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## **PRIVATE INTERNATIONAL LAW IN THE AMERICAS: Achieving Transnational Justice for Individuals**

**Document elaborated by the Department of International Law**



# PRIVATE INTERNATIONAL LAW IN THE AMERICAS: Achieving Transnational Justice for Individuals

*“Private international law is fundamental to achieving transnational justice and sustainable development for individuals of the Americas.”*

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## 1.0 INTRODUCTION

At the most recent General Assembly of the Organization of American States (OAS) held in 2021, the Committee on Juridical and Political Affairs (CAJP) was requested “to hold another special meeting to discuss strategies for the Organization to resume its activities in the area of codification and progressive development of private international law.” Towards that end, the Department of International Law was requested to prepare a document “containing the current state of the body of inter-American law in this area and proposals for possible courses of action to advance the aforementioned strategies, in consultation with Member States.” International Law, AG/RES. 2974 (LI-O/21).

### 1.1 What is Private International Law (PIL)?

International law encompasses both the “public” and “private” law spheres. Whereas public international law is the body of norms, principles, customs and other sources that govern relationships between states and encompasses topics of a “public” nature (such as environmental law or human rights) with impact across societies as a whole, private international law has developed into the legal framework that seeks to regulate the private relationships of persons in their individual capacity and in a transnational context, encompassing a range of topics (such as family law, wills and succession).

**FAMILY LAW:** Mary and John divorce. Mary obtains an order for child support and then moves to State A. Will the court in State A enforce the child support obligations that were imposed by the court in State B? While the child is in State B for visitation, John decides not to return the child to Mary. Should Mary apply for relief to the court in State A or B?



other words, the rules to determine which state's domestic law would be the most appropriate for the court to apply to resolve the particular dispute. In its origins the term has also been used and understood differently depending upon legal traditions, namely, those following the common law, those of a socialist tradition or the Romano-Germanic heritage. As is reflected among the various international entities specialized in this subject, private international law seeks to resolve conflicts that can arise between transnational parties by establishing applicable principles in three primary areas, namely, jurisdiction, applicable law, and recognition of judgments and awards, and also by promoting international cooperation.

Under the broader interpretation that has evolved and that is in use today, *private international law refers to the body of law, including conventions, model laws, principles, national laws, and other instruments, that seek to facilitate and provide certainty to transnational relationships between private individuals (i.e., both natural and legal persons).*

More recently, it has been recognized that the private sector must be engaged, first, to identify urgent issues in transnational relationships as they arise and, secondly, so that states can actualize goals for the greater public good; this is reflected in the types of topics that are emerging for consideration (e.g., simplified business formation and improved access to credit). As such, **private international law is fundamental to achieving transnational justice and sustainable development for citizens of the Americas.**

## 1.2 How is Private International Law Relevant in Practice?

**TRANSBOUNDARY LITIGATION:** Mary's mother lives in a small village in State A. Next to the village a subsidiary of Company B, with its headquarters (and assets) in State B, engages in activities that pollute the water source for the village. If the villagers bring an action against the subsidiary in State A, will a court in State B recognize and enforce the judgment against the parent Company? Alternatively, if the villagers bring an action in State B, will a court in State B take jurisdiction?



Many of the activities of both "natural" and "legal" persons can occur in a transboundary context. A natural person may require proof of documentation from his or her own state in order to study abroad (legalization); he may want to marry or divorce someone from another state or to adopt children from another state (family law); she may want to leave property in a will to persons in another state (wills and succession). A person, either a natural person or a legal entity such as a corporation, may require that a judgment issued by a court in its own state be recognized and enforced by a court of another state, or may seek to enforce an arbitral award in another state (recognition & enforcement). A person may request a court in another state to take jurisdiction over another person whose actions are causing harm to that first person (transboundary litigation). A person may compare the laws of different states when deciding where to invest or start a business, in terms of ease of incorporation, access to credit, or adherence to party autonomy (commercial and contract law).



**INTERNATIONAL BUSINESS LAW:** Mary has a small company in State A that is growing rapidly in sales but has a cash flow problem. As the company already has a mortgage registered against its building, Mary approaches her banker to request a loan on the basis of future sales as collateral. The bank declines, but points out that legislation based on the *Model Inter-American Law on Secured Transactions* is currently under consideration by the parliament in State B and that, should the law pass, it will be possible for the bank to accept such forms of collateral next year. Mary recommends to the Board of Directors that they move the business to State B.



Annex A elaborates these examples to illustrate how private international law affects everyday life. With growing numbers of persons moving or migrating across borders, whether permanently or temporarily, and with growing expansion of cross-border business transactions and investment, the number, types and complexities of private activities that include a transboundary component will only increase. Most of the time these activities, whether in the realm of family or business relationships, occur without incident; however, should a dispute arise, it will frequently involve issues that fall within the scope of “private international law.”

**LEGALIZATION OF DOCUMENTS:** Mary, a citizen of State A, wishes to attend graduate studies at a university in State B. To do so, it is quite probable that she will be required to show proof of her undergraduate degree, citizenship or other documentation, which in some states must be accompanied by some form of “legalization” (whereby State B is assured by State A as to the legitimacy of her documents).



For the most part, such issues fall to the courts of each state to resolve. However, state governments have recognized that these are serious issues that impede the actualization of transnational justice for their citizens or that create uncertainty as to whether private rights will be upheld abroad. For this reason, states have been engaged in the process of codification and harmonization of private international law. Initially, the focus of this work was largely to achieve greater congruence in the “conflict-of-laws rules” that are applied by courts to resolve these issues; however, over time the nature of this work has evolved so that today the goal of harmonization also encompasses substantive law (for example, model laws have been developed that simplify business incorporation and thereby encourage formalization, or facilitate asset-based lending and thereby improve access to credit) including consistency in interpretation by national judges so as to ensure the international character of these norms.

At the multilateral level, there are three main international organizations that undertake this work: the United Nations Commission on International Trade Law (UNCITRAL); the Hague Conference on Private International Law (HCCH); and the International Institute for the Unification of Private Law (UNIDROIT). A number of OAS Member States are also active members of these international organizations.

At the regional level, the OAS has engaged in this work primarily through the Inter-American Specialized Conferences on Private International Law (CIDIP) (explained in Part 2, below) and has continued the progressive development of private international law through the work of the Inter-American Juridical Committee (CJI). As evidenced by the instruments that have been produced over time, the work at the regional level has also progressed from a focus that was initially on conflict-of-laws rules to an ever-wider range of issues (e.g., simplified business formation and access to credit).

The end products of this work are instruments of “public” international law - sometimes in the form of international conventions that are subject to the law of treaties or sometimes in the form of “soft law” such as model laws or legislative guides - and yet, these instruments “govern” aspects of private international law. As this illustrates, the division between “public” and “private” international law is becoming increasingly blurred. This is also evidenced in the expansion in the range of topics now under consideration. This has coincided, in part, with recognition of the importance of engaging the private sector in the actualization of public international law goals.

