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Colombian Draft Project on Private International Law

A cura di Margherita Salvadori
e Gilbert Boutin Icaza

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Property Law

ABSTRACT: Article 20 of the Civil Code of Colombia, which contains the same rule since its adoption in 1887, has several weaknesses, mainly the use of obsolete terms and its confusing wording. According to it, the *lex rei sitae* rule applies to any type of property, moving away from the distinction between conflicts of laws in matters of real property (governed by the law of location) and movable property (governed by the law of the owner's domicile). In general terms, the IADIP Draft Law maintains the tradition included in the Civil Code of Colombia currently in force. However, it takes several steps forward, clarifying the regulation on this matter, while considering developments in relation to certain types of property.

KEYWORDS: Private international law - Colombia - IADIP Draft General Act - property - cultural property - intellectual property - mobile conflict

I. *Background*

Cases of conflict of laws regarding property are traditionally resolved according to the *lex rei sitae* rule, according to which the law of the stated in which the respective property is located is applicable[1]. The wide acceptance of this rule, which has an obvious territorial basis, is largely explained by the relevance that such rights have for the protection of the territorial sovereignty of the state of location[2], which is evident in relation

1. See M.J. Ochoa Jiménez, *Normas de Derecho Internacional Privado en Materia de Bienes: La Regla Lex Rei Sitae en América Latina y Colombia*, in *Revista de Derecho Privado*, 37, 2019, 153-183, on which the first part of this paper is partially based.

2. E. Pérez, *El denominado estatuto real*, in A. Abarca - J. González - M. Guzmán (coords.), *Derecho Internacional Privado*, UNED, Madrid, 2001, II, 267; J.L. Bonnemaison, *Curso de Derecho Internacional Privado*, Vadell Hermanos, Caracas, 2013, 295.

to real property[3]. Other reasons are also mentioned in support of the *lex rei sitae* rule, such as the legal certainty it provides[4], its predictability[5] and its favorability with respect to the rights of third parties[6]. But the need to revise the *lex rei sitae* rule has come about as a result of recent developments that have raised new concerns in relation to new types of property, such as intellectual and cultural property or movable assets subject to security rights.

The main conflict of laws rule on property rights in the Colombian legal system is contained in article 20 of the Civil Code. This article is based on article 16 of the Chilean Civil Code drafted by Andrés Bello in the mid-19th century. Basically, it follows the trend marked by Friedrich Carl von Savigny, according to which the *lex rei sitae* rule applies to any type of property. It thus moves away from the regulation that distinguished between conflicts of laws in matters of real property (governed by the law of the place of location) and personal property (governed by the law of the domicile of the owner), which was in force for a short time in part of the Colombian territory, in articles 12 and 13 of the Civil Code of the Antioquia Department of 1864[7]. However, article 20 of the Civil Code has several weaknesses. The use of obsolete terms and its confusing wording, together with a unilateral formulation, make its revision necessary.

As will be discussed below, although the rules of the Draft General Law of Private International Law for Colombia prepared by the *Instituto Antioqueño de Derecho Internacional Privado* (IADIP) (hereinafter, "IADIP Draft Law") also contain the *lex rei sitae* rule, it takes several steps forward by clarifying the regulation on this matter, while taking

3. A. Junker, *Internationales Privatrecht*, C.H. Beck, Múnich, 2017, 362.

4. A. Herrán Medina, *Compendio de Derecho Internacional Privado*, Editorial Temis, Bogotá, 1959, 224; J.P. Niboyet, *Principios de Derecho Internacional Privado*, D.F., Editora Nacional, México, 1951, 486; S. Symeonides, *Choice of Law*, Oxford University Press, New York, 2016, 584.

