

Conflict of Laws Regarding Separation and Divorce in Argentina, Paraguay, Chile and Colombia

Background

Conflict-of-laws problems abound in the international litigation of separation and divorce, since the facts surrounding the issues thereof are myriad, forums entertaining suit are reluctant to relinquish the prerogatives of sovereignty, and general legal concepts and rules are not always conveniently applicable thereto.

This is particularly true with respect to the Spanish-speaking countries of the Western Hemisphere, because the common hispanic culture and geographical proximity provide the inhabitants with easy accessibility to a number of different legal systems, not all of which permit the absolute dissolution of marriages (*i.e.*, divorce).

More specifically, there are four Spanish-speaking countries of South America which do not permit their courts to issue absolute divorce decrees, restricting said courts to the issuance, under certain defined circumstances, of decrees which enable the requesting spouses to suspend their matrimonial life together (*i.e.*, separation).

The context within which conflict-of-laws problems are analyzed in the area of separation and divorce, in the Latin American legal community, varies according to how the corresponding legislation of each country treats marriage: as a contract, a public institution, or a statutory creation. The concept of marriage in each Latin American country, in turn, is based upon many underlying economic, social, political, and philosophical orientations.

Of particular importance are the traditional roles which the Roman Catholic Church and the family unit have played within most Latin Ameri-

*Of the New York Bar, J.D., Columbia Univ. Law School; Member, American Inter-American, International and New York State Bar Associations, and The Association of the Bar of the City of New York.

can societies. Borda¹ summarizes some of the other elements at play in the policy process as:

1. The growing equality of women in all areas of endeavor, and their subsequent independence and change of attitude toward matrimonial subordination;

2. The age of technology leading to the phenomenon of instant change, and thus less patience in the search for peace and harmony;

3. The tendency towards less rigid moral and religious convictions, and thus the molding of the family more around the idea of making life comfortable and agreeable, than around the idea of performing duties;

4. The growth of large urban areas leading to a shortage of housing;

5. The cultural and political influence of such pro-divorce countries as the United States and the Soviet Union.

The legislature of a pro-divorce country (one allowing the absolute dissolution of marriage) in Latin America, would base expansive divorce laws on the following value judgments:

1. Prolonging a bad union is dysfunctional with respect to the personal lives of the parties, the children and society in general;

2. Not allowing complete divorce, after already allowing a separation of the parties thereto, is to encourage a conventional lie and prolong a bad remembrance;

3. Prohibiting the innocent party from remarrying and living in honesty creates either celibacy, sexual and psychological problems, or occult relationships;

4. The stigma of illegitimacy is maintained;

5. Complete divorce would be a civil remedy, and would not obligate Catholics to go against their consciences.

The legislatures of Argentina, Paraguay, Chile and Colombia (the so-called non-divorce countries) justify laws in this area on the following tenets:

1. One must approach this matter from a broad social perspective, and not from concrete cases—*i.e.*, social problems are of greater importance than the sacrifices of individuals;

2. Divorce breeds divorce because less tolerance is maintained;

3. There will be many children with “step-mothers” or “step-fathers,” or many “orphans” with live fathers and mothers, or many couples will decide not to have children at all;

4. The marriage contract would become the most infamous of all legal contracts—*i.e.*, easy to breach;

¹Guillermo Borda, *Manual de Derecho de Familia*, Buenos Aires, 1956.

5. Duties would be forgotten and an egoistic manner of thinking would prevail. "Matrimonial peace and harmony is not the fruit of successive attempts, but of a noble spirit of sacrifice."²

Analysis

Most conflict-of-laws problems regarding separation and divorce in Argentina, Paraguay, Chile and Colombia could conceivably encompass multitudinous factors, to wit: the country in which the marriage was celebrated or the separation or divorce decree was issued; whose legal system is petitioned for what remedy; the nationality, domicile or residency of the respective spouses at the time of marriage and at the time of separation and/or divorce; existing international, bilateral or multilateral agreements.

