Private International Law Rules Regarding Personal Status in Colombia: a System in Need of an Overhaul*

Normas de derecho internacional privado en materia de personas en Colombia: un sistema que necesita ser revisado

Règles de droit international privé concernant le statut personnel en Colombie : un système nécessitant une révision

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ABSTRACT: This article contains the findings of a research aimed at studying the Colombian private international law rules regarding the status of individuals and foreign commercial companies. Such rules are basically found in Colombia's Civil and Commercial Codes. The research also considered the existing rules in other Latin American countries. In this sense, the research methodology consisted of systematically locating and organizing the rules on this subject that are in force in the legal system of Colombia and in those of other countries in the region, and then proceeding to a general comparative analysis. The overview offered by the article allows the identification of some weaknesses of Colombian private international law. Based on this, it is concluded that it is necessary to review the Colombian rules that regulate the law applicable to the personal status of both individuals and foreign commercial companies.

Key words: private international law, codification, persons, Colombia, Latin America.

RESUMEN: Este artículo contiene los resultados de una investigación que ha tenido como objetivo estudiar las normas colombianas de derecho internacional privado relativas al estatuto de las personas físicas y las sociedades mercantiles extranjeras. Dichas normas se encuentran básicamente en el Código Civil y en el Código de Comercio de Colombia. En la investigación también se consideraron las normas existentes en otros países latinoamericanos. En este sentido, la metodología de la investigación consistió en ubicar y organizar sistemáticamente las normas sobre dicha temática vigentes en el sistema colombiano y en otros países de la región, para proceder posteriormente a hacer un análisis comparado general. El panorama que ofrece el artículo permite identificar algunas debilidades del derecho internacional privado colombiano. Partiendo de ello, se concluye que es necesario revisar las normas colombianas que regulan el derecho aplicable al estatuto personal tanto de las personas físicas como de las sociedades mercantiles extranjeras.

Palabras clave: derecho internacional privado, codificación, personas, Colombia, América Latina.

RÉSUMÉ: Cet article contient les résultats d'une recherche visant à étudier les règles colombiennes de droit international privé relatives au statut des personnes et des sociétés étrangères. Ces règles se trouvent essentiellement dans le Code civil et le Code commercial. La recherche a également pris en compte les règles existant dans d'autres pays d'Amérique latine. En ce sens, la méthodologie de recherche a consisté à localiser et organiser systématiquement les règles en vigueur en la matière dans le système colombien et dans d'autres pays de la région, puis à procéder à une analyse comparative générale. L'aperçu fourni par l'article permet d'identifier certaines faiblesses du droit international privé colombien. Sur cette base, il est conclu qu'il est nécessaire de revoir les règles colombiennes qui régissent le droit applicable au statut personnel des personnes physiques et des sociétés étrangères.

Mots-clés: droit international privé, codification, personnes, Amérique latine, Colombie.

I. Introduction

Codification of private international law has been of great interest to Latin American countries. Although this interest is not new,[1] it has taken on new life in recent decades. Examples are the national codifications of the Dominican Republic,[2] Panama,[3] Argentina,[4] and Uruguay.[5] It is also an ongoing process, as evidenced by the proposals currently under discussion in Chile[6] and Peru.[7] In such a context, it is striking that Colombia has turned its back on these developments. In Colombia, private international law rules are neither abundant nor modern. Moreover, they are scattered in different legal instruments since there is no systematic codification on private international law in the country. However, Colombia has ratified several international treaties on the field. This helps to alleviate, albeit only partially and in relation to certain matters, the difficulties arising from the lack of national codification.

[1] For some authors, modern private international law emerged with the Latin American treaties adopted in the nineteenth century. Delić, Ana, "The Birth of Modern Private International Law: The Montevideo Treaties (1889, amended 1940)", 2017, available at: *http://opil.ouplaw.com/page/Treaties-Montevideo*.

[2] Private International Law Act, Law no. 544-14, Dominican Republic, 5 December 2014, available at: *http://www.asadip.org/v2/wp-content/uploads/2017/02/Ley-544-14-sobre-Derecho-Internacional-Privado-de-la-Republica-Dominicana.pdf*.

[3] Code of Private International Law, Law no. 61, Panama, 7 October 2015, available at: *https://www.gacetaoficial.gob.pa/pdfTemp/27885_A/GacetaNo_27885a_20151008.pdf*.

[4] National Civil and Commercial Code, Law no. 26.994, Argentina, 8 October 2014, articles 2594-2671, available at: *http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/norma.htm*.

[5] General Act on Private International Law, Law no. 19.920, Uruguay, 27 November 2020, available at: *https://www.impo.com.uy/bases/leyes/19920-2020*.

[6] Chilean Association of Private International Law (ADIPRI) and Law School of the University of Chile, *Anteproyecto de Ley de derecho internacional privado*, 2020, available at: *https://fernandezrozas.com/wp-content/uploads/2020/09/Anteproyecto_de_Ley_de_Derecho_Internacional_Privado-1.pdf*.

[7] Working group for the revision and improvement of the Peruvian Civil Code of 1984, *Anteproyecto de propuestas de mejora al Código Civil peruano*, 2019, available at: *https://cdn.www.gob.pe/uploads/document/file/514546/Anteproyecto_Reforma_Codigo_Civil_Versio%CC%81n_adecuada.pdf*.

