

4-1-2009

Cuban Private International Law: Some Observations, Comparisons, and Suppositions

Kevin Tuininga

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Kevin Tuininga, *Cuban Private International Law: Some Observations, Comparisons, and Suppositions*, 40 U. Miami Inter-Am. L. Rev. 433 (2009)

Available at: <http://repository.law.miami.edu/umialr/vol40/iss3/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Cuban Private International Law: Some Observations, Comparisons, and Suppositions

Kevin Tuininga*

I.	INTRODUCTION	433
II.	TREATIES AND AGREEMENTS	435
III.	DOMESTIC LEGISLATION	437
	A. <i>Political Geography and Trade History</i>	437
	B. <i>The Civil Code</i>	439
	1. Capacity	441
	2. Property	442
	3. Succession	442
	4. Extracontractual Obligations	443
	5. Contracts	443
	6. <i>Renvoi</i>	447
	7. Public Policy Exception	447
	8. Application, Proof, and Interpretation	448
IV.	CONCLUSION	450

I. INTRODUCTION

For some time, the attitudes of American citizens and politicians toward the leaders and policies of Cuba have featured a dichotomy of fascination and aversion.¹ The fascination and aversion have endured over the years, perhaps because the embargo and Castro's anti-American fervor have interminably kept the feisty island's idiosyncrasies out of the reach of American curiosity piqued by pre-Castro excesses. It might even be said that the embargo, in collusion with the island's (former) charismatic leader and boastful defiance, has cloaked Cuba in mystique and garnered a grudging respect. The welcome end of that mystique, for the most part, may be signaled by the rise of the more matter-of-fact

* Law Clerk, the Honorable Gary A. Fenner, United States District Court for the Western District of Missouri.

1. See, e.g., BRIAN LATELL, *AFTER FIDEL: RAUL CASTRO AND THE FUTURE OF CUBA'S REVOLUTION 1* (2007) (As early as 1964, "[t]here were five or six [CIA analysts] working on Cuba, at a time when there were few other leaders of such intense interest in Washington policy circles as Fidel Castro."); Bureau of Western Hemisphere Affairs, *U.S.-Cuba Relations*, May 1, 2001, <http://www.globalsecurity.org/wmd/library/news/cuba/2558.htm> ("The relationship between the United States and Cuba for the last 40 years has been marked by tension and confrontations.").

and pragmatic Castro and the swing in political leanings in the United States.² A change in leadership, attitude, or approach in either or both countries, however, will not turn back the tangible and intangible effects of nearly fifty years of various states of sequestration. Rather, the reopening of ideological and economic channels between Cuba and the United States will require a re-acquaintance on numerous levels.

Due simply to exigence, the initial re-acquaintance will be largely on an economic level.³ With that re-acquaintance will come a surge in contractual and extracontractual disputes related to trade, some of which will be resolved in Cuba before Cuban courts and arbitral forums. With that in mind, this article investigates one foundational aspect of Cuban law: private international law,⁴ particularly choice of law.

Familiarity with a forum's choice-of-law rules is often overlooked in planning trans-jurisdictional business ventures and as a litigation strategy; this is true even in federally-organized countries like the United States, where choice-of-law dilemmas are a regular occurrence in solely domestic litigation. Creative arguments with respect to characterization of actions, characterization of issues within an action, and the location of events can propel or smother a claim due to application of more favorable or less favorable law. Moreover, knowledge of choice-of-law rules can aid parties in forming and realizing expectations with regard to future economic, political, and social interaction.⁵ With recent talk of opening markets in the United States to Cuban goods and vice versa, how Cuban forums determine the law applicable to disputes is a timely topic of study.

Though a significant bundle of literature exists regarding other aspects of the Cuban legal system, little has been written in

2. See Tom Brown, *Cuban American Support for Embargo Fading: Poll*, REUTERS, Dec. 3, 2008, available at <http://www.reuters.com/article/domesticNews/idUSTRE4B273S20081203>.

3. The United States is at present the seventh largest exporter to Cuba. It is the source of 4.3% of Cuba's imports. *Cuba Reiterates Call for End to U.S. Blockade*, W. ORLANDO NEWS, Sept. 28, 2008, available at <http://thepinehillsnews.com/wp/2008/09/25/cuba-reiterates-call-for-end-to-us-blockade/>.

4. Though the term is somewhat of a misnomer, generally private international law encompasses "the body of norms applied in international cases to determine the judicial jurisdiction of a State, the choice of the particular system or systems of law to be applied in reaching a judicial decision, and the effect to be given a foreign judgment." John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 561-62 (1952).

5. Henry J. Steiner, *The Development of Private International Law by International Organizations*, 59 AM. SOC'Y INT'L L. PROC. 38, 42 (1965).

readily-available North American journals in recent years on Cuban choice of law. Scant sources of information means substantial speculation is necessary with regard to how Cuban courts and lawyers determine applicable law, especially in light of Cuba's civil law tradition and socialist organization. Even without circumstantial barriers, the subject of choice-of-law in itself has been described as sometimes "speculative and arduous."⁶ Nevertheless, numerous general and interesting observations and comparisons can be made about Cuba's practice.

II. TREATIES AND AGREEMENTS

Cuba at one time exhibited a strong legal tradition and even international leadership, particularly in the area of choice of law. Dr. Antonio Sanchez de Bustamante y Sirvén of Cuba is credited with drafting the most comprehensive and generally accepted international convention on private international law in force among Latin American States.⁷ Though first identified as the Pan-American Code of Private International Law ("the Code"), delegates to the Sixth International Conference of American States passed a resolution recommending the Code be named "The Bustamante Code" in honor of Dr. Bustamante's work.⁸ In reference to the Code, the American delegate to the Conference, James Brown Scott, praised Cuba for its legal expertise at that time: "It is rare that a country within a few years of its independence has been able to take such an outstanding and leading position as the Republic of Cuba."⁹

Although Cuba's political history inserts significant uncertainty into determining the force of Cuba's international agreements entered into before the revolution, Inocencio García Velasco, a Cuban author writing on the subject of choice-of-law, notes that the Bustamante Code's continued validity and binding nature in Cuba should not be in doubt, as Cuba has never denounced the agreement.¹⁰ Even so, the Code's sphere of influ-

6. Jose Luis Siqueiros, *Private International Law in Mexico and the United States: A Brief Comparative Study*, 6 CAL. W. L. REV. 257, 258 (1969-1970).

