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Topics of Procedure in the Venezuelan 1998 Act on Private International Law

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I. HISTORICAL BACKGROUND

The Venezuelan Ministry of Justice created in September 1958 a Commission, composed of Professors Roberto Goldschmidt, Gonzalo Parra-Aranguren, and Joaquín Sánchez-Covisa, to prepare a Draft on Private International Law. A first Preliminary Document was finished after ten months of intensive work, but the Commission decided to wait some time to think it over, and it was only in April 1963 when the Draft was completed, with an "*Explanatory Report*" annexed.

The 1963 Draft was published and disseminated as much as possible, in order to solicit observations and suggestions. It was explained by Professors Gonzalo Parra-Aranguren and Joaquín Sánchez-Covisa at the Academy of Social and Political Sciences in Caracas. German Professor Wolfgang Müller Freienfels, when invited to a Symposium held at the Central University of Venezuela, commented on its conflict rules on family matters, but the Venezuelan juridical milieu was silent and made no suggestions at all. On the contrary, valuable observations were advanced by Professors Werner Goldschmidt and Rodolfo De Nova from Argentina and Italy respectively. The Commission also received additional remarks from Professor Rodolfo de Nova and letters from Professors Henri Batiffol, Albert A. Ehrenzweig and Gerhard Kegel.

Some time later, the Commission made a few changes to the Draft and handed over its *Revised Version* to the Ministry of Justice in 1965. The 1965 Draft was then published with the 1963 "Explanatory Report," but not submitted to Congress.

The 1965 Draft was well received abroad. According to Brazilian Professor Haroldo Valladao, it is an "outstanding" instrument, dealing with the subject matter in an "autonomous and up-to-date manner." Writing in 1967, the Austrian Professor Fritz Von Schwind found the 1965 Draft remarkable, particularly its

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General Dispositions. Professor Paul Heinrich Neuhaus in Germany, after its careful consideration, affirmed in 1970 that it was excellent. Eight years later the 1965 Draft was considered so noteworthy as to be reproduced in the third edition of Alexander N. Makarov's book: *Quellen des Internationalen Privatrechts. Nationale Kodifikationen*, prepared by Max-Planck-Institut für ausländisches und internationales Privatrecht under the direction of Jan Kropholler, Paul Heinrich Neuhaus and Jan Peter Waehler. In 1980, Professor Paul Heinrich Neuhaus examined it again, taking into account the most recent juridical developments, and concluded that it "deserves laudation because it represents a conception which will be followed by the international community."

Inter-American Treaties adopted after 1975, in particular, the *Inter-American Convention on General Rules of Private International Law*,¹ were strongly influenced by the Venezuelan 1965 Draft. The Venezuelan 1965 Draft also played a substantial role in the preparation of the new Peruvian conflicts rules, compiled in Book Ten of the 1984 Civil Code, and it was taken into consideration by the Argentinean Professor Werner Goldschmidt in his 1974 Draft on Private International Law. It also influenced the Preliminary Draft prepared by Professor Leonel Perez-Nieto Castro in Mexico, as *travaux préparatoires* of the conflicts rules to be included in the Preliminary Title of the Civil Code, finally adopted in December 1987.

Notwithstanding the influence of the 1965 Draft abroad, its impact in Venezuela was rather small, even though it was summarily explained at Law Faculties in Venezuelan Universities, mainly in Caracas. It was only ten years later when the Commission nominated to prepare a Draft Code of Civil Procedure reproduced most of its rules on Jurisdiction, Recognition and Enforcement of Foreign Judgments.

The First Meeting of the Private International Law Professors of all Venezuelan Universities held in Caracas in July 1995 requested the Government to present the 1965 Draft to Congress. Nevertheless, it was acknowledged that some adjustments had to be made, to take into account conventions ratified by Venezuela and the substantial changes in Venezuelan law during the last three decades.

Before undertaking any action, the Ministry of Justice consulted on the matter with the Attorney General of the Republic (*Procuraduría General de la República*). For this reason the 1965 Draft was submitted to the Juridical Advisory Council of the Public Administration (*Consejo de Asesoría Jurídica de la Administración Pública*), composed of representatives of the Legal Department of each Governmental Ministry. In the meantime, in April 1996, Private International Law Professors of all Venezuelan Universities met again; they insisted on their petition and suggested some adjustments to the 1965 Draft.