The Montevideo Treaty on International Civil Law of 1889, including the Convention and Additional Protocol thereto (hereinafter referred to as the "Montevideo Treaty"), which has been adopted by Argentina, Paraguay and Colombia (in addition to Bolivia, Peru, and Uruguay), is a multi-lateral treaty of some significance in the instant analysis. In particular, Article 13 thereof establishes the principle that the law of the matrimonial domicile governs separation and divorce, provided the grounds alleged thereunder are also admitted by the law of the country in which the marriage was celebrated.

The relationship of this variation of the domicile principle to the one governing Argentine and Paraguayan domestic law on separation and divorce, as well as to the nationality-territoriality principle established under Colombian law, results in a number of conflict of laws intricacies which are noted and commented upon herein.

On the other hand, the Code of Private International Law of 1928 (hereinafter referred to as the "Bustamante Code") has been largely ignored in this context, since Chile is the only one of the four cited countries, which did not deposit a major reservation to the pertinent provisions thereof. The reservations of Argentina, Paraguay and Colombia have, for all practical purposes, prevented the pertinent provisions from having any legal effect in the international litigation of separation and divorce in those countries.

For analytical purposes hereunder, a problematic guideline has been utilized in order to isolate those factors which may be most relevant to a specific conflict-of-laws situation, regarding separation and/or divorce in any one of the cited countries. Such a guideline should also offer some perspective on the major issues contained therein:

²Borda, *op. cit.*, *supra*, at 206.

- I. Alien Requesting Separation and/or Divorce in Country
 - a—Spouses married in that country or abroad
 - b—Spouses domiciled in that country or abroad.
- II. Alien Divorced Abroad Petitioning National Court for Recognition of Foreign Divorce in Country
 - a—Spouses married in that country or abroad
 - b—Spouses domiciled in that country or abroad at the time divorce proceedings were initiated
 - c—Spouses married or divorced in countries adopting the Treaty of Montevideo
 - d—Spouse(s) changed nationality after the marriage.
- III. Nationals Obtaining A Foreign Divorce-Effect in Country
 - a—Spouses married abroad in pro-divorce or non-divorce country
 - b—Spouses married in said country
 - c—Spouses married or divorced in countries adopting the Treaty of Montevideo
 - d—Only one spouse is a national of the country
 - e—Spouse(s) domiciled in country where divorce issued at the time of issuance.

The within analysis will begin with the laws of Argentina and Paraguay, which espouse the so-called domicile principle. The nationality-territoriality principle found in the Chilean and Colombian laws on separation and divorce will be treated thereafter.

Specific references to the Paraguayan Civil Code, and the case law derived therefrom, have not been included in the instant analysis of the domicile principle, because Paraguay adopted the Argentine Civil Code almost verbatim in 1889, and Chapter IX of the Paraguayan Civil Marriage Law on separation and divorce is almost identical to Chapter IX of the Argentine Civil Marriage Law (Law 2393). Furthermore, both countries have adopted the Treaty of Montevideo, and much more Argentine material is available for analysis.

Argentina

(i) Introduction:

The so-called domicile principle, as applied to marriage, annulment and separation (*divorcio*) in Argentina, is set forth in Article 104 of Law 2393:

The actions for separation and annulment should be initiated in the domicile of the spouses. If the husband is not domiciled in the Republic and if the marriage had been celebrated in the Republic, the action may be initiated before the judge of his last domicile in the country.

Domicile has been construed therein to include "... the place of the legal location of the spouses or the physical location of a spouse's principal place of business, or his family."³ This conceptual framework is in accordance with the more general treatment of the domicile principle, set forth in Articles 1, 6 and 7 of the Argentine Civil Code.

Most Argentine commentators now agree that Article 104 may not be applied to marriages celebrated abroad, regardless of whether the parties thereto are Argentines or aliens. Notwithstanding possible aberrations in the foregoing position, it appears reasonable to generalize that the nationality of the spouses is immaterial to the law governing separation (and marriage) in Argentina.