Among the private international law treaties that Colombia has ratified,[8] the following are noteworthy. On the one hand, the Treaty on International Civil Law and the Treaty on International Commercial Law, both of which were adopted at the South American Congress on Private International Law held in Montevideo in 1888-1889.[9] These treaties contain some rules that will be mentioned in this paper. On the other hand, the OAS Inter-American Convention on General Rules of Private International Law, adopted at the Second Inter-American Specialized Conference on Private International Law, that was also held in Montevideo in 1979.[10] This Convention contains rules concerning topics like public policy (*ordre public*) (article 5),

[8] The most important treaties ratified by Colombia are the UN Convention on Contracts for the International Sale of Goods of 11 April 1980 (Law no. 518 of 4 August 1999) and five treaties of The Hague Conference: Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 (Law no. 455 of 4 August 1998), on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 (Law no. 1073 of 31 July 2006), on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (Law no. 1282 of 5 January 2009), on the Civil Aspects of International Child Abduction of 25 October 1980 (Law no. 173 of 22 December 1994), and on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (Law no. 265 of 25 January 1996). Also, Colombia has ratified eleven of the OAS Inter-American Conventions: on General Rules of Private International Law of 8 May 1979 (Law no. 21 of 22 January 1981), on Extraterritorial Validity of Foreign Judgements and Arbitration Awards of 8 May 1979 (Law no. 16 of 22 January 1981), on Letters Rogatory of 30 January 1975 (Law no. 27 of 22 February 1988), on Proof of and Information on Foreign Law of 8 May 1979 (Law no. 49 of 16 December 1982), on the Taking of Evidence Abroad of 30 January 1975 (Law no. 31 of 8 October 1987), on Execution of Preventive Measures of 8 May 1979 (Law no. 42 of 17 September 1986), on International Commercial Arbitration of 30 January 1975 (Law no. 44 of 19 September 1986), on Conflict of Laws Concerning the Adoption of Minors of 24 May 1984 (Law no. 47 of 3 December 1987), on Support Obligations, 15 July 1989 (Law no. 449 of 4 August 1998), on International Traffic in Minors of 18 March 1994 (Law no. 470 of 5 August 1998), and on the International Return of Children, 15 July 1989 (Law no. 880 of 19 January 2004). Besides, Colombia has ratified the following bilateral treaties: Treaty on Private International Law of 18 June 1903 with Ecuador (Law no. 13 of 8 April 1905), Agreement on Letters Rogatory and Judicial Offices of 17 June 1981 with Chile (Law no. 45 of 1 December 1987), and Convention on the Execution of Civil Judgments of 30 May 1908 with Spain (Law no. 6 of 12 August 1908). National Colombian law of approval of each treaty is found in parentheses.

[9] Law no. 33, Colombia, 30 December 1992, available at: *http://www.secretariasenado.gov.co/senado/basedoc/ley_0033_1992.html*.

[10] Law no. 21, Colombia, 22 January 1981, available at: *http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Leyes/1577172*.

simultaneous application of laws (article 9), and recognition of foreign situations (article 7). It also states that rules included in international treaties prevail over national ones (article 1), and that national judges and authorities shall enforce foreign law in the same way as it would be enforced by the judges of the country whose law is applicable (article 2).

The relevance of the latter rule in the Colombian context was reaffirmed by the Constitutional Court,[11] by holding that the judges must *ex officio* obtain all information about the applicable foreign law, especially if individuals are not able to do it. Although the Constitutional Court opened up the scope of the Convention by applying it to a case that involved a country that had not ratified it (Honduras), this is of course not enough to overcome the legal uncertainty created by the absence of a national codification on the subject. The application of international treaties is, in general, limited not only to the subject matter (material scope), but also to the States ratifying them (territorial scope).

The Civil Code[12] and the Commercial Code,[13] for their part, contain some private international law rules.[14] However, they are not adapted to the current needs arising from cross-border activities.[15] This contrasts with

[11] Constitutional Court of Colombia, Ruling SU-768/14, Reporting Judge: Jorge Iván Palacio Palacio, 16 October 2014, available at: *https://www.corteconstitucional.gov.co/relatoria/2014/SU768-14.htm*. See also Ochoa Jiménez, María Julia, "Normas de derecho internacional privado en materia de bienes: la regla *lex rei sitae* en América Latina y Colombia", *Revista de Derecho Privado*, no. 37, 2019, p. 145, available at: *https://revistas.uexternado.edu.co/index.php/derpri/article/view/6059*.

[12] Civil Code, Law no. 84, Colombia, 26 May 1873, available at: *http://www.secretariasenado.gov.co/senado/basedoc/codigo_civil.html*. For example, article 19 of the Code (which will be dealt with in this paper), which refers to personal status; article 20, which refers to the law applicable to property located in Colombia, or article 21, concerning the form of public acts.

[13] Commercial Code, Decree no. 410, Colombia, 27 March 1971, available at: *http://www.secretariasenado.gov.co/senado/basedoc/codigo_comercio.html*. This Code has, for example, rules that indicate the law applicable to the execution of commercial contracts concluded abroad (article 869) and to commercial agency contracts executed in Colombian territory (article 1328).

[14] Álvarez Londoño, Luis Fernando and Galán Barrera, Diego Ricardo, *Derecho internacional privado (parte general)*, Bogotá, Pontificia Universidad Javeriana, 2001, and Monroy Cabra, Marco Gerardo, *Tratado de derecho internacional privado*, Bogotá, Temis, 2016.

[15] A different trend can be seen in the law that promotes access to credit and provides rules on securities. See Law no. 1676, Colombia, 20 August 2013, article 83, available at: *http://www.secretariasenado.gov.co/senado/basedoc/ley_1676_2013.html*, and Ochoa Jiménez,

the trend in other Latin American countries, such as Uruguay,[16] Argentina,[17] Panama,[18] the Dominican Republic,[19] Venezuela,[20] or Peru.[21]

Observing how Colombian private international law refers to the status of natural persons and foreign companies[22] may allow us to gain some insight into the current situation of the field in the country. To this end, the research presented in this article followed a three-step methodology. First, the codified rules on the subject matter that exist in the legal systems of Colombia and other Latin American countries were located; then, these rules were systematically organized, mainly considering whether or not they had the form of a conflict-of-law rule; finally, they were comparatively analyzed, and the result of the comparison was summarized graphically with the help of widely used data processing tools (*i. e.*, Excel sheets). The research was mainly based on the examination of national codifications adopted in Latin American countries and regional treaties that include relevant norms in the subject.

