

LES INSTRUMENTS AMERICAINS DU DROIT INTERNATIONAL PRIVE
UNE NOTE SUR LEURS RAPPORTS AVEC UNE FUTURE CONVENTION DE LA HAYE
SUR LES ACCORDS EXCLUSIFS D'ELECTION DE FOR

*préparé par Andrea Schulz, Premier secrétaire,
Arnau Muriá Tuñón et Rita Villanueva Meza, juristes stagiaires*

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THE AMERICAN INSTRUMENTS ON PRIVATE INTERNATIONAL LAW
A PAPER ON THEIR RELATION TO A FUTURE HAGUE CONVENTION
ON EXCLUSIVE CHOICE OF COURT AGREEMENTS

*prepared by Andrea Schulz, First Secretary,
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I. INTRODUCTION

1 During its meeting in April 2004, the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters discussed the possible final clauses of a preliminary draft Hague Convention on Exclusive Choice of Court Agreements, including the clauses on its relationship with other international instruments. Following the proposals submitted during the meeting, discussions focussed in particular on the so-called European instruments¹ and possibilities to resolve their overlap with the preliminary draft Hague Convention on Exclusive Choice of Court Agreements by inserting a "disconnection clause" into the latter. In this context it was stressed that the European instruments were not the only regional instruments likely to overlap and that there were other regions which had adopted private international law instruments that could overlap with a Hague Convention on Exclusive Choice of Court Agreements. The Permanent Bureau was asked to carry out further research on those conventions.² This paper addresses the issue with regard to conventions existing in the American arena.

2 Several Conventions in the Inter-American and South American arena have been examined in order to identify a possible overlap or even conflict with the future Hague Convention on Exclusive Choice of Court Agreements. Moreover, some Articles containing provisions related to other issues discussed during the negotiations are also mentioned, with the hope that they can provide suggestions for some of the issues still pending.

3 Where the instruments examined contain themselves explicit rules on the relationship with other (future) instruments, these rules will be applied to the preliminary draft Convention on Exclusive Choice of Court Agreements. Where, on the other hand, no specific rules have been identified, the relationship between any existing Latin-American instrument and the future Hague Convention on Exclusive Choice of Court Agreements would be governed by the general rules of international treaty law. These rules have been examined in a separate paper.³ Therefore, in these cases, this paper will limit itself to (1) identifying the overlap and possible conflict in substance, and (2) giving a brief summary of the effect that Article 23 as proposed by the Drafting Committee at its meeting in April 2005⁴ would have. The purpose of this paper is merely to give a simplified overview of existing instruments with a view to facilitating discussions on the disconnection clause. It does not attempt a full academic research of the issue.

II. THE LIMA TREATY

4 The *Treaty to Establish Uniform Rules on Private International Law in America* was adopted in Lima on 9 November 1878 during a Latin-American jurists congress hosted by Peru.⁵ It was a minimum formula after an attempt to unify all Latin-American private law.⁶

¹ This expression refers to the Conventions of Brussels and Lugano on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 and 16 September 1988, respectively, as well as to Council Regulation (EC) No 44/2001 of 22 December 2000 on the same issues which has replaced the Brussels Convention in the relations among all European Union (EU) Member States with the exception of Denmark. Between Denmark and the other fourteen "old" EU Member States (*i.e.* before the enlargement which took place on 1 May 2004), the Brussels Convention still applies. The almost identical Lugano Convention covers all fifteen "old" EU Member States plus Iceland, Norway, Poland and Switzerland.

² See already A. Schulz, "Report on the First meeting of the Informal Working Group on the Judgments Project – 22-25 October 2002", Prel. Doc. No 20 of November 2002, p. 16, available at < www.hcch.net >.

³ See A. Schulz, "The Relationship between the Judgments Project and other International Instruments", Prel. Doc. No 24 of December 2003, available at < www.hcch.net >.

⁴ See A. Schulz, "Report on the Meeting of the Drafting Committee of 18-20 April 2005 in Preparation of the Twentieth Session of June 2005", Prel. Doc. No 28 of May 2005, available at < www.hcch.net >.

⁵ *Tratado para Establecer en América, Reglas Uniformes sobre Derecho Internacional Privado, suscrito en Lima, el 9 de Noviembre de 1878*, published in R.F. Seijas, *El Derecho Internacional Hispano Americano (Público y Privado)*, Caracas, 1884, pp. 260-269. Also available online at < www.bcn.cl/tratados/detalle_acuerdo.php?num_ficha=2091 > (Spanish). The translation of the Treaty into English is ours and served as the basis for the translation into French.

⁶ See letter of 11 December 1878 from Joaquin Godoy, Legation of Chile in Peru to the State Minister in the Department of Foreign Relations of Chile at < www.bcn.cl/tratados/detalle_acuerdo.php?num_ficha=2089 >. See also D.P. Fernandez Arroyo, *La Codificación del Derecho Internacional Privado en América Latina*, Madrid, 1993 (hereinafter D.P. Fernandez Arroyo, *Codificación*), pp. 90 *et seqq.*

5 The Treaty was signed by Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela in 1878. Guatemala and Uruguay joined these States by a separate Protocol of 5 December 1878.⁷ Peru was designated as depositary State under Article 57 of the Treaty. It appears that Peru is the only State that also ratified the Convention in 1879.⁸ According to information provided by the depositary in May 2005, no further instruments of ratification were received from States that have signed or acceded.⁹ It seems that Ecuador and Costa Rica ratified the Treaty but never deposited their instruments of ratification with the Peruvian Government.¹⁰ Therefore, according to its Articles 57 and 58, the Treaty is in force only for Peru¹¹ and is consequently dead letter law.

6 The Treaty contains a rule on choice of court clauses that, translated into English, reads as follows:

“Article 27

Foreigners, despite being absent, may be sued before the courts of the Nation:

(...)

(3) If it has been stipulated that the Judicial Branch of the Republic should adjudicate disputes relating to obligations undertaken in another country.”

7 The Treaty also contains a compatibility provision with existing treaties. Translated into English, it reads as follows:

“Article 53

The provisions of the aforementioned sections do not alter the provisions established in the treaties in force with other nations.”

8 In light of the fact that the Treaty never became operative, its relationship with the future Hague Convention on Exclusive Choice of Court Agreements will not be discussed any further in this paper.

III. THE TREATIES OF MONTEVIDEO OF 1889 AND 1940¹²

9 The first set of Montevideo Treaties was signed in 1889. These treaties were the result of the First South American Congress on Private International Law held in Montevideo from 1888 to 1889. Eight treaties and an additional protocol on specific subject matters were adopted. They were a South-American reaction to the nationality principle that prevailed in the Lima Treaty.¹³ The Treaties of interest are the ones on International Civil Law, International Commercial Law and International Procedural Law.

⁷ Protocol of 5 December 1878. See D.P. Fernandez Arroyo, *Codificación* (*supra* note 6), pp. 92 *et seq.*

⁸ Legislative Resolution of 29 January 1879.

⁹ Information provided by the Office of Treaties of the Peruvian Ministry of Foreign Affairs by e-mail of 19 May 2005.

¹⁰ See D.P. Fernandez Arroyo, *Codificación* (*supra* note 6), pp. 92 *et seq.*

¹¹ Peru is a Member State of the Hague Conference. However, it is to be assumed that a Hague Convention on Exclusive Choice of Court Agreements would, as it is tradition for Hague Conventions, also be open to non-Member States of the Hague Conference. Therefore the information on membership of American States to the Hague Conference given in this document does not imply that a possible conflict between any American instrument and a future Hague Convention on Exclusive Choice of Court Agreements could not arise for non-Member States.

¹² *Tratados de Montevideo* (1889-1940). The translations of the 1889 Montevideo Treaties are ours. The translations into English of the 1940 Montevideo Treaties and Protocol are taken from 37 *American Journal of International Law, Supplement (AJILs)* (1943), pp. 116 *et seqq.* The French translation of the 1940 Montevideo Treaty on International Civil Law is taken from 84 *Journal du Droit International (JDI)*, pp. 483 *et seqq.*

¹³ See *supra*, under II.