Of more significance for conflict-of-laws purposes, is an analysis of the different legal effects which foreign divorce decrees have in Argentina, depending upon whether the corresponding marriage was celebrated in Argentina or abroad.

(ii) Recognition of a foreign divorce of a marriage celebrated in Argentina:

Most Argentine commentators are of the opinion that if the matrimonial domicile was in the foreign country issuing the divorce decree when the action for absolute divorce was initiated there, and if the grounds upon which such divorce decree is based, exist under Argentine law as grounds for separation,⁴ Argentine courts should reject the absolute dissolution of a marriage originally celebrated in Argentina, but should accept and recognize the foreign judgment of absolute divorce as if it were a decree for simple separation.

It is also their opinion that the Argentine court so recognizing such foreign divorce decree, should specifically pronounce in its decision that the respective spouses will still be ineligible to remarry. The rationale offered in support thereof, emphasizes that the results achieved thereunder are not inconsistent with Article 7 of Law 2393, which states that persons married in Argentina will not have foreign divorce decrees honored in Argentina for purposes of remarriage, since the language of said article is restrictive only with respect to the spouses' right to remarry.

Similarly, that position maintains that such results do not countermand the public order requirement of Article 14 of the Civil Code, which provides:

Foreign laws will not be applied if they oppose the public order, religion of

³18 *La Ley* 537.

⁴Article 67 of Law 2393.

the State, criminal laws or the tolerance of the culture, morality and good customs . . . or the spirit of the legislation of this Code.

Furthermore, proponents thereof argue that such reasoning and result are consistent with the provisions of Article 13 of the Treaty of Montevideo (*supra*), which Argentina has duly ratified.

Article 7 of Law 2393 does not include the words "in Argentina" after the prohibition on remarriage (as is done in Article 120 of the Chilean Civil Code, *infra*), and thus an expansive construction of this Article prohibits all spouses married in Argentina, from ever remarrying anywhere at any time before the death of the other spouse for purposes of Argentine law.

Therefore, it is conceivable that someone who marries in Argentina, subsequently establishes domicile and duly obtains a divorce in the United States, and then remarries in the United States, will not have his second marriage recognized in Argentina under the restriction in Article 7, even though his divorce was secured on grounds also set forth in Article 67 of the Argentine Civil Marriage Law, regarding separation.

The recognition of a foreign divorce decree as a simple separation decree is the present tendency in Argentina,⁵ although some commentators still submit that the Argentine courts should refuse, on public policy grounds, to recognize the validity of a divorce judgment granted by a foreign tribunal regarding a marriage celebrated in Argentina.

The only authority in case law for this latter position, however, consists of cases in which the matrimonial domicile was determined to be in Argentina at the time divorce proceedings were initiated abroad. Those decisions of the Argentine courts were based primarily on the incompetence of the foreign tribunal issuing the divorce decree⁶ and on the public order clause of Article 14 of the Civil Code.⁷

It is interesting to note herein that although the Mexican divorces in the last two cited cases were not granted any legal effect in Argentina, the Court did state, by way of dictum, that the decrees could be used as grounds for separation proceedings in Argentina, referring specifically therein to Article 67, Paragraph 5, of Law 2393 — "grave injuries."

(iii) Recognition in Argentina of a foreign divorce of a marriage not celebrated in Argentina:

It is well settled under Argentine law that aliens or Argentines married abroad may not petition an Argentine court to divorce them. Article 82 of Law 2393, which states that persons married in a pro-divorce country, may

⁵Borda, *op. cit.*, *supra* at 216.

⁶Article 104 of Law 2393.