7. Ernest G. Lorenzen, *The Pan-American Code of Private International Law*, 4 TUL. L. REV. 499, 528 (1930); James Brown Scott, *The Sixth International Conference of American States*, 12 INT'L CONCILIATION 276, 307 (1928).

8. Scott, *supra* note 7, at 307.

9. *Id.*

10. Inocencio García Velasco, *El sistema de derecho internacional privado en la república de Cuba*, 41 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 669 n.3 (1989) (on file with author).

ence is limited with respect to most litigants outside of Central and South America and a few Caribbean countries. The Final Act of the Sixth International Conference of American States makes clear that the Code's application is only between signatory States,¹¹ namely Bolivia, Brazil, Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.¹² With the possible exception of voluntary extension of some principles,¹³ it has no application in disputes involving parties from Asia, Europe, the Middle East, Africa, or the United States and Canada. For this reason, and the fact that multiple English translations and original texts are readily accessible for study,¹⁴ an in-depth discussion of the Bustamante Code is beyond the scope of this Article.

With regard to other inter-American developments in choice of law, Cuba is the black sheep. For instance, though the suspension was recently lifted, Cuba has been excluded from participation in the activities of the Organization of American States ("OAS") since 1962.¹⁵ Thus it is not a signatory to the various OAS conventions on the subject of private international law and has not participated in the six-and-counting Inter-American Specialized Conferences on Private International Law ("CIDIP") that

11. Where used in the following rules and text, "State" generally includes countries and jurisdictional subdivisions of foreign countries.

12. See Final Act of the Sixth International Conference of American States art. 2, Feb. 20, 1928 (Oceana); Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 590 n.17 (1992).

13. See Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225, 248 (1995) (acknowledging the Bustamante Code states its scope of application is only among the ratifying States, but implying that at least with respect to the treatment of foreign law, it makes sense to approach circumstances involving litigants from non-signatory States in a consistent manner); García Velasco, *supra* note 10 (stating some of the Bustamante Code's dispositions are invoked as general principles—presumably referring to circumstances where it does not by its own terms apply).

14. See, e.g., Earnest Lorenzen, *The Pan-American Code of Private International Law*, 4 TUL. L. REV. 499 (1930); JULIO ROMAÑACH, THE BUSTAMANTE CODE, BILINGUAL (SPANISH/ENGLISH) EDITION: INTERAMERICAN CODE OF PRIVATE INTERNATIONAL LAW 53 (Julio Romañach trans., Lawrence Publishing Company 1996); Convention on Private International Law (Bustamante Code), Oceana Treaties and International Agreements Online, CTIA No. 9759.000; Código de Bustamante, available at <http://www.mintra.gov.ve/legal/codigos/codigobustamante.html>.

15. Organization of American States, Member States and Permanent Missions, <http://www.oas.org/documents/eng/memberstates.asp> (last visited June 8, 2009); Nestor Ikeda, *OAS Ends Cuba Suspension After 47 Years*, ASSOCIATED PRESS, June 4, 2009. At the time of this article's publication, however, Cuba's position was that it had no interest in rejoining the OAS. *Id.*

have convened intermittently since 1975.¹⁶ Though Cuba could choose to adhere to CIDIP instruments, there is no sign that it currently does or has motivation to do so. Even if Cuba did follow those instruments or eventually adopts them, they would not be of primary significance for litigants outside of the signatory countries in South America, Central America, and the Caribbean.¹⁷

III. DOMESTIC LEGISLATION

A. *Political Geography and Trade History*

Immediately following the success of Castro's revolutionary forces, the enactment of "the Fundamental Law of February 7, 1959 suspended the Congress and vested all legislative authority in the Council of Ministers, which functioned under the prime minister appointed by the Council."¹⁸ Conflicts of domestic law under a system that allowed for only one legislative source must have evaporated. In 1974, Cuba was politically and administratively divided into fourteen provinces and 169 municipalities, with one special municipality, the *Isla de la Juventud* [Isle of Youth].¹⁹ In 1976, Popular Assemblies were established at the national, provincial, and municipal levels.²⁰ But despite the federal reorganization, only the *Asamblea Nacional del Poder Popular* [National Assembly of the People's Power] (hereinafter "National Popular Assembly") was granted legislative authority.²¹

In fact, legislative power was further centralized in the thirty-one-member Council of State elected from the National Popular Assembly's members.²² The 614-member National Popular Assembly meets only a few days per year to approve, without meaningful consideration, proposals submitted and previously

16. *Id.*; John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment of the IMF Charter*, 33 VA. J. INT'L L. 591, 614 (1993); Inter-American Specialized Conferences on Private International Law: Report and Conclusions 3, Apr. 17, 2003, available at scm.oas.org/doc_public/ENGLISH/HIST_03/CP11200E04.doc.

17. See Organization of American States, SIGNATORIES AND RATIFICATIONS OF THE INTER-AMERICAN TREATIES, http://www.oas.org/DIL/treaties_signatories_ratifications_subject.htm (last visited Jan. 23, 2009).

18. DEBRA EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 11 (Westview Press 1994).

19. Government and Politics of Cuba, http://www.cubapolidata.com/gpc/gpc_institutional_order.html (last visited Sept. 8, 2008).

20. EVENSON, *supra* note 18, at 14.

21. *Id.*

22. See *infra* notes 23-24 and accompanying text.

approved by the Council of State.²³ Whatever powers are delegated to provincial and municipal governments are “eminently administrative.”²⁴ This arrangement persists today.²⁵ Thus, conflicts between provincial laws or between municipal laws of Cuba should be virtually non-existent, aside from minor discretionary administrative rules or national legislation directed toward fewer than all provinces or municipalities.

Litigation involving foreign parties who were not signatories to the Bustamante Code over the last number of decades also likely presented relatively few choice-of-law problems in Cuban forums. Until its collapse at the beginning of the 1990s, the Soviet Union was Cuba’s principal trading partner and benefactor.²⁶ Close to 90% of Cuba’s trade was with countries of the Council for Mutual Economic Assistance (“CMEA”) and therefore at least as driven by politics and ideology as economics.²⁷ Where disputes did arise, they were governed by a large number of bilateral and multilateral agreements precluding choice-of-law issues.²⁸ Presently, leftist-leaning Venezuela and communist(?) China and Vietnam are among Cuba’s principal trading partners, although a smattering of other countries also maintained or have commenced trade with Cuba.²⁹ Economic interactions with some Middle Eastern countries sharing other characteristics with Cuba (read “anti-American” or “autocratic”), particularly Iran, are also on the rise.³⁰

23. Inter-Parliamentary Union-Cuba, http://www.ipu.org/parline-e/reports/2079_B.htm (last visited Sept. 8, 2008); *The Structure of Cuban State*, DIARIO GRANMA, <http://www.granma.cubaweb.cu/2008/02/24/nacional/artic20.html> (last visited Sept. 8, 2008); JAIME SUCHLICKI, CUBA: FROM COLUMBUS TO CASTRO AND BEYOND 164 (Brassey’s 2002) (1974).