5. S. Symeonides, *Choice of Law*, Oxford University Press, New York, 2016, 584.

6. This can be seen in the German system, where article 43.1 of the Introductory Act to the Civil Code provides for the *lex rei sitae* rule, the rule of article 932 of the German Civil Code being also applicable in international situations; this article refers to bona fide acquisitions: «[…] the acquirer becomes the owner even if the acquirer becomes the owner even if the thing does not belong to the seller, unless the acquirer does not act in good faith. acquirer does not act in good faith at the time he acquires ownership […]»; cfr. J. Schellerer, *Gutgläubiger Erwerb und Ersitzung von Kulturgegenständen*, Mohr Siebeck, Tubinga, 2016, 13.

7. This codification is not in force.

into consideration the developments that have occurred in relation to certain types of property.

II. *Current situation*

The principle of territoriality is central to private law in Colombia, as in other Latin American countries[8]. Framed within this principle, article 20 of the Colombian Civil Code contains the same regulation as its original version of 1887[9].

> The goods located in the *territories*, and those found in the *states*, in whose property the Nation has an interest or right, are subject to the provisions of this Code, even when their owners are foreigners and reside outside of Colombia.
> This provision shall be without prejudice to the stipulations contained in contracts validly concluded in a foreign country.
> But the effects of such contracts, to be fulfilled in any territory, or in cases that affect the rights and interests of the nation, shall be in accordance with this code and other civil laws of the *union*.

In this article, the use of the words "territories" and "states" in the first paragraph and "union" in the last paragraph immediately catch the reader's attention, because they do not correspond to current legal and political terms and concepts[10]. This shows us, on the one hand, that, despite the numerous amendments made to the Civil Code since its adoption, article 20 has not been revised and, on the other hand, that its content

8. See, e.g., Código Civil de Colombia, article 18: "The law is mandatory for both nationals and foreigners residing in Colombia" and article 14 del Código Civil chileno; cfr. E. Hernández-Bretón, *Mestizaje Cultural en el Derecho Internacional Privado de los Países de la América Latina*, Academia de Ciencias Políticas y Sociales, Caracas, 2007, 25; J. Samtleben, *Internationales Privatrecht in Lateinamerika-Regionale Entwicklungen und nationale Kodifikationen (2001)*, in J. Samtleben (coord.), *Rechtspraxis und Rechtskultur in Brasilien und Lateinamerika*, Shaker Verlag, Aachen, 2010, 443.

9. According to Mayorga, «[…] despite several drafts, the Civil Code adopted for the Republic in 1887 is the one that currently governs the country […]»; see F. Mayorga, *Codificación de la Ley en Colombia*, available at http://www.banrepcultural.org/blaavirtual/revistas/credencial/abril2002/codificacion.htm (last access: June 27, 2023).

10. For a synopsis of the history of the Colombian Civil Code, see A. Valencia Zea, *Derecho Civil. Parte General y Personas*, XV ed., Temis, Bogotá, 2000, Vol. I, 31; F. Mayorga, *Codificación de la Ley en Colombia*, available at http://www.banrepcultural.org/blaavirtual/revistas/credencial/abril2002/codificacion.htm (last access: June 27, 2023).

is not easy to understand and interpret. However, the presence of such words cannot be overlooked and must be read in the light of their current meaning[11]. Thus, "territories" should be read in the singular, as referring to the national territory, while "states" should be understood as synonymous with departments, and "union" as referring to the Republic of Colombia.

Article 20 of the Colombian Civil Code contains a unilateral conflict of laws rule, since, when referring to rights over property located in Colombia, it mandates the application of the Colombian legal system. This article can be analyzed by dividing it into three parts[12]. Firstly, it states the *lex rei sitae* rule in broad terms without distinguishing between movable and immovable property (first paragraph)[13]. Thus, all property located in Colombian territory is subject to the Colombian legal system, provided that «the Nation has an interest or right» in it. This last sentence covers, for example, property included in the cultural heritage, in respect of which the interest of the Colombian state is undeniable[14] and is evident in relation to archaeological objects (see articles 63 and 72 of the Political Constitution)[15]. Secondly, article 20 refers to the application of the *lex rei sitae* rule to contracts concluded abroad. Thus, the existence and validity of contracts entered into abroad that deal with assets located in Colombia, over which the Colombian state has some right or interest, must be recognized within the Colombian territory. This rule does not refer to contracts on assets located in the country, on which the Colombian state does not have any right or interest, nor to contracts on assets not located in the country[16].