The Treaties were reviewed and modified 50 years later in 1939 / 1940, as a reaction to the Bustamante Code,¹⁴ during the Second South American Congress on Private International Law.

10 The more recent version is used commonly between Argentina, Paraguay and Uruguay (*i.e.* three States that did not adopt the Bustamante Code) and is well known among economic operators in these States.¹⁵ Argentina, Paraguay and Uruguay have shown in the Inter-American arena a very strong desire to preserve the Treaties of Montevideo in practice among themselves.¹⁶

11 The 1940 International Civil¹⁷ and International Commercial¹⁸ Law Montevideo Treaties contain a clause on the relationship with the 1889 Treaties. The clause establishes that the more recent Treaties prevail over the previous ones. No other compatibility clauses can be found in the Montevideo Treaties.

1. Treaties on International Civil Law

12 The Civil Law Treaties contain some language that could overlap with the validity provisions in a convention on choice of court. Moreover, Articles 56 *et seqq.* contain jurisdiction rules. They provide, *inter alia*, that for personal actions, the courts of the place whose law governs the juridical act that constitutes the subject matter of the action will have jurisdiction, as well as the courts of the defendant's domicile. Actions *in rem* are subject to the jurisdiction of the court where the property is located. Article 56 of the 1940 Treaty moreover permits prorogation of jurisdiction after the action has been instituted.

Treaty on International Civil Law¹⁹

(Montevideo, 1889)

Ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay. Acceded to by Colombia.

Treaty on International Civil Law²⁰

(Montevideo, 1940)

Ratified by Argentina, Paraguay and Uruguay.

¹⁴ See *infra*, under IV.

¹⁵ See D.P. Fernandez Arroyo, *Codificación* (*supra* note 6), p. 121.

¹⁶ See D.P. Fernandez Arroyo, *Derecho Internacional Privado Interamericano: Evolución y perspectivas, Comité Jurídico Interamericano, Curso de Derecho Internacional*, XXVI, 1999 (hereinafter D.P. Fernandez Arroyo, *Curso*), pp. 182 *et seq.*

¹⁷ Article 66.

¹⁸ Article 55.

¹⁹ *Tratado de Derecho civil internacional, Montevideo 12 de febrero de 1889*, 18 *Martens* (2nd) p. 443 (Spanish); 7 *Lecciones y ensayos* p. 57 (Spanish); also available at < <http://secretjurid.www5.50megs.com/leyes/3192.htm> > in Spanish. For the current status of ratifications see < www.oas.org/juridico/spanish/firmas/f-1.html > (in Spanish).

²⁰ *Tratado de Derecho civil internacional, Montevideo 19 de marzo de 1940*, 8 *Hudson* p. 513 (Spanish; English translation); 84 *JDI* p. 483 (Spanish, English translation, French translation); 7 *Lecciones y ensayos* p. 57 (Spanish), 37 *AJILs* p. 141 (English translation). In legal doctrine, different views are expressed concerning the entry into force of this Treaty. For example, according to C.L. Wiktor, *Multilateral Treaty Calendar: 1648-1995*, The Hague, 1998, p. 406, "the treaty did not enter into force". On the other hand, several publications, including D.P. Fernandez Arroyo, *Codificación* (*supra* note 6), pp. 120 *et seq.*, and J. Samtleben, *Internationales Privatrecht in Lateinamerika*, Tübingen, 1979 (hereinafter J. Samtleben, German edition), p. 17, express the opposite view. According to Article 65 of the treaty, the entry into force depends on communication of the instruments of approval to the depositary (the Government of Uruguay) and a subsequent notification by the depositary to the other Contracting States to that effect. No minimum number is required. According to the OAS website (see < www.oas.org/juridico/spanish/firmas/f-17.html > (in Spanish)), instruments of ratification were deposited by Argentina and Paraguay in 1956 and 1958, respectively. Uruguay ratified all the Montevideo Treaties of 1940 by Law Decree No 10.272 of 12 November 1942, published in the Official Gazette of 22 December 1942. Although the OAS website does not mention Uruguay's ratification or deposit of an instrument of ratification, it indicates a reservation made by Uruguay upon ratification so it seems that Uruguay (as the depositary) has indeed also deposited its instrument of ratification.

“Article 32

The law of the place where contracts are to be performed shall determine whether it is necessary to make them in writing and the formality level of the corresponding document.

Article 33

The same law governs:

- a) Its actual existence;
- b) Its nature;
- c) Its validity;
- d) Its effects;
- e) Its consequences;
- f) Its execution;
- g) In fine, all matters relative to the contracts, from any point of view.”

“Article 39

The forms of public instruments are governed by the law under which they are issued.

Private instruments, by the law of the place of execution of the respective contract.”

“Article 56

Personal actions should be instituted before the judges of the place whose law governs the juridical act that constitutes the subject matter of the action.

They may likewise be instituted before the judges of the defendant’s domicile.”

“Article 36

The law which governs juridical acts determines the character of the corresponding documents. The forms and formalities relating to such juridical acts are governed by the law of the place where they are concluded or executed; the methods of publication, by the laws of the respective States.

Article 37

The law of the place where a contract is to be performed determines:

- a) Its actual existence;
- b) Its nature;
- c) Its validity;
- d) Its effects;
- e) Its consequences;
- f) Its execution;
- g) In fine, all matters relative to the contracts, from any point of view.”

“Article 56

Personal actions should be instituted before the judges of the place whose law governs the juridical act that constitutes the subject matter of the action.

They may likewise be instituted before the judges of the defendant’s domicile.

Territorial extension of jurisdiction is permitted if, after the action has been instituted, the defendant consents voluntarily to such an extension, always provided that the action in question relates to patrimonial personal rights.

The intention of the defendant must be expressed in a positive, and not in a fictitious form.”

2. Treaties on International Commercial (Terrestrial) Law

13 These Treaties contain several rules establishing direct jurisdiction. For example, the courts of a company’s domicile have jurisdiction to hear disputes between the shareholders of the company or disputes between the company and third parties (Article 7 (1889), Article 10 (1940)). The courts of the company’s domicile also have

jurisdiction in disputes against insurance companies (Article 10 (1889)). The 1940 Treaty contains detailed rules on terrestrial and life insurance.

14 Insurance contracts are covered by the scope of the preliminary draft Convention on Exclusive Choice of Court Agreements. Therefore, the provisions in these Treaties may overlap with the Convention's provisions on jurisdiction. In addition, depending on whether multimodal transport will be covered by the scope of the future Hague Convention, there would be an overlap with these Montevideo Treaties.

Treaty on International Commercial Law²¹

(Montevideo, 1889)

Ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay. Acceded to by Colombia.

"Article 6

The branches or agencies incorporated in a State by a corporation having its seat in another State shall be deemed as domiciled in the place where they carry out their activities and subject to the jurisdiction of the local authorities, regarding the operations that they undertake."

"Article 10

The judges competent to try the claims instituted against insurance companies are those of the States where the said companies have their legal domicile.

If the companies have branches in other States, the provisions of Article 6 shall govern."

Treaty on International Commercial Terrestrial Law²²

(Montevideo, 1940)

Ratified by Argentina, Paraguay and Uruguay.

"Article 12

Contracts of terrestrial insurance are governed by the law of the State where that property is situated which is the object of the insurance at the time when the contracts are concluded; and life insurance contracts are governed by the law of the State where the insurance company, or its branches or agencies are domiciled.

Article 13

The judges competent to try actions instituted in regard to terrestrial or life insurance, are those of the State whose law governs the said contracts, according to the provisions of the foregoing Article; or alternatively at the option of the plaintiff, either those of the State where the insurers, or their branches or agencies (in the cases involving the latter), are domiciled, or those of the place where the insured parties have their domicile."

²¹ *Tratado de Derecho comercial internacional, Montevideo, 12 de febrero de 1889*, 18 *Martens* (2nd) p. 424 (Spanish). For the current status of ratifications see < www.oas.org/juridico/spanish/firmas/f-2.html > (in Spanish).