⁷See 93 *La Ley* 343, 18 *La Ley* 537, and 87 *La Ley* 263.

not have their marriage dissolved in Argentina except by the death of their respective spouses, and the public order clause of Article 14 of the Civil Code prohibit such an action. Persons married abroad may petition an Argentine court, however, for a separation decree pursuant to the applicable laws thereof.⁸

The conflict of laws problems of individuals who have been married and divorced abroad, and wish their divorce decrees to be effective in Argentina, are more significant for analytical purposes. The prevailing practice in Argentina is to follow the Calandrelli and Machado Doctrine and recognize the validity of such foreign divorce decrees if the matrimonial domicile of the couple at the time of divorce was not in Argentina.

This same result will probably be reached even if the spouses originally married in a non-divorce country, moved to a pro-divorce country, and were domiciled there at the time of their divorce.⁹ A foreign divorce would also be recognized by Argentine courts under this reasoning, if only the husband was domiciled outside Argentina at the time of divorce, since Article 90, paragraph 9 of the Argentine Civil Code stipulates that the domicile of the husband controls in such cases.

The case cited in 29 *La Ley* 308 supports this last conclusion, by recognizing a divorce issued in Germany concerning a marriage celebrated in South Africa, when the husband was domiciled in Uruguay and the wife in Argentina at the time of the divorce.

The results and reasoning outlined above would be contrary to the provisions of Article 13 of the Montevideo Treaty (*supra*), however, if the country in which the marriage was originally celebrated is a non-divorce signatory of the Treaty and the country which issued the divorce decree is a pro-divorce signatory of the Treaty. For example, this inconsistency would occur if the Argentine courts would recognize a divorce decree issued in Uruguay concerning a marriage celebrated in Colombia on grounds not admitted by Colombian law (*i.e.*, mutual consent). This particular conflict of laws in the area of divorce has not been resolved in Argentine case law, although many commentators have treated in some detail, the general conflict-of-laws problems, arising out of inconsistent constructions of national laws and treaties.

An interesting sidelight of this matter is that the so-called "Montevideo Divorces" (*i.e.*, Argentine nationals obtaining "quickie" divorces in Montevideo, Uruguay), remain a problem in Argentina, not so much because Argentina cannot authoritatively justify its non-recognition of them under Article 104 of Law 2393 or under Article 13 of the Treaty of Montevideo,

⁸Article 67, *et seq.*, of Law 2393.

⁹See 18 *La Ley* 537 and 29 *La Ley* 308.

but rather because of Uruguay's justification for issuing them under that Treaty.

Uruguayan courts broadly interpret domicile in Article 13 thereof, and then rely on Article 4 of the Additional Protocol of the Montevideo Treaty, which states that "foreign laws may not be applied against the institutions of public order of signatory States," to declare divorce an "institution of the public order" in Uruguay. Argentina, on the other hand, maintains that a specific reference to divorce in the text of the Montevideo Treaty, precludes reliance on the general terms of "public order" contained in the Additional Protocol.

Chile

(i) Introduction

The nationality-territoriality principle, as incorporated into Articles 14 and 15 of the Civil Code—Chilean law governs all inhabitants of the Republic, including aliens; and Chilean nationals are subject to the provisions of Chilean law, with respect to their status and capacity to perform certain acts which are to have effect in Chile, notwithstanding their residency or domicile in a foreign country—controls the granting and recognition of separation in Chile. Therefore, the applicable Chilean law on separation and divorce will be analyzed from the perspective of its distinct effect on aliens and Chilean nationals.

(ii) Chilean law on separation and divorce vis-à-vis aliens:

Similar to Argentine law,¹⁰ Article 121 of the Chilean Civil Code does not permit Chilean courts to issue any absolute divorce decrees, even though the law of the place where the marriage was celebrated, would allow such a dissolution. Alien spouses, however, may petition the Chilean courts for a separation decree, and the proceeding would be governed by Chilean law.

It is interesting to note in this regard that annulment proceedings, the usual substitute in Chile for absolute divorce, are governed by the law of the place where the marriage was celebrated.¹¹ Accordingly, Article 31 of the Civil Marriage Law, stipulating that a marriage not duly celebrated before the appropriate Civil Registrar with the proper number of witnesses is null and void, is sometimes utilized, in conjunction with Articles 16 and 37(2) of the same and Articles 4(4) and 8 and Title III of the Civil Registry

¹⁰Article 82 of Law 2393, *supra*.

