International Contracts in a Mixed Jurisdiction:

Puerto Rico

Introduction

It was established supra that culture and history have a direct influence on the shape of each legal system; in the case of Puerto Rico, the coexistence of two legal traditions has made duality the predominant characteristic for this jurisdiction. As will be seen through this chapter, the continuous ambivalence between Common Law and Civil Law has resulted in special features that typify the Island’s system as unique and interesting. A precise picture of the aforementioned dualism is noticeable by analyzing Puerto Rico’s Private International Law (PIL), in particular its international contract law. Profiting from these colorful contrasts I will try to prove my hypothesis according to which flexible connecting factors —such as the dominant contacts theory— allow the judge to justify the choice of any applicable law he has previously and individually considered most fitted to solve a particular case. His choice will not be totally objective, since history, culture and politics will influence the final determination.

In order to prove and contextualize my hypothesis, I will present some basic structural remarks, like Puerto Rico’s present political organization and some of the most outstanding decisions taken by its Tribunal Supremo; a summary of its historical legal stages emphasizing the impact that each one had in shaping today’s PIL and a comment on the articles that regulate it in the Civil Code. Observations about the articles regulating contracts in the Draft made by the Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico (the Draft) will also be made. Finally, this study will be completed with an analysis of case law focused on the determination of the applicable law to international contracts. Conclusions will revolve around the present state of Boricua jurisprudence and regulations on international contracts, and the possibility of a change of approaches.
Puerto Rico’s dualism: Basic structural remarks

Puerto Rico was a Spanish colony from its discovery in 1493\(^1\) until it was officially yielded to the U.S. by the Treaty of Paris in December 10, 1898.\(^2\) Since then the Island has been considered a territory of the United States (US) and from 1955 until the present an unincorporated one;\(^3\) this means that Puerto Rico is not a part of the U.S. but rather that the Island belongs to it and therefore is under American jurisdiction.\(^4\) Such status grants the American Congress power to regulate some internal aspects of the Island such as currency, postal service, international relations, communications and environmental issues, amongst others. The subjects not regulated by the U.S. Congress will be ruled by the statutes and regulations passed by the Puerto Rican Asamblea Legislativa. These considerations being made, it is relevant to mention that, since 1952, this territory has had its own Constitution, passed by the Asamblea Legislativa and approved by the American Congress and the Puerto Rican people via referendum.\(^5\)


\(^2\) Spain was reluctant to yield Puerto Rico. During the Treaty negotiations it offered money and other territories in an effort to keep the Island. All attempts were fruitless because in the U.S. opinion Puerto Rico was a strategic gate into the Caribbean and it was a source of one of the most highly valued commodities of the time: sugar. Mouchet & Sussini, supra note 1, footnote 35 at 25 and Antonio Córdoba González, El Cartel de la Avenida Cardón 32 (2004).

\(^3\) Article 1 of the Constitution expressly defined the Island’s status by using a transactional formula that characterized Puerto Rico as an “unincorporated territory”. It leaves things conveniently undefined to maintain a link with the U.S., simultaneously leaving an open door for future changes aimed to the territory’s independence. Mouchet & Sussini, supra note 1, at 62-63. To review an opinion to the contrary, see: Antonio Córdoba Gonzalez, El Cartel II. El cartel de la Avenida Chardón y el Cartel de la Avenida Roosevelt conspiran contra Puerto Rico 46 (2006).

\(^4\) In this sense see Downes v. Bidwell, 182 U.S. 244, 287 21 S.Ct. (1901). “We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.”

\(^5\) In May 4, 1951 a referendum took place to decide if Puerto Ricans wanted their own Constitution. People decided they did. On March 3, 1952, a second referendum was organized to determine if the people approved the constitutional draft and so they did. Then the draft was discussed in the U.S. Congress, where some
Nowadays Puerto Rico’s political organization is based on the republican system, with the classical division of power into three branches: the Executive, led by the Gobernador; the Legislative, conducted by the Asamblea Legislativa -organized into two chambers, Senado y Representantes; and the Judiciary, whose highest authority is the Chief Justice of the Tribunal Supremo of Puerto Rico. As a part of the U.S. the Island is subject to the U.S. federal jurisdiction, particularly to the First Circuit’s Court of Appeals and District Court of this territory. Finally, the Resident Commissioner of Puerto Rico; serves as the link between Puerto Rico and the U.S., by acting as a non-voting observer and representative in the U.S. Congress.

