

## **Conflict of Laws and their Reception in National Legal System.**

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### **A. STATISTICAL QUESTIONS**

#### **24) Which Hague Conventions have been ratified by your country?**

- a. Convention on the taking of evidence abroad in Civil or Commercial matters (Accession giving rise to an acceptance procedure: 01/11/1993)
- b. Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial matters (Accession: 10/29/1993)
- c. Convention on the Civil aspects of international child abduction (Ratified: 16/10/1996)
- d. Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Ratified: 01/10/1997)
- e. Convention abolishing the requirement of legalization for the foreign public documents (Accession: 1/08/1998)

#### **25) Which CIDIP Conventions have been ratified by your country?**

- a. Inter-American convention on convention on letters rogatory (08/12/1984)
- b. Inter-American convention on conflict of laws concerning bills of exchange, promissory notes and invoices (01/30/1985)
- c. Inter-American convention on extraterritorial validity of judgments and arbitral awards (01/30/1985)
- d. Inter-American convention on conflicts of laws concerning checks (01/30/1985)

- e. Inter-American convention on the taking of evidence abroad (02/22/1985)
- f. Inter-American convention on international commercial arbitration (03/22/1985)
- g. Inter-American convention on conflicts of laws concerning commercial companies (03/29/1985)
- h. Inter-American convention on proof of and information on foreign law (03/29/1985)
- i. Inter-American convention on the legal regime of powers of attorney to be used abroad (11/06/1985)
- j. Inter-American convention on general rules of private international law (11/06/1985)
- k. Additional Protocol to the Inter-American Convention on Letters Rogatory (08/27/1991)
- l. Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (05/20/1993)
- m. Inter-American convention on the law applicable to international contracts (09/22/1995)
- n. Inter-American convention on the international return of children (05/28/1996)

**26) Did your State participate and send delegations to the diplomatic conferences where these Conventions were adopted?**

Yes. Venezuela sent delegations to all the conferences.

**27) How many Hague and CIDIP Conventions have been signed but not ratified. Please enumerate them.**

Hague: None

CIDIP:

- a. Inter-American convention on domicile of natural persons in private international law (05/08/1979)
- b. Inter-American convention on Execution of Preventive Measures (05/08/1979)
- c. Inter-American convention on conflict of laws concerning the adoption of minors (05/24/1984)
- d. Inter-American convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (05/24/1984)
- e. Inter-American convention on personality and capacity of juridical persons in private international law (05/24/1984)
- f. Inter-American convention on Contracts for Carriage of Goods (07/28/1989)
- g. Inter-American convention on support obligations (07/15/1989)
- h. Inter-American Convention on International Traffic in Minors. (03/18/1994)

B. CONFLICTS CONVENTIONS AND DOMESTIC CONFLICTS LAW – A  
SUBSTANTIVE COMPARISON

**28) Is the text of The Hague and CIDIP Conventions similar to norms in your domestic legislation?**

Yes, some of our regulations are similar to those Conventions.

**29) Please explain similarities and differences.**

The Private International Law Statute has a particularly close relationship with the Inter-American convention on general rules of private international law. It is well known that the Venezuelan Project of Private International Law Statute, elaborated in 1963-1965, had a direct influence on the Inter-American convention on general rules of private international law. The content of many articles of the Inter-American Convention was taken from the said Project.

In 1998, the Venezuelan Project of Private International Law was enforced as a Statute. Most of the articles that regulate general institutions remained the same. The biggest difference between them is that the Convention regulates fraud and the Statute does not do so in general. It has a fraud regulation regarding the applicable law to divorce. Therefore, both instruments have a very similar content as specified in the table below.

<b>Inter-American Convention on general rules of private international law</b>	<b>Venezuelan Statute</b>
<p>Article 2<sup>1</sup>: Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked.</p>	<p>Article 2: Foreign law proving to be competent shall be applied in accordance with the principles governing in the respective foreign country, so as to allow the objectives sought by the Venezuelan rules of conflict should be met.</p> <p>Article 60: Foreign Law shall be applied ex officio. The parties may bring information related to the applicable</p>

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<sup>1</sup> In this context the Inter-American Convention on proof of and information on foreign law (03/29/1985), also influenced the Venezuelan Private International Law Statute, because it developed and detailed the content of article 2 of the Inter-American Convention on general rules of private international law.