24. Nelson Amaro, *Decentralization, Local Government and Citizen Participation in Cuba*, 6 CUBA IN TRANSITION 262, 267 (1996).

25. *The Structure of Cuban State*, *supra* note 23.

26. Berta Esperanza Hernandez Truyol, *Out in Left Field: Cuba’s Post-Cold War Strikeout*, 18 FORDHAM INT’L L.J. 15, 53 (1994).

27. *Id.* at 53 n.191.

28. García Velasco, *supra* note 10, at 673.

29. Mark Frank, *Cuba Tells Creditors Debt Grew by \$1.1 Billion*, REUTERS, Sept. 5, 2008, available at <http://www.reuters.com/article/marketsNews/idINN0519102820080905?rpc=44&sp=true>. Countries that have either maintained or expanded trade with Cuba include Canada, Spain, the Netherlands, Brazil, Germany, Russia, Japan, and Vietnam. Oficina Nacional de Estadísticas [National Office of Statistics], Intercambio comercial de mercancías por países seleccionados y áreas geográficas [Trade Exchange of Goods with Selected Countries by Geographical Area], <http://www.one.cu/aec2007/datos/8.4.xls> (last visited Sept. 9, 2008).

30. STAFF REPORT, CUBA TRANSITION PROJECT, ISLAMIC INVESTMENT IN CUBA (Aug. 11, 2008), available at <http://ctp.iccas.miami.edu/main.htm>; HANS DE SALLES-DEL VALLE, ISLAMIC INVESTMENT IN CUBA: PART II (Oct. 6, 2008), available at <http://ctp.iccas.miami.edu/main.htm>.

Thus, much of Cuba's trade relations remain significantly driven by goals of "mutual economic assistance" and political cooperation rather than free-market forces.³¹ One would expect that the ends and means of such trade relations are by nature less likely to generate cross-border trade disputes. Still, inter-State and investor-State disputes have no doubt increased due to Cuba's efforts to diversify its economy and trading partners to survive the collapse of its former socialist cohorts.

B. *The Civil Code*

The less-than-robust environment for entrepreneurial trade is reflected in Cuba's cursory set of domestic laws addressing choice-of-law issues.³² Most of these laws are included in the text of Cuba's Civil Code, enacted in 1987.³³ The 1987 Civil Code, according to García Velasco, simultaneously reflects the influence of Latin America, the Socialist Bloc, and the Spanish legal tradi-

31. See, e.g., *Cuba and Venezuela Sign Agreements for \$1.5 Billion in Projects*, DIGITAL GRANMA INTERNACIONAL, Mar. 1, 2007, available at <http://granmai.cubasi.cu/ingles/2007/marzo/juev1/09acuerdan-i.html>.

32. Though Cuba's domestic choice-of-law provisions are cursory and undeveloped, there are indications of significant choice-of-law scholarship. Rodolfo Dávalos Fernández, current President of Cuba's Court of International Commercial Arbitration and professor at Havana's Law School, has reportedly authored numerous books on subjects that include private international law. Marta Veloz, *Vigente nuevo Decreto de Ley sobre Arbitraje de Comercio Exterior* [New Foreign Arbitration Act in Force], SEMANARIO ECONÓMICO Y FINANCIERO DE CUBA [ECONOMIC AND FINANCIAL WEEKLY OF CUBA], Sept. 16, 2007, available at <http://www.opciones.cubaweb.cu/leer.asp?idnuevo=3004>; Gilda Fariñas Rodrigues, *Constituida nueva Corte Cubana de Arbitraje Comercial Internacional* [New Cuban Court of International Commercial Arbitration Established], DIGITAL GRANMA INTERNACIONAL, Sept. 14, 2007, available at <http://www.granma.cu/ESPAÑOL/2007/septiembre/vier14/38cortecomercio.html>. Dávalos Fernández is also listed as an honorary member of the Asociación Americana de Derecho Internacional Privado. See American Association of Private International Law, Members List, <http://www.asadip.org/members.html> (last visited Mar. 15, 2009). Along with a smattering of other literature, multiple course descriptions can be found via the internet that describe private international law classes taught at Cuban law schools. See, e.g., Course Description, Universidad Central Marta Abreu de las Villas, Derecho Internacional Privado, <http://derecho.sociales.uclv.edu.cu/derecho%20internacional%20privado.htm> (last visited Sept. 9, 2008); Course Description, <http://www.fgr.cu/Resumenes%20Especialidad%20Derecho/Internacional%20Privado/DERECHO%20INTERNACIONAL%20PRIVADO.doc> (last visited Sept. 9, 2008); Diana Bautista, El contrato electrónico y el Derecho Internacional Privado (Parte 1), May 19, 2004, http://www.injef.com/php/index2.php?option=content&do_pdf=1&id=414; Diana Bautista, El contrato electrónico y el Derecho Internacional Privado (Parte 2), May 25, 2004, http://www.injef.com/php/index2.php?option=content&do_pdf=1&id=418.

33. See *infra* notes 39-88 and accompanying text.

tion.³⁴ The influence of Latin America is reflected in Cuba's decision to maintain its body of conflicts rules in the preliminary title of its Civil Code rather than enacting a separate body of choice-of-law regulations.³⁵ On the other hand, the influence of Bustamante on Cuba's present system of private international law, according to García Velasco, is minimal.³⁶ Instead, Cuba's membership in the CMEA has exerted considerable sway over the present code.³⁷ Finally, the structure of the rules, augmented by some gap-filling provisions, continues to reflect the structure of the Spanish Civil Code mandated to govern Cuba beginning in 1889.³⁸

Similar diverse influences are reflected in the substance of the rules. For example, Article 18 of the Code follows the Spanish legal tradition and states that Cuban law governs the threshold characterization or qualification of a natural or legal event for the purpose of determining the applicable rule where laws conflict.³⁹ Accepting a near universal premise, Article 20 acknowledges that if an international agreement or treaty to which Cuba is a party establishes rules different from those expressed or not expressed in the Civil Code, the rules set forth in the international agreement or treaty apply.⁴⁰ This provision is of particular note considering Cuba's appetite for Bilateral Investment Treaties ("BITS")

34. García Velasco, *supra* note 10, at 669.

35. *Id.* at 670.