11. Act 57 of 1887, article 2.

12. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, in *Teoría General del Derecho Internacional Privado*, coords. L. García Matamoros And A. Aljure Salame (coords.), Temis, Bogotá, 2016, 194. A rule consisting of these three parts, but only with respect to immovables, is found in article 12 of the Civil Code of the State of Antioquia (Act 20) of 1864.

13 Cfr. A. Cock Arango, *Tratado de Derecho Internacional Privado*, Universidad Nacional de Colombia, Bogotá, 1952, 262.

14. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, in *Teoría General del Derecho Internacional Privado*, cit., 192.

15. Political Constitution of Colombia, article 63: «[…] the archaeological heritage of the Nation and other assets determined by law are inalienable, imprescriptible and unseizable», and article 72: «[…] The archaeological heritage and other cultural assets that make up the national identity belong to the Nation and are inalienable, unseizable and imprescriptible […]»

16. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, in *Teoría General del Derecho Internacional Privado*, coords. L. García Matamoros and A. Aljure Salame, Temis, Bogotá, 2016, 194.

Thirdly, considering that in Colombia only the existence and validity of contracts entered into abroad must be recognized, according to the third paragraph of article 20, the national law governs the effects of contracts on goods located in Colombia that have been entered into abroad, provided that such effects occur in the national territory or affect rights and interests of the Colombian state. In the latter case it would be irrelevant, as Zapata argues, the place where such effects are produced[17].

In Colombia, as in other countries, the *lex rei sitae*-rule acts as the general rule, so that in specific cases, rules on special matters would prevail. It should be noted that, however, although according to article 1012 of the Civil Code succession is governed by the law of the last domicile of the deceased, a judgment of the Supreme Court of Justice established in 2016 that the law of the place of location of the succession property is applicable if the deceased is domiciled in another country but has Colombian nationality[18]. It is also worth noting that, at the regional level, the 1889 Treaty of Montevideo on International Civil Law includes the *lex rei sitae* rule in article 26[19]:

> Property, whatever its nature, is exclusively governed by the law of the place where it exists as to its quality, its possession, its absolute or relative alienability, and all the legal relations of a real nature to which it is susceptible.

An antecedent of this rule is found in the Treaty of Private International Law, or Treaty of Lima, of 1878, which did not enter into force, but its text is largely the same as the Treaty that Colombia and Ecuador signed bilaterally in 1903[20]. The structure of article 20 of the Civil Code coincides with the form of the *lex rei sitae* rule of the latter Treaty[21], but here an exception is made regarding successions.

17. Cfr. A. Zapata, *La Ley Aplicable al Contrato Internacional*, cit., 196.
18. Supreme Court of Justice of Colombia, Civil Cassation Chamber, Decision AC7803-2016, rad.: 11001-02-03-000-2015-03168-00, September 16, 2016.
19. This rule was later included in article 32 of the Montevideo Treaty of 1940 on International Civil Law, to which Argentina and Paraguay are parties; cfr. J. Samtleben, Der *Kleinstaat Uruguay als Zentrum des Internationales Privatrecht*, in *Festschrift für Dieter Martiny zum 70. Geburtstag*, coords. E. Witzleb, R. Ellger, P. Mankowski, H. Merck and O. Remien, Mohr Siebeck, Tubinga, 2014, 580.
20. Cfr. J. Samtleben, *La Relación entre Derecho Internacional Público y Privado en Andrés Bello*, in *Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana*, 14, 1982, 14.
21. Treaty on Private International Law of June 18, 1903 (Colombia, Act 13 of 1905), article 3: «The assets existing in the Republic shall be governed by the national laws, even if their owners are foreigners and do not reside therein, except as provided in the title of

III. *IADIP Draft Law*

III.1 *General rule*

Chapter Twelve of the IADIP Draft Law deals with property rights. This Chapter, which is made up of three articles (i.e., articles 66 to 68), contains the rules relating to the law that must be applied by Colombian courts in cases regarding such matter. Whereas the regulation on jurisdiction, that will be mentioned below, is included in Chapter Four.