### 1.3 What are the Concrete Benefits of Private International Law for the Individual and for the State?

It is commonly said that “business does not like uncertainty.” But this could easily be restated as “people do not like uncertainty.” When a business enters into an international contract, the parties want to be certain that the agreement will be enforced as written and, should there be a dispute, that any judgment or arbitral award will be recognized and enforced. Similarly, when an individual makes a pledge or writes a will, she wants to be certain that it will be upheld, recognized, and enforced as written. Providing certainty in the law is a concrete benefit both for natural and legal persons and is a cornerstone of good governance.

**WILLS AND SUCCESSION:** Mary wrote a will while in State B, leaving all of her assets (some of which are located in State A and some in State B) to John. When Mary dies of a broken heart in State A, can John enforce the will in State A? What about Mary’s assets and jointly-held assets located in State B? What proof or evidence will John require?



Legal certainty also bodes well for states. The process of codification and harmonization that leads to greater congruence among the domestic laws of states encourages cross-border investment, tourism and trade. This, in turn, leads to economic growth and sustainable development.

### 1.4 How is Private International Law Relevant for the Region and for the OAS?

For these reasons, **private international law is fundamental to achieving transnational justice for citizens of the Americas** and clearly relevant for the region. Proclaiming economic, social and cultural development among its purposes, the *Charter of the OAS* reaffirms that economic cooperation is essential to common welfare and prosperity (Art. 3); it states that development, as



a primary responsibility of each country, “should constitute a continuous process for the establishment of a more just economic and social order that will contribute towards the fulfillment of the individual” (Art. 33). As noted in the *Inter-American Democratic Charter*, “democracy and social and economic development are interdependent and mutually reinforcing” (Art. 11) and therefore Member States are committed to “all those actions required to generate productive employment and reduce poverty” (Art. 12). Moreover, the *Social Charter of the Americas* recognizes that “the business sector plays a key role in creating jobs, expanding opportunity and contribution to poverty reduction” (Art. 9) and that “Member States, in partnership with the private sector and civil society, will promote sustainable development” (Art. 10).

The question to consider is “what role is most appropriate and feasible for the OAS in the promotion of private international law among its Member States?” The *Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law* (1996 Panama Declaration) recognizes the OAS as “the principle and irreplaceable forum in which states, on an equal footing, adopt legal provisions in both public and private international law to govern their relations at the hemispheric level.” In that Declaration, member states resolved “to intensify the development of private international law and the harmonization of national laws so that they will not hinder the free movement of persons and goods but facilitate regional trade.” Accordingly, this question will be considered further in Part III, below.

### **1.5 What is the Added Value that the OAS can Contribute to the Codification and Progressive Development of Private International Law?**

The OAS as a regional organization is able to focus on issues in private international law from a regional perspective in a way that addresses the particular needs of its Member States in a unique way. Secondly, as a smaller organization, the OAS is able to work more efficiently towards achieving consensus than an international organization comprising many more Member States; the OAS has technical and political bodies under the same institutional umbrella, which facilitates their interaction. Sometimes the regional work products of the OAS or its Inter-American Juridical Committee have encouraged other organizations to consider the topic or have served as precursors to the development of international instruments. For example, the inter-American instruments on secured transactions (2002), simplified corporations (2012) and warehouse receipts (2016) were followed by UNCITRAL instruments in these topics in (2016), (2021) and (still in progress), respectively. More recently, steps have been taken to re-establish regular interactions with legal advisors at the foreign ministries of Member States and collaboration with regional organizations, universities and institutes, thereby strengthening the OAS as a focal point for work in the progressive advancement of private international law in the region.

### **1.6 What strategies should be followed given the current global scenario?**

As mentioned above, there are specialized multilateral forums in which the discussion, study and development of private international law has continued uninterruptedly and in which several OAS Member States actively participate. Accordingly, the strategic plan that is developed to guide the way forward by which the OAS will resume its activities in the areas of codification and progressive development of private international law should be carried out in light of this global context, bearing in mind the following:

- *First*, to recognize the limited resources that are available from the institutional perspective and thereby avoid undertaking study of issues that are being discussed in other specialized forums. With regard to these issues, priority should be given to multilateral codification efforts over possible regional ones.
- *Secondly*, to recognize the region's own characteristics as the guiding axis. In other words, priority should be given to the study or treatment of those problems or issues that are identified as existing only in the region or that will be better solved from a regional perspective.
- *Thirdly*, to invite representatives of the specialized multilateral organizations as observers to the discussions so that they may contribute to the advancement of the issues.
- *Fourthly*, to recognize economic limitations and in order to ensure success in resuming these efforts, to require that working meetings be conducted in virtual form and that participants have subject matter expertise to enable the technical progress of the discussions.

## **2.0 CURRENT STATE OF PRIVATE INTERNATIONAL LAW IN THE REGION**

### **2.1 History of Private International Law in the Region (pre-OAS)**

As was noted above, state governments have recognized the advantages gained through the progressive codification and harmonization of private international law, which initial efforts in the region resulted in the Treaty of Lima of 1878. Subsequently, this work led to the adoption of the Treaties of Montevideo in 1889 and the Bustamante Code in 1928 which laid the groundwork for the establishment of private international law in this hemisphere. Both of these were as a result of the first approach to codification, which envisages a single comprehensive code to encompass all of the rules of this discipline. Indeed, as noted in the 1996 Panama Declaration, the contribution of the inter-American legal system to the establishment of important principles in the development and codification of private international law has been recognized by the world community.

### **2.2 History of Private International Law at the OAS**

In the period immediately following the establishment of the OAS, the Inter-American Juridical Committee made new efforts using that same unitary approach and prepared a draft code that, however, was not supported by Member States. This led to the abandonment of this approach and the beginning of the second stage, in which sectoral codification of private international law has predominated to develop specific instruments in particular areas of the law.

Thus, in 1971 the new process of codification was launched, through the Inter-American Specialized Conferences on Private International Law (known by the Spanish acronym "CIDIP"). As described in Article 122 of the *Charter of the OAS*, these are "intergovernmental meetings to deal with special technical matters or to develop specific aspects of inter-American cooperation."