There are four major parties in the Island and the main difference between them gravitates towards their views regarding Puerto Rico’s political status and the way to proceed in the future. During the American rule over Puerto Rico the political parties dominating the scene have been the Partido Nuevo Progresista (PNP) and the Partido Popular Democrático representatives manifested their worries regarding the effects this instrument would have; will it mean that Puerto Rico was now independent? Disregarding these concerns the draft was passed with few modifications and is the Constitution that remains in force until today. Mouchet & Sussini, supra note 1, at 46-47, 49, 52.

Until 1947, the Gobernador was elected by American authorities. Since the Constitution was passed, in 1952, the Gobernador is elected through the direct vote of Puerto Rican electors (Article IV, section 1). Mouchet & Sussini, supra note 1, at 72-73. Ennio Colón et al, Puerto Rico, in Mixed Jurisdictions Worldwide. The third legal family 364, 368-369 (Vernon Valentine Palmer ed., 2001).

The members of both chambers are elected by direct vote (Constitutional article III, section 1).

According to the statute regulating Puerto Rico’s judiciary (Ley de la Judicatura del Estado Libre Asociado de Puerto Rico, passed on 2003) the Tribunal Supremo will be composed by a Chief Magistrate and 6 Associated Magistrates. The Magistrates are appointed by the Gobernador with the consent of the Senate. Such appointments are for life and the number of Magistrates can only be changed by law upon the Tribunal’s request.

According to Ennio Colón Puerto Rico obtained a bigger degree of autonomy in its government due to the pressures the United Nations put over the U.S. Ennio Colón et al, supra note 1, at 19, 28.

These parties are the Partido Independentista Puertorriqueño, which promotes independence from the U.S.; the Partido Nuevo Progresista, which is pro total integration of Puerto Rico as a U.S. state; the Partido Popular Democrático, which motto is that political independence can only be achieved through economical independence and maintains that being an unincorporated U.S. territory is the best alternative for the Island at the moment; and the Puertorriquenos por Puerto Rico which is the newest party – was created in the mid 90’s- and has no particular views regarding Puerto Rico’s political future.
(PPD). They have alternated in power pretty evenly: since the sixties\(^\text{11}\) the PNP has held power four times, while the PPD has done so six times. Puerto Rico’s first Gobernador elected by vote was sponsored by this party. Such evenness in power may remain as it has been historically unless an ideological revolution takes place, since political affiliations in Puerto Rico are defined depending on which family are people born and the main reasons to maintain political identity are economical dependence to the parents and parental respect.\(^\text{12}\)

Like in any other system, the political party in power has an impact over the tendencies followed to model a country’s law; yet in Puerto Rico who controls power is even more important since such party will have a stellar role establishing which legal system predominates in the mixed jurisdiction.\(^\text{13}\) Among other things, this is due to the fact that the Gobernador appoints the Tribunal Supremo Magistrates; nevertheless, it should be kept in mind that the impact is limited to the number of appointments a Gobernador can actually make during his or her mandate.\(^\text{14}\) This assertion is enhanced by the fact that during the periods when the PPD was in power, all the designated Magistrates were members of this party. The same situation took place whenever the PNP was in power.

For example, during Hernández Colón’s (PPD) first period as a Gobernador, all the appointment magistrates were lawyers, members of the PPD. This included the designation of Trías Monge as Chief Justice of the Tribunal Supremo decision that, as will be explained infra,

\(^{11}\) It must be remembered that until 1952 all the Gobernadores were designated by the U.S.; and that, according to Córdoba Gonzalez, the trend of appointing judges loyal to the party in power is not new; it started in 1898, when all the designated judges would have to be loyal to the American interests. According to the author, the same principle had repercussions as late as 2004, in the designation of Tribunal Supremo magistrates, who had to be approved by the U.S. executive and therefore would need not only to fulfill strict moral and professional requirements, but also would need to yield to the American interests and, if possible, be a member of the PNP. As a consequence, says Córdoba Gonzalez, the judges of the federal court were and still are “homo-politicus”, and they know that their nomination and permanence in the court depends on their capacity to protect the American interest whenever they are debated. See: Antonio Córdoba Gónzalez, supra note 2, at 36 and 40. He maintains this idea in Antonio Córdoba Gónzalez, supra note 3, at 23.

\(^{12}\) Antonio Córdoba Gonzalez, supra note 3, at 15.

\(^{13}\) Mouchet & Sussini, supra note 1, at 11.