The general conflict of laws rules entailed in Chapter Twelve essentially maintain the legal tradition based on the *lex rei sitae* rule, which is followed in article 20 of the Civil Code. However, the rules proposed in the IADIP Draft Law are more comprehensive and specialized. Above all, it is worth mentioning that the general rule of article 66, first paragraph, contains the *lex rei sitae* rule in a bilateral manner: «Property and rights thereon are governed by the laws of the State in which they are located». National tribunals must thus apply Colombian law if the property is situated in Colombian territory, but foreign law if the property is located abroad. In similar terms, the *lex rei sitae* rule is included in the IADIP Draft Law (article 95, first paragraph) regarding acquisitive prescription (usucapion): «Acquisitive prescription of movable or immovable property is governed by the law of the place where it is located». The bilateral way in which the *lex rei sitae* rule is conceived in the above-mentioned articles is an important step forward vis-à-vis the strong territorial approach of article 20 of the Civil Code and its unilateral formulation. Article 66 of the IADIP Draft Law also excludes any reference to obsolete terms regarding the political and territorial organization of the country. There are no confusing allusions to international contracts either. All this together makes article 66 a rule that provides greater legal certainty.

However, nowadays the *lex rei sitae* rule alone is doubtlessly insufficient to cover the whole spectrum of situations related to property rights. In this regard, as will be described below, article 66 of the IADIP Draft Law also entails some special rules that take into account the legal developments that have taken place in relation to certain types of property.

successions. This provision does not limit the power of the owner of such property to enter into contracts valid in the other country, but the effects of such contracts, when they are to be performed in the Republic, shall be governed by its laws».

III.2 *Specific rules in article 66*

In article 66 of the IADIP Draft Law one finds four special rules regarding property in transit, property subject to security rights, ships, aircraft, and other means of transport, and publicity of acts of creation, transfer, and extinction of property rights. The second paragraph of article 66 states that: «The acquisition and loss, by legal acts, of rights over goods in transit are governed by the law of the state of destination». The application of the law of destination in this type of situation can be found in private international law codifications of different Latin American countries. In the Dominican Republic, for example, article 77 of the Private International Law Act provides a similar rule. This has been adopted in other countries, such as Switzerland (article 101, Swiss Federal Private International Law Act of December 18, 1987), Belgium (article 88, Belgian Code of Private International Law of July 16, 2004), and Korea (article 22, Korean Private International Law Act of 2001). And the same rule exists in Peru, where article 2089 of the Civil Code contains a slightly more detailed rule based on the application of the situs law (article 2088), which establishes that «tangible property in transit is considered to be located at the place of its definitive destination». It is also interesting to note that Peruvian law includes recognition of the autonomy of the parties with respect to property in transit. Indeed, the parties

> may submit the acquisition and loss of real rights over tangible goods in transit to the law that regulates the original legal act of the constitution or loss of such rights, or to the law of the place of shipment of the tangible goods.

However, the validity of the choice made by the parties is limited, since it produces inter partes effects, which is probably an influence of the Swiss Private International Law Act (article 104).

According to the third paragraph of article 66 of the IADIP Draft Law, «Movable property subject to security is governed by the law designated by the special rules on the subject». Thus, it refers to the special legislation on the matter. In this regard, it is worth noting that Colombia has been a party to the Unidroit Convention on International Interests in Mobile Equipment (Cape Town Convention, 2001) since 2007[22]. According to this Convention, the law applicable to the creation and effects of international interests in airframes, aircraft engines and helicopters;

22. Approved through Decree 4734-2007.

railway rolling stock; and space assets (article 2.3) is the law of the forum state (lex fori) (article 5.3). It is also relevant Act No. 1676 of 2013, that includes the *lex rei sitae* rule with respect to assets subject to security in article 83, according to which

> the law applicable to creation, third-party effectiveness, registration, priority and enforcement shall be the law of the state in which the property that is the object of the security interest is located.