36. *Id.* at 669. Nevertheless, García Velasco notes some of the Bustamante Code's general provisions are sometimes invoked, presumably referring to instances where it does not directly apply. *Id.* at 669 n.3. *Cf.* Dolinger, *supra* note 13, at 248 (contending it would be unacceptable for a signatory State, at least in terms of application and proof of foreign law, to treat member States' law as law and treat non-member States' law otherwise).

37. García Velasco, *supra* note 10, at 670. For example, Cuba's separation of family law from its civil code into a separate set of laws reflects the organization in other socialist countries. *Id.* Regulations on personal status that are integrated into the family code are no longer included in the Civil Code's choice-of-law provisions. *Id.* at 672. Nevertheless, contrary to some other socialist structures, capacity in the realm of family law remains subject to the general conflicts provision of the Civil Code. *Id.* To illustrate, a foreigner who intends to formalize his marriage in Cuba with a Cuban, in addition to satisfying other requirements, has to prove his capacity in accordance with his personal law, i.e. that of his citizenship or nationality. *Id.* The capacity to become a guardian of a minor or incapacitated person is not encompassed within the general rule on capacity, however, as Cuban citizenship is a precondition to guardianship in Cuba. *Id.* Cuba has a comprehensive family code enacted in February of 1975 with various successive amendments. *Id.* at 670 n.9. It integrates matters ranging from marriage and divorce, parent-child relationships, and parentage and support, to guardianship. *Id.*

38. *Id.* at 671.

39. Código Civil [Cód. Civ.] Ley 59 art. 18, available at http://www.informatica-juridica.com/legislacion/Cuba_Codigo_civil.asp; García Velasco, *supra* note 10, at 671.

40. Cód. Civ. Ley 59 art. 20.

and analogous trade agreements.⁴¹

1. Capacity

Once the issue is identified or characterized, the following rules apply. Generally, the civil capacity of individuals to exercise their rights and perform legal acts is governed by the laws of the State of which they are citizens.⁴² This rule is in contrast to the majority of legal systems in North and Latin America, which now use the law of the State of a person's domicile or habitual residence as the determinant for matters relating to personal status.⁴³ Further expanding on the rule, Cuban law provides if a resident of Cuba is without citizenship, his or her capacity is determined by the law of Cuba.⁴⁴ The capacity of juridical persons is determined by the law of the State in which the entity was formed.⁴⁵

If an actor is deemed capable of a legal act, the proper form of the act is governed by the laws of the State in which the act was

41. Paul A. Haslam, *BITing Back: Bilateral Investment Treaties and the Struggle to Define an Investment Regime for the Americas*, 23 POLICY AND SOCIETY 91, 96 (2004), available at http://www.sciencedirect.com/science?_ob=mimg&_imagekey=B8JK2-4TK31JG-5-1&_cdi=43742&_user=687815&_orig=search&_coverDate=12%2F31%2F2004&_sk=999769996&view=c&wchp=dGLbVzz-zSkWz&md5=25c06d4e4c48925b4bd3a127000d43f7&ie=/sdarticle.pdf. Cuba ranks ahead of the United States and 23rd in the world in terms of advancing BITs. *Id.*

42. Cód. Civ. Ley 59 art. 12(1). However, the body of laws Cuban choice-of-law rules refer to appears to include the choice-of-law rules of the State whose law is deemed to apply. *See infra* note 80 and accompanying text. Thus, it is possible a Canadian citizen or other national residing in the United States might have his or her personal capacity determined by the law of his domicile according to American choice-of-law rules rather than the law of his nationality according to Cuban choice-of-law rules. Similarly, an American residing in Cuba might have his capacity determined by the law of Cuba since American choice-of-law rules would again refer back to the law of Cuba as the litigant's domicile. The same could be said with respect to the capacity of juridical persons or any other issue where Cuba's choice-of-law rules differ from those of the State to which they refer.

43. Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 273-74 (2002). The choice-of-law rules of continental European States, at least until recently, continue to designate the law of a person's nationality as that applicable to issues of status. *Id.* Tellingly, the choice between whether to use nationality or domicile as the connecting factor for status issues has been "widely acknowledged as essentially a debate about conflicting national interests between countries with emigrating populations and countries with immigrating populations." Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1789-90 (2008).

44. Cód. Civ. Ley 59 art. 12(2). There is no express provision for parties who have dual citizenship.

45. *Id.* art. 12(3).

undertaken, with some exceptions discussed below.⁴⁶ Acts undertaken before a Cuban consular officer or diplomat or before the captain of a Cuban vessel or aircraft are governed by the laws of Cuba.⁴⁷

2. Property

With respect to both movable and immovable property, the form and effect of civil legal acts are governed by the laws of the State in which the property is located.⁴⁸ The scope of this rule is very broad, and some other rules related to status and the form of legal acts are limited by the *lex rei sitae*.⁴⁹ One would assume, however, that the *lex rei sitae* is, in turn, circumscribed in many respects by provisions of family and succession law.⁵⁰ In addition to the nuances of its scope in relation to other provisions, the property rule presents numerous unanswered questions related to determining the situs of movable property. The Bustamante Code has some provisions which may shed light on how a Cuban court would approach such problems.⁵¹

3. Succession

According to Article 15 of the Code, the law of the State of which the deceased was a citizen at the time of his or her death, irrespective of the nature of the assets and their location, governs succession.⁵² This provision is similar to Article 144 of the Bustamante Code, which generally provides the deceased's personal law (law of the country of citizenship with regard to Cuba) governs

46. *Id.* art. 13(1).

47. *Id.* art. 13(2).

48. *Id.* art. 14(1). This is consistent with Articles 105 and 140 of the Bustamante Code. Other civil law countries similarly apply the law of the situs with regard to both movable and immovable property. See, e.g., CÓDIGO CIVIL art. 10.1 (Spain). Note, however, that at least under the Bustamante Code, situs rules would not apply where the property right in question is one related to domestic relations or arose from a legal act of the parties. See Ernest G. Lorenzen, *The Pan-American Code of Private International Law*, 4 TUL. L. REV. 499, 509 (1930). Ships and aircraft are subject to the law of the State of their flag, registration, or certification. Cód. Civ. Ley 50 art. 14(2).