\(^{14}\) It must be remembered that the appointments are for life; in consequence, having the opportunity of making new appointments depends on the number of vacancies that take place during a Gobernador’s four years term.
changed forever Puerto Rico’s legal picture by highlighting and enhancing the application of Civil Law in to solve controversies in the Island. The PPD had a majority among the Magistrates since the designation of Trías Monge as Chief Justice until the period when Anderu García was Chief Justice (1992-1993); this period coincided with the election of Pedro Roselló (PNP) as Gobernador. Logically, during his office Roselló designated enough Magistrates to have the majority of the Tribunal. The statistic shifted again in favor of the PPD for the next two periods when the elected Gobernador belonged to that party. The last change took place recently, after Luis Fortuño (the present Gobernador of Puerto Rico) assumed the office. Nowadays, judges that are partisans of the PNP dominate the Tribunal Supremo. Having this considerations been made, it is not hard to imagine that the Magistrates appointed by the pro-union party (PNP) would give preeminence to Common Law and the Magistrates appointed by the PPD would emphasize Civil Law or would be pragmatists, defending the usage of both systems as long as they can produce coherent results. 15 This is conclusion is backed up by the fact that during the whole renaissance period the PPD had the majority at the Tribunal Supremo, this advantage was a key element to make the changes addressed infra.

Another subject that reflects how much politics affects the legal context is the official language in the Island; this subject raises controversy even today. The Foraker Act established English as the official language in 1900, however, Spanish was the lingua de facto used by the majority of the population. By 1948, it was officially recognized as the Island’s second tongue and in 1991, during Gobernador Hernández Colón’s second mandate, an act regulating the language entered into force. It declared Spanish as the one and only official language of Puerto Rico; 16 this was a strong statement regarding the Island’s “independence”. It did not last long,

15 In this sense see the interview made to Professor Luis Muñiz-Arguelles (Universidad de Puerto Rico) on November 29th, 2011, marked as Annex “A”.
However, as in 1993, Gobernador Rosselló González reinstated English as the official language, in coexistence with Spanish.\(^\text{17}\) This regulation remains in force until today.

Puerto Rico’s Constitution is silent on this regard. It only makes a slight reference to language in its article III, section 5, which enumerates the requirements to be a member of the Asamblea Legislativa by stating: “No person shall be a member of the Legislative Assembly unless he is able to read and write the Spanish or English language”. It is relevant to emphasize that according to the text it is not necessary to master both languages, as one will suffice.

In 1965, the Tribunal Supremo expressed its views regarding the usage of Spanish as the official language of justice in Puerto Rico in the case People v. Superior Court:\(^\text{18}\)

“Spanish is the language of the people of Puerto Rico; therefore all the judicial procedures followed in our tribunals must be in Spanish; however, the judges will take the necessary measures to protect the rights of every prosecuted person that does not know our language sufficiently; this translates to maintaining the prosecuted individual and his lawyer -as an element of his right to an active defense- informed at all times by the means of translators or any other efficient mechanism, of everything that happens in the procedure, and so shall be kept in the tribunal’s records”

Nevertheless, such a statement does not apply to the Federal Courts resolving cases derived from Puerto Rico. In this sense Puerto Rico’s District Court has established that:\(^\text{19}\)

“It does not follow, however, that because proceedings in local courts are conducted in Spanish, proceedings in this court must also be conducted in that language. This court is not a local court of Puerto Rico. Rather, it is a United States district court, part of the federal judicial system, litigating cases arising under the Constitution and laws of the United States or by reason of diversity of state citizenship.”


\(^\text{18}\) “Siendo el español el idioma de los puertorriqueños, los procedimientos judiciales en nuestros tribunales deben seguirse en español, pero los jueces tomarán aquellas medidas que resulten necesarias para que, en protección de los derechos de cualquier acusado que no conozca suficientemente nuestro idioma, se mantenga a éste –y desde luego a su abogado por ser ello parte de su derecho a una defensa efectiva-- informado, por medio de traductores o de otro modo eficaz, de todo lo que transcurra en el proceso, y para que así lo revele el récord” People v. Superior Court, 92 P.R.R. 580, 588-589 (1965). This decision is still in force as can be derived from the case Hernández Torrez v. Hernández Colon, 127 D.P.R. 974, 994 n.1 (Mr. Justice Negron Garcia, dissenting 1991).

This decision is a reminder that Puerto Rico is not an independent country, but rather an unincorporated territory of the U.S. Its influence is far from being irrelevant and must not be underestimated, particularly in the legal field, where lawyers often speak in Spanish but think in English.