Taking into account the favorable opinion of the Attorney General, the Government presented the 1965 Draft to Congress at the end of June 1996. The Permanent Commission of Foreign Affairs of the Senate recommended its adoption and proposed several additions after consulting with the Legal Department of

1. CIDIP-II, Montevideo, 1979.

Congress and some external advisors. The Senate also made suggestions of its own during the first discussion of the 1965 Draft, in particular to avoid eventual contradictions with the Bill on Commercial Arbitration that was simultaneously under consideration, finally enacted and coming into force on April 7, 1998.² Thus, a 1996 Draft was prepared and a few paragraphs were added to the 1963 "Explanatory Report" aiming to indicate the reasons for the modifications made. It was commented on by Venezuelan Professors of Private International Law in a Symposium held at the Academy of Social and Political Sciences in Caracas. The Senate finally approved the Bill at the end of November 1997.

The Chamber of Deputies requested the opinion of its Permanent Commission of Foreign Affairs on the 1996 Draft, which recommended adoption after consulting with the Sub-Commission on Conventions, Legislation and Juridical Matters. The second discussion started at the beginning of June 1998, but was suspended and the matter referred again to the Permanent Commission of Foreign Affairs to amend formal defects of its Report and to examine the appropriateness of the title given to the Bill. However, no modifications were suggested and the Chamber approved the 1996 Draft without any changes. Therefore, Congress sanctioned the Act and sent it to the Executive. The Government held a special commemoration to celebrate the adoption of the new law and on the same day, August 6, 1998, it was published in Nr. 36.511 of the Official Gazette.³

II. CONTENTS OF THE 1998 ACT ON PRIVATE INTERNATIONAL LAW

The 1998 Venezuelan Act is composed of 64 Articles distributed throughout twelve Chapters. General Dispositions are included in Chapter I; Chapter II regulates Domicile; the determination of the applicable law, mainly through bilateral conflict rules, is made in Chapters III (Persons), IV (Family), V (Property), VI (Obligations), VII (Successions) and VIII (Form and Proof of Acts); Chapter IX deals with jurisdiction and competence; enforcement of foreign judgments is regulated in Chapter X; Chapter XI focuses on some other procedural issues; the final dispositions are in Chapter XII.

III. DOMICILE

The fundamental modification made by the 1998 Act, already stated in the 1963 Draft, is the change of the connecting factor to determine the applicable law to natural persons in matters relating to family and successions. Instead of the nationality, adopted by Venezuela in the second part of last century following European patterns, the domicile is given preference because of the demographic, economic and social conditions of Venezuela, as the "Explanatory Report" explains.

2. *Gaceta Oficial de la República de Venezuela*, Nr. 36.430 Apr. 7, 1998; See also *Venezuelan Supreme Tribunal of Justice* (visited Aug. 11, 1999) <<http://www.tsj.gov.ve/legislacion/lac.html>>.

3. See *Supreme Tribunal of Justice* (visited Aug. 11, 1999) <<http://www.tsj.gov.ve/legislacion/ldip.html>>.

Therefore, it was advisable to regulate the domicile of natural persons for conflicts of laws and for jurisdiction purposes (Article 15), being understood that domicile is not affected by reason of residence in a country as a consequence of public functions entrusted to a person by a State or by an international organization (Article 14).

Following developments generally accepted nowadays, Article 7 of the 1998 Act locates domicile in the State of the habitual residence of a natural person, differing therefore from Article 27 of the Venezuelan Civil Code which defines domicile as the principal place of his/her business and interests. Since the notion of habitual residence is not further clarified, its interpretation shall be made according to its common and ordinary meaning. The determination of the domicile of natural persons and its eventual change are matters of fact to be decided taking into account the circumstances of the concrete case, as it was stated in the 1963 "Explanatory Report." This is the solution accepted in the October 19, 1996 *Hague Convention On Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*; and in the January 13, 2000 *Hague Convention on the International Protection of Adults*.

Hence, the Act did not reproduce the definition accepted in Article 2 of the *Inter-American Convention on Domicile of Natural Persons in Private International Law*,⁴ which stipulates that "the domicile of a natural person shall be determined by the following circumstances in the order indicated: (1) The location of his habitual residence; (2) The location of his principal place of business; (3) In the absence of the foregoing, the place of mere residence; (4) In the absence of mere residence, the place where the person is located."⁵ Congress ratified this Convention in 1985 with the reservation of Article 3, but it is not in force in Venezuela because the Government has neither ordered its publication in the Official Gazette nor deposited its instrument of ratification.