49. García Velasco, *supra* note 10, at 672.

50. See *id.* (explaining that Cuban family law is "substantive, direct, and material;" suggesting it has direct application without referring to some other law); Law No. 50, art. 15 (stating the law of citizenship governs succession, whatever the nature and location of the assets); Lorenzen, *supra* note 7, at 509.

51. See Bustamante Code, arts. 106-11.

52. Cód. Civ. Ley 59 art. 15. The rules on succession and extracontractual obligations were reportedly intended as implementation of their counterparts in the Spanish Civil Code. García Velasco, *supra* note 10, at 672.

matters, such as “order of descent, the quantum of rights of descent and intrinsic validity.”

4. Extracontractual Obligations

Article 16 provides that extracontractual obligations⁵³ are governed by the law of the place where the fact or event that gave rise to the obligation occurred.⁵⁴ It is unclear whether the language of this provision would by default point to the law of the place of the injury in circumstances where the place of injury and the place of the act do not coincide.⁵⁵ If the Civil Code’s drafters intended the place of the injury to predominate, the provision departs from the Bustamante Code’s emphasis on the place of the act or omission.⁵⁶

5. Contracts

Contract issues, in the absence of an express or implied submission of the parties, are governed by the law of the place of performance.⁵⁷ At least where Cuban law is determined applicable, germane law may include the relevant customs and usages of trade.⁵⁸ Reportedly, the allowance for party autonomy in contract choice of law does not apply to disputes that arise from an employ-

53. The field of extracontractual obligations is likely somewhat broader under Cuban law than the field of tort law in the United States. An article linked to the website for Cuba’s *Fiscalia General* cites a definition of “extracontractual obligation” from the European Committee on Legal Cooperation as “the obligation to repair damage resulting from an event other than the nonperformance or performance of a contractual obligation.” DERECHO INTERNACIONAL PRIVADO: OBLIGACIONES Y DERECHOS REALES 8, available at <http://www.fgr.cu/Resumenes%20Especialidad%20Derecho/Internacional%20Privado/Separata%20de%20Derecho%20Internacional%20Privado.doc>.

54. Cód. Civ. Ley 59 art. 16.

55. Under common law rules, a variety of factors are considered in determining whether the law of the place of the injury or of some other contact point (i.e. the law of the place of the act or the law of the parties’ common domicile) should govern, such as whether the law in question is conduct regulating or loss distributing and whether the parties have a common domicile. See Patrick J. Borchers, *Survey of New York Law: Conflict of Laws*, 49 SYRACUSE L. REV. 333, 347 (1998).

56. See Bustamante Code, art. 168.

57. Cód. Civ. Ley 59 art. 17.

58. Commercial Code of the Republic, art. 2 (on file with author), available at <http://www.gacetaoficial.cu/html/codigocomerciorepublica.html>. Cuba “has a Commercial Code that dates back to 1886 . . . Cuba’s Commercial Code was amended numerous times prior to the 1959 revolution, and . . . has survived thirty-seven years of socialist rule during which only three amendments have been introduced defining the rules for administrative contracts.” Matias F. Travieso-Díaz & Stephan M Bleisteiner, *Some Lessons For Cuba From the Legal Changes in Eastern Europe*, 3 U. MIAMI Y.B. INT’L L. 173, 204 (1995).

ment contract.⁵⁹ The offered justification for the separate treatment of employment contracts is, first, that socialist countries do not accept the will of the parties as a point of connection in employment contracts, and second, that Cuba deems the problems in determining the law applicable to such contracts merit a distinct approach.⁶⁰

One article accessible through the website of Cuba's *Fiscalia General de la República*⁶¹ acknowledges identifying the law of the place of performance in contract disputes is not easily made with respect to some contracts and is not as static as the simple terms of the rule suggest.⁶² Nevertheless, the writer lauds the versatility of the rule in that the choice of the place of a contract's performance avoids the automatic imposition of national law while allowing sufficient State control of activity that occurs within Cuba, particularly in the area of international trade.⁶³ Based on that rationalization, one would suspect a strong and natural preference for the application of forum law in debatable cases. In contrast to the provisions of the Civil Code, the general contract-conflicts rules of the Bustamante Code establish two presumptions where no valid choice-of-law clause governs: First, the personal law common to the contracting parties is controlling.⁶⁴ In the absence of common personal law, the law of the place of the contract's formation governs.⁶⁵

The scope of party autonomy in contract choice-of-law, which laws allow for derogation, for example, is unclear. One writer suggests Cuba is careful to guard against the improper avoidance of laws of mandatory application in contract choice of law, as are other countries.⁶⁶ European courts follow a similar approach and

59. García Velasco, *supra* note 10, at 672 n.23. One would suspect the law of the place of performance would be the logical choice to displace the parties' choice.

60. *Id.*

61. Cuba's *Fiscalia General de la República* has been compared to a United States Attorney General's Office. Raymond J. Michalowski, *Between Citizens and the Socialist State: The Negotiation of Legal Practice in Socialist Cuba*, 29 *LAW & Soc'y REV.* 65, 70 (1995).

62. DERECHO INTERNACIONAL PRIVADO: OBLIGACIONES Y DERECHOS REALES 2, available at <http://www.fgr.cu/Resumenes%20Especialidad%20Derecho/Internacional%20Privado/Separata%20de%20Derecho%20Internacional%20Privado.doc>.