This paper is divided into two main sections. The first section discusses the law applicable to natural persons, with a focus on article 19 of the Civil Code of Colombia, while the second one is dedicated to the law applicable to commercial companies, upon the basis of article 469 of the Colombian Code of Commerce. In both sections, a general overview of the abovementioned rules is followed by a mention of the normative models concerning these matters that, in general, can be identified in Latin America. The paper concludes by briefly discussing some general issues.

María Julia *et al.*, "La elección del derecho aplicable en el derecho internacional privado en Colombia", *Estudios Socio-Jurídicos*, vol. 21, no. 1, 2019, available at: *https://revistas.urosario.edu.co/index.php/sociojuridicos/article/view/6784*.

16 General Act on Private International Law…, *cit*.

17 National Civil and Commercial Code…, *cit.*, articles 2594-2671.

18 Code of Private International Law…, *cit*.

19 Private International Law Act, Law no. 544-14…, *cit*.

20 Private International Law Act, Venezuela, 6 August 1998, available at: *https://venezuela.justia.com/federales/leyes/ley-de-derecho-internacional-privado/gdoc/*.

21 Civil Code, Legislative Decree no. 295, Peru, 24 July 1984, book X, articles 2046-2111, available at: *http://spij.minjus.gob.pe/notificacion/guias/CODIGO-CIVIL.pdf*.

22 This paper focuses mainly on foreign commercial companies (*sociedades comerciales*). See Commercial Code, Decree no. 410…, *cit.*, articles 469-497.

II. Preliminary note: personal status in private international law

Colombian scholars[23] follow positivist approaches to develop the legal concept of person. Thus, person is defined as a legal construct,[24] that is subject of legal obligations and subjective rights.[25] Another assumption, which is basic to private international law, is that who a person is within a certain legal system is determined by that same system.[26] This includes both natural persons and legal entities. In Latin American private international law, as is also the case in Colombia, the European concept of personal "status" (*statut personnel* or *Personalstatut*) is generally used. Although this is certainly a quite heterogeneous concept,[27] it can be linked, as far as natural persons are concerned, to the rules applicable to their civil status and their capacity and, as regards legal entities, to the rules that make up the legal regime to which they are subject, which can encompass aspects that are also attributed to natural persons (*e. g.*, the capacity to enter into contracts or to perform legal acts).[28]

[23] For example, Montoya Osorio, Martha Elena and Montoya Pérez, Guillermo, *Las personas en el derecho civil*, Bogotá, Leyer, 2010, pp. 122-123.

[24] See Savigny, Friedrich Karl von, *Sistema de derecho romano actual*, transl. by Jacinto Mesía and Manuel Poley, Madrid, F. Góngora, 1879. Savigny only referred to collective persons, but this also extends to natural persons. See also Recasens Siches, Luis, *Filosofía del derecho*, Mexico, Porrúa, 2006, p. 263; Kelsen, Hans, *Pure Theory of Law*, transl. by Max Knight, Berkeley, University of California Press, 1967, p. 172. Person is also considered as a point of legal imputation, as Kelsen does.

[25] Recasens Siches, Luis, *op. cit*. As is well known, this idea is taken further by Kelsen, for whom person "*is* these obligations and rights—a complex of legal obligations and rights whose totality is expressed figuratively in the concept of "person". "Person" is merely the personification of this totality". Kelsen, Hans, *op. cit.*, p. 173.

[26] Recasens Siches, Luis, *op. cit.*, p. 261.

[27] They can refer, for example, to the capacity to acquire rights or to be in debt to a creditor, the beginning and the end of human life, the capacity to conclude contracts or to perform legal acts, name, and gender, status as a merchant, consumer or professional. Basedow, Jürgen, *El derecho de las sociedades abiertas*, transl. by Teresa Puig Stoltenberg, Bogotá, Legis, 2017, p. 209.

[28] See Caicedo Castilla, José Joaquín, *Derecho internacional privado*, Bogotá, Temis, 1967, p. 160.

Some find it difficult to sustain that the questions about personal status merit differentiated treatment in private international law.[29] It is argued that such issues are often preliminary in cases related to other specific areas of law (*e. g.*, family, contracts), and that specific conflict-of-law rules concerning the status of natural persons (*e. g.*, marriage, divorce, names) have been progressively adopted.[30]

However, as things currently stand, although in Latin America some international instruments apply to certain rights and obligations arising from some types of cross-border family relationships,[31] and some national codifications contain conflict-of-law rules on names,[32] the need for general conflict-of-law rules relating to personal status appears to remain intact. The main reason for this is that even where more specific conflict-of-law rules exist, general rules relating to personal status can still be useful for addressing potential legal loopholes and for interpreting specific rules if necessary.

III. Law applicable to natural persons

1. *Situation in Colombia*

In order to observe the rules that determine the law applicable to cross-border situations relating to the civil status[33] and capacity[34] of natural per-

[29] See Basedow, Jürgen, *op. cit.*, pp. 209-210.

[30] Regarding names, for example, see article 10 of the Introductory Act to the Civil Code of Germany, according to which names are subject to the law of the country which the person is a national, and article 37 of the Federal Act on International Private Law of Switzerland, according to which names are subject to the law of the person's domicile. These codifications leave some room for the choice of the applicable law by the individual concerned.

[31] See, for instance, OAS Inter-American Convention on Support Obligations of 15 July 1989 (Law no. 449, Colombia, 4 August 1998, available at: *http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Leyes/1832122#:~:text=Art%C3%ADculo%204%C2%B0.,cualquier%20otra%20forma%20de%20discriminaci%C3%B3n*).

[32] National Civil and Commercial Code…, *cit.*, article 2618, and Private International Law Act, Law no. 544-14…, *cit.*, article 34.