Married women may have a separate domicile from their husbands (Article 12). As explained in the 1963 "Explanatory Report," the solution represents not only an homage to contemporary political and social conceptions relating to the emancipation of women and the equal treatment of genders, but also aims to avoid frequent and grave injustices in private international law matters. This provision, already included in the 1963 Draft, was also reproduced in Article 2 of the *Inter-American Convention on Domicile of Natural Persons in Private International Law*.⁶

Article 13 prescribes that the domicile of minors and other incompetent persons is located in the State where they have their habitual residence, acknowledging therefore the possibility of a separate domicile from their legal representatives. This rule reflects the Venezuelan position when the *Inter-American Convention on*

4. CIDIP-II, Montevideo 1979.

5. International Law Materials 1979, Volume XVIII, at 1.234; the Inter-American Conventions are located at *Organization of the American States* (visited Aug. 11, 1999) <<http://www.oas.org/EN/PROG/JURIDICO/english/treaties.html>>.

6. CIDIP-II, Montevideo, 1979.

*Domicile of Natural Persons in Private International Law*⁷ was being prepared. However, it was not successful, Article 3 of the Convention stipulating that “the domicile of incompetent persons is that of their legal representatives, except when they are abandoned by those representatives, in which case their former domicile shall continue.” In this respect it is important to recall that Article 10 of the 1963 and 1965 Venezuelan Drafts followed the traditional doctrine. This substantial change made in the 1998 Act shall always be kept in mind to properly understand rightly the meaning of its provisions, whenever the domicile of children and incompetent persons is the connecting factor for the determination of the applicable law or for jurisdiction purposes. Then it is possible that some rules of the 1998 statute, even though the same as those of the 1963-1965 Drafts, may bring about different results.

The 1998 Act does not define the domicile of juridical persons. In the case of corporations, the Political Administrative of the former Supreme Court of Justice has taken into account Article 203 of the Commercial Code to fill the *lacuna*. Consequently, domicile is located in the place indicated in the by-laws, or in the place of their principal establishment, failing such designation.⁸

IV. RULES ON INTERNATIONAL CIVIL PROCEDURE

The regulation of international civil procedure begins in Chapter IX dealing with jurisdiction and competence. Article 39 prescribes that Venezuelan courts shall have jurisdiction not only when the defendant is domiciled in Venezuela, but also over persons domiciled abroad as determined by Articles 40, 41 and 42 of the 1998 Act.

Claims regarding patrimonial matters may be entertained by Venezuelan courts: (1) if they relate to the disposition or tenancy of property, movable or immovable, located in Venezuela; (2) in cases of obligations of any kind to be performed in Venezuela or if they arise out of contracts entered into or out of facts occurring in Venezuela; (3) if the defendant was personally served within Venezuela; and (4) whenever the parties submit to their jurisdiction, expressly or tacitly (Article 40).

Express submission to jurisdiction must be evidenced in writing (Article 44). Tacit submission shall result, for the plaintiff, from the act of filing the complaint; and for the defendant because of the performance, personally or through an attorney-of-fact, of any act different from objecting either to the jurisdiction of the Venezuelan court or to any provisional measure that may have been ordered (Article 45).

Submission is not valid for proceedings affecting creation, modification or extinction of real rights on immovable property, unless permitted by the *lex situs* (Article 46). Furthermore, the jurisdiction of Venezuelan courts cannot be derogated from by agreement of the parties, in favor either of foreign courts or of

7. *Id.*

8. *Pedro Glucksmann c. Metales Internacionales Paraguana, C.A. (Metimpaca)* (visited Aug. 11, 1999) <<http://www.zur2.com/users/fipa/objetivos/leydip1/present.htm>>.

arbitrators deciding abroad in any of the following cases: (a) if the dispute relates to real rights on immovable property located in Venezuela, (b) whenever a transaction is not permitted on the subject matter of the controversy, and (c) when essential principles of Venezuelan public policy are affected (Article 47). Claims related to goods considered as universality may be entertained by Venezuelan courts: (1) if Venezuelan law is applicable to the substance of the dispute; and (2) if some of the goods forming part of the universality are located in Venezuela (Article 41). According to Article 42, Venezuelan Courts have jurisdiction to entertain proceedings relating to the status of persons or family relationships: (1) if Venezuelan law governs the substance of the dispute; or (2) in case of submission, express or tacit, but only if the controversy has an effective connection with Venezuelan territory. Therefore, submission is regulated in stricter terms than in Article 40, paragraph 4. Notwithstanding their lack of jurisdiction to decide the dispute, Venezuelan courts may order provisory measures to protect persons present in Venezuela (Article 43).