63. *Id.*

64. Bustamante Code, art. 186.

65. *Id.*

66. DERECHO INTERNACIONAL PRIVADO: OBLIGACIONES Y DERECHOS REALES 8, <http://www.fgr.cu/Resumenes%20Especialidad%20Derecho/Internacional%20Privado/Separata%20de%20Derecho%20Internacional%20Privado.doc> (last visited Jan. 26, 2009). European courts, from which Cuba derives much of its civil law tradition, will refuse

rule that party autonomy is restricted by certain categorical exceptions.⁶⁷ On the other hand, American courts generally follow a more flexible approach, using a “public-policy” benchmark.⁶⁸ In this respect, party autonomy is almost certainly more restricted in Cuba than most common law attorneys would otherwise encounter. This more conservative approach may be reflected in Cuba’s refusal to honor choice-of-law clauses in employment contracts.⁶⁹

At the same time, where contracting parties have the opportunity to indentify governing law but fail to do so expressly, Cuban conflicts rules defer to the implied or tacit submission of the parties.⁷⁰ The scope of the inquiry into an “implied or tacit submission,” whether objective indications of intent are required or whether a hypothetical intent is assumed in the absence of other indications outside or within the contract, for example, is unclear.⁷¹

Cuban choice-of-law rules also respect forum-selection clauses, at least when they choose arbitral forums.⁷² According to a recently enacted law governing the Corte Cubana de Arbitraje Comercial Internacional [Cuban Court of International Commercial Arbitration] (“CCICA”), formerly the Corte de Arbitraje de Comercio Exterior [Arbitration Court of Foreign Trade] (“ACFT”),

to enforce a choice-of-law clause that derogates from a “mandatory rule” or deprives a consumer or employee of the laws and protections of her home State. Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1651 (2008). There are two kinds of mandatory law in European jurisprudence. “Some are mandatory in the contracts sense in that they ‘cannot be derogated from by contract.’ Some rules are also mandatory in the conflicts sense in that they must be applied regardless of whatever law is applied to the contract, whether or not that choice of law is the result of party stipulation.” *Id.*

67. Borchers, *supra* note 66, at 1645.

68. *Id.*

69. See *supra* notes 59-60 and accompanying text.

70. García Velasco, *supra* note 10, at 672. The difference between accepting the parties’ implied or tacit choice and the process of using an objective ad-hoc approach in the absence of an express choice may not be meaningfully distinct in many instances, depending on whether one’s definition of implied intent requires evidence of actual intent or includes hypothetical intent. One prominent American author notes the law the parties impliedly intended to have applied is often deemed to be the law of the State toward which the contract was directed, which in turn sounds remarkably akin to the objective multilateral approaches like that of the Restatement (Second) of Conflict of Laws. Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 199-200 (1997).

71. Dolinger, *supra* note 13, at 246 (pointing out that international conventions generally require “that the free choice of the parties has to be established expressly, ‘clearly demonstrated,’ or ‘demonstrated with [some degree of] reasonable certainty,’” to give effect to their intent).

72. See *infra* notes 73-76 and accompanying text.

Cuba's courts of ordinary jurisdiction are prohibited from hearing matters within the scope of an express agreement to arbitrate unless, on motion of a party, the court of ordinary jurisdiction deems the arbitration agreement invalid, ineffective or unenforceable.⁷³ According to the CCICA's president, the prohibition on ordinary-court jurisdiction is limited to those cases where the parties invoke arbitration as their exclusive mode of dispute resolution.⁷⁴ When applicable, however, the prohibition reaches beyond CCICA arbitrations and similarly prevents ordinary-court interference in ad-hoc arbitral proceedings.⁷⁵ At least in arbitrations before the CCICA, it appears that Cuban courts are directed to honor arbitration clauses with regard to extracontractual matters as well.⁷⁶

All things considered, in Cuba, where the Bustamante Code and its sound endorsement of party autonomy in contractual relations emerged, the scope of party choice is probably broader, and certainly no less expansive, than in kindred Latin American States.⁷⁷ Consider, for example, that as late as 1940 some other Latin American countries signed on to an Additional Protocol to the 1889 Montevideo Convention that expressly restricted party autonomy with respect to choice of law and jurisdiction in its Article 5.⁷⁸ Further, in terms of timing, Cuba accepted the principle of party autonomy in contractual choice of law sooner than the United States—party autonomy continued to be a disputed subject in American law after the adoption of the Bustamante Code in 1928.⁷⁹

73. Law No. 250, On the Cuban Court of International Commercial Arbitration, art. 15, July 31, 2007 (on file with author). This corresponds to Article 55 of Law No. 1303. On the Arbitration Court for Foreign Trade, May 26, 1976 (on file with author), available at <http://www.aeec.cu/docs/Ley%20No.%201303-1976%20De%20la%20Corte%20de%20Arbitraje%20de%20la%20C%2%A0mara%20de%20Comercio.doc>.

74. Rodolfo Dávalos Fernández, *El arbitraje comercial internacional en Cuba* [International Commercial Arbitration in Cuba], 2005 REVISTA DE LA CORTE ESPAÑOLA DE ARBITRAJE [JOURNAL OF THE SPANISH COURT OF ARBITRATION] 11, 24-25 (Spain) (2005).

75. *Id.*

76. Cód. Civ. Ley 250 art. 9.

77. Cf. Dávalos Fernández, *supra* note 74, at 32.

78. See *id.*; Additional Protocol to the 1889 Montevideo Convention, art. 5, Mar. 19, 1940, available at <http://ar.geocities.com/doctoracalderon/tratado.htm>.

79. See, e.g., *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F. 2d 115, 117 (2d Cir. 1931) (Per Judge Learned Hand, "People cannot by agreement substitute the law of another place Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.").

6. *Renvoi*

Related to party autonomy in contract choice-of-law, no presumption is stated in Cuban law as to whether a generally-stated choice by the parties is presumed to include the choice-of-law provisions of the State chosen or only its substantive law. In other areas, apparently without significant limitation, Cuba accepts the theory of *renvoi*.⁸⁰ Thus the reference of Cuba's codified choice-of-law rules to the law of another State includes that State's choice-of-law rules. In light of that, parties who do not distinguish between substantive law and conflicts law in their contract choice-of-law clauses increase the risk that a Cuban forum will apply laws they never envisioned could apply.

According to Article 19 of the Civil Code, where Cuban private international law refers to foreign laws, and those foreign laws refer back to Cuban law, Cuban law applies.⁸¹ Moreover, if foreign law refers to the law of a third State (commonly referred to as transmission), application of that State's law is permissible so long as it does not violate principles of social, economic, and political development of Cuba.⁸² If the third State's law does violate those principles, Cuban law applies.⁸³

7. Public Policy Exception

Beyond situations involving transmission to a third State's law, Article 21 of the Civil Code states foreign law does not apply to the extent that its effects are contrary to the principles of political, social, and economic development of the Republic of Cuba.⁸⁴ For reasons unknown, Article 21 makes no provision with respect to what law is to apply in place of the displaced foreign law.⁸⁵ This is in contrast to Article 19, referenced above, which states Cuban law applies if the law of a third State is deemed contrary to Cuban public policy.⁸⁶

For certain, Articles 19 and 21 could function as an end around with regard to negating the effect of their adjacent choice-of-law rules. García Velasco acknowledges the political nature of

80. Cód. Civ. Ley 59 art. 19.

81. *Id.*

82. *Id.* 59 art. 21.