If any conclusion can be drawn out of this oversimplified summary of facts is that Puerto Rico is ruled by duality and that Magistrates respond to a clear political ideology that most likely affects their decisions and reasoning. Friction between cultures is present in all aspects of life but in the legal area it becomes more evident and -if not managed wisely- problematic. This introduces us to the next question: to what legal tradition does Puerto Rico belong? Is it a Civil Law jurisdiction or a Common Law one? The answer is far from simple, since the Island is considered to be a “mixed jurisdiction”. This term is applicable to those systems characterized by the juxtaposition of Common and Civil Law, where elements of the latter are present in the codification of law and traces of the former are found in the technique of adjudication of law and the value given to precedents as a source of law. Usually, in mixed jurisdictions Common Law is predominant in Private Law and Civil Law in the Public field. Fitting in the category of “mixed jurisdiction” does not imply –by any means- that the frictions between Common Law and Civil Law have stalled. On the contrary, mixed jurisdictions, are always a work in progress where the dominant legal tradition can change from one decade to another; as a result, the judicial families can be viewed as tectonic plates in a slow but constant clash for space directed by the judges making decisions at the Tribunal.

In the next section Puerto Rico’s historic development will be analyzed in six different stages. The purpose of this part is to evidence how strong of an influence a country’s history can be over its people, particularly judges, lawyers and law school students and professors.

20 Mouchet & Sussini, supra note 1, at 65.
Another purpose of the following section is to remark what was affirmed in this one, regarding the impact politics have over the law.
Puerto Rico’s dualism: the tale of a historic metamorphosis

In this section the historical development of Puerto Rico under the Spanish and American Rules will be examined. Each of the stages left an impression in the legal related elite of the time, and consequently modeled the statutes and court decisions of each era.

I. Puerto Rico as a Spanish Colony

As previously mentioned, Puerto Rico was a Spanish colony between 1493 and 1898. Such period has been divided by Mouchet y Sussini in three phases: The first one corresponds to the Indian Law, the second one to Modern Liberal Law and the third one with the Autonomic period. Although I will follow their division, I will also complement these authors vision with ideas taken from other scholars. During the first period, Puerto Rico was considered by Spain as a mere possession and a source of resources. The Island suffered attacks from the French, English and Dutch people since it represented a military advantageous location; yet all the attempts were fruitless and it remained isolated from other colonies and foreign countries. Such segregation negatively impacted the territory’s development from every angle. Finally, on the XVII century, Puerto Rico experienced some advances represented by an increase in the number of its population and by a raise in the level of education of the majority of the population. While this period lasted, the applicable laws in Puerto Rico were the Spanish and Indian Laws.

In the second period of the Spanish dominion, characterized by the influence of Modern Liberal Law, Boricuas managed to have a representative on the Spanish Junta Central Gubernativa del Reino and even elevated its status from colony to province. This modification was evidenced in the Constitución de Cádiz from 1812. One major consequence of such change

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22 Mouchet & Sussini, supra note 1, at 17.
23 Id. at 17-18.
24 This was an institution that gathered the executive and legislative power during the Spanish Napoleonic occupation. See: http://censoarchivos.mcu.es/CensoGuia/productordetail.htm?id=46709 (visited for the last time on November 19, 2011).
was that, from that point on, the modern Spanish Codes and statutes became the applicable law to Puerto Rico. It also raised the Boricuas spirits as they felt like equals to Spaniards rather than second class citizens.\textsuperscript{25} Later on in this period, more precisely in 1831, the \textit{Real Audiencia de Puerto Rico} was created. It served the functions of a local tribunal and gave the Island judicial independence from other Spanish territories.\textsuperscript{26} Although these were clear steps toward autonomy, they did not mean that Puerto Rico was not a colony anymore; such steps just meant that the Island and its people were in a better situation than in the previous stage.\textsuperscript{27}

Two other milestones happened in the Modern Liberal Law period: the first pro-independence outbreak took place in 1868, without major repercussions though. Also in 1867 Boricuas attempted to organize their first political party. Although this initiative was crushed by the Spanish government, it showed a political will and maturity that Spain could not overlook, and in 1870 the first party (the liberal reformist party) was formally allowed to exist.\textsuperscript{28} During this second stage of Spanish rule the applicable laws were the C.C. of 1888; the Commerce Code of 1885; the Penal Code of 1870 and the rest of the Spanish statutes.\textsuperscript{29} This period is especially important for lawyers because in 1840, twelve of them created the Puerto Rican Bar Association and initiated the first domestic legal publication. At the time, only privileged members of society could become lawyers, since degrees could only be obtained in Spain or Cuba. By 1888, free classes were taught in Puerto Rico, but the exams to acquire the degree still had to be taken abroad. These free classes approach opened new possibilities and enriched the production of law, since other points of view were exposed and considered by the new