¹¹Section 6 of the Civil Marriage Act (*Ley de Matrimonio Civil*) of January 10, 1884.

Law,¹² by the Chilean courts to dissolve otherwise indissoluble ties between Chilean spouses or those alien spouses married in Chile.

Unless, therefore, the provisions of the particular foreign law on marriage and annulment are as expansive as Article 31 of the Chilean Civil Marriage Act (and very few are), alien spouses married abroad will feel the sting of Chile's rigid divorce law, without the corresponding benefits of the broad construction given to the annulment provisions cited herein. Presumably, Chilean spouses married abroad would still qualify thereunder, since they are at all times subject to Chilean legal provisions governing marriage.¹³

Unlike Article 7 of the Argentine Civil Marriage Law, which limits a prohibition on remarriage to those spouses originally contracting marriage in Argentina, Article 120 of the Chilean Civil Code prohibits all remarriage *in Chile*, regardless of where the marriage was originally celebrated.¹⁴ A legislative attempt in 1952 (eventually Law 10.271), which would have added ". . . however, this prohibition does not apply when both spouses are aliens and their marriage was celebrated outside Chile" to Article 120, was unsuccessful, thus lending persuasive authority to the argument that the original legislative intent therein, was to have the remarriage limitation of Article 120 apply indistinctly to both Chilean and alien spouses.

Otherwise, the spouses' right to remarry in Chile aside, Chilean law should recognize the validity of a decree of absolute divorce duly rendered by a foreign court, for all other legal effects of the dissolution, provided neither spouse is a Chilean national. This conclusion is supported by dictum in *Endlich v. Grothkarst*,¹⁵ even though the decision itself held that a German national's second marriage in Chile was void under Article 120 of the Civil Code, notwithstanding that his first marriage and divorce both occurred in Germany.

A foreign divorce decree was also utilized in Chile in 1936 to demonstrate the full legal capacity of the woman divorced abroad.¹⁶

Therefore, as a practical example of the above, it appears reasonable to conclude that a Chilean court would recognize the second marriage of an American citizen, which marriage was celebrated in the United States after his first marriage in Chile was subsequently dissolved outside Chile, for all legal purposes except remarriage in Chile, provided that none of the parties in either marriage was a Chilean national.

¹²Law 4.808 of January 31, 1930.

¹³Article 15 of the Civil Code, *supra*.

¹⁴See, *Revista de Derecho y Jurisprudencia*, Vol. XLVI, pg. 547.

¹⁵G.T. (1918), at 279.

¹⁶*Revista de Derecho y Jurisprudencia*, Vol. XXXVI, pg. 91, 11/28/36.

In addition, as mentioned above, Chile has adopted the Bustamante Code without major reservations and has thus theoretically incorporated the variation of the matrimonial domicile principle, contained in Articles 52 and 53 thereof, into its judicial approach toward the recognition of absolute divorce decrees issued by other signatories thereof:

Article 52. The right to separation and divorce is regulated by the law of the matrimonial domicile, but it cannot be founded on causes prior to the acquisition of said domicile if they are not authorized with equal effect by the personal law of both spouses.

Article 53. Each contracting State has the right to permit or recognize, or not, the divorce or new marriage of persons divorced abroad, in cases with effects or for causes which are not admitted by their personal law.

Nevertheless, the restrictive nature of Article 53, as well as the policy implications of Chile's reservation to the Bustamante Code: "... it will reserve its vote on such matters and questions as it may deem advisable, especially with regard to those points relating to the traditional policy of legislation of Chile," have apparently limited the degree to which Chilean courts have relied on that Code in handing down their decisions in this particular subject matter.