### **2.3 Results of the CIDIP Process**

Between 1975 and 2009, seven CIDIPs were held in various cities throughout the Americas and have produced 26 inter-American instruments (i.e., conventions, protocols, uniform documents and a model law) on various matters related to effective legal and judicial cooperation among states and efficacy in civil, family, commercial and procedural relations. Annex B provides a brief summary of the objectives and main features of each of these instruments. The status of signatures and ratifications is available at the following link:

[https://www.oas.org/en/sla/dil/docs/private\\_international\\_law\\_summary\\_table\\_signatories\\_ratifications.pdf](https://www.oas.org/en/sla/dil/docs/private_international_law_summary_table_signatories_ratifications.pdf)

Information on Central Authorities for conventions that require states to make such a designation is available at the following link:

[https://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_central\\_authorities.asp](https://www.oas.org/en/sla/dil/inter_american_treaties_central_authorities.asp)

## **2.4 Work of the OAS in Private International Law Post-CIDIP (Since 2009)**

As noted above, the Inter-American Juridical Committee (CJI) has been instrumental in the development of private international law since the inception of the OAS. As provided in Article 100 of the Charter, the CJI “may also, on its own initiative, undertake such studies and preparatory work as it considers advisable...” Consequently, the CJI has explored various topics in private international law (e.g., international commercial contracts and simplified business incorporation) that have resulted in new soft-law instruments as described in Annex B. The CJI has the following three topics in private international law on its current agenda: domestic procedures for the recognition and enforcement of foreign judgments; contracts between merchants with a contractually weak party; new technologies and their relevance to legal cooperation. In reality, since the CIDIP process has given way to development of legal instruments by the Inter-American Juridical Committee, it has become the only OAS organ that has continued to work on issues of private international law and with specific soft law proposals as a result.

## **2.5 Transformative Value of Private International Law for Sustainable Development**

At the most recent OAS General Assembly, Member States expressed their renewed commitment to the attainment of the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs): *Renewed Commitment to Sustainable Development in the Americas Post COVID-19*, AG/DOC. 104, November 12, 2021. In that regard, it is important to point out that “most development occurs not only through public action but also through private action...governed predominantly by private law (contracts, property, company law) ... and the transnational aspect of these actions is governed by private international law.” (excerpt from *The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law* (2021)). Private international law is an indispensable part of the global legal architecture that is necessary to turn the SDGs into reality. Some examples are given below.

### **2.5.1 Access to Credit**

The *Model Inter-American Law on Secured Transactions* and accompanying *Model Regulatory Regulations* help to improve access to credit, particularly for MSMEs, women and marginalized groups. This is achieved by expanding the range of acceptable collateral beyond traditional forms (i.e., land and buildings) and thereby facilitates the extension of credit at more affordable rates of



interest for those who need it most. This helps to achieve to several of the SDGs, which have been described as “integrated and indivisible.”

#### **SDG 1. No Poverty**

**Target 1.4.** By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.

#### **SDG 2. Zero Hunger**

**Target 2.3.** By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.

#### **SDG 5. Gender Equality**

**Target 5.A.** Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws.

#### **SDG 9. Industry, Innovation and Infrastructure**

**Target 9.3.** Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets.

#### **SDG 10. Reduced Inequalities**

**Target 10.1.** By 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average.

### **2.5.2 Formalization**

The *Model Law on the Simplified Corporation* offers a modernized and simplified corporate structure, extending the possibility of affordable incorporation to MSMEs. This will encourage formalization of many MSMEs, which, in turn, will improve their likelihood of obtaining access to formal (and affordable) credit and bring these enterprises within the protection of the law.

#### **SDG 8. Decent Work and Economic Growth**

**Target 8.3.** Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services.

### **2.5.3 Promoting the Rule of Law**

Ongoing work for the codification and harmonization of law through the promotion of private international law instruments helps to modernize legal regimes and bring domestic laws into conformity with international standards and best practices. All of this work is in furtherance of SDG 16, which seeks to “promote peaceful and inclusive societies for sustainable development,

provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

**SDG 16. Peace, Justice and Strong Institutions**  
**Target 16.3** Promote the rule of law at the national and international levels and ensure equal access to justice for all.

### **3.0. PROPOSED COURSES OF ACTION TO RESUME ACTIVITIES IN THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN THE REGION**

#### **3.1 Preliminary Considerations**

##### **3.1.1 CJI as Forum for Codification and Progressive Development**

The CJI is the only forum within the OAS - and within the region - that is currently undertaking work in the progressive development of private international law and with successful results.

##### **3.1.2 Consultation Mechanisms**

The CJI has started to “institutionalize” consultation mechanisms with different actors, such as the Legal Advisors of Foreign Ministries of Member States through the use of questionnaires and periodic joint meetings. In its work on public international topics, for example, access to public information and personal data protection, the CJI initiated consultations with public institutions, such as the Ibero-American Data Protection Network (RIPD), and the Transparency and Access to Public Information Network (RTA), and also with civil society and other actors, such as the International Committee of the Red Cross (ICRC), as well as other OAS organs such as the Inter-American Commission for Women, thereby bringing the important dimension of gender into consideration. Similar consultations have been undertaken in respect of the CJI’s work in private international law, particularly on the topic of international commercial contracts, on which consultations were held with experts from the American Association for Private International Law (ASADIP) and the American Bar Association (ABA). These consultations have achieved good results and could be further enhanced.

The CJI, through its Technical Secretariat, also engages in consultations with other international organizations (specifically UNCITRAL, HCCH and UNIDROIT, among others), with whom good channels of communication and cooperation have been established. All of this lends legitimacy to the process of developing private international law instruments within the CJI in a manner that ensures consistency with international standards, maximizes shared resources and avoids duplication of efforts. The consultation mechanisms carried out with Member States through questionnaires and other feedback systems also provide a channel for said States to contribute to this process of codification and progressive development, without the significant costs that would be incurred if such instruments were to be negotiated by means of diplomatic conferences, as was the case with the CIDIPs in previous years.

##### **3.1.3 Topic identification and selection**



As a result of discussions at the Committee for Juridical and Political Affairs (CAJP), Member States could, through the General Assembly, bring to the attention of the CJI for its consideration topics in private international law of particular interest and relevance to the region. Member States at the CAJP could be kept informed on an annual basis about the progress that is being made by the CJI on those topics.

At the same time, and by its own authority, the CJI may undertake the development of specific topics. Those topics might be included as a result of exchange of ideas and discussions during the periodic Joint Meetings with the Legal Advisors on Private International Law of the Ministries of Foreign Affairs of Member States.

Depending on the nature of the topic, the CJI could consider the drafting of a convention to be brought to the attention of the political organs or could work on soft law instruments such as model laws, legislative guides, recommendations, declarations, and so on. The expedited process provided within the CJI allows for a technically robust document to be produced within a relatively short period of time.

The OAS Department of International Law (DIL) as the Technical Secretariat to the CJI can act both as catalyst to encourage involvement by stakeholders (those appropriately identified as such by OAS Member States) and as coordinator of the consultation process, as was the case with the Model Law 2.0 on Access to Public Information.