The 1998 Act is not restricted to regulate the jurisdiction of Venezuelan courts. It also includes provisions to determine the internal competence of Venezuelan courts *ratione loci* (Articles 48 to 53) They aim to clarify certain cases avoiding *lacunae*, i.e. if the parties submit to Venezuelan courts without further specification (Article 49, paragraph 4; Article 51, paragraph 2); or whenever they have jurisdiction because Venezuelan law is applicable to the dispute (Article 50, paragraph 1; Article 51, paragraph 1).

Chapter X only regulates the efficacy of foreign judgments in Venezuela, foreign arbitral awards being subject to the 1998 Law on Commercial Arbitration, as it is indicated in general terms by Article 47. Conditions for enforcement of foreign judgements are set up by Article 53, which requires that: (1) they shall not have been rendered in civil or commercial matters, or, in general, in matters relating to private juridical relationships; (2) they are *res judicata*, according to the law of the State where rendered; (3) they shall not have been adjudicated on real rights on immovable property located in Venezuela, or have been taken away from Venezuela's exclusive jurisdiction; (4) they have been rendered by courts having jurisdiction to entertain the case according to general principles on jurisdiction accepted by Venezuela; (5) the defendant was served in due legal form, having enough time to attend the summons, and received all procedural guarantees to assure the possibility of a reasonable defense; and (6) they are not contrary to a previous judgment having the force of *res judicata* or had been rendered after Venezuelan courts were seized of the same dispute among the same parties.

In general terms, the 1998 Act follows the 1965 Draft. Therefore reciprocity is no longer required and no express reference to *ordre public* is made. Article 53 seems to have been carefully examined by Congress and its advisers, internal and external. A new paragraph was added requiring compliance with Venezuelan public policy in a specific case, i.e. that foreign judgements shall not adjudicate real rights on immovable property located in Venezuela, or take away from Venezuela's exclusive jurisdiction. Besides, the Code of Civil of Procedure formerly in force prescribed in general terms that foreign judgments shall not violate Venezuelan

public policy. Therefore, the omission of *ordre public* in Article 53 cannot be explained as a mere oversight. In this respect, it may be recalled that juridical situations created abroad by foreign law are regulated by Article 5, which stipulates that they shall be recognized in Venezuela whenever such foreign law claims jurisdiction in accordance with international admissible criteria, unless they are contrary to the objectives of the Venezuelan conflict rules, or if their subject matter falls under the exclusive competence of Venezuelan law. Hence, compliance with Venezuelan *ordre public* is required in Article 5 for the validity of all juridical situations created abroad, including those arising out of foreign judgments, not being necessary for this reason to reproduce the *ordre public* requirement in Article 53.

As far as it has been possible to determine, from the entry into force of the 1998 Act, until the end of January 2000, the Political Administrative Chamber of the Supreme Court of Justice has granted four times the *exequatur* requested, merely controlling the specific conditions indicated in Article 53.⁹ In two occasions it has additionally examined compliance with Article 8 which prescribes that "provisions of foreign law that would be applicable according to the present Act, shall not be applied only in case that their application would have an effect clearly incompatible with the fundamental principles of Venezuelan public policy."¹⁰ Besides, the conformity of the foreign judgment with essential principles of Venezuelan *ordre public* was expressly declared on October 21, 1999,¹¹ even though Article 8 was not mentioned. Compliance with Venezuelan public policy was examined the same day, October 21, 1999,¹² but because it is required in Article 2, paragraph (h), of the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* applicable to the case.¹³

Article 54 admits the possibility of partial efficacy of foreign judgements, reproducing, therefore, the corresponding provision of the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*.¹⁴ Chapter X ends with Article 55, prescribing that the enforceability of foreign judgements in Venezuela is submitted to their previous declaration of enforceability, after verification that they comply with the conditions required by the Act. Chapter XI deals with other matters of procedure. Competence of public officers and procedure shall be governed by the *lex fori* (Article 56).

