art. 6, Inter-American Convention on General Rules of Private International Law, dated May 8th, 1979.

- (26) See BALESTRA, R.R.: "Derecho Internacional Privado. Relación Económica Contemporánea", Abeledo-Perrot (1978), pages 26/28; KALLER DE ORCHANSKY, Berta: "Manual de Derecho Internacional Privado", Plus Ultra, (1976), page 383 and fol.

- (27) WENGLER, W.: "Die Anknüpfung des zwingenden Rechts im internationalen Privatrecht", Zeitschrift für vergleichende Rechtswissenschaft, 54. Band, Heft 3 (1941), page 168 and fol.
- (28) ALLENDE, Guillermo: "El derecho consuetudinario en el Código Civil", in "La Ley", No. 91, 12 May 1976, page 1 and fol.; BREBBIA, Roberto: "La costumbre "contra legem" y "praeter legem" y el artículo 17 del Código Civil", in "El Derecho", No. 4864 of 12th December 1979; MOSSET ITURRASPE, Jorge: "Derecho sin ley (la costumbre como fuente)", "La Ley" No. 83, 27th April 1979, page 1 and fol.; and decision "AIACHINI, Francisco c/Sefag. S.A." from NATIONAL COMMERCIAL CHAMBER OF APPEALS, "A", 28th February, 1980, "El Derecho", 9th May, 1980, No. 4967, esp. page 13 and fol.
- (29) T. Trab. Zarate, December 9-1970: "EIRAS PEREZ, Leonardo C. c/Techint Engineering Company S.A.", "La Ley", Vol. 142, April-June 1971, page 176 and fol.
- (30) For example, First Instance court decisions in "Estudios Espindola c/ Bollati, Cristóbal I.", "El Derecho", Vol. 33, page 27 and fol.; "Pablo Treviso S.A.F.A.C.I.M.I. y otros c/Banco Argentino de Comercio", "Jurisprudencia Argentina" of October 26th, 1977, No. 5017; also, Commercial Chamber of Appeals "E", "Banco de Rio Negro y Neuguén c/ Independencia Transportes Internacionales S.A.", "El Derecho" No. 5420, February 18th, 1982 (Vol. 97), esp. page 6 and fol.; Supreme Court of Justice of the Argentine Republic, "Asociación Bancaria Rotterdamsche Bankvereenigig contra la Provincia de Buenos Aires sobre cobro de pesos", May 10th, 1923, "Fallos" 138-37.
- (31) Supreme Court of Justice of the Argentine Republic: "Perú, Gobierno de la República del c/ SIFAR, Soc. Ind. Financ. Argentina s/ Incumplimiento de Contrato", December 10, 1956, "La Ley", Vol. 86, page 328.
- (32) Supreme Court of Justice of the Argentine Republic: "Y.P.F. y SARGO S.A.", "La Ley", 1975-A, page 541 and fol.

- (32 bis) For an example of the "loi de police" reasoning observed by an Argentine Court (Though in the case it was concluded that the legal text invoked was not a "loi de police"), see National Commercial Court of Appeals, Chamber "C", P.T.O. "INVAL S.R.L.", September 30th, 1981; "La Ley", October 26th, 1982, No. 208, page 1 and fol.
- (33) GOLDSCHMIDT, W.: "TRANSPORTE INTERNACIONAL", "La Ley", April 29th, 1980, page 1 and fol.
- (34) MALBRAN, M.E.: "NORMAS DE POLICIA Y NORMAS COACTIVAS EN EL DERECHO INTERNACIONAL PRIVADO ARGENTINO"; "La Ley", No. 208, 26th October, 1982, esp. at page 3. It is untenable that all municipal norms that cannot be renounced by the parties, on account of that only circumstance and even if no conflict rule indicates their application, are projected to the international sphere as "lois de police".
- (35) First Instance Decision "Transportes Marbellini S.A. c/ Expofrut S.R.L." in "La Ley", No. 84, April 20th, 1980.
- (36) They are what Pierre MAYER calls "... lois d'application immédiate qui ne sont pas des lois de police", "Droit International Privé", Montchrestien, (1977), page 102 and fol.; No. 125 and fol.
- (37) First Instance Judgement in "Ibarra y Cía., Sociedad Española en Comandita contra Capitán del Ibaí", "La Ley", May 15th, 1937, Vol. 6, page 500 and fol.; see in general JUENGER, Friedrich: "Der Kampf ums Forum", RabelsZ, 1982, Heft 4, pages 708/716.
- (38) Supreme Court of Justice of the Argentine Republic: "Vlasov c/Vlasov", "La Ley", Vol. 98, page 287 and fol.
- (39) HOLLEAUX, Dominique: "Compétence du Juge Etranger et Reconnaissance des Jugements", Dalloz, 1970, No. 382 and fol., page 312 and fol.

- (40) KARAQUILO, Jean Pierre: "Études de quelques manifestations des lois d'application immédiate dans la jurisprudence française de Droit International Privé", P.U.F. (1977), No. 491 and fol.; page 154 and fol.
- (41) AGO, Roberto: "Lezioni di Diritto Internazionale Privato" (Parte Generale), Giuffrè, 1955, esp. pages 60/61.
- (42) CUETO RUA, Julio C.: "Fuentes del Derecho" (Abeledo-Perrot, 1982), pages 24/25.
- (43) See GOLDMAN, Berthold: "Règles de conflit, règles d'application immédiate et règles matérielles dans l'arbitrage commercial international", in "Travaux du Comité Français de Droit International Privé", Dalloz (1970), page 119 and fol.