### **3.2 Proposed Courses of Action**

#### **3.2.1 Development of Regional Instruments**

It is proposed to continue with and to strengthen the current process that has emerged over the course of the past decade whereby the CJI has served as the primary forum for the progressive development of private international law in the region, -the only such forum to bring together all the American countries-, with the DIL serving as Technical Secretariat and with more active involvement by Member States through their engagement with the CAJP. The process as it has evolved is largely as outlined above. As recognized by the CJI during its most recent session in May 2022, this body is essential for the proposal and elaboration of common legal norms in both public international law and private international law with which Member States manage their relations at the hemispheric level; on the other hand, the OAS is the main, irreplaceable and most appropriate forum where said States, as equals, elaborate, negotiate and adopt these legal norms, CJI/DEC.02 (C-O/22).

#### **3.2.2 Promotion of Regional Instruments**

It is proposed to continue promoting awareness of the existing inter-American private international law instruments among OAS Member States. This is currently carried out by the DIL, at minimal cost, through webinars and dissemination of information through books, articles and presentations and the DIL website. These efforts could be strengthened by greater involvement of Member States (for example, through greater promotion of these activities by their respective diplomatic academies, Ministries of Foreign Affairs and other public institutions and entities, as well as by the academic and private sectors).



### **3.2.3 Promotion of Global Instruments**

It is proposed to promote awareness among OAS Member States of global instruments in private international law as relevant to the region. Towards this end, Member States have at their disposal the DIL which, in recent years, has strengthened and promoted greater inter-organizational collaboration with UNCITRAL, HCCH and UNIDROIT at the global level and with ASADIP, among others, at the regional level.

### **3.2.4 Support to Member State Domestic Reforms**

It is proposed to study new alternatives so that the DIL may have adequate resources to support OAS Member States in their efforts to modernize and reform domestic legislation in topics of private international law in conformity with inter-American instruments (including conventions, model legislation and other soft-law instruments) and with international standards. Towards this end, the DIL could once again provide technical assistance at the levels and on a scale that best serves Member States.

### **3.2.5 Development of Jurisprudence**

It is proposed to promote uniformity in the interpretation and application of inter-American private international law instruments. Towards this end, the DIL is undertaking the development of a database of jurisprudence in collaboration with ASADIP and possibly with the involvement of other academic institutions (faculties of law, professors and students) to inform the next generations of lawyers in private international law. It is proposed to involve OAS Member States in such a way that said database would be recognized as official and public. With more direct and regular participation of Member States, this database would become an authentic source of jurisprudence for all users.

### **3.2.6 Joint Meetings with Legal Advisors of Ministries of Foreign Affairs and other Ministries of Member States**

It is proposed that the DIL continue to organize these Joint Meetings on an annual basis for the purpose of identifying specific needs of OAS Member States in matters of codification and progressive development of private international law within the region and submitting these needs for the consideration of the political organs of the OAS as well as the CJI. For this to be actualized and to encourage greater participation of legal advisors in these meetings, ongoing and consistent support of the Permanent Missions to the OAS is necessary.

### **3.2.7 The Role of the CAJP and Other Political Bodies of the OAS**

During its most recent session held in May 2022, the CJI expressed its satisfaction with the holding of special sessions of the CAJP in which discussions of the codification and progressive development of private international law have been resumed and it encouraged the ongoing efforts to strengthen this area of the law, CJI/DEC.02 (C-O/22). In this regard, it is proposed that these sessions be held annually in order to continue advancing the subject and to progressively identify and evaluate the specific steps that are required for promoting the codification and progressive development of private international law.

### 3.3 Summary

These proposals are intended to encourage Member States to discuss different strategies to resume activities in the area of codification and progressive development of private international law within the framework of the Organization. The ultimate purpose is for the region to achieve **better transnational justice and sustainable development for all individuals of the Americas.**

## ANNEX A

### EXAMPLES TO ILLUSTRATE HOW PRIVATE INTERNATIONAL LAW AFFECTS EVERYDAY LIFE



#### LEGALIZATION OF DOCUMENTS

##### EXAMPLES

1

Mary, a citizen of State A, wishes to attend graduate studies at a university in State B. To do so, it is quite probable that she will be required to show proof of her undergraduate degree, citizenship or other documentation, which in some states must be accompanied by some form of legalization (whereby State B is assured by State A of the legitimacy of her documents).

2

Pierre, a citizen of State A, is seriously ill with covid in State B. Will the Power of Attorney he had executed in State A be recognized in State B so that his sister may act on his behalf?

##### REFERENCES

Consider the *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (HCCH 1961 Apostille Convention) and the *Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad* (1975), among others.



#### FAMILY LAW

##### EXAMPLES

1

While at university, Mary falls in love and plans to marry John, a citizen of State B. Will the marriage be recognized in both states? What if Mary was previously married? Will State B recognize the divorce granted to Mary by State A? What if Mary marries a same-sex partner and the couple moves to State C. Will their marriage be recognized in that third state?



2

Mary and John adopt a child from State C, but after a few years, the couple divorces. Maria obtains an order for child support and then moves back home to State A. Will the court in State A enforce the child support obligations that were imposed by a court in State B? While the child is in State B visiting that second parent, John decides not to return the child to Mary. To which State should Mary appeal, State A or B?

## REFERENCES

Consider the *Convention on Celebration and Recognition of the Validity of Marriages* and the *Convention on the Recognition of Divorces and Legal Separations* (HCCH 1978 Marriage Convention and HCCH 1970 Divorce Convention).

Consider the *Inter-American Conventions on Conflict of Laws Concerning the Adoption of Minors* (1984), *Support Obligations* (1989), and *International Return of Children* (1989) (among others).



## WILLS AND SUCCESSION

### EXAMPLES

1

Mary wrote a will while in State B, leaving all of her assets (some of which are located in State A and some in State B) to John. When Mary dies of a broken heart in State A, can John enforce the will in State A? What about Mary's assets and jointly-held assets located in State B?

2

Pierre's will states that his property is to be divided equally among all his children. In State A, "children" means children born within marriage whereas in State B, it is interpreted to mean offspring. Which law should the court apply in an action to determine whether to divide the estate between the 2 children of his marriage or all 4 of his offspring?

## REFERENCES

Consider the *Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions* (HCCH 1961 Wills Convention); the *Inter-American Convention on Proof of and Information on Foreign Law* (1979) (among others).



## PERSONAL INJURY / TRANSBOUNDARY LITIGATION

### EXAMPLES

1

While on vacation in State B, Mary was injured in a car accident that was caused by a defect in the airbag, which was manufactured by a company located in State C. In which State should Mary bring an action? How will evidence in one state be collected in a manner acceptable to the courts of another state?

### REFERENCES

Consider the *Inter-American Convention on the Taking of Evidence Abroad* (1975) and its *Additional Protocol* (1984), the *Inter-American Convention on Proof of and Information on Foreign Law* (1979) (among others).