²² *Tratado de Derecho comercial terrestre internacional, Montevideo 19 de marzo de 1940*, in Spanish available at < http://secretjurid.www5.50megs.com/leyes/lyscom/dl7771_56_com.htm >; 8 *Hudson* p. 498 (English translation); 37 *AJILs* p. 132 (English translation). For the current status of ratifications see < www.oas.org/juridico/spanish/firmas/f-16.html > (in Spanish).

"Article 16

Actions based on international carriage by joint services may be instituted, at the option of the plaintiff, against the first carrier with whom the shipper contracted, or against the last one to receive the merchandise which was to be surrendered to the consignee.

Such action shall be instituted, at the option of the plaintiff, before the judges of the place of shipment, the judges of the place of destination or any of the places of transit where there is a representative of the carrier sued.

(...)

Article 17

Contracts of carriage relating to the transportation of persons through the territories of different States, whether concluded by only one company or by joint services, are governed by the law of the State which is the passenger's destination.

The competent judges shall be those of the latter State, or the ones of the State where the contract was concluded, at the option of the plaintiff."

3. Treaties on International Procedural Law

Treaty on International Procedural Law²³

(Montevideo, 1889)

Ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay. Acceded to by Colombia.

"Article 5

Judgments and arbitral awards rendered in civil and commercial matters in one of the signatory States, shall have in the others the same force as in the country where they were pronounced, provided that they comply with the following requirements:

- a) They must have been rendered by a tribunal competent in the international sphere;
- b) (...)
- c) (...)

Treaty on International Procedural Law²⁴

(Montevideo, 1940)

Ratified by Argentina, Paraguay and Uruguay.

"Article 5

Judgments and arbitral awards rendered in civil and commercial matters in one of the signatory States, shall have in the territory of the other signatories, the same force as in the country where they were pronounced, provided that they comply with the following requirements:

- a) They must have been rendered by a tribunal competent in the international sphere;
- b) (...)
- c) (...)

²³ *Tratado de Derecho procesal internacional, Montevideo 11 de enero de 1889, 7 Lecciones y ensayos* p. 80 (Spanish); 18 *Martens* (2nd) p. 414 (Spanish). For the current status of ratifications see < www.oas.org/juridico/spanish/firmas/f-3.html > (in Spanish).

²⁴ *Tratado de Derecho procesal internacional, Montevideo 19 de marzo de 1940, 7 Lecciones y ensayos* p. 80 (Spanish); 8 *Hudson* p. 472 (English translation); 37 *AJILs* p. 116 (English translation). For the current status of ratifications see < www.oas.org/juridico/spanish/firmas/f-14.html > (in Spanish).

- d) They must not conflict with the public order in the country of their enforcement.”
- d) They must not conflict with the public order in the country of their enforcement.
(...)”

15 These Treaties could obviously overlap with the chapter on recognition and enforcement of a Hague Convention on Exclusive Choice of Court Agreements. The rule on indirect jurisdiction in Article 5 a) of these Treaties refers to the direct jurisdiction rules contained in Articles 56 *et seqq.* of the Treaties on International Civil Law.²⁵ Article 23 as proposed by the Drafting Committee in Preliminary Document No 28,²⁶ in particular its paragraphs 1-4, would ensure that judgments rendered by the court designated in an exclusive choice of court agreement would be recognised as widely as possible while still enabling a State to comply with possible conflicting obligations under these earlier Treaties.

4. Additional Protocol to the Treaties on Private International Law (1940)²⁷

16 The additional protocol to the Montevideo Treaties (1940) contains one provision restricting party autonomy. This protocol was ratified by Argentina, Paraguay and Uruguay.

“Article 5

The jurisdiction and the law which are applicable according to the respective treaties, may not be modified by the will of the parties, except in so far the said law may authorise such modifications.”

5. Conclusion

17 It is not clear whether the rules on jurisdiction in the Montevideo Treaties are “exclusive” or at least exhaustive in that they do not allow the States Parties to provide for additional bases of jurisdiction in their internal law or by joining other treaties. Arguably, at least the Additional Protocol to the 1940 Treaties confers this mandatory character on the jurisdiction rules contained in the 1940 *Treaty on International Civil Law* and the 1940 *Treaty on International Commercial Terrestrial Law*. The Treaties of Montevideo do not contain any clause concerning the relationship with later treaties. As concerns the 1940 Montevideo Treaties, all three States Parties to them are also Parties to the Additional Protocol which makes the jurisdiction rules contained in these Treaties mandatory. However, should all three States become Party to the future Hague Convention, they could thereby jointly amend the mandatory character, should they want the Hague Convention to prevail. In the alternative, Article 23 (in particular its paragraph 3) as proposed by the Drafting Committee in Preliminary Document No 28²⁸ would allow them to comply with their obligations under the Montevideo Treaties in a case of conflict even if, in general, the Hague Convention prevails and not all States Parties to the 1940 Montevideo Treaties and the Protocol become Parties to the future Hague Convention.

²⁵ See J. Samtleben, “*Neue interamerikanische Konventionen zum Internationalen Privatrecht*”, *Rabels Zeitschrift* 56 (1992), p. 1 (21).

²⁶ *Supra* note 4.

²⁷ *Protocolo adicional a los Tratados de Derecho internacional privado, Montevideo, 19 de marzo de 1940*, 8 *Hudson* p. 529 (English translation); 37 *AJILs* p. 151 (English translation).

²⁸ *Supra* note 4.

IV. THE PAN-AMERICAN UNION AND THE PAN-AMERICAN CONFERENCES: THE CONVENTION ON PRIVATE INTERNATIONAL LAW (THE BUSTAMANTE CODE)

18 The Pan-American Union, predecessor of the Organization of American States (OAS), organised six Pan-American Conferences between 1889 and 1928, with the aim of unifying and codifying Private International Law in America.²⁹ During the sixth Pan-American Conference, held in 1928 in La Havana, Cuba, the *Convention on Private International Law* was adopted by a significant number of American States.³⁰ This Convention, which consists of nine Articles, gives force to the 437 Articles of the Private International Law Code drawn up by Antonio Sánchez de Bustamante y Sirvén,³¹ known as the Bustamante Code. This Code is considered the most important Pan-American private international law legislative document of the twentieth century.

19 The Convention was signed by twenty countries; Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela have deposited their instruments of ratification and are Parties to the Convention. It entered into force in November 1928, thirty days after the deposit of the second instrument of ratification (Article 4), and subsequently for each State thirty days after the deposit of the respective instrument of ratification. All the deposits took place between 1928 and 1933.³²

20 Articles 318-332 set forth rules of direct jurisdiction in civil and commercial matters. The provisions of the Code likely to touch a future Hague Convention on Exclusive Choice of Court Agreements read as follows:³³

"Article 318

The judge competent in the first place to take cognizance of suits arising from the exercise of civil and commercial actions of all kinds shall be the one to whom the litigants expressly or impliedly submit themselves, provided that one of them at least is a national of the Contracting State to which the judge belongs or has his domicile therein, and in the absence of local laws to the contrary.

The submission in real or mixed actions involving real property shall not be possible if the law where the property is situated forbids it."

21 The Code also contains further limitations to choice of court agreements, which read as follows:

"Article 319

The submission can be made only to a judge having ordinary jurisdiction to take cognizance of a similar class of cases in the same degree.

²⁹ C. Delgado Barreto, M.A. Delgado Menéndez and C.L. Candela Sánchez, *Introducción al Derecho Internacional Privado*, Tomo I, Lima, 2004. p. 108.

³⁰ *Convention on Private International Law*, with annexed Code of Private International Law (Bustamante Code), 6th Panamerican Conference, Havana, 20 February 1928, OASTS No 31 (Spanish); 86 *League of Nations Treaty Series (LNTS)* 111 (Spanish), 113 (French), 246 (English), 247 (Portuguese); 13 *Revista de derecho internacional privado* 20 (Spanish). For a further English translation, see J. Romañach Jr., translator, *Bustamante Code*, Baton Rouge, 1996. The original Spanish text of the Convention (not of the Code) is also available at < www.oas.org/juridico/spanish/tratados/a-31.htm >. The text of the Code (in Spanish) is available at < www.gobiernoenlinea.gob.ve/docMqr/sharedfiles/codiqobustamante.pdf >.