This article also contains specific rules for certain situations that offer greater certainty, and thus serve the purpose of this Act, which consists of providing greater protection to the creditor[23]. Thus, the law of the place where the guarantor is located applies in case the property is used in more than one country (article 83, second paragraph), and the law of the place where the registration is made, in case the property is subject to a special registration (article 83, third paragraph).

Regarding the publicity of acts of creation, transfer, and extinction of property rights, article 66 of the IADIP Draft Law states in its last paragraph that this «is governed by the law of the state where the formalities of such publicity are carried out». Note that this rule is conceived in broader terms, so that it covers not only any type of property but also formalities of any kind.

Finally, it is worth highlighting that the specific conflict of laws rules of article 66 of the IADIP Draft Law also have a bilateral approach, insofar as they do not limit themselves to ordering the application of Colombian law but allow the applicability of foreign law. They are, therefore, more flexible, and modern than the general rule of article 20 of the Civil Code which, as mentioned above, was conceived in the 19th century and is still in force.

III.3 *Cultural property*

The international restitution of cultural property is considered in the IADIP Draft Law separately in article 68. This article reflects that the advantages of using the *lex rei sitae* rule are not uncontested regard-

23. R. Bejarano Guzmán, *Garantías Mobiliarias*, in *Ámbito Jurídico*, available at https://www.ambitojuridico.com/noticias/columnista-impreso/civil-y-familia/garantias-mobiliarias (last Access: June 27, 2023).

ing cultural property, since its special nature and a great value[24]. This was considered by the Constitutional Court of Colombia in case No. T-3.402.625, in which the Court was asked whether the government is obliged to take the necessary actions so that 122 pre-Columbian gold sculptures are returned by Spain to Colombia. In cases of these kinds, notwithstanding underlying challenges, there is a tendency to prefer the application of the law of the place of origin of the property (lex originis). Thus, the 1991 Resolution by the Institute of International Law entitled "The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage" says in article 2 that «The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country», and in article 3 that «The provisions of the law of the country of origin governing the export of works of art shall apply». The *lex originis* rule is followed, for example, in article 13 of Directive 2014/60/EU of the European Parliament and the Council, 15 May 2014, and in national laws of Bulgaria and Belgium[25]. Furthermore, national courts in several countries have examined the use of the *lex originis* rule in several cases: for instance, in England, Attorney General of New Zealand v. Ortiz (1983) and Iran v. Barakat (2007)[26]; in Italy, Ecuador v. Danus-

24. D. Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, in *Columbia Journal of Law and the Arts*, 32, 2008, 11-150; E. Jayme, *Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law*, in *International Journal of Cultural Property*, 6, 2, 1997, 376-378; K. Siehr, *Das IPR der Kulturgüter*, in *MHB Yil*, 22, 2001, 751-772; K. Siehr, *The Beautiful One Has Come - to Return*, in J.H. Merryman (ed.), *Imperialism, Art and Restitution*, Cambridge University Press, New York, 2006, 114-134; K. Siehr, *Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property*, in *Uniform Law Review*, 20, 2015, 503-515; S. Symeonides, *Choice of Law*, Oxford University Press, New York, 2016; M. Wantuch-Thole, *Cultural Property in Cross-Border Litigation. Turning Rights into Claims*, De Gruyter, Berlin, 2015; V. Wiese, *Der Bedeutungswandel der Situs-Regel im Internationalen Sachenrecht der Kulturgüter*, in *Kulturgüterschutz - Kunstrecht - Kulturrecht. Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars Kunst und Recht*, eds. K. Odendahl and P. Weber, Nomos Verlag, Baden-Baden, 2010, 83-100.

25. International Private Law Code of Bulgaria (2005, modified in 2009), article 70; International Private Law Code of Belgium (2004), article 90 (Symeonides, 2016; Wiese, 2010).