## RECOGNITION AND ENFORCEMENT OF JUDGMENTS

### EXAMPLES

1

Mary brings a tort action in State C and successfully obtains a judgment for damages against ACME Company. But in the meantime, ACME Company has moved all of its assets out of State C. Will a court in State D enforce the judgment by a court of State C against ACME's subsidiary located in State D?

2

Mary's mother lives in a small village in State A. Next to the village a subsidiary of Company B, with its headquarters (and assets) in State B, engages in activities that pollute the water source for the village. If the villagers bring an action against the subsidiary in State A, will a court in State B recognize and enforce the judgment against the parent Company? Alternatively, if the villagers bring an action in State B, will a court in State B take jurisdiction?



## REFERENCES

Consider the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (1979); *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments* (1984) (among others).



## BUSINESS LAW

### EXAMPLES

1

Mary is the Chief Executive Officer of a company in State A that is considering expanding its operations. Her advisors have compared the advantages of States B and C, which are more or less equal in all aspects, except that State B has enacted laws based on the OAS Model Law on the Simplified Corporation. Given the ease of setting up a company in State B, compared with the complex, time-consuming and expensive process that is required in State C, Mary recommends to the Board of Directors that they open a subsidiary in State B.

2

Mary's company in State A is growing rapidly in sales but it has a cash flow problem. The company already has a mortgage on the building, and so Mary approaches her banker to request a loan on the basis of future sales as collateral. The bank declines, but points out that legislation based on the Model Inter-American Law on Secured Transactions is currently under consideration by the parliament in State B and that, should the law pass, it will be possible for the bank to accept such forms of collateral next year. Mary recommends to the Board of Directors that they move the business to State B.

### REFERENCES

Consider the *Model Law on the Simplified Corporation* (2012).

Consider the *Model Inter-American Law on Secured Transactions* (2002).





## INTERNATIONAL CONTRACTS

### EXAMPLES

1

Mary enters into negotiations with a Big Business Ltd. based in State B. The parties agree that the international contract of sale will be governed by the law of State B. Mary is unsure if such a clause will be upheld by the courts in State A and seeks legal advice. Her lawyer points out that the contract also includes an arbitration clause, which requires that the parties will resolve any dispute that arises between them by arbitration and that any award issued pursuant to that clause may be entered as a judgment in the court of either State.

### REFERENCES

Consider the *Inter-American Convention on the Law Applicable to International Contracts* (1994), the *Guide on the Law Applicable to International Commercial Contracts in the Americas* (2019) and the *Inter-American Convention on International Commercial Arbitration* (1975), (among others).

## ANNEX B

### Summary Descriptions of Inter-American Private International Law Instruments

#### PART I. INSTRUMENTS DEVELOPED BY THE INTER-AMERICAN JURIDICAL COMMITTEE

- *Guide on the Law Applicable to International Commercial Contracts in the Americas (2019)*

The fundamental purpose of the *Guide on the Law Applicable to International Commercial Contracts in the Americas* (“Guide”) is to promote clear adherence to the international principle of party autonomy, subject to specific public policy exceptions, and to provide guidance in the absence of effective choice. This means that contracting parties in different states may decide which state’s laws should govern their contract and that this “choice,” which is typically contained in a “choice of law” clause within the contract, will be upheld by the courts of that state in the event of a contractual dispute between the parties. While party autonomy is the norm around the world, in many states of the Americas adherence to this principle is unclear and this uncertainty can be dissuasive for international businesses. The Guide entails 18 detailed recommendations to OAS Member States that are elaborated upon in its subsequent chapters with examples of legislation and jurisprudence; the key recommendations being 7 (party autonomy) and 17 (public policy exceptions).

In 2015 on the 20<sup>th</sup> Anniversary of the *Mexico Convention* (described below), the Inter-American Juridical Committee (“CJI”) had concluded that, rather than promoting additional ratifications or embarking upon efforts to amend that convention, it would be much more effective for States of the Americas to adopt or revise domestic laws for consistency with guidelines endorsed by the OAS, based on international rules and best practices. Among its stated objectives, the Guide proposes to comprise a statement of the law applicable to international commercial contracts for the Americas based on the fundamental principles of the Mexico Convention and with the incorporation of subsequent developments in the field, particularly as outlined in the *Principles on Choice of Law in International Commercial Contracts* (adopted in 2015 by the Hague Conference on Private International Law); to encourage OAS Member States to modernize their domestic laws on international commercial contracts in accordance with international standards; to provide assistance to contracting parties and their counsel in drafting and interpreting international commercial contracts; and, to provide guidance to adjudicators (judges and arbitrators) in the exercise of their particular powers to apply, interpret and supplement domestic laws, particularly on matters in international commercial contracts that may not be addressed in such laws.

- *Principles for Electronic Warehouse Receipts for Agricultural Products (2016)*

This topic was included by the CJI onto its agenda out of concern over the lack of credit in the agricultural sector, particularly for smallholder farmers. Warehouse receipt financing is a form of asset-based lending that allows a farmer (or other business person) to obtain a loan by using the

crop (represented by the warehouse receipt) as collateral. The *Principles for Electronic Warehouse Receipts for Agricultural Products* ("Principles") set out some of the fundamentals that should be considered for a strong warehouse receipt system in order to modernize the agricultural sector, which is essential for many OAS Member States as a way to alleviate poverty and stimulate economic growth, and recognizing that e-commerce is the way forward.

The stated purpose is "to promote a strong and reliable system of warehouse receipt financing and thereby encourage secured lending for and modernization of the agricultural sector; to improve access to credit, particularly for small scale agricultural producers without access to conventional forms of collateral, as a way to stimulate economic growth and alleviate poverty; and, to facilitate and encourage a transition from paper-based to electronic warehouse receipts." The Principles were intended to pave the way for the development of a more elaborated legal instrument in the future and as of 2020, UNCITRAL and UNIDROIT have commenced the development of a draft Model Law for Warehouse Receipts, currently in progress.

- *Model Law on the Simplified Corporation (2012)*

Incorporation of a business is complex, time-consuming, and costly in many states throughout the region, largely because of outdated laws and antiquated procedures. To address this, the CJI adopted the *Model Law on the Simplified Corporation*, which offers a modernized and simplified corporate structure without such complexity and its associated costs. While enhanced efficiency will improve competitiveness for businesses of any size, extending the possibility of affordable incorporation is of particular benefit to many small- and medium-sized enterprises ("MSMEs"), particularly those that operate in the informal sector. Simplified *incorporation* serves as a useful first step in the process of business *registration*. This will encourage formalization of many MSMEs, which, in turn, will improve their likelihood of obtaining access to formal (and affordable) credit.

In 2017, the OAS General Assembly took note of the Model Law, requested that it be disseminated as widely as possible, and invited Member States to adopt those aspects of the Model Law that are in their interest (*Model Law on the Simplified Corporation*, AG/RES. 2906 (XLVII-O/17)). In furtherance of that mandate and with input from member states, a report was prepared that includes the status of reforms throughout the region on the basis of the Model Law and an explanation of the 12 key elements of the Model Law that are essential to simplified incorporation.