³¹ See J. Samtleben, *Derecho Internacional Privado en América Latina, Teoría y Práctica del Código Bustamante*, Buenos Aires, 1983, pp. 56 *et seq.* (translated from the German edition (*supra* note 20). Unless stated otherwise, the cites given in this paper refer to the Spanish edition.).

³² See < www.oas.org/juridico/english/sigs/a-31.htm >.

³³ 86 *LNTS* 246 (338, 340).

Article 320

In no case shall the parties be able to submit themselves expressly or impliedly for relief to any judge or court other than that to whom is subordinated according to local laws the one that took cognizance of the suit in the first instance.”

“Article 333

The judges and courts of each contracting State shall be incompetent to take cognizance of civil or commercial cases to which the other contracting States or their heads are defendant parties, if the action is a personal one, except in case of express submission or of counterclaims.”

22 The Code contains no specific rules on consent and capacity with regard to choice of court agreements. However, since it is a general Code on private international law, the provisions in the Code governing consent and capacity as well as party autonomy for general contracts may be applicable.

23 The capacity of the parties is to be determined by their personal law.³⁴ The law of the territory³⁵ governs matters of consent such as error, violence, intimidation and fraud (*dolo*).³⁶ Prohibition of the contracts contrary to law and good customs is also governed by the law of the territory.³⁷ The form requirement to execute a contract in writing or to notarise it, results from the simultaneous application of the *lex loci contractus* and the *lex executionis*.³⁸

24 Articles 423-433 deal with the recognition and enforcement of foreign judgments:

“Article 423

Every civil or administrative judgment rendered in one of the contracting States shall be enforceable and susceptible of execution in the others if it meets the following conditions:

1. That the judge or court that rendered it had jurisdiction to hear the matter and adjudicate it, in accordance with the rules of this Code.
2. That the parties have been cited to appear in the proceedings personally or through their representatives.
3. That the decree does not contravene the public policy or the public law of the country in which execution is desired.
4. That it is executory in the State in which it was rendered.

(...).”

25 The Bustamante Code is sometimes considered a source of generally accepted principles of private international law extending beyond the fifteen States Parties. Consequently, it has been applied by the courts of States that are not Parties to the Convention.³⁹

26 Neither the Code nor the Convention state whether the rules on direct jurisdiction are exclusive and / or exhaustive. However, upon ratification, Chile, Costa Rica, Ecuador

³⁴ Article 176.

³⁵ The expression “law of the territory” (“*ley territorial*” or “*ley de orden público internacional*”) is defined in the Bustamante Code as covering all laws that apply to all persons present within the territory, independent of their nationality (see Article 3(II) of the Bustamante Code). For further details, see J. Samtleben, German edition (*supra* note 20), pp. 192 *et seqq.*

³⁶ Article 177.

³⁷ Article 178.

³⁸ Article 180. See generally N. de Araujo, *Contratos Internacionais, Autonomia da Vontade, Mercosul e Convenções Internacionais*, Rio de Janeiro, 1997, pp. 151 *et seqq.*

³⁹ D.P. Fernandez Arroyo, *Codificación* (*supra* note 6), pp. 155 *et seqq.*; J. Samtleben, German edition (*supra* note 20), pp. 291 *et seqq.* Examples can be found in particular in Argentina (Cám. Nac. fed. 4.2.1960, *Jur. Arg.* 1960-IV-104 (106); J. Paz Cap. 7.10.1969, *Jur. Arg.* 8 (1970) 101 (109); Cám. civ. com. Rosario 7.9.1971, *Revista de Derecho Internacional y Ciencias Diplomáticas* 21 (1972) 298 (301)).

and El Salvador reserved the ability to, in the future, legislate over the issues contained in the Code.⁴⁰ Some Chilean commentators assume that the reservation equally preserves the ability to execute new treaties.⁴¹ Panama has made a declaration in accordance with the provisions of the Bustamante Code to protect its choice of law principles but has not made any reservations. Venezuela reserved several matters not relating to choice of court. Bolivia, when depositing its instrument of ratification, declared that other international treaties and domestic law should prevail over the Code. Chile and Costa Rica made the same reservation for their own legislation.

27 Neither the Convention nor the Code contains a compatibility provision – neither a general one, nor one specifically addressing the rules on jurisdiction.⁴²

28 Article 23(1) as proposed by the Drafting Committee in Preliminary Document No 28⁴³ leaves existing treaty rules in place. Where a party is resident, or the chosen court is situated, in a “Hague State” in which the Bustamante Code does not apply, the Hague Convention prevails under Article 23(2). However, paragraph 3 allows States Parties to both instruments to comply with the other, older treaty obligation if applying the “Hague rules” would be incompatible with these older rules. Therefore no conflict should arise between the two instruments.

V. THE ORGANIZATION OF AMERICAN STATES (OAS) AND THE SPECIALIZED CONFERENCES ON PRIVATE INTERNATIONAL LAW (CIDIPs)

29 The Organization of American States (OAS), through the Department of International Law, plays an important role in the harmonisation and codification of private international law in the Americas.⁴⁴ The principal component of this work are the Inter-American Specialized Conferences on Private International Law, known for their acronym in Spanish as CIDIPs – *Convención Interamericana de Derecho Internacional Privado*. CIDIPs are held every four to six years⁴⁵ and have produced international instruments in different areas. After the Bustamante Code, the trend for general codification changed through the CIDIPs to focus on specific sectors of private international law.⁴⁶

1. Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards (Montevideo, 8 May 1979)⁴⁷

30 This Convention was negotiated and concluded during CIDIP II and entered into force for Peru and Uruguay on 14 June 1980. Subsequently, Argentina, Bolivia, Brazil,

⁴⁰ Among the States which have ratified the Convention on the Bustamante Code, Brazil, Chile, Panama, Peru and Venezuela are Members of the Hague Conference. Moreover, Costa Rica has been admitted but has not yet accepted the Statute. Again, it is recalled that a future Hague Convention on Exclusive Choice of Court Agreements would most likely also be open to non-Member States of the Hague Conference so that a possible conflict with the Bustamante Code would not necessarily be limited to Member States of the Conference.

⁴¹ See J. Samtleben (*supra* note 31), pp. 124 *et seq.*

⁴² However, Article 350 contains specific provisions stating that the Code is subsidiary to previous treaties in matters of extradition, and in Article 115 it is stated that intellectual and industrial property shall be governed by existing and future specific conventions. See also J. Samtleben (*supra* note 31), pp. 122 *et seqq.*

⁴³ *Supra* note 4.

⁴⁴ Office of Interamerican Law Programs, Private International Law, < www.oas.org/dil/private_international_law.htm >.

⁴⁵ To date, six CIDIP Conferences have been held in various cities throughout the Americas: CIDIP I was held in Panama City, Panama in 1975; CIDIP II was held in Montevideo, Uruguay in 1979; CIDIP III was held in La Paz, Bolivia in 1984; CIDIP IV was held in Montevideo, Uruguay in 1989; CIDIP V was held in Mexico City, Mexico in 1994; and CIDIP VI was held at the OAS headquarters in Washington, D.C. in 2002. CIDIP VII was convened by the OAS General Assembly in June 2003 and is currently being prepared.

⁴⁶ See T. Maekelt, *El Desarrollo del Derecho Internacional Privado en las Americas*, Caracas, March 2001, available at < www.oas.org/juridico/spanish/tatiana_maekelt.htm >, *passim*.

⁴⁷ OASTS No 51; see < www.oas.org/juridico/english/treaties/b-41.htm > for the English version. For the current status of ratifications see < www.oas.org/juridico/english/sigs/b-41.html >.