83. Cód. Civ. 59 art. 19. What kinds of laws violate principles of social, economic, and political development of Cuba is unclear.

84. *Id.* art. 21.

85. *Id.* art. 19; García Velasco, *supra* note 10, at 671.

86. Cód. Civ. 59 art. 19.

Articles 19 and 21 and notes the Cuban rule on the matter was originally intended to be on the more politicized end of the public order continuum when compared to similar provisions in other socialist States.⁸⁷ The risk of politicized use is especially great considering the fervor with which Cuba has guarded its revolutionary ideals combined with doubts about the independence of Cuba's judiciary and other conflict-resolution forums. Nevertheless, it should be noted that the Cuban government now has considerable incentive to ensure a predictable legal environment for foreign litigants due to the necessity of attracting foreign investment into its fragile economy. Cuban lawyers recognize the need for predictability and stability in the legal field.⁸⁸

8. Application, Proof, and Interpretation

With regard to application, proof, and interpretation of a foreign law, all indications are that Cuba is part of the host of other civil law countries that treat applicable law primarily as a question of law.⁸⁹ Such an approach would follow that of multiple continental European civil law traditions, including the Spanish legal tradition ancestral to Cuba's.⁹⁰ Cuba's former allies in the Socialist Bloc similarly followed the principle of *jura novit curia*⁹¹ rather than treating foreign law as a question of fact to be applied only on request and proof by the parties.⁹²

Another hint in this regard is that Article 408 of the Bustamante Code states "the judges and courts of each contracting State shall, when appropriate, apply *ex officio* the laws of the others, without prejudice of the probative means referred to in this chapter."⁹³ Nevertheless, in an attempt to assist the judge in his task, the Bustamante Code proceeds to provide the opportu-

87. García Velasco, *supra* note 10, at 671. Cuba's rule was reportedly similar to that enacted by Czechoslovakia in 1963 and the German Democratic Republic in 1975. *Id.* at 671 n.20.

88. Alina Zaragoza Ramírez & Odalys Otero Nuñez, *El Arbitraje y los contratos de joint venture: Su tratamiento en la ley de inversión extranjera cubana*, [Arbitration and Joint Venture Contracts: Their Treatment under the Cuban Foreign Investment Law], REVISTA IBEROAMERICANA DE ARBITRAJE Y MEDIACION [IBERO-AMERICAN JOURNAL OF ARBITRATION AND MEDIATION] (2008) (Peru), available at <http://www.servilex.com.pe/arbitraje/congresopanama/b-09.php>.

89. See Dolinger, *supra* note 13, at 225.

90. *Id.* at 235-36.

91. "The court knows the laws; the court recognizes rights." BLACK'S LAW DICTIONARY 852 (6th ed. 1990).

92. D. Lasok, *Extraterritorial Enforcement of Law by Treaty in Eastern Europe*, 12 INT'L & COMP. L.Q. 1340 n.24 (1963).

93. Bustamante Code, art. 408, in ROMANACH *supra* note 14, at 53.

nity for a party to prove the text, force, and meaning of a foreign law.⁹⁴ Interestingly, Article 244 of Cuba's Civil and Labor Procedural Law takes this effort to provide assistance to the judge one step further and states each party has the burden of proving the validity of a foreign law when they invoke its application.⁹⁵ Admittedly, by stating so in terms of a burden rather than an opportunity or right, Article 244 implies a judge might not be required to apply a foreign law, even when Cuba's choice-of-law rules point to it and where the law is in fact valid and capable of proof, if the party who favors that law's application does not successfully assist with proof of its content or validity.⁹⁶ If this were the case, it would make application of foreign law to some extent voluntary for the judge and akin to treating the foreign law as fact.

The more likely interpretation in light of Cuba's legal heritage and the Civil Code's benefactors would be that Cuban law, although fundamentally treating foreign law as law, allows the judge to impose upon litigants to assist with the discovery of the content and enforceability of the foreign law in question.⁹⁷ Nevertheless, the judge must still make every effort to apply the foreign law in the absence of the parties' assistance.⁹⁸ This approach would be consistent with that of the Bustamante Code which, where such proof remains absent, authorizes the judge on his own motion to request a report on the subject through diplomatic channels.⁹⁹ One author notes it would be antithetical, or at least unacceptable, for a country "to treat the law of the member-states of the Bustamante Code as law and give a different treatment to the legal provisions of other states."¹⁰⁰ Perhaps explaining the contradiction in the phraseology of Article 244, Brazil, a fellow signatory to the Bustamante Code, similarly authorizes the judge to demand proof from a benefiting party, but if that party is silent, even intentionally to avoid compliance with the foreign law, the judge remains obligated to "search, find, and apply the law" by all avail-

94. *Id.* at arts. 409-10.

95. Law No. 7, On Administrative, Civil and Labour Procedures, Aug. 22, 1977 (amended 1999), available at <http://www.gacetaoficial.cu/html/leyprociviladminlaboral.html>.

96. Such an approach would be consistent with that of Brazil, also a signatory to the Bustamante Code. See Dolinger, *supra* note 13, at 244-45.

97. See *id.*

98. *Id.*

99. Bustamante Code, art. 410, in ROMANACH, *supra* note 14, at 53-54.

100. Dolinger, *supra* note 13, at 248.

able means.¹⁰¹

Article 244 of the Civil and Labor Procedural Law does not state whether a judge should apply forum law, apply principles of equity, dismiss the case, or impose some other solution in the event of impossibility of proper proof of the content or validity of foreign law. Nor does it state whether a judge should apply foreign law *ex officio* in contractual disputes where the parties did not expressly or tacitly choose applicable law but were able to do so.¹⁰² It may be, due to the relative disrepair of Cuba's legal system, that these more refined choice-of-law questions have not yet been addressed by Cuban legal scholars.