## PART II. INSTRUMENTS ADOPTED AT THE INTER-AMERICAN SPECIALIZED CONFERENCES ON PRIVATE INTERNATIONAL LAW (“CIDIPs”)

The current status of signatures and ratifications of CIDIP conventions is available at this link: [https://www.oas.org/en/sla/dil/docs/private\\_international\\_law\\_summary\\_table\\_signatories\\_ratifications.pdf](https://www.oas.org/en/sla/dil/docs/private_international_law_summary_table_signatories_ratifications.pdf)

### CIDIP-VII (OAS Headquarters, Washington, DC, 2009)

- *Model Registry Regulations under the Model Law Inter-American Law on Secured Transactions*

The *Model Registry Regulations* were designed to complement the Model Law that was adopted at CIDIP-VI as described below. Noting that some states had begun domestic reforms on the basis of the Model Law, it was acknowledged that proper and full implementation of a legal framework also requires supplemental registry rules. Accordingly, the Model Regulations provide the legal foundation for implementing and operating the registry regime contemplated by Title IV of the Model Law. The role of this registry is to provide for public disclosure of security interests as provided in the various provisions of the Model Law. Registration is a central feature of the priority structure of the Law applicable to security interests in most types of collateral.

The Model Regulations have been designed to provide guidance to States that have implemented or contemplate the adoption of a local version of the Model Law. However, States may make appropriate amendments to the Model Regulations, as with the Model Law, to address their particular circumstances.

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### CIDIP-VI (OAS Headquarters, Washington, DC, 2002)

- *Model Inter-American Law on Secured Transactions\**

The purpose of the *Model Inter-American Law on Secured Transactions* is to improve access to credit by expanding the range of acceptable collateral and thereby significantly reducing the cost of borrowing, particularly for MSMEs. Access to finance is restricted if only immovable assets (*i.e.*, land and buildings) can be used as collateral, which is the case in many OAS Member States (either *de jure* or *de facto*). Consequently, borrowers without real property and no collateral are either: 1) excluded from obtaining affordable *formal* credit (*i.e.*, from institutional lenders such as banks) and eligible only for unsecured high-interest loans (*e.g.*, credit cards) or 2) offered credit by informal lenders at high-interest rates and outside of the protection of the law. This is particularly important for women and marginalized groups that often do not have access to traditional forms of collateral (*i.e.*, land).

The Model Law provides a template for any state seeking to modernize its secured transactions framework; it creates a single uniform system (instead of separate registries based on asset type, which is still common in many countries), expands the types of movable property that may serve as collateral, protects third parties, and provides efficient enforcement remedies. It creates uniformity by incorporating all existing mechanisms for secured lending into a single “security

interest" that may encumber any present or future, tangible or intangible movable goods. This is achieved through the following main provisions: a) provides the maximum possible range of goods which can constitute a security (Article 4); b) simplifies the procedures for creating a security interest which thereby reduces costs (Articles 5 to 9); c) establishes clear criteria for publicizing different types of security interests and determining the "rank" or priority between creditors (Articles 10 to 34); d) standardizes the documentary and registry aspects concerning the security (Articles 35 to 46); e) assures the efficacy of the security through the establishment of foreseeable and detailed criteria on the order of priorities (Articles 47 to 53); f) procures speed in execution proceedings of the security itself, thereby avoiding unnecessary loss and offering reasonable security to the secured debtor (Articles 54 to 67).

States may make appropriate amendments to the Model Law to address their particular circumstances and several OAS Member States have embarked on the reform of their own domestic regimes in conformity with the Model Law.

\* What is a "secured transaction"? In this context a "security interest" refers to an "interest" or "claim" against movable property that has been given as collateral or security for a loan.

- For example, a person may take out a mortgage of \$100K secured against a house having a fair market value of \$200K. The lender (mortgagee) has a mortgage or claim against that house in the amount of \$100K. [loans against immovable property - mortgage]
- Similarly, a person may take out loan of \$100K that is secured against \$200K worth of inventory. The lender has a secured interest or claim against that inventory in the amount of \$100K. [loans against movable property - secured transaction]

Note that this type of "security interest" is distinct from a "security" or "share" in a corporation that may be traded on a securities market.

- *Inter-American Specialized Uniform Through Bill of Lading for the International Carriage of Goods by Road*

This instrument is a Uniform Through Bill of Lading intended to serve as a template or "standard form" for use in the international carriage of goods across the Americas. It is offered in negotiable or non-negotiable form. It essentially seeks contractual unification of the law aimed at increasing uniformity and predictability in the legal process of transportation of goods being imported or exported. It builds on earlier work for the *Inter-American Convention on Contracts for the International Carriage of Goods by Road* (not in force), adopted at CIDIP-IV and described below.

- *Applicable Law and Competency of International Jurisdiction with Respect to Extracontractual Liability (CIDIP-VI/RES. 7/02)*

The topic "Conflicts of Laws on Extracontractual Liability, with an Emphasis on Competency of Jurisdiction and Applicable Law with Respect to Civil International Liability for Transboundary Pollution" had been included on the agenda for consideration at CIDIP-VI. This refers to the need to balance the reasonable expectation of plaintiffs to sue before forums that are accessible and have a favorable legal system with the reasonable expectation of defendants not to be sued and judged before forums or by the application of laws lacking a reasonable connection with the subject of the suit or with the parties. The resolution recognized that further work on this topic would be required

before preparing an instrument was possible and requested the CJI to issue a report and recommendations for consideration by a meeting of experts.

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#### **CIDIP-V (Mexico City, Mexico, 1994)**

- *Inter-American Convention on the Law Applicable to International Contracts*

As explained above in the summary for the 2019 Contracts Guide, although party autonomy is the norm around the world, many states of the Americas have been reticent. The *Mexico Convention* sought to promote adherence to the principle of party autonomy and also provided guidance for cases where the contracting parties had either failed to make a choice of law or their choice was ineffective. Given states' hesitance, the *Mexico Convention* was said to be ahead of its time and did not attract many ratifications after its adoption.

- *Inter-American Convention on International Traffic in Minors*

The purpose of the *Inter-American Convention on International Traffic in Minors* is to prevent and punish international traffic in minors (under 18) through international cooperation and to regulate civil and penal aspects of such trafficking. Under the Convention, States Parties undertake to institute a system of mutual legal assistance and to adopt related administrative and legal provisions to that effect and to ensure the prompt return of minors who are victims of international traffic to the state of their habitual residence. "International traffic" means the abduction, removal or retention (or attempt) of a minor for unlawful purposes (including prostitution, sexual exploitation and servitude, among others) or by unlawful means. Each State Party shall designate a Central Authority to facilitate judicial and administrative proceedings, the taking of evidence and other procedural steps in order to achieve these objectives.