[33] Decree no. 1260, Colombia, 27 July 1970, available at: *https://www.suin-juriscol.gov.co/viewDocument.asp?id=1254136*. Article 1 of the Decree: "The civil status of a person is his or her legal status in the family and society, determines his or her capacity to exercise certain rights and to incur certain obligations, is indivisible, unavailable and imprescriptible, and is

sons in Colombia, attention must be paid to the two criteria that have been traditionally used to that purpose: nationality and domicile. In Latin America, the use of both[35] was considered at the American Congress of Jurisconsults held in 1877-1878, also known as the Congress of Lima, where the use of the nationality prevailed. Then, the so-called Treaty of Lima was approved, whose article 2 states as follows: "The status and legal capacity of persons shall be determined by their national law…".

As can be observed, this rule is based upon the nationality principle. Although this treaty did not reach practical relevance, its content is, however, almost identical to that of the bilateral Treaty on Private International Law between Ecuador and Colombia,[36] which is still in force for both countries. The nationality principle is also included at the national level in the Civil Code of Colombia, which follows in this regard the Civil Code of Chile of 1855. Article 19 of the Civil Code of Colombia refers to law applicable to civil status and capacity, as well as the obligations and rights derived from family relations:

> Colombians that are resident or domiciled in a foreign country shall remain subject to the provisions of this Code and other national laws regulating civil rights and obligations:
>
> 1) Concerning the status of persons and their capacity to carry out certain acts that are to have effect in any of the territories administered by the general government, or in matters within the competence of the Union.
>
> 2) In respect of the obligations and rights arising from family relationships, but only in respect of their spouses and relatives in the cases indicated in the preceding paragraph.[37]

assigned by law". Article 2: "The civil status of a person derives from the facts, acts, and orders that determine it and from the legal qualification of them". See Montoya Osorio Martha Elena and Montoya Pérez, Guillermo, *op. cit.*, pp. 122-123.

[34] Civil Code, Law no. 84…, *cit.* Article 1502 of the Code, second paragraph: "A person's legal capacity consists in being able to bind himself or herself, without authorization of another".

[35] Its use expanded with the Italian school of Mancini. Samtleben, Jürgen, *Derecho internacional privado en América Latina. Teoría y práctica del Código Bustamante*, transl. by Carlos Bueno Guzmán, Buenos Aires, Depalma, 1983, p. 15.

[36] Law no. 13, Colombia, 8 April 1905, available at: *https://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Leyes/1568784*. See Samtleben, Jürgen, *op. cit.*, p. 14.

[37] The wording of this article is very close to article 15 of the Civil Code of Chile.

As can be seen, article 19 of the Civil Code has a unilateral character. In this sense, it is a strongly territorial rule, which does not admit the application of foreign law to situations that involve foreign nationals.[38] Consequently, such a rule does not serve the recognition of the relation of natural persons with their place of origin, nor does it support the idea of continuity which, considering that nationality is not as easy to change as domicile, is often linked to the use of the nationality principle.[39]

Article 1 of the Treaty on International Civil Law of 1889,[40] in turn, subjects the capacity of natural persons to the law of domicile: "The capacity of persons is governed by the laws of their domicile". Colombia adhered to the domicile principle by ratifying that treaty. It also submitted a proposal[41] to amend the 1928 Code of Private International Law (Bustamante Code)[42] to be based on this principle. According to article 7 of the Bustamante Code, each State "…shall apply as personal law that of domicile, that of nationality or that which have been or will be adopted by its domestic legislation". It thus reflects a compromise between the two opposing dominant positions, represented by those who defended the nationality principle and those who supported the domicile principle.[43] In doing so, this solution is also an expression of the predominance of the territoriality principle in Latin American private international law.[44] Although the Colombian proposal did not prosper, it is an indication that already in the mid-twentieth century the idea of using the domicile principle found support in Colombia. In this sense, not only the nationality principle but also the domicile principle has played a role in Colombian private international law, and both are included in rules that are applicable in the country.

[38] Uribe Misas, Alfonso, "El estatuto personal de los extranjeros en Colombia. Un caso de separación de bienes", *Estudios de Derecho*, vol. 11, nos. 109-110, 1924, p. 198.

[39] Jayme, Erik, *Zugehörigkeit und kulturelle Identität. Die Sicht des Internationalen Privatrechts*, Göttingen, Wallstein Verlag, 2012, p. 19.

[40] Law no. 33…, *cit.*

[41] This proposal was presented in 1966 by Caicedo Castilla, who was a Colombian leading expert in the field. See Samtleben, Jürgen, *op. cit.*, p. 81.

[42] Approved at the Sixth International Conference of American States in Havana, Cuba, on 20 February 1928. Colombia signed the treaty to which this code is annexed, but never ratified it.

[43] Samtleben, Jürgen, *op. cit.*, p. 57.

[44] *Ibidem*, pp. 63-83.

Some national codifications in Latin America include the habitual residence criterion as equivalent to that of domicile. In this sense, the Venezuelan[45] and the Uruguayan[46] laws reflect the solution of the OAS Inter-American Convention on the Domicile of Natural Persons in Private International Law,[47] which has not been ratified by Colombia. In Colombian law, there is no explicit reference to this criterion for determining the law applicable to the personal status of natural persons.[48]

2. *Codifications in other Latin American countries*

By incorporating the nationality criterion in a unilateral conflict-of-law rule,[49] Colombia departs from the main trend in Latin America. Domicile is used as a connecting factor of bilateral conflict-of-law rules in Argentina,[50] Bolivia,[51] Brazil,[52] Dominican Republic,[53] Guatemala,[54] Mexico,[55] Peru,[56] Uruguay,[57] and Venezuela.[58] While the nationality criterion is included in

[45] Private International Law Act, Venezuela…, *cit.*, article 11.

[46] General Act on Private International Law…, *cit.*, article 14.

[47] According to its article 2.1, the domicile is determined, in the first place, by the law of regular residence.

[48] Nevertheless, it is worth mentioning that the Inter-American Convention on Support Obligations refers to the application of the law of the domicile or that of regular residence of the creditor or debtor (Law no. 449…, *cit.*, article 6).

[49] Civil Code, Law no. 84…, *cit.*, article 19.