	foreign Law and the Courts and authorities may issue orders tending to better knowledge thereof.
Article 3: Whenever the law of a State Party has institutions or procedures essential for its proper application that are not provided for in the law of another State Party, this State Party may refuse to apply such a law if it does not have any like institutions or procedures.	Article 9: When the foreign Law having been declared applicable to the issue should establish essential institutions or proceedings for adequate application thereof not being contemplated by the Venezuelan legal system, applications of said foreign Law may be denied provided that Venezuelan Law should not have analogous institutions or proceedings.
Article 4: All the appeals provided for in the procedural law of the place where the proceedings are held shall also be admissible for cases in which the law of any of the other States Parties is applicable.	Article 61: Recourses provided by the law shall be admissible under any juridical system which should have been applied in the decision being subject to such recourses.
Article 5: The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (order public).	Article 8: Provisions of foreign Law to be applied in accordance with this statute shall only be excluded when their application should produce results being clearly incompatible with the essential principles of Venezuelan public policy.
Article 7: Juridical relationships validly established in a State Party in accordance with all the laws with which they have a connection at the time of their	Article 5: Issues of law having been created in accordance with a foreign Law attributing its own competence under international admissible criteria shall

<p>establishment shall be recognized in the other States Parties, provided that they are not contrary to the principles of their public policy (order public).</p>	<p>produce effect in the republic, provided they are not in contradiction with Venezuelan rules of conflict, that the Venezuelan law should claim exclusive competence over the respective matter, or that they should be clearly incompatible with general principles of Venezuelan public policy.</p>
<p>Article 8: Previous, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue.</p>	<p>Article 6: Previous, preliminary or incidental issues that may arise with respect to a main issue need not necessarily be solved under the Law regulating the latter.</p>
<p>Article 9: The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case.</p>	<p>Article 7: The several Laws that may be competent to govern the different aspects of a juridical relationship, shall be applied harmoniously, aiming at reaching the goals sought by each of those Law.</p> <p>Possible difficulties resulting from their simultaneous application shall be solved considering the requirements imposed by equity in the specific case.</p>

The Private International Law Statute was influenced by the Inter-American convention on the law applicable to international contracts. In fact, the Statute's Preamble states that articles ruling contractual obligations took the Convention and the doctrine as an inspirational guide.

<b>Inter-American Convention on the law applicable to international contracts</b>	<b>Venezuelan Statute</b>
<p>Article 7: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</p> <p>Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.</p>	<p>Article 29: Conventional obligations are governed by the Law agreed to by the parties.</p>
<p>Article 9: If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties.</p> <p>The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.</p> <p>Nevertheless, if a part of the contract were</p>	<p>Article 30: Lacking a valid indication, conventional obligations are governed by the Law to which they are most directly linked. The Court shall consider all the objective and subjective elements arising from the contract in order to determine such Law. It shall bear in mind also the General Principles of Business Law accepted by international organizations.</p>

<p>separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract.</p>	
<p>Article 10: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.</p>	<p>Article 31: In addition to the provisions of the former articles, whenever it should so result, application shall be made of norms, customs and principles of International Business Law, as well of generally accepted trade uses and practices, with the purpose of reifying the requirements imposed by justice and fairness in the solution of a concrete case.</p>

The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption also had an impact on the Venezuelan Statute of protection of children and adolescents. Chapters II (related to the requirements for intercountry adoptions) and IV (dedicated to the procedural requirements in intercountry adoption), had a profound impact on the Venezuelan Statement.

It is very interesting that the Venezuelan Project of Private International Law Statute was considered when the Inter-American convention on domicile of natural persons in private international law was elaborated. However, Venezuela only signed (but did not ratify) this Convention. However, the Venezuelan Statute of Private International Law, in articles 11 to 16, reflects the general principles of the said Convention. That is to say that the conjugal domicile is the place where the spouses live together, without prejudice to the right of each spouse to have his or her domicile. The domicile of diplomatic agents shall be their last domicile in the territory of the accrediting State. Nevertheless, the Venezuelan Statute differs from the Convention on the regulation of the domicile of incompetent persons. For

the national instrument, the domicile of incompetent persons shall be that of their regular residence. On the contrary, for the international instrument, 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.

Regarding the commercial companies, the Venezuelan Statute includes, as does the Inter-American convention on conflicts of laws concerning commercial companies, an autonomous characterization related to the place where they are constituted. It is notorious that both instruments establish the place where the companies are constituted to rule, as applicable law, the existence, capacity, operation and dissolution of commercial companies.

The Inter-American conventions on the international return of children, execution of preventive measures, conflict of laws concerning the adoption of minors and on international protection in minors, influenced the inclusion of a rule regulating preventive measures in the Venezuelan Statute.