26. P. Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, in *The DePaul University College of Law, Technology, Law & Culture Research Series Paper*, No. 09-007, 2009, 21-48; M. Wantuch-Thole, *Cultural Property in Cross-Border Litigation. Turning Rights into Claims*, De Gruyter, Berlin, 2015.

so (1982)[27]; and in the United States, U.S. v. McClain (1989) and U.S. v. Schultz (2002)[28].

In article 68 of the IADIP Draft Law the *lex originis* rule regarding the international restitution of cultural property is included as follows:

If an object considered by a state to be part of its cultural heritage has left its territory in a manner that the law of that state considers illegitimate at the time of departure, the restitution requested by that state is governed by the law of that state or, at the choice of the latter, by the law of the state on whose territory the object is located at the time of the request for restitution.

In addition, article 68 recognizes the rights of good faith possessors:

If the law of the state that considers the property to be part of its cultural heritage does not grant protection to the possessor in good faith, the latter may invoke the protection granted by the law of the state in whose territory the property is located at the time of the request for restitution.

This shall be read together with article 4 of the 1995 Unidroit Convention on Stollen or Illegally Exported Cultural Objects, to which Colombia is a party, when dealing with cases related to other states parties to this Convention[29], and attention may be paid also to the rule proposed in article 4, paragraph 2, of the above-mentioned 1991 Resolution of the Institute of International Law.

27. L. Prott, *Witnesses to History. Documents and Writings on the Return of Cultural Objects*, Unesco, Paris, 2009; V. Wiese, *Der Bedeutungswandel der Situs-Regel im Internationalen Sachenrecht der Kulturgüter*, in K. Odendahl - P. Weber (eds.), *Kulturgüterschutz - Kunstrecht - Kulturrecht. Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars Kunst und Recht*, Nomos Verlag, Baden-Baden, 2010, 83-100.

28. P. Gerstenblith, *From Steinhardt to Schultz: The McClain Doctrine and the Protection of Archaeological Sites*, in J. Richman (ed.), *Legal Perspectives on Cultural Resources*, Altamira Press, Walnut Creek, 2004, 100-118. Together with the use of the *lex originis* rule, in this matter it is also considered the need for going beyond conflictual justice and seeking towards the satisfaction of material justice, which requires looking at the final result; cfr. J. Basedow, *El Derecho de las Sociedades Abiertas. Ordenación Privada y Regulación Pública en el Conflicto de Leyes*, Legis, Bogotá, 2017; S. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, in P. Borchers - J. Zekoll (eds.), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, Transnational Publishers, 2001, 125-140.

29. Ratified since December 1, 2012.

Finally, this article refers to property of cultural value to an indigenous people or community that is returned to Colombia. In this regard, the article states that such destination «is governed by the rules of that people or community, unless the said people or community decides that it should be governed by the law of the state of which it is a part». Thus, article 68 of the IADIP Draft Law recognizes the right of these peoples and communities to decide on such property, which is rooted in articles 11 and 12 of the 2012 United Nations Declaration on the Rights of Indigenous Peoples, which reflect «the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions», contained in article 5 of the same Declaration.

III.4 *Intellectual property*

Article 90 contains the only conflict-of-laws rule relating to intellectual property rights in the Draft IADIP Law. The first paragraph of this article establishes the *lex loci protectionis* rule as follows: «Rights relating to intellectual property are governed by the law of the state in which the intellectual property is claimed». In the absence of specific conflict-of-laws rules and since, as mentioned below, issues relating to contracts are dealt with separately, the *lex loci protectionis* rule would apply mainly to conflict of laws cases relating to non-contractual obligations. The scope of the first paragraph thus embraces questions regarding the protection of intellectual property rights, as well as limitations and exceptions, such as duration, exhaustion of rights and provisions on fair dealing in copyright. At first glance, the rule contained in the first paragraph of article 90 leads to a territorial approach. However, an interpretation in that direction should be avoided as excessively formalistic – particularly in cases regarding copyright, the protection of which is not even subject to registration - and consideration should be given to the application of the law of the place where protection is sought, and not necessarily the *lex fori*[30].