[50] National Civil and Commercial Code…, *cit.*, articles 2616, 2618.

[51] Salazar Paredes, Fernando, *Ley de derecho internacional privado boliviano. Proyecto*, 2009, article 21, available at: *https://asadip.files.wordpress.com/2009/12/ley-dipr-2.pdf*.

[52] Lei de Introdução às normas do Direito brasileiro [Law of Introduction to Norms of the Brazilian Law], Law no. 12.376, Brazil, 30 December 2010, article 7.

[53] Private International Law Act, Law no. 544-14…, *cit.*, article 31.

[54] Ley del Organismo Judicial [Law of the Judicial Organism], Decree no. 2-89, Guatemala, 28 March 1989, article 24, available at: *https://www.wipo.int/edocs/lexdocs/laws/es/gt/gt004es.pdf*.

[55] Federal Civil Code, Mexico, 26 May 1928 (last modification: 11 January 2021), article 13, fr. II, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/2_110121.pdf*.

[56] Civil Code, Legislative Decree no. 295…, *cit.*, articles 2068, 2070.

[57] General Act on Private International Law…, *cit.*, article 17.

[58] Private International Law Act, Venezuela…, *cit.*, article 16.

unilateral rules in the Civil Codes of Ecuador[59] and El Salvador,[60] which follow the model of the Civil Code of Chile,[61] as is also the case in Colombia.

Rules included in other codifications deserve a little more attention. In Costa Rica,[62] the national law on the status and capacity of persons binds Costa Ricans with respect to any juridical act or contract to be executed in Costa Rica, regardless of the country where the contract is executed or entered into, and they also bind foreigners with respect to acts to be executed or contracts to be entered into and to be executed in Costa Rica. In Cuba,[63] the nationality principle is included in a bilateral conflict-of-law rule, and the residence criterion is applied unilaterally —that is, referring to the Cuban legal system— for persons without nationality (citizenship) who reside in Cuba. In Panama,[64] nationality is used as a connecting factor in a unilateral conflict-of-law rule for situations involving Panamanians, and the same is explicitly contemplated for the case of foreign nationals. In this case, there is a presumption that admits an exception if the national law refers to another law, in which case the Panamanian judge must apply the latter. In this way, the Panamanian law allows renvoi, which would only be admissible up to the second degree. The regulations of Peru and the Dominican Republic, where the domicile principle is applied bilaterally, contemplate the possibility of the so-called mobile conflict, whose resolution is based on the vested rights theory.

The general situation of Latin American codifications described in the preceding paragraphs can be graphically seen on the following chart:

[59] Civil Code, Ecuador, 24 June 2005 (last modification: 22 May 2016), article 14, available at: *https://www.hgdc.gob.ec/images/BaseLegal/Cdigo%20Civil.pdf*.

[60] Civil Code, El Salvador, 10 November 1880, article 15, available at: *http://www.redicces.org.sv/jspui/handle/10972/1607*.

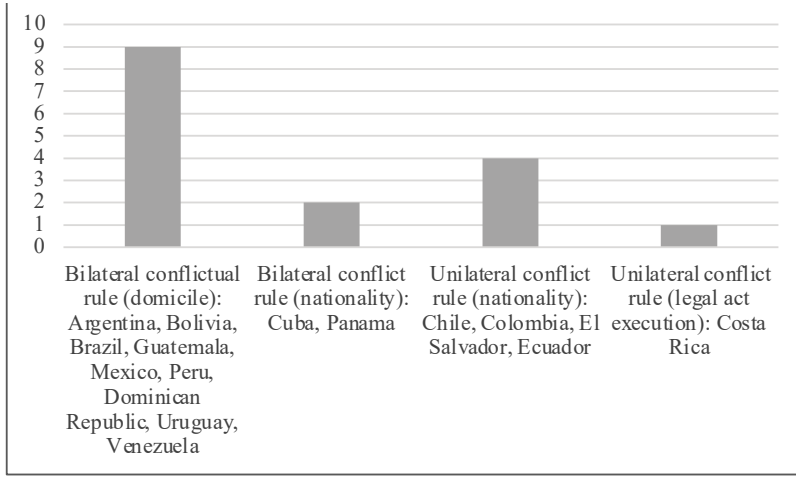
[61] Civil Code, Chile, 30 May 2000 (last modification: 11 September 2020), article 15, available at: *https://www.bcn.cl/leychile/navegar?idNorma=172986*.

[62] Civil Code, Law no. 63, Costa Rica, 28 September 1887, article 23, available at: *http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=15437&nValor3=118816&strTipM=TC*.

[63] Civil Code, Law no. 59, Cuba, 16 July 1987, article 12, available at: *https://web.archive.org/web/20160428022535/http://www.gacetaoficial.cu/html/codigo%20civil%20lib1.html#l1t1*.

[64] Code of Private International Law…, *cit.*, article 23.

FIGURE 1



SOURCE: Developed by the authors.

IV. LAW APPLICABLE TO FOREIGN COMMERCIAL COMPANIES

1. *Situation in Colombia*

Under Colombian law, a commercial company is a legal person,[65] and therefore it may have capacity, name, assets, and domicile.[66] The possibility of commercial companies having a nationality was rejected for some time, either for scientific or political reasons.[67] Indeed, the Constitution of 1886 was criticized because it accepted the distinction between national and foreign companies.[68] However, since the new Political Constitution of 1991

[65] Commercial Code, Decree no. 410…, *cit*. Article 98 of the Code: "The company, once legally constituted, forms a legal person distinct from the individual partners".

[66] Leal Pérez, Hildebrando, *Derecho de sociedades comerciales. Partes general y especial*, Bogotá, Leyer, 2015, pp. 54-55.

[67] Explanatory Note by the Colombian Delegation to the discussions about the Private International Law Code (Bustamante Code).