\textsuperscript{25} Mouchet & Sussini, \textit{supra} note 1, at 17, 19.
\textsuperscript{26} Delgado Cintrón has a less candid opinion of the second Spanish period. According to this author Spain was not a gentle conqueror; he describes them as politically intransigent and intolerant. He also affirms that Spanish people and Puerto Ricans were not equals and that there were profound differences in Puerto Rican’s rights since they were not absolute and could be modified by law. Carmelo Delgado Cintrón, \textit{supra} note 16, at 3-9.
\textsuperscript{27} Ennio Colon et al, \textit{supra} note 1, at 5.
\textsuperscript{28} Mouchet & Sussini, \textit{supra} note 1, at 21 and Carmelo Delgado Cintrón, \textit{supra} note 16, at 49.
\textsuperscript{29} Mouchet & Sussini, \textit{supra} note 1, at 20-21.
colleagues. Despite all these advances, the first Boricua law school would have to wait for the dawn of 1913 to see the light under the American rule.\(^\text{30}\)

The third and last stage under the Spanish domain is known as the Autonomic period, which initiated in 1897 when Puerto Ricans expressly asked for independence.\(^\text{31}\) In that year, due to the pressures of the Boricua representative in Spain at the Council of Ministers to the Queen Regent; the Cuban Civil War and the turmoil in Spanish internal politics, the reign issued a *Carta Autonómica* (the Autonomic Charter) for Cuba and Puerto Rico.\(^\text{32}\) This document enhanced political and administrative independence of these provinces transforming the local government in an essentially sovereign one.\(^\text{33}\) Nevertheless, the *Carta Autonómica* did not release the colonies from their conqueror; this was expressly stated in the document itself. With all these improvements Puerto Rico could have reached its independence a few years later; yet the autonomic dreams were lived shortly since by July of the 1987 the Americans seized the Island.\(^\text{34}\) Sadly, by that time, Puerto Rico’s legal system was as advanced as any European or American system. This only made the American dominion harder.\(^\text{35}\)

II. Puerto Rico as an American Colony


\(^{31}\) Mouchet & Sussini, *supra* note 1, at 22-23. Once again, Delgado Cintrón has a different opinion in this regard. According to this author, this period started much earlier, by 1870, when Puerto Rico was exasperated by the Spanish dominion and the situation almost turned into an armed revolution. In order to maintain things under control, Spain decided to enact the *Carta Autonómica*. Carmelo Delgado Cintrón, *supra* note 16, at 9.


\(^{33}\) The *Carta Autonómica* meant that laws affecting Puerto Rico would have to be discussed with the Boricua government and could not be passed only by Spain; the local government could create taxes and create, modify or eliminate import/export rights; the local government had the authority to decide if the Island was to adhere or not to a treaty and was free to sign commercial treaties on its own; among others. Mouchet & Sussini, *supra* note 1, at 22-23.

\(^{34}\) Rodríguez Ramos, *supra* note 1, at 1-2.

\(^{35}\) Carmelo Delgado Cintrón, *supra* note 16, at 45, 49.
Puerto Rico’s transformation under the American domain can also be divided in three stages. The first one was characterized by the incorporation of American law into the existent legal system of the Island until 1898, when the territory was subject to military occupation. The second stage is typified by a strong *renaissance* of Civil Law, promoted mainly by José Trías Monge; this period arose at the beginning of the 1960’s, reached its peak during the 1970’s and ended in the middle of the 1980’s. Through these years the methods of interpretation and application of law were modified by reintroducing civil law methodology into a very Americanized Puerto Rican legal system. The final stage lingers until today; it reflects maturity, increased stability and self-determination which, as will be evidenced *infra*, should not be understood as independence from the Common Law influence. Summarizing these stages is highly important in order to understand the development of the regulation of international contracts in this jurisdiction and its relationship with the country’s history.