(iii) Chilean law on separation and divorce vis-à-vis Chilean nationals:

The most interesting Chilean conflict-of-laws problems in the area of separation and divorce, concern Chileans who are attempting to gain recognition in Chile of absolute divorce decrees issued abroad. The parties encounter hereunder the prevailing position that Articles 19 and 4(1) of the Civil Marriage Law (prohibiting, respectively, the absolute dissolution of marriage and a subsequent remarriage by the spouses, absent death), Articles 15 and 121 of the Chilean Civil Code (discussed, *supra*) and Article 15 of the Civil Marriage Law (stating that all marriages celebrated abroad by Chileans in contravention of Articles 4-7 thereof will have the same legal effect in Chile as if they were celebrated in Chile), construed together, do not allow Chileans to divorce nor remarry under any circumstances.

Consequently, a foreign divorce decree involving Chilean spouses will have absolutely no legal effect in Chile, regardless of where the marriage was originally celebrated.¹⁷ This approach maintains that any limited construction placed on the restriction set forth in Article 120 of the Civil Code, concerning the spouses' right to remarry in Chile, if valid, must be understood as applying only to aliens married and divorced abroad, since

¹⁷See, *Revista de Derecho y Jurisprudencia*, Vol. XXV, p. 572; Vol. LVI, p. 214; Vol. LVII, p. 146.

Articles 15 and 121 of the Civil Code already govern the marriage and divorce relationship of all Chilean nationals thereunder.

A less rigid position emphasizes the separation provisions of Articles 19-21 of the Civil Marriage Law, discounts the sweeping generalizations of Articles 15 and 121 of the Civil Code, and maintains that Article 120 of the Civil Code prohibits only Chileans divorced abroad from *remarrying in Chile*, no other legal consequences arising therefrom.

Accordingly, this rationale would allow limited recognition in Chile (*i.e.*, for purposes of separation), of divorce decrees validly secured by Chilean nationals abroad. Such was the case in *Flanders v. Berengues*,¹⁸ in which Chilean spouses married in Brazil, divorced in Mexico, and subsequently convinced a Chilean court to recognize the Mexican divorce decree as a *divorce a mensa et thoro*.

There also was dictum in *Pinochet v. Muñoz*,¹⁹ to the effect that an absolute foreign divorce decree would be recognized in Chile for limited purposes. These cases, however, remain interesting exceptions to the general rule that Articles 15 and 121 of the Civil Code will be judiciously applied by Chilean courts to deny any recognition of all absolute divorce decrees secured abroad by Chilean spouses.

Braun v. Berdeau,²⁰ is not necessarily uncorroborated authority for the position that a Chilean may never validly marry a divorced alien abroad. This case held, *inter alia*, that the marriage in New York between a Chilean spinster and a previously divorced (Nevada) American man was void in Chile, on the grounds that the alien husband was still bound by an undissolved matrimonial bond at the time of his cited second marriage to the Chilean spinster.²¹

This holding may be restricted somewhat when one realizes that the *lex-loci-celebrationis* rule regarding New York State's recognition of the husband's Nevada divorce, and the subsequent validity of his marital status in the jurisdiction where the marriage was celebrated, was largely ignored by the Chilean court's majority, although stressed by the dissent. One must take into further consideration, since annulment is the strategic substitute for divorce in Chile, that the instant recourse was the most convenient legal means of freeing the plaintiff-wife in this particular case to remarry.

Of current significance is the recent effort of the Chilean Minister of Justice to reintroduce a bill into the Chilean legislature which, if successful, would amend the existing Chilean laws in this area, to permit Chilean

¹⁸LII RDJ 381.

¹⁹XXV RDJ 572.

²⁰81 G.T. 359, 1940.