[68] Article 14 of the Colombian Constitution of 1886: "Societies or corporations that are recognized as legal persons in Colombia shall have no other rights than those corresponding to Colombian persons".

does not directly refer to the nationality of companies, some Colombian authors argue that they can be classified into national and foreign companies.[69] As can be seen, behind this lies the idea that commercial companies have a nationality. The relevance of determining if a commercial company is national or foreign is twofold: Firstly, this is necessary to know what law it must comply with to be considered validly constituted; and secondly, this allows us to know the *lex societatis*,[70] in particular, under which rules, within the Colombian law, they shall operate.[71]

Regarding the question of whether a commercial company is national or foreign, article 469 of the Colombian Code of Commerce establishes that "Foreign companies are those constituted following the law of another country and with their main domicile abroad". In this rule, both incorporation (constitution) and domicile are relevant, so that not only the will of the partners of the company, who incorporated the business in a foreign country, but also the center of its economic activities is taken into account.[72] However, article 469 is not a conflict-of-law rule. Its wording differs, for example, from article 5 of the Treaty on International Commercial Law of 1889,[73] according to which, "Companies or associations that have the character of a legal person shall be governed by the laws of the country of their domicile".[74] As can be seen, here the domicile is used as a connecting factor of a conflict-of-law rule. In article 469, in contrast, the domicile (abroad) does not indicate the application of a certain legal system, but is, together

[69] Caicedo Castilla, José Joaquín, *op. cit.*, pp. 147-148.

[70] Fresnedo de Aguirre, Cecilia, "Las pequeñas y medianas empresas en el comercio internacional", in All, Paula *et al.* (eds.), *La actividad internacional de la empresa*, Bogotá, Ibáñez, 2017, and Pérez Vera, Elisa *et al.*, *Derecho internacional privado*, Madrid, UNED, 2001, vol. 2, p. 50.

[71] Pinzón, Gabino, *Sociedades comerciales*, Bogotá, Temis, 1977, pp. 17-18, and Neira Archila, Luis Carlos, *Apuntaciones generales al derecho de sociedades*, Bogotá, Temis, 2006, pp. 6-8.

[72] Caicedo Castilla, José Joaquín, *op. cit.*, pp. 148-153. The incorporation theory is included in article 2 of the Inter-American Convention on Conflicts of Laws Concerning Commercial Companies of 8 May 1979. This was also incorporated in the Inter-American Convention on Personality and Capacity of Juridical Persons in International Private Law of 24 May 1984. None of the mentioned Conventions has been ratified by Colombia.

[73] Law no. 33…, *cit.*

[74] Article 7 of the Treaty on International Commercial Law of 1889 also refers to jurisdiction.

with the incorporation according to the law of another country, a condition for the qualification of a company as foreign. Conversely, domestic companies are those formed under Colombian law that have their principal domicile in the country.

Even though article 469 does not contain any explicit reference to the applicable law, according that rule, to classify a company as foreign, the Colombian authorities are called upon to observe the rules that govern the incorporation of the type of company in question in the country where it is incorporated. Once the company is classified as foreign, the application of Colombian law for foreign companies follows. In particular, this refers to the rules of Title VIII of the Colombian Code of Commerce, among which it is important to highlight the rule that subjects them to State supervision —what is exercised through the Superintendence of Finance or Companies— when they develop activities in Colombia on a permanent basis.[75] Thus, the solution found in article 469 of the Commercial Code has a strong territorial character.

Article 5 of the Treaty on International Commercial Law of 1889, for its part, mandates that the performance of acts shall be governed by the law of the country in which such acts are intended to be performed. This certainly leads to the same result as the solution of the Commercial Code, in the case of acts carried out in Colombia. However, when applied by each State party, article 5 of the mentioned treaty would have the effect of a bilateral conflict-of-law rule, so that, if it is applied in Colombia to acts carried out in another country, the law of the latter must be applied. Thus, this not necessarily implies to apply the *lex fori*.

2. *Codifications in other Latin American countries*

Codifications of Latin American countries regarding the law applicable to the status of foreign companies can be classified into two groups. The first group represents the most modern trend in this area.[76] These are codifications that include conflict-of-law rules that follow the incorporation

[75] Commercial Code, Decree no. 410…, *cit.*, article 470.

[76] Fresnedo de Aguirre, Cecilia, *op. cit.*, p. 42.

theory; they are generally applicable to the existence, form, and capacity of foreign legal entities. A general tendency in this group is that, according to these codifications, when they carry out activities in the national territory, such activities are subject to territorial law. In addition, the capacity admitted to foreign entities and companies incorporated abroad may not be greater than that recognized to those created in the country.[77] The codifications in this group include those of Argentina,[78] Bolivia,[79] Brazil,[80] Cuba,[81] the Dominican Republic,[82] Mexico,[83] Panama,[84] Peru,[85] Uruguay,[86] and Venezuela.[87] Among these codifications, those of Panama, the Dominican Republic, and Venezuela have certain particularities. The legislation of Panama includes a bilateral conflict-of-law rule without distinguishing between national and foreign legal entities and, besides, recognizes party autonomy in the case of an international economic interest group.[88] In the

[77] Ley de Sociedades Comerciales [Business Companies Act], Law No. 16.060, Uruguay, 4 September 1989, article 192, available at: *https://www.bps.gub.uy/bps/file/12029/1/ley-16.060-ley-de-sociedades-comerciales.pdf*, and Civil Code, Legislative Decree no. 295…, *cit.*, article 2073.

[78] Ley General de Sociedades [General Companies Act], Law no. 19.550, Argentina, 30 March 1984, article 118, available at: *http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25553/texact.htm*.

[79] Commercial Code, Decree-Law no. 14379, Bolivia, 25 February 1977, article 413, available at: *https://servdmzw.asfi.gob.bo/circular/Leyes/CCOM.pdf*.

[80] Lei de Introdução às normas do Direito brasileiro [Law of Introduction to Norms of the Brazilian Law]…, *cit.*, article 11.

[81] Commercial Code, Cuba, 28 January 1886, article 15, available at: *http://www.gecomex.cu/uploads/descargas/doc-8460.pdf*.