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#### **CIDIP-IV (Montevideo, Uruguay, 1989)**

- *Inter-American Convention on Contracts for the International Carriage of Goods by Road (not in force)*

This Convention seeks to unify the domestic laws that apply to contracts for international carriage of goods by road. It establishes a uniform liability regime and a harmonized bill of lading for all goods being transported internationally by road and its legal effect would be to create a new system of international law in respect of liability, documentation and insurance for goods that move across borders.

- *Inter-American Convention on the International Return of Children*

As stated in Article 1, "the purpose of this Convention is to secure the prompt return of children (below 16) habitually resident in one State Party who have been wrongfully removed from any State to a State Party or who, having been lawfully removed, have been wrongfully retained. This Convention further seeks to secure enforcement of visitation and custody rights of parties entitled to them." Each State Party shall designate a Central Authority to ensure fulfillment of obligations



under the Convention, specifically to assist in locating and returning the child, obtaining the necessary documentation for proceedings.

It is said to be complimentary to *Hague Convention on the Civil Aspects of International Child Abduction* of October 25, 1980. Over half of OAS Member States (28) are party to the Hague Convention while over a third (14) are party to the Inter-American Convention. When a state is party to both, Article 34 provides that the Inter-American instrument prevails, unless has been otherwise agreed; nonetheless, notwithstanding Article 34, in some OAS Member States the Hague Convention is more frequently applied because of additional provisions available in the HCCH system, such as Guides to Good Practices and a Model Application Form for the return of wrongfully removed or retained children.

- *Inter-American Convention on Support Obligations*

As stated in Article 1, “the purpose of this Convention is to establish the law applicable to support obligations and to jurisdiction and international procedural cooperation when the support creditor is domiciled or habitually resides in one State Party and the debtor is domiciled or habitually resides or has property or income in another State Party.” It applies to child support obligations (those below 18 and those older who continue to be entitled to support) and to spousal support obligations, although states may (by declaration) restrict the scope to child support obligations or extend it to other creditors.

Article 29 provides that among OAS Member States that are parties to the Inter-American Convention and to the Hague Conventions of October 2, 1973 on the recognition and enforcement of decisions relating to maintenance obligations and on the law applicable to maintenance obligations, the Inter-American instrument prevails, unless has been otherwise agreed. Subsequently, on November 23, 2007, the Hague adopted the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* (HCCH 2007 Child Support Convention) and the *Protocol on the Law Applicable to Maintenance Obligations* (HCCH 2007 Maintenance Obligations Protocol) that seek to establish a modern, efficient and accessible international system for the cross-border recovery of child support and other forms of family maintenance. These more recent instruments would also need to be taken into consideration.

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### **CIDIP-III (La Paz, Bolivia, 1984)**

- *Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors*

This Convention addresses conflict of laws that may arise in the international adoption of minors. It states that the law of the habitual residence of the minor shall govern capacity and consent, as well as procedures and formalities, while the law of the domicile of the adopter shall govern capacity to adopt, age, marital status and spousal consent, unless the requirements are manifestly less strict, in which case the law of the minor shall govern. The Convention also clarifies the applicable law for publication and registration, secrecy, medical and background information, rights of succession, revocation and annulment, and addresses full adoption, simple adoption and adoptive legitimation.

Subsequently, on May 29, 1993, the Hague adopted the *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (HCCH 1993 Adoption Convention) to prevent the abduction, sale of or trafficking in children and to ensure that intercountry adoptions are in the best interests of the child. It establishes international standards of practices for intercountry adoptions and should also be taken into consideration.

- *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*

This Convention contains provisions for the effective application of Article 2(d) of the *Montevideo Convention* (described below) to prevent jurisdictional disputes among States Parties. Specifically, it clarifies the requirements of jurisdiction for different types of cases, such as an action *in persona*, rights relating to tangible movable property, property rights relating to movable property, or an international business contract. It also addresses instances where jurisdiction had been assumed to avoid a denial of justice, counterclaims, infringements of exclusive jurisdiction and sets out the types of cases to which the convention does not apply (e.g., divorce, child support, labor, torts, among others).

- *Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law*

This is a Convention for the “juridical” or “legal” person, which is an entity that is created by law, such as a corporation. It stipulates that such entities are governed by the law of the state where that entity was organized (as to its existence, capacity, dissolution, etc.), and includes provisions on its recognition, establishment and representation in other states.

- *Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad*

Further to the *Inter-American Convention on the Taking of Evidence Abroad*, the *Additional Protocol* outlines provisions for the designation by each State Party of a Central Authority that shall perform the functions as assigned in both the Convention and Protocol. In particular, letters rogatory requesting the taking of evidence shall be prepared in conformity with the annexed requirements and transmitted and processed as outlined. The Protocol also addresses costs and expenses for such services and the taking of evidence by diplomatic or consular agents.

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#### **CIDIP-II (Montevideo, Uruguay, 1979)**

- *Inter-American Convention on Conflicts of Laws Concerning Checks*

As indicated by its title, this Convention provides rules for resolving conflict of laws that may arise concerning checks. For example, capacity to enter into an obligation by means of a check and all obligations rising from it are governed by the law of the place in which the obligation was contracted (with specific provisions in cases of incompetence). It is in furtherance of the convention adopted during CIDIP-I concerning checks and another on bills of exchange, *et al.*

- *Inter-American Convention on Conflicts of Laws Concerning Commercial Companies*

As indicated by its title, this Convention provides rules for resolving conflict of laws that may arise concerning commercial companies. It stipulates that such companies are governed by the law of the state where they are constituted (as to existence, capacity, operation and dissolution); it also includes provisions on recognition, establishment and representation in other states.

- *Inter-American Convention on the Domicile of Natural Persons in Private International Law*

This Convention provides uniform rules on the domicile of natural persons and specifies that domicile shall be determined in the following order: habitual residence; principle place of business; in the absence of the foregoing, place of mere residence; and in absence thereof, place where the person is located. The Convention also provides rules to determine conjugal domicile, and that of incompetent persons and diplomatic agents.

- *Inter-American Convention on Execution of Preventive Measures*

The purpose of this Convention is to enable the court of a State Party to execute the preventive (or "interim") measures issued by the court of another State Party. Such measures may be necessary to guarantee the security of a person (e.g., by providing protective custody) or the security of property (e.g., seizure of assets) until such time that a decision in a future proceeding concerning the matter is rendered final. In addition to the general regime outlined in the Convention, Article 10 includes special provisions in exceptional cases where urgent measures are required. The preventive measures shall be executed by means of letters rogatory, transmitted as outlined by the Convention, or through the State Party's Central Authority competent to receive and distribute same.