²¹Articles 4(1) and 15 of the Civil Marriage Law.

courts to decree the absolute dissolution of marriages celebrated both in Chile and abroad.²²

Colombia

(i) Introduction

Articles 18 and 19 of the Colombian Civil Code incorporate the nationality-territoriality principle, to much the same degree that Article 15 of the Chilean Civil Code does in Chile. However, Colombia adheres without reservation or exception to the Montevideo Treaty, so the conflict-of-laws problems in Colombia in the area of separation and divorce, become somewhat complicated by the incorporation therein of the domicile principle set forth in Article 13 thereof.²³

Furthermore, it must be taken into account that ecclesiastical and civil marriages are optional in Colombia, both producing full legal effects.²⁴ On the other hand, especially with respect to any aspect of the law related to the dissolution of marital ties, the ecclesiastical marriage of aliens and Colombian nationals alike is deemed to be a distinct legal institution under Colombian law, and the policy implications resulting therefrom are readily apparent in both legislative and judicial treatment of the subject.

For example, separation and/or divorce decrees obtained abroad by Roman Catholics who were originally married under the auspices of the Roman Catholic Church, regardless of where the ceremony took place, will not be recognized in Colombia unless ecclesiastical authorities intervene therein.²⁵ For analytical purposes hereunder, therefore, aliens are considered to have been married civilly unless otherwise expressly noted.

(ii) Colombian law on separation and divorce vis-à-vis aliens:

Alien spouses may not secure an absolute divorce in Colombia, regardless of where they were originally married. Article 18 of the Civil Code applies Colombian law to all aliens residing in Colombia, and Article 153 thereof stipulates that "divorce does not dissolve the marriage, but suspends the matrimonial life of the spouses." Furthermore, Article 423 (3) of the Colombian Code of Civil Procedure²⁶ provides that the legal effects of a separation (*divorcio*) decree, issued by a Colombian court shall be governed by Colombian law, even though the marriage was originally celebrated abroad.

²²*La Nación*, November 15, 1971.

²³Caicedo, J.J., *Manual de Derecho Internacional Privado*, (1939), at 232-34.

²⁴Law 57 of 1887.

²⁵Laws 57 and 153 of 1887 and Cas., 4/6/56, LXXXII, 564.

²⁶*Código de Procedimiento Civil*, Decree 1400 of August 6, 1970.

The text of this Article differs from that of its predecessor, Article 786 of the Judicial Code (*Código Judicial*), which stated in slightly more stringent terms that aliens who were married abroad could only petition a Colombian court for a simple separation decree, even though the spouses would be entitled to an absolute divorce decree under the laws of the jurisdiction where the marriage was celebrated. Nevertheless, the practical effect of the textual modification on the existing law governing separation actions initiated directly in Colombia by aliens is negligible.

The Colombian Civil Code contains no other specific legal provisions, which stipulate or imply that a divorce decree obtained abroad by non-resident aliens who were also married abroad, will not be fully recognized by a Colombian court. For example, there is no equivalent therein of Article 120 of the Chilean Civil Code, to create ambiguity surrounding the legal effect which foreign divorce decrees of non-resident aliens will have in Colombia for purposes of remarriage or otherwise.

Therefore, assuming that the rather vague public policy provisions of Article 16 of the Civil Code ("not against public order and good customs") will not be expansively applied in any particular case, it is reasonable to conclude under a literal construction of the other cited Colombian legal provisions, that an absolute divorce decree secured by aliens in a foreign jurisdiction regarding a marriage celebrated outside Colombia, will be fully recognized by Colombian courts, provided neither spouse began residing in Colombia before the foreign divorce decree was finalized.²⁷

Notwithstanding the foregoing, the "public order" provision of Article 16 of the Civil Code, together with Article 153 thereof, would probably be applied to prevent the full recognition in Colombia of any absolute foreign divorce of a marriage originally celebrated in Colombia, regardless of how long the alien spouses had lived abroad. In this regard the policy implications of Colombia's reservation to the Bustamante Code, are worthwhile noting:

. . . as regards the provisions relative to divorce, the Delegation of Colombia formulates its unqualified reservation to the regulation of divorce by the law of the matrimonial domicile, because it considers that for such purpose, and in view of the exceptionally transcendental and sacred character of marriage (basis of society and of the State itself), Colombia cannot accept the application within her territory of alien laws.