[82] Private International Law Act, Law no. 544-14…, *cit.*, articles 37-38.

[83] Federal Civil Code…, *cit.*, article 2736.

[84] Code of Private International Law…, *cit.*, article 24.

[85] Commercial Code, Peru, 15 February 1902, article 15, available at: *http://www.oas.org/juridico/PDFs/mesicic3_per_codcomercio.pdf*, and Civil Code, Legislative Decree no. 295…, *cit.*, article 2073.

[86] Ley de Sociedades Comerciales [Business Companies Law]…, *cit.*, article 192, and General Act on Private International Law…, *cit.*, article 38. On the use of the incorporation criterion in the Uruguayan legal system, see Fresnedo de Aguirre, Cecilia, *op. cit.*, p. 42.

[87] Private International Law Act, Venezuela…, *cit.*, article 20.

[88] Code of Private International Law…, *cit.*, articles 24, 28, and Boutin, Gilberto, "La noción de grupo de interés económico en el Código de Derecho Internacional Privado panameño", in All, Paula *et al.* (eds.), *op. cit.*, pp. 206-216.

Dominican Republic, the general rule is established through a unilateral conflict-of-law rule, which refers to the Dominican law; however, a bilateral conflict-of-law rule, which applies the criterion of incorporation together with that of the real seat, applies to companies and individual limited liability companies.[89] The Venezuelan law contains a bilateral conflict-of-law rule that does not distinguish between domestic and foreign private legal entities and applies to the existence, capacity, operation, and dissolution of such entities.[90]

The second group of codifications represent those that do not adopt a conflictual solution *stricto sensu*. These include codifications of Costa Rica, Chile, Ecuador, El Salvador, and Guatemala. Some of these countries have rules that indicate when a company is foreign, as done by article 469 of the Colombian Code of Commerce (see *supra*), or rules that implicitly recognize the nationality of a company based on the laws of the country of its incorporation: Chile,[91] Ecuador,[92] El Salvador,[93] Costa Rica,[94] and Guatemala.[95]

The widespread use of the incorporation theory among Latin American codifications, some of which contain conflict-of-law rules and some of which do not, can be easily seen in the following chart:

[89] Private International Law Act, Law no. 544-14…, *cit.*, articles 29, 37 y 38.

[90] Private International Law Act, Venezuela…, *cit.*, article 20.

[91] Commercial Code, Chile, 23 November 1865 (last modification: 13 April 2021), article 447, available at: *https://www.bcn.cl/leychile/navegar?idNorma=1974*.

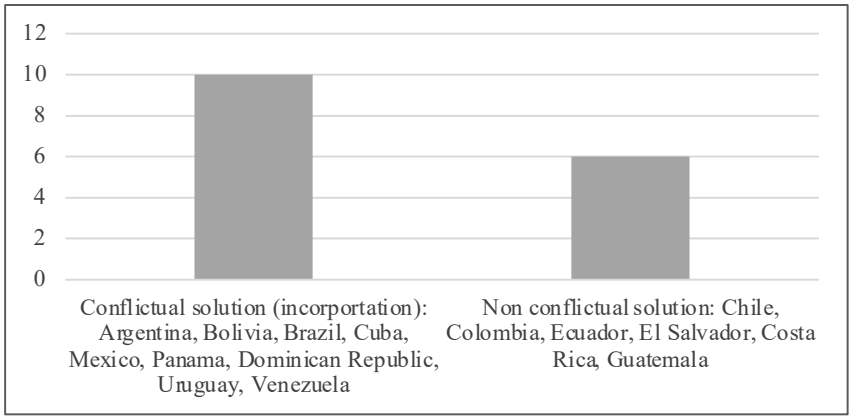
[92] Companies Law, Ecuador, 5 November 1999 (last modification: 29 December 2017), articles 425, 418, available at: *https://portal.compraspublicas.gob.ec/sercop/wp-content/uploads/2018/02/ley_de_companias.pdf*.

[93] Commercial Code, Legislative Decree no. 671, El Salvador, 8 May 1970, article 358, available at: *http://www.oas.org/juridico/spanish/mesicic3_slv_comercio.pdf*.

[94] Commercial Code, Law no. 3284, Costa Rica, 30 April 1964, article 226, available at: *http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=6239&nValor3=89980&strTipM=TC*.

[95] Commercial Code, Decree no. 2-70, Guatemala, 22 April 1970, article 213, available at: *http://www.oas.org/juridico/spanish/mesicic3_gtm_anex2.pdf*.

FIGURE 2



SOURCE: Developed by the authors.

V. GENERAL COMMENTS

Considering the situation of private international law in Colombia described in this paper, it is relevant to comment on some of its consequences. First of all, the lack of a systematic national codification on private international law reinforces the assumption that it is enough to deal with cross-border cases just from a material perspective based on the *lex fori*, without paying attention to conflict-of-law solutions. In some cases, it is certainly correct to proceed from a strictly material point of view, for instance, in cases regarding the acquisition of nationality,[96] which does not require a conflict-of-law approach.[97] However, dealing with all kinds of cross-border situations only by assessing compliance with material rules, for instance, through the evaluation of the possible violation of fundamental rights, is problematic. Mainly because by proceeding in that way, the relation of the case with foreign law is disregarded, which may threaten the achievement

[96] See, for example, Constitutional Court of Colombia, Ruling T-006/20, Reporting Judge: Cristina Pardo Schlesinger, 17 January 2020, available at: *https://www.corteconstitucional.gov.co/Relatoria/2020/T-006-20.htm*.

[97] See Political Constitution of Colombia, 20 July 1991, article 96, available at: *http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html*.

of a just result. Additionally, judicial decisions are directly applicable to one particular situation, and they imply an *a posteriori* evaluation, which is linked to legal uncertainty.