In the second paragraph, the article deals with contractual issues. Here, the IADIP Draft Law clearly distances itself from a strict territorial approach and offers space for the freedom of choice by means of a remission to Section Two of Chapter Fourteen: «Contracts relating to intellectual property shall be governed by the provisions on contractual obligations of this Law».

30. Cfr. A. Metzger, *Intellectual Property (IPL)*, in *Max-EuP 2012*, available at https://max-eup2012.mpipriv.de/index.php/Intellectual_Property (PIL) (last access: June 26, 2023).

III.5 *Mobile conflict*

Article 67 of the IADIP Draft Law, which deals with mobile conflict cases, reads as follows:

> The change of location of movable property does not affect the rights acquired under the law of the place where it was located at the time of its acquisition. However, such rights may be opposed to third parties only after the requirements of the law of the new situation have been fulfilled.

This solution, based on the respect of vested rights, has historical roots in Latin America. The 1889 Treaty of Montevideo on International Civil Law includes such a rule in articles 30 and 31, which also state the respect of the rights acquired according to the law of origin of the property.

III.6 *Jurisdiction*

The national procedural rules that are currently in force in Colombia do not refer to the competence of its national courts to decide on conflict of law cases, i.e., situations with relevant foreign elements. Because of the lack of such procedural norms, some authors[31] have argued that article 28 of the Code of Civil Procedure, which addresses domestic (non-international) cases, might be interpreted extensively covering also cross-border cases. Such an interpretation, nevertheless, does not eliminate the disadvantages linked to the lack of codified rules in this field, especially in view of the legal uncertainty that lies behind it. In this sense, the second paragraph of article 32 of the IADIP Draft Law contains the *forum rei sitae* rule as follows: «Matters relating to rights in rem over real property located in Colombia are considered matters of exclusive jurisdiction». The first paragraph of the article clarifies that

> The exclusive international jurisdiction of Colombian courts is of an exceptional nature, must be interpreted restrictively, and lacks jurisdiction over other matters that may arise with respect to the same subject.

31. V.H. Guerra Hernández, *Conflictos de Jurisdicción y Competencia en Derecho Internacional Privado*, in L. García Matamoros - A. Aljure Salame (coords.), *Teoría General del Derecho Internacional Privado*, Temis, Bogotá, 2016, 349-375.

Article 30, for its part, regulates the competence of national courts regarding conflict of laws cases related to universal property:

> Colombian courts will have jurisdiction to hear actions related to universal property if: 1. the domicile of the debtor is located in Colombian territory, or 2. assets that form an integral part of the universality are located in Colombia.

In addition, the second paragraph of article 95 entails the *forum rei sitae* rule in relation to statute of limitations, according to which extinctive prescription of actions «is governed by the law of the place where the property is located». Finally, it is worth mentioning that article 29 of the IADIP Law Project refers to international jurisdiction in intellectual property matters:

> Colombian courts shall have jurisdiction to hear actions relating to the protection of intellectual property when the defendant is domiciled in Colombia or, in the absence of domicile, when the protection is invoked before them.

IV. *Summary*

The conflict of laws rule of article 20 of the Civil Code of Colombia must be reviewed. It clearly includes, as has been seen, obsolete terms that, among other things, make the norm difficult to understand. Additionally, resorting to interpretation does not fully solve the underlying problem, which lies in the lack of clarity of its text and in its unilateral character. It thus limits the consideration of the application of a foreign legal system even when this would be the most appropriate in a specific case. Addressing this is needed, not only in terms of legal certainty but also in terms of justice. While essentially maintaining the tradition included in the Colombian Civil Code currently in force, the IADIP Draft Law takes several steps forward. It not only includes rules relating to international jurisdiction, but also clarifies how the applicable law is to be determined and considers developments in relation to different types of property, namely property in transit, property subject to security, cultural and intellectual property, as well as particular situations such as mobile conflicts and acquisitive prescription.