Even if this reasoning is strictly followed, however, such foreign absolute divorce decree would apparently still be recognized in Colombia, under Article 153 of the Civil Code and Article 423 (3) of the Code of Civil Procedure, for purposes of separation, provided the grounds utilized

²⁷See 12 *Rev. de la Acad. Col. de Juris*, (1937), at 54.

therein were similar to those set forth in Article 154 of the Colombian Civil Code.²⁸

As previously indicated herein, however, Article 13 of the Montevideo Treaty would not permit the full recognition in Colombia, of an absolute divorce decree issued by the court of a pro-divorce signatory of the Treaty (e.g., Uruguay), regarding a marriage originally celebrated in a non-divorce signatory thereof (e.g., Argentina), for a cause not admitted under the former's law (i.e., mutual consent).

Similarly, Article 13 of the Montevideo Treaty, as well as the "public order" clause of Article 16 of the Colombian Civil Code, would not permit the full recognition of a foreign absolute divorce decree, obtained by aliens who temporarily moved abroad in order to avoid the Colombian divorce laws, especially if the spouses were originally married in Colombia. However, such foreign absolute divorce decrees should still be recognized in Colombia under Article 153 of the Civil Code, and Article 423 (3) of the Code of Civil Procedure, for purposes of separation, provided the grounds were similar to those set forth in Article 154 of the Colombian Civil Code.

(iii) Colombian law on separation and divorce vis-à-vis Colombian nationals divorced abroad:

Article 19 of the Colombian Civil Code, incorporating the nationality principle, governs the rights and obligations of Colombian nationals with respect to separation and divorce, and does not permit the recognition in Colombia of any legal effects emanating from an absolute divorce decree, obtained by Colombian spouses abroad.²⁹

This same result would also be reached if only one of the divorced spouses was a Colombian national, since Article 19 includes, in addition to "their personal status and their capacity to perform acts," "the obligations and rights which arise from domestic relations, but only with respect to their spouses and relatives," when all of the above "are to have legal effect in Colombia."

This rationale was adopted in a 1943 case, in which a Dominican Republic divorce between a Frenchman and a Colombian woman, who were originally married ecclesiastically in Bogotá, was not recognized by the Colombian court.³⁰ Following the above reasoning, the result probably would have been the same, even if the original marriage between the spouses had taken place outside Colombia.

A literal construction of Article 13 of the Montevideo Treaty, on the

²⁸See, *inter alia*, Cock, Alfred, *Tratado de Derecho Internacional Privado*, 1940.

²⁹Articles 152 and 153 of the Civil Code.

³⁰*Rev. de la Acad. Col. de Juris.* 545.

other hand, would permit a Colombian court to recognize the validity of an absolute divorce decree secured by Colombian nationals abroad, at least for purposes of separation, provided that the spouses had originally married abroad, and had divorced on grounds permitted by both the law of the matrimonial domicile, and the law of the place where the marriage was celebrated.

The inconsistency apparent in this factual situation, between the nationality principle embodied in Article 19 of the Colombian Civil Code, and the domicile principle reflected in Article 13 of the Montevideo Treaty, remains unresolved under Colombian case law. Proponents of a rigid application of the nationality principle, emphasize that divorce proceedings clearly run contrary to the "public order" of Colombia, and any treatment thereof should in no event depart from the policy considerations underlying Articles 16 and 19 of the Civil Code.

Caicedo,³¹ among other Colombian legal scholars, emphasizes the necessity of preserving the concept of reciprocity under the Treaty of Montevideo, particularly with respect to legal acts performed entirely in another country signatory thereof, and would fully recognize such an absolute divorce decree in Colombia, on the grounds that the domicile principle contained therein overcomes any policy considerations of public order, or sovereignty which may underlie Articles 16 and 19.

³¹ *Derecho Internacional Privado*, 1944.