Finally, it is important to highlight that article 54 of the Venezuelan Statute permits the partial efficacy of a foreign judgment. This new regulation was created considering the Inter-American convention on extraterritorial validity of judgments and arbitral awards.

**30) Has being a Party to any of the Conventions had an impact on domestic law?**

Question 6 reflects such impact.

**C. CONFLICTS BETWEEN CONFLICTS CONVENTIONS AND DOMESTIC LAW**

**31) Precedence of domestic law or international Conventions according to your Constitution.**

Venezuela's legal system has remained silent on this subject since 1954. The present Constitution does not rule on this matter in a particular disposition. It only refers, in its article 23, to the prevalence of Human Rights Treaties over the Constitution itself and the

other Venezuelan regulations only when such treaties are more favorable to a certain situation. The same article establishes that those treaties are entitled to direct application by the tribunals and the rest of the national organs. However, constitutional article 7 establishes that the Constitution is the supreme rule and the system's foundation.

This situation opens the possibility of assuming different positions:

- a) Following the monist theory, the Constitution prevails over the international conventions.
- b) Following the dualist theory, there's a vacuum in the legal system, and therefore, this matter doesn't have a precise answer.
- c) Eclectic theories propose to solve this situation based on the practical results: following article 1 of the Venezuelan Private International Law Statute, the national jurisprudence applies the international treaties with precedence to the internal law.

It is necessary to highlight the important role of article 151 of the Venezuelan Constitution. This article establishes the imperative submission to the Venezuelan jurisdiction and law, whenever contracts of "public interest" are celebrated. This obligation shall be fulfilled even when is not contemplated expressly in the contract. However, there's one acknowledged exception: the submission shall not be contrary to the nature of the contract itself.

This vague regulation has been addressed many times by the Private International Law doctrine. When shall a contract be characterized as related to "public interest"? When is this imperative submission contrary to the nature of the contract?

### **32) How are inconsistencies between domestic law and the Conventions resolved?**

In Venezuela, inconsistencies are resolved in a very classic fashion. We solve them by including reservations to the ratification, invoking international public order or by denouncing the treaty.

## **D. IMPLEMENTATION OF CONFLICTS CONVENTIONS**

**33) How has the implementation of the Conventions ratified by your country taken place.**

After the international negotiation process, which is to be performed by the Executive Branch of the government<sup>2</sup>, the Legislative branch evaluated the international instrument, and, if it agrees with its content, dictates an “*Approbatory Statute*”. Such Statute does not compromise the President, meaning that it doesn’t oblige him to ratify the treaty. If the President doesn’t sign the convention, it is not considered to be in force.

The enforcement depends on what the treaty disposes in this regard. Generally, the implementation ends with the publication of the complete text of the Approbatory Statute and the treaty in the “Gaceta Oficial”.

**34) Cite jurisprudence applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.**

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<sup>2</sup> Article 236 (4) Venezuelan Constitution.

- **Sentences of the Venezuelan Supreme Court of Justice, applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction:**

Tribunal: Supreme Court of Justice

Sentence N°: 579

File N°: 00-0325

Parties: Mariana Capriles

Date: 06/20/2000

Summary of the sentence:

A Venezuelan mother of two American children, domiciled in the United States of America, illegally subtracted them and brought them to Venezuela. The father asked for a judiciary order of return of the children, based on the Convention on the Civil aspects of international child abduction. A Venezuelan tribunal issued such order without notifying the mother. The mother and the children were not heard by the tribunal.

The mother sued the tribunal in the Constitutional chamber of the Venezuelan Supreme Court of Justice. Her allegations included violation of due process. The Supreme Court ruled in favor of the mother. The motivation of the sentence included the fact that the tribunal had wrongfully applied the Convention on the Civil aspects of international child abduction, because:

a) The requirement of expeditious procedure, included in article 2, did not mandate to overrule the basic principle of due procedure.

- b) It was necessary to open a period of probation, in order to demonstrate that the children were domiciled in a country that wasn't Venezuela (Article 4 of the Convention).
- c) From article 12, it can be derived that a probation period was necessary to verify if children were settled in their new environment and therefore could not be returned.
- d) The tribunal did not secure the voluntary return of the children or an amicable resolution of the issues, as article 7.c provides.
- e) The tribunal did not accomplish its duty to find out if the children objected to being returned, as established by article 13.

The magistrate ends its sentence stating that, observing the superior interest of the children, the request of return based on the Convention shall be decided. However, such decision shall comply with the due process principle.