Colombia, Ecuador, Mexico, Paraguay and Venezuela have equally deposited instruments of ratification.⁴⁸

31 It is a "simple convention" which does not deal with direct jurisdiction. However, Article 2 establishes an indirect rule on jurisdiction as a prerequisite for recognition. It refers to the internal law of the State where recognition and enforcement is sought (so-called mirror principle), and reads as follows:

"Article 2

The foreign judgments, awards and decisions referred to in Article 1 shall have extraterritorial validity in the States Parties if they meet the following conditions:

- a) They fulfill all the formal requirements necessary for them to be deemed authentic in the State of origin;
- b) The judgment, award or decision and the documents attached thereto that are required under this Convention are duly translated into the official language of the State where they are to take effect;
- c) They are presented duly legalized in accordance with the law of the State in which they are to take effect;
- d) The judge or tribunal rendering the judgment is competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the State in which the judgment, award or decision is to take effect;
- e) The plaintiff has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the State where the judgment, award or decision is to take effect;
- f) The parties had an opportunity to present their defense;
- g) They are final or, where appropriate, have the force of *res judicata* in the State in which they were rendered;
- h) They are not manifestly contrary to the principles and laws of the public policy (*ordre public*) of the State in which recognition or execution is sought."

32 The Convention, in its Article 1, only deals with its relationship with the *Inter-American Convention on International Commercial Arbitration* and does not specify its relationship with other conventions.⁴⁹ It could obviously overlap with the recognition and enforcement part of a Hague Convention on Exclusive Choice of Court Agreements. An example would be a situation where the recognition rule mentioned above would make a less stringent form standard applicable than the one provided as the minimum standard in a Hague Convention on Exclusive Choice of Court Agreements. In that case the Inter-American Convention would be more generous in recognising a foreign judgment based on a choice of court clause than the future Hague Convention on Exclusive Choice of Court Agreements.⁵⁰ Article 23 of the preliminary draft Convention on Exclusive Choice of Court Agreements permits this. A more stringent form requirement under the internal law of the requested State, on the other hand, would be superseded by the form requirements of the Hague Convention which become internal law of the requested State and thereby finds their way into the application of the mirror principle under the Inter-American Convention. So both Conventions would lead to the same result and can easily

⁴⁸ Among these States, Argentina, Brazil, Mexico, Paraguay, Peru, Uruguay and Venezuela are Member States of the Hague Conference on Private International Law.

⁴⁹ See also D.P. Fernandez Arroyo, *Curso* (*supra* note 16), pp. 180 *et seqq.*

⁵⁰ This is particularly interesting in light of the position taken in 2003 by several members of the Informal Working Group on the Judgments Project that the future Hague Convention should exclude less rigid national form standards for choice of court agreements. Under the Inter-American Convention of 1979, such standards – albeit as an indirect jurisdiction rule in the recognition chapter – could still be applied.

coexist.

2. *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (La Paz, 24 May 1984)*⁵¹

33 This Convention was negotiated and concluded during CIDIP III. The intention was to achieve uniformity on the subject of international jurisdiction going beyond what was achieved by the *Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards*. While the latter contains rules on recognition and enforcement, the La Paz Convention supplements it with rules on indirect jurisdiction. It does however not contain rules on direct jurisdiction.⁵² For States Parties, the La Paz Convention replaces the rules on indirect jurisdiction contained in the internal law of the States parties, and thereby harmonises indirect jurisdiction within and outside the application of the 1979 Montevideo Convention.⁵³

34 The Convention entered into force in December 2004, according to Article 13, thirty days after the deposit of the second instrument of ratification. So far, the Convention is in force only between Mexico and Uruguay.⁵⁴

35 The Convention contains the following specific language on choice of court agreements:

"Article 1

For the purposes of the extraterritorial validity of foreign judgments, the requirement of jurisdiction in the international sphere is deemed to be satisfied when the judicial or other adjudicatory authority of the State Party that rendered the judgment would have had jurisdiction in accordance with any of the following provisions:

A. In an action in persona for a money judgment, any of the following bases or, if applicable, that provided for in section D of this article shall be satisfied:

1. At the time the action was initiated, the defendant, if a natural person, had his domicile or habitual residence in the territory of the State Party in which judgment was rendered or, if a juridical person, had its principal place of business in that territory;
2. In an action against a private non-commercial or business enterprise, the defendant had its principal place of business at the time the action was initiated in the State Party in which judgment was rendered or was organized in that State Party;
3. In an action against a branch, agency, or affiliate of a private non-commercial or business enterprise, the activities that gave rise to such action took place in the State Party in which judgment was rendered, or
4. In the case of non-exclusive fora permitting submission to other fora, the defendant either consented in writing to the jurisdiction of the judicial or other adjudicatory authority that rendered the judgment or, despite making an appearance, failed to submit a timely challenge to the jurisdiction of that authority.

B. In an action involving rights relating to tangible movable property, either of the following bases shall be satisfied:

1. The property was located, at the time the action was initiated, in the territory of the State Party in which the judgment was rendered, or

⁵¹ OASTS No 64; see < www.oas.org/juridico/english/treaties/b-50.htm > for the English version. The translation into French is ours.

⁵² See J. Samtleben (*supra* note 25), *Rabels Zeitschrift* 56 (1992), p. 1 (19).

⁵³ Article 12; see further J. Samtleben (*supra* note 25), *Rabels Zeitschrift* 56 (1992), p. 1 (24).

⁵⁴ For the current status of ratifications see < www.oas.org/juridico/english/sigs/b-50.html >.

2. Any of the bases provided for in section A of this article is satisfied.

C. In an action involving property rights relating to immovable property, the property was located, at the time the action was initiated, in the territory of the State Party in which the judgment was rendered.

D. In an action arising from an international business contract, the parties agreed in writing to submit to the jurisdiction of the State Party in which the judgment was rendered, provided that such jurisdiction was not established in an abusive manner and had a reasonable connection with the subject matter of the action.”

“Article 4

The extraterritorial validity of the judgment may be denied if the judgment has infringed the exclusive jurisdiction of the State Party in which it is being invoked.”

36 The La Paz Convention contains a compatibility clause:

“Article 8

The rules contained in this Convention shall not limit any broader provisions contained in bilateral or multilateral conventions among the States Parties regarding jurisdiction in the international sphere or more favourable practices in regard to the extraterritorial validity of foreign judgments.”

37 During the first meeting of the Informal Working Group in 2002, the view was submitted that “broader provisions” meant a more complete or progressive convention, covering a wider range of issues.⁵⁵ Thus, a Convention dealing with jurisdiction based on exclusive choice of court agreements only might probably not be regarded as a broader one in that sense. However, the wording “*más amplia*” in addition to “broader” can also be translated as “wider” in the sense of “more generous”. It seems that the general trend in Inter-American conventions is to preserve the most favourable practices.⁵⁶ During the session for the approval of the Convention in the Uruguayan Congress, there was a statement about Article 8 to the effect that “... *the adopted rules are subsidiary rules, in the sense that they are applicable if there do not exist other rules conventional or customary that are broader and more generous.*”⁵⁷

38 Thus, the La Paz Convention does not prevent the States Parties to it from joining a Hague Convention on Exclusive Choice of Court Agreements which has less rigid form requirements for choice of court agreements and / or is more favourable to the recognition and enforcement of judgments based on a choice of court agreement. This could arise, e.g., in a case where the agreement does not comply with the form requirement of the La Paz Convention (“in writing”) but with a form requirement of the future Hague Convention, for example where it has been concluded by electronic means of communication. With regard to form, the preliminary draft Convention on Exclusive Choice of Court Agreements is slightly more generous than the La Paz Convention.

39 As to substantive validity, it remains to be seen whether the future Convention on Exclusive Choice of Court Agreements will contain any requirements or leave this aspect to internal law. The La Paz Convention requires for the purposes of recognition and enforcement that the jurisdiction of a court designated in a choice of court clause “*was not established in an abusive manner and had a reasonable connection with the subject matter of the action*”. Article 23(1) as proposed by the Drafting Committee in Preliminary Document No 28⁵⁸ leaves existing treaty rules in place. Where a party is resident, or the chosen court is situated, in a “Hague State” in which the La Paz Convention does not

⁵⁵ See Prel. Doc. No 20 (*supra* note 2), p. 16.

⁵⁶ See D.P. Fernandez Arroyo, *Curso* (*supra* note 16), p. 181.

⁵⁷ See *República Oriental del Uruguay, Diario de Sesiones, Cámara de Representantes, 38a sesión, (Extraordinaria)*, 30 July 2002, p. 71, available at

< www.parlamento.gub.uy/sesiones/pdfs/camara/20020730d0038.pdf >. Emphasis added.