- *Inter-American Convention on General Rules of Private International Law*

As indicated by its title, this Convention sets out a set of general rules of private international law. It covers choice of applicable law, proof and enforcement of foreign law, and exceptions for public policy (ordre public). In the absence of an international rule, the States Parties shall apply the conflict rules of their domestic law. This was the first instrument of its kind to be adopted in the world.

- *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*

The *Montevideo Convention*, as it is commonly known, was designed as an instrument of judicial cooperation to ensure the extraterritorial validity of judicial judgments and arbitral awards issued in civil, commercial, or labor proceedings. In other words, it establishes the criteria for a tribunal in one state to recognize a decision (by a court or arbitral tribunal) of another state (Article 2) and the documents of proof that are required (Article 3).

However, the *procedures* for ascertaining such validity are governed by the law of the State in which execution of the judgment or award are sought (Article 6). As these domestic procedures vary from one state to another and are typically surrounded by strict formalities, this poses a serious



obstacle to the objective of the Convention. It is this situation that prompted the CJI to include onto its current agenda the topic of "Validity of foreign judicial decisions in light of the *Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards*." The Rapporteur for the topic has prepared four reports, the last of which includes draft recommendations with the goal to simplify domestic procedures used in the recognition and enforcement of foreign judgments by providing guidance for the interpretation, application and, where necessary, legislative reform of such procedures, in conformity with international standards and best practices, and to encourage, wherever possible, application and use of technological advances for greater efficiency by courts in the recognition and enforcement of foreign judgments (CJI/doc.611/20).

- *Inter-American Convention on Proof of and Information on Foreign Law*

The purpose of this Convention is to establish rules for international cooperation to obtain elements of proof of and information on the law of another State Party. Each State Party shall designate a Central Authority to facilitate exchanges and response to requests for suitable means of proof, such as certified copies of legal texts, expert testimony, or reports on the text, validity, meaning and scope of law.

- *Additional Protocol to the Inter-American Convention on Letters Rogatory*

Further to the *Inter-American Convention on Letters Rogatory*, the *Additional Protocol* outlines provisions for the designation by each State Party of a Central Authority that shall perform the functions as assigned in both the Convention and Protocol. In particular, letters rogatory shall be prepared in conformity with the annexed requirements and transmitted and processed as outlined. The Protocol also addresses costs and expenses for such services. It applies to procedural acts (pleadings, motions, orders and subpoenas) set forth in Article 2(a) of the Convention that are served and requests for information that are made by a judicial or other adjudicatory authority of a State Party to that of another State Party and transmitted by letters rogatory.

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#### **CIDIP-I (Panama City, Panama, 1975)**

- *Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices*

As indicated by its title, this Convention provides rules for resolving conflict of laws that may arise concerning bills of exchange, promissory notes and invoices. For example, capacity to enter into an obligation by means of a bill of exchange and all obligations rising from it are governed by the law of the place in which the obligation was contracted (with specific provisions in cases of incapacity).

- *Inter-American Convention on Conflict of Laws concerning Checks*

This Convention stipulates that provisions of the foregoing *Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices* shall also apply to checks, but with certain modifications as listed therein.

- *Inter-American Convention on International Commercial Arbitration ("Panama Convention")*

Prior to the Panama Convention, enforcement of foreign arbitral awards in Latin America was covered primarily by provisions in the Treaty of Montevideo of 1889, the Bustamante Code of Private International Law and the Treaty of Montevideo of 1940. Under these treaties, in order to enforce a foreign arbitral award it was necessary to provide proof: 1) that the award was rendered by a competent tribunal; 2) that the award was final in the state where rendered; 3) that the party against whom enforcement was sought had been legally summoned for the arbitration proceeding; and, 4) that the award did not conflict with public policy in the country where enforcement was sought. However, *the burden of proof rested with the party seeking confirmation of the award*; moreover, none of these instruments addressed enforcement of arbitration agreements.

In 1958, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention") took center on the global stage, but many Latin American states were reticent to become parties (an official version in Spanish did not become available until 1988). Instead, many joined the Panama Convention, which was intended to be a compatible instrument. Both treaties 1) recognize the validity of an agreement to arbitrate future disputes; 2) require that the arbitration agreement be in writing; 3) *place the burden of proof on the party objecting to confirmation of the award*; and, 4) provide nearly identical grounds for refusing recognition or enforcement. There are also important differences, for example, the Panama Convention contains specific requirements concerning the arbitration procedure and the respective areas of application differ as between the two instruments.

Subsequently, most Latin American states became parties also to the New York Convention. Thus, it could be said that the Panama Convention served as a bridge that helped change the environment and thinking about arbitration in the region.

- *Inter-American Convention on Letters Rogatory*

Letters rogatory are a request from the court in one state to the court of another state requesting performance of an act, such as service of process, summons or subpoenas on a party to a legal proceeding. The *Inter-American Convention on Letters Rogatory* together with its *Additional Protocol* described above streamlines the procedure for transmitting letters rogatory, which may be done through the designated Central Authority in each State Party, in order to reduce the time and burden under the traditional process. The Convention outlines the requirements for execution and the Additional Protocol provides a standard form. It applies to civil and commercial matters (and although State Parties can elect to expand its application to criminal and administrative matters, only one has done so).

In addition to the Inter-American Convention and Protocol, also relevant to the topic is the Hague's *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (HCCH 1965 Service Convention) which provides channels of communication to be used for transmission of a judicial or extrajudicial document from one State to another for service.

- *Inter-American Convention on the Taking of Evidence Abroad*

This Convention governs letters rogatory issued in conjunction with the taking of evidence abroad. It addresses matters such as the procedure, the information to be specified, execution and formalities, costs and transmission, which may be done through the designated Central Authority in each State Party.

In addition to the Inter-America Convention, also relevant to the topic is the Hague's *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (HCCH 1970 Evidence Convention) which "establishes two methods of co-operation between States Parties for the taking of evidence abroad in civil or commercial matters" (i) Letters of Request, and (ii) diplomatic or consular agents and Commissioners.

- *Inter-American Convention on the Legal Regime of Powers of Attorney to be used Abroad*

The purpose of this Convention is so that powers of attorney duly given in one of the States Parties shall be valid in any other State Party, provided there has been compliance with the given provisions. The Convention stipulates the law applicable to certain aspects of powers of attorney, for example, that formalities shall be governed by the State in which the powers are given (with exceptions) whereas requirements with respect to publicity shall be governed by the law of the State in which the powers are to be used.

This Convention continues to serve as a valuable bridge between the civil and common law systems. In some common law jurisdictions that do not include the concept of a notary public (equivalent to the "notariado latino" or "escribanos públicos"), this Convention enables use of the "power of attorney" instead, which will be considered valid and effective in civil law jurisdictions provided that the requirements of Articles 6 and 7 of this Convention have been met.

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