Tribunal: Supreme Court of Justice

Sentence N°: 01560

File N°: 16293

Parties: Aurillely Josefina Betancourt v. José de Jesús Sánchez

Date: 07/04/2000

Summary of the sentence:

A Venezuelan mother illegally subtracted her daughter from the United States of America, breaching the rights of custody attributed to the father. The father submitted a request of

return to the American Central Authority. The Venezuelan Tribunal competent to decide on this matter ruled in favor of the mother, based on article 13 of the Convention on the Civil aspects of international child abduction. However, the father had opposed a preliminary question, regarding Venezuela's jurisdiction.

The Venezuelan Supreme Court of Justice had to decide about the preliminary question. This Court stated in its decision that the Convention granted jurisdiction to the Venezuelan tribunals and, considering that it has the same rank as the Constitution and that it is of immediate application, the Supreme Court disregarded the preliminary question and confirmed the tribunal competence.

It is important to stress that there is a mistake in this sentence. When it refers to the constitutional rank of the Convention, it makes reference to the Interamerican Convention instead of the Hague Convention. We believe this is a material mistake. The Tribunal meant to refer to the Hague Convention. We believe so because it had based its reasoning on this last Convention, and because the Interamerican Convention is not applicable to this case, because the United States did not sign it. Therefore, it is of no use in this particular case.

- **Sentences applying the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption:**

Tribunal: Supreme Court of Justice

Sentence N°: 53

File N°: 97-392

Parties: Augusties Reinhold Yannikis y Claudia Helene Margherita Spohn de Yannikis

Date: 02/19/1998

Summary of the sentence:

A Swiss couple wanted to adopt a Venezuelan child. Following the Venezuelan Adoption Statute, they obtained the mother permission for the adoption two days before the birth of the child. However it was an international case. Therefore article 4 of the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption was applicable. Such article establishes that the mother's permission shall be given after the birth of the child. Considering it was given before the birth, it was declared invalid.

Tribunal: Circuit Court of the 1st Judicial Circuit in and for Caracas, Family and Minors Division.

File N°: 11.258

Parties: Bruce Robert Kraft y Yolanda Terrero Montero de Kraft

Date: 09/27/1999

Summary of the sentence:

An American diplomat, while domiciled in Venezuela, decided to adopt a Venezuelan child. There was a controversy regarding the international character of the adoption, and therefore, the applicable law to it. If the adoption was domestic, then the applicable law was the Venezuelan Adoption Statute. On the contrary, if it was international, the applicable law depended on article 1 of the Venezuelan Private International Statute.

The said article states that the applicable law for international cases is to be determined, on the first place, by the application of international treaties. In this case, the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

In order to determine the internationality of the case, article 14<sup>3</sup> of the Private International Statute was capital. It demonstrated that the solicitants were not domiciled in Venezuela, because they were in the country developing diplomatic functions.

The tribunal decided that the adoption was international and applied the Hague convention and the Venezuelan Private International Law Statute.

**35) Cite jurisprudence applying the CIDIP III Convention of 1984 on Conflicts of Law in Adoption of Minors and the CIDIP IV Convention of 1989 on International Restitution of Minors<sup>4</sup>.**

- **Sentences of the Venezuelan Supreme Court of Justice, applying the CIDIP IV Convention of 1989 on International Restitution of Minors:**

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<sup>3</sup> Article 14. When the regular residence in the territory of a State should be the exclusive results of functions conferred by a national, foreign or international public body, such will not produce the effects provided in the former articles.

<sup>4</sup> This Convention was not ratified by Venezuela.

Sentence N°: 108

File N°: 01-598

Parties: Daniel Porras Nucete

Date: 11/13/2001

Summary of the sentence:

An Ecuadorian mother took her daughter to Ecuador for vacations with the father's permission. However, they never came back to Venezuela and the father submitted a request for return to a Venezuelan Family Court. Such Court stated that it did not have jurisdiction because the girl was domiciled in Ecuador.

Procedural Venezuelan law establishes that in cases of denial of jurisdiction, the Supreme Court of Justice shall revise such a decision in all cases. With this opportunity, the Supreme Court decided that Venezuela has jurisdiction based on the Interamerican Convention on International Restitution of Minors (article 6). Nevertheless, this controversy was decided in 2001, and Ecuador ratified it in 2002, therefore, it wasn't applicable as a treaty but as a general principle of Private International Law, as provided by article 1 of the Venezuelan Statute.