⁵⁸ *Supra* note 4.

apply, the Hague Convention prevails under Article 23(2). However, paragraph 3 allows States Parties to both instruments in such a situation to comply with the other, older treaty obligation if applying the "Hague rules" would be incompatible with these older rules. Therefore no conflict should arise between the two instruments.

VI. MERCOSUR

40 Under Article 1 of the Treaty of Asunción the States Parties to the MERCOSUR committed themselves to harmonise their legislation in the pertinent areas. Based upon this provision the MERCOSUR States are building a framework of private international law protocols to the Treaty of Asunción. All MERCOSUR Members (Argentina, Brazil, Paraguay and Uruguay) are Members of the Hague Conference on Private International Law.⁵⁹

41 The following private international law instruments of MERCOSUR are likely to overlap with a Hague Convention on Exclusive Choice of Court Agreements:

1. *Protocol of Las Leñas on Jurisdictional⁶⁰ Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters, Decision No 5/92, Valle de Las Leñas, 27 June 1992, and Complementary Agreement, Decision No 5/97, Buenos Aires, 19 June 1997⁶¹*

42 The Protocol was signed and ratified by Argentina, Brazil, Paraguay and Uruguay. According to its Article 33, it entered into force on 17 March 1996, thirty days after the deposit of the second instrument of ratification by Brazil. In 1997, the Protocol was supplemented by a Complementary Agreement, which entered into force on 29 April 2000 for Argentina and Paraguay. No further States have joined them yet.

43 The Protocol establishes a system of Central Authorities and provides for co-operation in the taking of evidence and other procedural matters. The Complementary Agreement approves the forms to be used for jurisdictional cooperation and assistance. While the Protocol does not deal with direct jurisdiction, its provision on recognition and enforcement of judgments, translated into English, reads as follows:

"Article 20

The judgments and arbitral awards referred to in the previous Article shall have extraterritorial effect in the States Parties provided they meet the following conditions:

(...)

(c) that said judgments and arbitral awards emanate from a competent judicial or arbitral authority in accordance with the law on international jurisdiction in the requested State;

(...)

(f) that the judgments and arbitral awards do not manifestly conflict with the principles of public order of the State where recognition and / or execution is sought."

⁵⁹ Both the Treaties of Montevideo and the MERCOSUR respond to the South-American integration attempts. Indeed the Treaties of Montevideo are widely used between Argentina, Paraguay and Uruguay which are also Members of the MERCOSUR.

⁶⁰ The translation into English was taken from M.H. Ferrari, *The Mercosur Codes*, London, 2000, p. 309. "Jurisdictional" is the expression used by her, but it appears that out of the several meanings of the Spanish expression "*jurisdiccional*", the proper English term would be "judicial" in our context. Our French translation reflects this.

⁶¹ *Protocolo de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa. Decisión No 5/92, firmado en el Valle de Las Leñas, el 27 de junio de 1992*; available at < www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC592.HTM >, and *Acuerdo Complementario al Protocolo de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa, Decisión No 5/97, firmado en Asunción, el 19 de junio de 1997*; available at < www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC0597.HTM >.

44 These provisions are almost identical with Article 2 of the *Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards* (Montevideo, 8 May 1979). The overlap with a Hague Convention on Exclusive Choice of Court Agreements would therefore be the same.

45 According to Article 33, the Protocol is part of the Treaty of Asunción. Article 35 provides that the Protocol does not restrict provisions of conventions on the same subject matter concluded earlier by the States Parties as far as those provisions are not in contradiction with the provisions of the Protocol. The Protocol does not contain any clause concerning the relationship with later treaties.

2. Protocol of Buenos Aires on International Jurisdiction in Contractual Matters, Decision No 1/94, Buenos Aires, 5 August 1994⁶²

46 The Buenos Aires Protocol on International Jurisdiction in Contractual Matters was signed and ratified by Argentina, Brazil, Paraguay and Uruguay. It entered into force on 6 June 1996 and is, according to its Article 16, an integral part of the Treaty of Asunción. The Buenos Aires Protocol contains rules on direct jurisdiction. Moreover, its Article 14 links it to the Valle de Las Leñas Protocol, thereby introducing the Buenos Aires rules as rules of indirect jurisdiction into the Las Leñas Protocol:

“Article 14

International jurisdiction as governed by Article 20 of the *Protocol of Las Leñas on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters*, shall be subject to the provisions of this Protocol.”

47 Article 1, the rule on the Protocol’s territorial scope of application, is very likely to provoke an overlap with a future Hague Convention on Exclusive Choice of Court Agreements. It only requires one of the parties to have his or her domicile or seat in a State Party and a choice of court clause designating the courts of a Contracting State, in order to make the Protocol applicable. The provision on scope reads as follows:

“Article 1

This Protocol shall apply to international contentious jurisdiction in international civil or commercial contracts concluded between private persons, either natural or legal persons:

- a) domiciled or having their seat in any State Party to the Treaty of Asunción;
- b) where at least one of the contracting parties is domiciled or has its seat in a State Party to the Treaty of Asunción and, additionally, an agreement on choice of jurisdiction has been concluded conferring jurisdiction on the courts of a State Party and there is a reasonable connection pursuant to the rules of this Protocol.”

48 The choice of court provisions read in English as follows:

“Article 4

In disputes arising out of civil or commercial international contracts the courts of the State Party to which the contracting parties have agreed in writing shall have jurisdiction, provided that the agreement has not been obtained wrongfully.

Prorogation of jurisdiction in favour of arbitral tribunals may also be agreed.

⁶² *Protocolo de Buenos Aires sobre Jurisdicción Internacional en Materia Contractual. Decisión 1/94, firmado en Buenos Aires el 5 de agosto de 1994*, available at < www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC194.HTM >. The translation into English was taken from Ferrari (*supra* note 60) p. 299. The French translation is ours.

Article 5

The agreement on choice of jurisdiction may be entered into at the time the contract is concluded, or during or after a dispute has arisen.

The validity and effect of the agreement on choice of jurisdiction shall be governed by the national law of the State Party which would have jurisdiction pursuant to the provisions of this Protocol.

In any case, the law most favourable to the validity of the contract shall be applied.

Article 6

Whether or not jurisdiction has been agreed, it shall be deemed prorogated to the State Party where the action is brought if the defendant, after proceedings have been instituted, voluntarily, positively and actually accepts such jurisdiction.”

49 In the absence of a choice of court agreement, Article 7 provides subsidiary rules of jurisdiction: At the option of the plaintiff, the courts of the place where the contract is performed, the court of the defendant’s domicile or the court of the plaintiff’s domicile or principal place of business (provided that the plaintiff demonstrates that he has fulfilled his obligations) have jurisdiction.

50 The Protocol does not contain any provision on the relationship with other instruments except for Articles 14 and 16 mentioned above.

51 It establishes an autonomous form standard (“in writing”). In this respect, the preliminary draft Convention on Exclusive Choice of Court Agreements is currently more generous than the Protocol. Therefore, a case could arise where the agreement does not comply with the form requirement of the Buenos Aires Protocol (“in writing”) but with a form requirement of the future Hague Convention, in particular if it has been concluded by electronic means of communication. It is not obvious whether the *favor validitatis* rule in Article 5(3) of the Buenos Aires Protocol also extends to form, or whether it is limited to the substantive validity aspect. While the wording (“validity”) seems to cover both, the location of the rule in Article 5 (which deals with substantive validity, while form is dealt with in Article 4) seems to suggest that it is limited to substance. The general context of favouring party autonomy and the validity of choice of court clauses, however, pleads in favour of extending the *favor validitatis* rule to form. In that case, the more generous form requirement in the Hague Convention on Exclusive Choice of Court Agreements would be in line with the Buenos Aires Protocol.