Lack of jurisdiction of Venezuelan judges in relation to foreign courts shall be declared, *ex officio* or at the request of any of the parties to the dispute, at any stage or grade of the proceedings. They shall be suspended as soon as the petition is presented. In case that Venezuelan jurisdiction is affirmed, proceedings shall continue as they stood before the request was formulated, but the decision which

9. May 13, 1999, *Navarro c. Salgado*; July 7, 1999, *Ventura c. Santos*; Oct. 21, 1999, *Vieira c. Camara Leme*; Oct. 12, 1999, *Ramía c. Camejo*.

10. July 1, 1999, *Figueredo c. Malgorzata*; Sept. 23, 1999, *Durán c. Lou Schiller*.

11. *Dominguez c. Avellán*.

12. *Villavicencio c. Toala*.

13. (visited Aug. 11, 1999) <<http://www.zur2.com/users/fipa/objetivos/leydip1/present.htm>>.

14. *International Legal Materials*, 1979, Volume XVIII, p. 1.225.

denies it shall be consulted with the Supreme Tribunal of Justice.¹⁵ If the denial is confirmed, proceedings shall be extinguished (Article 57). This provision had to be incorporated to avoid unsatisfactory results brought about by the rules previously in force.

Article 58 prescribes that Venezuelan exclusive jurisdiction shall not be prejudiced because the same or a connected dispute is pending before a foreign judge. According to Article 59, Venezuelan courts may address any foreign competent authority through letters rogatory for the practice of summons, probatory acts or any other judicial activity necessary for the good development of the proceedings. Likewise, they shall execute as soon as possible letters rogatory received from foreign courts, provided that comply with the general principles of international law applicable on the subject matter (Article 59).

In this respect, it is useful to recall that Venezuela has ratified the following multilateral treaties on judicial assistance *strictu sensu*: (a) *Inter-American Convention on Letters Rogatory*¹⁶ and its *Additional Protocol*;¹⁷ (b) *Inter-American Convention on the Taking of Evidence Abroad*¹⁸ and its *Additional Protocol*;¹⁹ (c) *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*; and (d) *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. Venezuela is also Contracting State of the *Hague Convention of October 5, 1961 Abolishing the Requirement of Legalization for Foreign Public Documents*.²⁰

Foreign law shall be applied *ex officio*, even though parties to the dispute may co-operate in its determination (Article 60), and shall enjoy the same guarantees for its correct interpretation and application as Venezuelan law is granted (Article 61). These rules of the 1965 Draft were reproduced in Articles 2 and 4 of the *Inter-American Convention on General Rules of Private International Law*.²¹ They are complemented in the *Inter-American Convention on Proof of and Information on Foreign Law*,²² both of which were ratified by Venezuela.

V. CONCLUSION

Chapter XII includes the final dispositions. Article 63 abrogates all norms regulating the same matter; and Article 64 prescribes that the Act shall enter into force six months after its publication in the Venezuelan Official Gazette. The Act

15. Formerly Supreme Court of Justice, its name will be changed in the new Constitution published in Official Gazette Nr. 36.860, Dec. 30, 1999.

16. CIDIP-I, Panama, 1975.

17. CIDIP-II, Montevideo, 1979.

18. CIDIP-I, Panama, 1975.

19. CIDIP-III, La Paz, 1984.

20. See *Hague Conference* (visited Aug. 11, 1999) <<http://www.hcch.net>>.

21. CIDIP-II, Montevideo, 1979.

22. CIDIP-II, Montevideo, 1979, *International Legal Materials*, 1979, Volume XVIII, pp. 1231-

came into force on 6 February 1999. It is the end of efforts started forty years ago, even though very little was done during three decades. The present writer, as the only living member of the Commissions that prepared the 1963 and the 1965 Draft, cannot find words to express his feelings for this achievement. The Venezuelan Act is the first enacted in the American hemisphere. Expectations are high. No doubt, it is a great step forward to adapt private international law rules to the social, economic and human conditions of Venezuela. However, the final decision shall only be given by the results of its actual application to adjudicate cases connected with various juridical systems. It is just a question of time.