Of course, this does not mean that human and fundamental rights are irrelevant. The unilateral character of article 19 of the Civil Code, for example, can indeed be analyzed from this perspective. In this sense, it is noteworthy that, on the one hand, this rule refers only to Colombians and does not take into account foreign nationals.[98] On the other hand, the use of the term "Colombians" aims at achieving a uniform citizenship, so no attention is paid to the cultural diversity existing within the country. This could be explained not only by the predominance of the principle of territoriality in Latin America[99] but also by the particular history of Colombia.[100] However, in current times, this can be objected to from a human rights perspective.

The lack of consideration of foreign nationals can be criticized if we see it within the framework of the human right to migration.[101] And, although the question of to what extent private international law can or has to accommodate the rights of indigenous groups that inhabit the country's territory may be not only controversial but also very complex, thinking about it

[98] See Cock Arango, Alfredo, *Tratado de derecho internacional privado*, Bogotá, Universidad Nacional de Colombia, 1952, p. 256. It should be noted that Colombian courts have observed this rule considering its effects on foreigners. See, *e. g.*, Constitutional Court of Colombia, Ruling C-395/02, Reporting Judge: Jaime Araújo Rentería, 22 May 2002, available at: *https://www.corteconstitucional.gov.co/RELATORIA/2002/C-395-02.htm*; Supreme Court of Colombia, Ruling SC2502-2021, Reporting Judge: Luis Armando Tolosa Villabona, 23 June 2021, available at: *https://cortesuprema.gov.co/corte/wp-content/uploads/2021/07/SC2502-2021-2014-01811-01.pdf*.

[99] Samtleben, Jürgen, "Principio de territorialidad en América Latina (1977)", in Samtleben, Jürgen (ed.), *Rechtspraxis und Rechtskultur in Brasilien in Lateinamerika*, Aachen, Shaker Verlag, 2010.

[100] According to María Angélica Gómez Matoma, in the late nineteenth century and the beginnings of the twentieth century, discrimination towards immigrants was evident in both Colombian politics and legislation. Gómez Matoma, María Angélica, "La política internacional migratoria colombiana a principios del siglo XX", *Memoria y Sociedad*, vol. 13, no. 26, 2009, available at: *https://revistas.javeriana.edu.co/index.php/memoysociedad/article/view/8221*.

[101] Article 13.2 of the Universal Declaration of Human Rights of 10 December 1948: "Everyone has the right to leave any country, including his own, and to return to his country". Article 12.2 of the UN International Covenant on Civil and Political Rights of 16 December 1966 (Law no. 74 of 26 December 1968): "Everyone shall be free to leave any country, including his own".

seems also unavoidable today.[102] In any case, in relation to both foreign nationals and members of indigenous groups, the right to non-discrimination must also be taken into account.[103] Taking these observations into consideration, as a starting point, it is reasonable to allow for the possibility of following the criterion of domicile, which could be more compatible with the integration of foreigners in Colombia as a host country. However, it should not be forgotten that this cannot disregard the ties, particularly those of a cultural or religious nature, that individuals may have with their legal system of origin. Moreover, as far as the indigenous population is concerned, strict application of the principle of domicile would imply an assimilationist approach. Therefore, it does not seem advisable to completely exclude the application of the law of origin if we accept that private international law aims to protect two values: the exchange between cultures and civilizations and the cultural identity of individuals and peoples, both of which are related to the protection of fundamental rights.[104]

Regarding commercial companies, as has been seen, the rule contained in the Colombian Code of Commerce does not conform to the most modern trend in this matter. While it can be said that it reflects the incorporation theory, it does not properly reflect a conflict-of-law perspective, what translates into the fact that it does not clearly indicate what aspects of foreign companies are governed by foreign law. Fundamental rights may also be relevant here. Although the Political Constitution of 1991 does not directly refer to the nationality of companies, however, when its article 100 recognizes foreigners the same rights granted to Colombians, no distinction is made between natural and legal persons. In this sense, what the Constitutional Court has held with respect to legal persons, in general, may also be applicable to foreign ones: "There are rights of legal entities, which they can claim within the social rule of law and which the authorities are

[102] See UN Declaration on the Rights of Indigenous Peoples of 13 September 2007 and ILO Convention no. 169 on Indigenous and Tribal Peoples of 27 June 1989 (Law no. 21 of 4 March 1991).

[103] Article 26 of the UN International Covenant on Civil and Political Rights of 16 December 1966 (Law no. 74, Colombia, 26 December 1968, available at: *https://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Leyes/1622486*). See also Political Constitution of Colombia…, *cit.*, articles 13, 100.

[104] Calvo Caravaca, Alfonso Luis, "El "derecho internacional privado multicultural" y el revival de la ley personal", *La Ley*, no. 7847, 2012, pp. 1-8.

obliged to respect and ensure that they are respected".[105] And according to the Court, "among the immense range of rights that correspond to them, there are also fundamental ones, insofar as they are closely linked to their very existence, to their activity, to the core of the guarantees that the legal order offers them".[106] Of course, this cannot be interpreted as excluding discrimination (differentiation) between domestic and foreign companies. From a conflict-of-law perspective, under a future national codification on the subject, this could take place, for example, by taking into consideration foreign law regarding those aspects that, by means of a conflict-of-law rule, could be subject to such law; or, on the contrary, by excluding the application of foreign law, and applying the national law instead, by virtue of the public policy clause.

In view of the above considerations, it is necessary to review the Colombian rules governing the law applicable to the personal status of both individuals and commercial companies. But this must be seen in the broader framework of the need for a systematic national codification of private international law, which would provide *a priori* solutions and, consequently, greater legal certainty. Such a codification will inevitably go beyond material solutions, which ignore issues related to conflict of laws. This will allow for a more adequate assessment of the relationship that cross-border situations may have with foreign law.

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[105] Constitutional Court of Colombia, Ruling SU-182/98, Reporting Judges: Carlos Gaviria Díaz and José Gregorio Hernández Galindo, 6 May 1998, available at: *https://www.corteconstitucional.gov.co/relatoria/1998/SU182-98.htm*.

[106] *Idem*.

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