52 With regard to substantive validity, it remains to be seen whether the future Hague Convention on Exclusive Choice of Court Agreements will contain any requirements or leave this aspect to internal law. The Buenos Aires Protocol requires that the jurisdiction of a court designated in a choice of court clause has not been obtained wrongfully. For the rest, the (substantive) validity of a choice of court clause is governed by the law of the State “*which would have jurisdiction pursuant to the provisions of this Protocol*”, supplemented by a subsidiary *favor validitatis* rule that does not specify any particular law. So it could be read as covering also the future Hague Convention where it applies in a State Party to the Buenos Aires Protocol. A choice of court agreement invalid under the Buenos Aires Protocol but valid under the Hague Convention would be recognised under the Buenos Aires Protocol through the *favor validitatis* rule. Where a choice of court agreement is invalid under the Hague Convention but valid under the Buenos Aires Protocol, Article 23(1) as proposed by the Drafting Committee in Preliminary Document No 28⁶³ leaves existing treaty rules in place. Where a party is resident in a “Hague State”, or the chosen court is situated, in a “Hague State” in which the Buenos Aires Protocol does not apply, the Hague Convention prevails under Article 23(2). However, paragraph 3 allows States Parties to both instruments in such a situation to comply with the other, older treaty obligation if applying the Hague rules would be incompatible with

⁶³ *Supra* note 4.

these older rules. Therefore no conflict should arise between the two instruments.

3. **Agreement on Multimodal Transport between the States Parties to the MERCOSUR, Decision No 15/94, Ouro Preto, 17 December 1994**⁶⁴

53 This Agreement deals with transportation of goods by two or more different means of transportation. It entered into force on 30 December 1994 between Argentina, Brazil, Paraguay and Uruguay. The Agreement itself does not deal with jurisdiction, however in Annex II, "Conflicts Resolution", jurisdiction rules are established. The Annex also provides that it will be valid only until the moment that the Protocol on Jurisdiction in Transport Matters comes into force.⁶⁵

54 This Annex would, in our reading, overlap with a Hague Convention on Exclusive Choice of Court Agreements and restrict the autonomy of the parties.

55 The Articles of the Annex read as follows:

"Article 1

At the discretion of the plaintiff or of the person acting on his behalf, jurisdiction to hear the actions related to the multimodal transport of goods under this Agreement shall lie with the court corresponding to the domicile of the main place of business of the defendant or its agent or representative taking part in the operation of multimodal transport or, of the place of surrender of the goods or where the goods were supposed to be surrendered.

Article 2

The parties may agree in writing after the events have taken place, that every controversy related to the contract of multimodal transport be submitted to arbitration under rules established by the parties.

Arbitration procedures set up in this way must apply the provisions of this Agreement.

The legal actions shall be filed in the arbitration tribunal competent under this Article, the tribunal will be obliged to apply the provisions of this Agreement."

56 These provisions deal with a specific subject matter (multimodal transport) and not with general rules on jurisdiction and / or recognition and enforcement of judgments in civil or commercial matters. It is not quite clear whether party autonomy to deviate from Article 1 is limited to a choice of arbitration by Article 2. However, Article 23(1) as proposed by the Drafting Committee in Preliminary Document No 28⁶⁶ leaves existing treaty rules in place. Where a party is resident, or the chosen court is situated, in a "Hague State" in which the Ouro Preto Agreement does not apply, the Hague Convention prevails under Article 23(2). However, paragraph 3 allows States Parties to both instruments in such a situation to comply with the other, older treaty obligation if applying the "Hague rules" would be incompatible with these older rules. Therefore no conflict should arise between the two instruments. Moreover, Article 23(5) explicitly deals with instruments on specific subject matters and lets them prevail over the Hague Convention. However, this paragraph may no longer be necessary in light of the results already achieved by paragraphs 1-3.

⁶⁴ *Acuerdo de Transporte Multimodal Internacional entre los Estados Partes del MERCOSUR. Decisión No 15/94, firmado en Ouro Preto el 17 de diciembre de 1994*, available at

< www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC1594.HTM >. For the entry into force, see < <http://www.mercosur.org.uy/espanol/snor/normativa/acuerdosinternacionalesestadospartes.htm> >.

The translation is ours. The text translated into English has served as a basis for the translation into French.

⁶⁵ That is the only provision on the relationship with other instruments in this Protocol. See further *infra* under 5.

⁶⁶ *Supra* note 4.

4. Santa María Protocol on International Jurisdiction in Matters of Consumer Relations, Decision No 10/96, Fortaleza, 17 December 1996⁶⁷

57 The Santa María Protocol has not yet entered into force. It was signed in Fortaleza on 17 December 1996. According to its Article 15, the Protocol will enter into force for the first two ratifying States, thirty days after the deposit of the second instrument of ratification. For the remaining States, the Protocol will enter into force thirty days after the deposit of the respective instrument of ratification.

58 This Protocol provides for application over consumer relations in which at least one party is a consumer.⁶⁸ Its territorial scope is restricted to the territory of the MERCOSUR Member States and defined as follows:

“Article 2 – Territorial scope

The Protocol shall apply to consumer relationships between sellers and consumers:

- a) domiciled in different State Parties to the Treaty of Asunción;
- b) domiciled in the same State Party if the characteristic obligation of the consumer relationship is to be performed in another State Party.”

59 The Protocol may overlap with a future Hague Convention on Exclusive Choice of Court Agreements. The major point of overlap lies in an Annex Protocol which defines the consumer in such a way that, in some cases, also a business may be considered as a consumer under the Protocol while under a Hague Convention on Exclusive Choice of Court Agreements it is not. The definitions read as follows:

“a) Consumer. Is every natural or legal person acquiring or using products or services as a final user in a consumer relationship or in connection to it. Other persons exposed to the consumer-provider relationships, whether they are determinable or not, are equated to consumers.

Is not considered a consumer or user who, without being a final user, acquires, stores, uses or consumes products or services for their incorporation in the production processes, transformation, commercialisation or use by third parties.

b) Provider. Is every natural or legal person, public or private, national or foreign, as well as the depersonalised agents of the States Parties whose residence is provided for in their legal order, that carry out in a professional manner activities of production, assembling, creation followed by execution, building, transformation, importation, distribution and commercialisation of products and services in a consumer-provider relationship.

c) Consumer Relationship. Is the link established between the provider who, in order to obtain a profit, provides a product or service, and the one who acquires or uses it as the final recipient.

(...)”

60 Consequently, where a legal person buys goods as a final user, it would be covered by the definition of “consumer” under the Santa María Protocol (and therefore covered by the scope of the Protocol). At the same time, the business would **not** be covered by the definition of “consumer” under Article 2(1) a) of the preliminary draft Hague Convention on Exclusive Choice of Court Agreements (and therefore be covered by the scope of the

⁶⁷ *Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo. Decisión No 10/96, firmado en Fortaleza el 17 de diciembre de 1996*, available at www.mercosur.org.uy/espanol/snor/normativa/decisiones/dec1096.htm >. The translations are ours.

⁶⁸ Article 1.

latter Convention, because the consumer provision is a rule which excludes consumer contracts from scope).

61 Where a natural person buys goods to be used by him- or herself at work, the Hague exclusion rule would not apply because the purchase is not for "personal, family or household purposes". The Hague Convention would therefore be applicable. Probably the Santa María Protocol would equally apply because the person would be the "final user", and the purpose (business or private) is irrelevant. Therefore, in these two cases both instruments would apply.

62 The Santa María Protocol contains the following jurisdiction rules:

"Article 4 - General Rule

1. International jurisdiction in claims filed by the consumer, if they relate to consumer relationships, shall be vested in the judges or courts of the State in which the consumer is domiciled.
2. The provider of goods or services may sue the consumer before the judge or court of his / her domicile."

63 Alternatively, Article 5 gives the consumer (not the other party) the choice⁶⁹ to seise the courts of the State where the contract was concluded, where the goods or services were delivered or performed, or the State where the defendant is domiciled. Where a defendant is domiciled in one Contracting State and maintains a branch, subsidiary, agency or other establishment in another Contracting State through which he or she carried out the operations which generated the dispute, the plaintiff may also seise the courts of either of these two States (Article 6). In case of suits brought against multiple defendants and relating to the same object, the courts of the States of domicile of any of the defendants have jurisdiction (Article 7). Moreover, where a counterclaim is based on acts or omissions that served as a basis for the principal claim, the court having jurisdiction over the principal claim also has jurisdiction over the counterclaim by virtue of Article 8.