IV. CONCLUSION

Since the infancy of Cuba's legal tradition, the instances in which an attorney would encounter choice-of-law issues in a Cuban forum have probably not been prolific. For much of Cuba's history, the substance of its laws, whether categorized as public or private, was not especially important. Under Spanish colonial rule, the legal landscape was famous for corruption, fraud, and enforcement laxity.¹⁰³ What followed independence was a succession of regimes so depraved an American ambassador once angrily complained, "[C]orruption has never become so rampant, so organized, or so profitable for those at the top [in Cuba]. It has never caused such widespread disgust."¹⁰⁴ Thus, rather than concern oneself with what law might apply to a dispute, one was wiser to investigate the most beneficial targets for bribery or other forms of extra-legal persuasion.¹⁰⁵

A foreseeable result of this chaotic legal history, the choice-of-law provisions codified in Cuba's domestic law are meager. At least to the eye of a common-law attorney, they are also vague and underdeveloped. García Velasco admits that, unlike modern tendencies in choice-of-law rules, Cuba's rules exhibit stubborn methodological traditionalism in their adherence to rigidity and their

101. *Id.* at 245.

102. On this issue, some suggest the parties' silence on choice-of-law should be interpreted as a choice of forum law, thereby negating the judge's responsibility to apply foreign law. *Id.* at 246. Others believe knowledge and rejection of foreign law in preference for forum law cannot be implied from mere silence on the issue and the judge therefore should still seek and apply foreign law. *Id.*

103. SERGIO DÍAZ-BRIQUETS & JORGE PÉREZ-LÓPEZ, CORRUPTION IN CUBA: CASTRO AND BEYOND 61 (University of Texas Press 2006).

104. *Id.* at 77.

105. *Id.* at 72.

accounting for few connecting factors.¹⁰⁶ He notes Cuban legislators have probably perceived little need for revision because for many years Cuba's most significant legal traffic involved Socialist Bloc countries under a large number of bilateral and multilateral agreements precluding choice-of-law issues.¹⁰⁷ According to García Velasco, the conflict provisions embedded in the Civil Code were aimed at regulating legal traffic of minimal importance.¹⁰⁸ Nevertheless, with increasing volume and diversity of international activity directed toward Cuba, they will likely be invoked with greater frequency in the coming years in multiple forums and circumstances.

For instance, since Cuba has sought to open certain sectors of its economy to foreign investment, investor-State disputes not governed by a superseding international agreement addressing choice of law or those disputes including a forum-selection clause that avoids Cuban courts have no doubt increased substantially.¹⁰⁹ In that context, one could encounter the rules in ad-hoc arbitration under the 1976 United Nations Commission on International Trade ("UNCITRAL") Arbitration Rules or the 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in 2006); both provide that applicable law is to be determined by the conflict-of-laws rules the tribunal deems applicable in the absence of the parties' choice.¹¹⁰ It is therefore possible such tribunals could find Cuba's choice-of-law rules applicable.

The rules also arise in arbitration before the CCICA.¹¹¹ By

106. García Velasco, *supra* note 10, at 673.

107. *Id.*

108. *Id.*

109. In its first twenty-five years of operation, the ACFT processed only 181 cases, an average of only seven per year. Gilda Fariñas Rodrigues, *Constituida nueva Corte Cubana de Arbitraje Comercial Internacional* [New Cuban Court of International Commercial Arbitration Established], DIGITAL GRANMA INTERNACIONAL, Sept. 14, 2007, available at <http://www.granma.cu/ESPANOL/2007/septiembre/vier14/38corte.comercio.html>. In contrast, between 1990 and 2006, the ACFT resolved 478 disputes, averaging forty-seven per year from 2000 to 2006. *Id.* From 2000 to 2004, the ACFT presided over 209 proceedings. Dávalos Fernández, *supra* note 74, at 13 n.6.

110. United Nations Commission on International Trade Law Arbitration Rules, art. 33, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Apr. 28, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; 1985 UNCITRAL Model Law; art. 28(1)-(2), (4) (Dec. 11, 1985) (amended 2006), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

111. Although utilized particularly by parties from select countries—out of forty-two cases before the ACFT in 2004, thirty-three involved parties from Spain, Italy, and Panama—the scope of participants will likely expand if the CCICA can maintain and expand on the ACFT's relatively noble reputation. Dávalos Fernández, *supra* note 74, at 13.

moniker alone, it is evident disputes in the CCICA involve foreign contacts. Preceding the CCICA, arbitrations before the ACFT applied Cuban law in the absence of the parties' designation.¹¹² It is possible that mandate was to include Cuba's choice-of-law rules, but it is unclear whether this was the drafter's intent or the ACFT's practice.¹¹³ Beginning with the reconstitution of the ACFT in the CCICA, however, with one significant twist, it is expressly provided that applicable law is determined by the choice-of-law rules of the forum if the parties' have not indicated their choice.¹¹⁴

Even before encountering litigation in the forums discussed above or in Cuba's other domestic courts, choice-of-law rules are important in terms of planning future relations.¹¹⁵ Often, litigation can be avoided or minimized with knowledge of choice-of-law rules that might apply to a foreseeable dispute and the scope of party autonomy in choosing the law applicable. If applicable law is clear, one less issue remains for resolution by a neutral third party. In this regard, the summary set forth above at minimum identifies potential disputes that could be avoided from the outset of an investment venture or other interaction involving Cuban parties.

112. Cód. Civ. Ley 1303 art. 56.

113. See Enrique Dahl & Alejandro M. Garro, *Cuba's System of International Commercial Arbitration: A Convergence of Soviet and Latin American Trends*, 15 LAW. AM. 441, 457-58 n.85 (1984). The authors of one article on the ACFT state simply that, in the absence of the parties' choice, Cuban law applied; and so did commercial usage, custom and rules stipulated to by the parties. Zaragoza Ramírez & Otero Nuñez, *supra* note 88.

114. Cód. Civ. Ley 250 arts. 29-30. However, with respect to certain disputes submitted for arbitration under Cuba's foreign investment laws, Cuban law is automatically applied regardless of the parties' choice or the otherwise applicable choice-of-law rules. *Id.* Note the application of choice-of-law rules in non-judicial forums may be somewhat different. Generally, limits on party autonomy are fewer and more lax in the context of commercial arbitration. Philip J. McConaughay, *The Scope of Autonomy in International Contracts and its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT'L L. 595, 609-10 (2001); Juenger, *supra* note 70, at 201-02. Further, arbitrators may be more inclined to consider principles of equity or factors outside the law in determining applicable law. *Id.* Both of these phenomena have been acknowledged by the chief arbitrator of Cuba's institutionalized arbitral forum. Dávalos Fernández, *supra* note 74, at 34.

115. See Steiner, *supra* note 5, at 42.