64 Article 12 links the Santa María Protocol to the Protocol of Valle de Las Leñas on recognition and enforcement:

"Article 12 – Indirect jurisdiction

The requirement of international jurisdiction for the extraterritorial effect of judgments, set forth in Article 20, letter "c" of the *Protocol on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters*, shall be considered satisfied if the judgment or decision was issued by an organ with international jurisdiction, according to the rules established in this Protocol."

65 The Santa María Protocol does not seem to permit derogations from its provisions under internal law. The question whether derogations contained in other, more recent international instruments would be permitted, is a question of international treaty law. It seems that, as for the other instruments discussed, the proposed Article 23 would provide a satisfactory solution for the small area of possible overlap and conflict.

⁶⁹ Article 5 states that this is an exception, and that the consumer has to demonstrate his will to avail himself of this additional jurisdiction clearly and expressly at the moment that the claim is filed. Consequently, although the Protocol does not expressly prohibit choice of court agreements concluded before the dispute arises, one must assume that the intention is indeed to exclude all other bases of jurisdiction not established or permitted by the Protocol.

5. Agreement on Jurisdiction in Matters of Contracts on the International Transport of Goods between the States Parties to MERCOSUR, Decision No 11/02, Buenos Aires, 5 July 2002⁷⁰

66 The *Agreement on Jurisdiction in Matters of Contracts on the International Transport of Goods*, signed in Buenos Aires on 5 December 2002, applies to the international (ground or fluvial) transport of goods carried out between the territories of the States Parties. The Agreement has not yet entered into force. According to its Article 9, it will enter into force for the first two ratifying States, thirty days after the deposit of the second instrument of ratification. For the remaining States, the Protocol will enter into force thirty days after the deposit of the respective instruments of ratification.

67 The provisions that may overlap with the provisions of the preliminary draft Convention on Exclusive Choice of Court Agreements are the following:

"Article 2 – Jurisdiction

In all judicial proceedings relating to the contract on the international transport of goods according to this Agreement, the plaintiff may, at his choice, institute the proceedings before the tribunals of the State:

- a) of the defendant's domicile;
- b) of the place where the contract was concluded provided that the defendant has in such place an establishment, branch or agency through which the contract was concluded;
- c) of the place of loading or unloading;
- d) of the place of transit where a representative of the transporter, also called carrier or conveyor, is located if the latter is the defendant;
- e) of any other place designated to that effect in the contract of transport, provided that it is located in a Contracting State."

"Article 4 – Mandatory character and public policy

- a) No judicial proceedings may be instituted, in relation with the transport of goods by virtue of the present Agreement, in a place different from those set forth in Article 2.
- b) Any clauses of exclusive jurisdiction shall be void and without any effect, without prejudice to the plaintiff's right to select the tribunal of the place designated in the contract of transport according to letter e) of Article 2.
- c) Any clauses of the contract of transport and the individual agreements concluded before the occurrence of the litigious events that attempt to elude or exclude the application of the provisions set forth in this Agreement, either by selecting the applicable law, as far as jurisdiction is inferred from it, or by modifying the rules on jurisdiction shall also be void and without any effect.

Article 5 – Prorogation "*post litem natam*"

Notwithstanding the previous Article, the parties may agree to submit their dispute to another jurisdiction, either judicial or arbitral, after the litigious events have occurred."

68 Should the international transport of goods remain within the scope of the Hague Convention, it seems that, as for the other instruments discussed, the proposed Article 23 would provide a satisfactory solution for the area of possible overlap and conflict. Article 23(3) as proposed by the Drafting Committee allows Contracting States to respect the mandatory character of Articles 2 and 4 of the Buenos Aires Agreement.

⁷⁰ *Acuerdo sobre Jurisdicción en materia de Contrato de Transporte Internacional de Carga entre los Estados Parte del Mercosur, Decisión No 11/02 del 5 de julio de 2002*; available at < www.mercosur.org.uy/espanol/snor/normativa/decisiones/2002/0211.htm > (in Spanish).

VII. CONCLUSION

69 The American States have a rich and longstanding tradition of harmonising their private international law. The picture, however, is not all too clear. Some international instruments are not widely adhered to, e.g. the Lima Treaty of 1878 was ratified only by Peru. The Montevideo Treaties of 1940 apply to Argentina, Paraguay and Uruguay. The MERCOSUR *Santa María Protocol on International Jurisdiction in Matters of Consumer Relations* (Fortaleza 1996) and the *Agreement on Jurisdiction in Matters of Contracts on the International Transport of Goods between the States Parties to MERCOSUR* of 2002 have not yet entered into force.

70 Other instruments attracted wider adherence: The Montevideo Treaties of 1889 apply to six States (Argentina, Bolivia, Colombia, Paraguay, Peru, Uruguay). Argentina, Brazil, Paraguay and Uruguay are Parties to the MERCOSUR *Protocol on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters* (Valle de Las Leñas 1992), the MERCOSUR *Protocol on International Jurisdiction in Contractual Matters* (Buenos Aires 1994) and the *Agreement on Multimodal Transport between the States Parties to the MERCOSUR* (Ouro Preto 1994). MERCOSUR seems to be an active and expanding actor in this field. The Bustamante Code, eventually, applies to Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela, and the *Interamerican Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (Montevideo, 1979) to Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

71 There is an overlap between international instruments, which are in force in Latin America, and the preliminary draft Hague Convention on Exclusive Choice of Court Agreements, both at the jurisdiction and recognition and enforcement stage. This creates a need for appropriate final clauses governing the relationship of the future Hague Convention on Exclusive Choice of Court Agreements with other instruments. Since most of the instruments discussed in this paper do not contain any specific compatibility clauses, the general rules of international treaty law, as discussed in Preliminary Document No 24,⁷¹ will govern their relationship with the future Hague Convention.

72 At the jurisdiction stage, the 1889 Montevideo Treaties on International Civil Law and International Commercial Law, the 1940 Montevideo Treaties on International Civil Law and International Commercial Terrestrial Law and the Additional Protocol, the Bustamante Code and the MERCOSUR Protocols of Buenos Aires 1994, Ouro Preto 1994, Santa María 1996 and Buenos Aires 2002 overlap with the future Hague Convention.

73 At the stage of recognition and enforcement, this is true for the 1889 and 1940 Montevideo Treaties on International Procedural Law, the Inter-American Conventions of Montevideo 1979 and La Paz 1984 and the MERCOSUR Protocols of Las Leñas 1992 and Buenos Aires 1994.

74 The application of either one of the Treaties discussed in this paper or of the future Hague Convention may lead to different results. Whether they would be not just different but irreconcilable, and therefore require a specific rule, will depend on the particular case. Some examples have been mentioned in the text. As concerns jurisdiction, it seems that only the 1940 Montevideo Treaties on International Civil Law and International Commercial Terrestrial Law, by way of the Additional Protocol, the MERCOSUR *Santa María Protocol on International Jurisdiction in Matters of Consumer Relations* 1996 and the MERCOSUR Buenos Aires *Agreement on Jurisdiction in Matters of Contracts on the International Transport of Goods between the States Parties to the MERCOSUR* consider

⁷¹ *Supra* note 3.

their jurisdiction rules to be exclusive and / or exhaustive so that they should neither be amended by the parties nor supplemented by rules contained in other, later treaties.

75 At the stage of recognition and enforcement, the proposed Article 23(4) allows coexistence of the Hague Convention with other instruments on recognition and enforcement. Should the second sentence be included into the Hague Convention, which says that the judgment may not be recognised or enforced to a lesser extent than under the Hague Convention, mandatory non-recognition under one of the Treaties discussed in this paper would remain possible by way of Articles 1-3 if so required.

76 It therefore seems that, for all instruments discussed in this paper, the proposed Article 23 would provide a satisfactory solution for any area of overlap and conflict, in particular because paragraph 3 allows Contracting States in such cases to comply with their earlier Treaty obligations. Even in these cases, however, the proposed Article 23 in Preliminary Document No 28 provides a satisfactory solution, as has been demonstrated above.