**Stage I: The Americanization of Law in Puerto Rico. Special reference to the Civil Code**

As previously stated, throughout the years of Spanish dominion, Puerto Rico’s legal system fit into the Civil Law mold as all its institutions had been inherited from the conqueror’s tradition. With the arrival of Americans, many Boricuas thought freedom and independence had finally arrived; however, some of the governors that held office during the military occupation deemed that Puerto Ricans were not ready to govern themselves and were comparable to the American Indians living in reservations. During this first period Puerto Ricans were forced to adapt to many abrupt political, economic and social changes. Among the most relevant were the imposition of an unknown language and, of course, a new legal system; particularly applicable to the Public Law domain where its implementation was necessary to have structural control over the new colony.

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38 Ennio Colón et al, *supra* note 6, at 403-404.
39 For example, the “Audiencia Territorial” (considered as the last instant tribunal) was substituted by a “Tribunal Supremo” which was a mere copy of the U.S. Supreme Court. José Trías Monge, *La Crisis del Derecho en Puerto Rico* 49 Rev. Jur. U.P.R., 7 (1980).
In the realm of Private Law, the initial idea was to maintain the pre-existent system as much as possible; the new authorities feared that a violent legal transplant in this area would provoke an uprising in the astonished Boricua society. With this idea in mind, General Brooks, the first governor of the “Department of Porto Rico” during military occupation, issued on October 18, 1898 its General Order N° 1, according to which the majority of laws regulating private aspects should be kept in force except in those cases where they were incompatible with the changes introduced by the Americans. Also Private Laws were to be applied exactly as before the occupation; however, Brooks’ orders ended up thwarted by contradictory instructions. Soon after Brooks’ decree, it was obvious that not everybody shared the same ideas about the future of Puerto Rico’s Private Law since many executive and military orders were directed to “adapt” the new colony to its new masters. According to these orders, America did not have to adjust to Puerto Rican standards but rather the contrary; logically, this line of thought turned out to be detrimental for the survival of Private Law with Civil Law roots, as American judges and lawyers coming to the Island saw no reason to maintain and respect the previous tradition. From 1898 to 1903, an important number of Americans immigrated to Puerto Rico as it was perceived as the Island of opportunity and easy money making. Many lawyers were amongst these immigrants, they wanted to practice even if they did not know the

40 Ennio Colón et al, supra note 6, at 371.
41 Which lasted from October 18, 1898 to May 1, 1900. Rodríguez Ramos, supra note 1, at 6.
42 Mouchet & Sussini, supra note 1, at 26.
43 This order was issued following the direct instructions of President McKinley; who thought preserving the private laws would make it easier to control the recently acquired territory since it will give its people a sense of normality. Luis Muñoz Morales, Reseña histórica y anotaciones al Código Civil de Puerto Rico 15-16 (1947) and Rodríguez Ramos, supra note 1, at 6-7.
44 During the 18 month of Military Occupation 375 General Orders were issued; 268 Circulars were released and at least 100 other documents were elaborated. Not all of them were coherent as a whole. Rodríguez Ramos, supra note 1, at 7.
45 Mouchet & Sussini, supra note 1, at 69.
46 In General Davis’ (successor of General Henry) opinion, the officers in charge of the Island may have exceeded their authority by unnecessarily changing statutes and codes that were not really in conflict with the U.S. Law. The General affirmed in defense of the officers that there was a lot of confusion on the scope and practical consequences of “adaptation”. Rodríguez Ramos, supra note 1, at 8.
language or the law of the new territory.\textsuperscript{47} During General Brooks mandate they were not able to do so; however, they kept pushing to change the laws and the judicial system so it was as similar to the American as possible and, eventually, their efforts were rewarded.\textsuperscript{48}

Under the rule of General Guy Henry – the next Governor after Brooks- many changes took place due to the aforementioned pressures. According to Delgado Cintrón, the real transculturation started at this point.\textsuperscript{49} By means of General Order N° 14 of February, 1899, it was even established that those that opposed Americanization would be sanctioned.\textsuperscript{50} On the other hand, a commission was created for the analysis of Puerto Rico’s general state of affairs. This commission recommended, among other things, a total reform of the Boricua judicial system.\textsuperscript{51} Its final report estates: “the way to Americanize Porto Rico was giving it the complete benefit of our judicial system and not to insert partial reforms of the Spanish judicial system.”\textsuperscript{52} These words reflect a deep disrespect for the Puerto Rican system and the desire to Americanize it as soon as possible, which was coherent with the Manifest Destiny sentiment that guided American expansion during those days.

Later on an important percentage of native laws were characterized as “non-compatible” with the American system and overruled, the remaining ones were interpreted and applied in a Common Law fashion making the survival of Civil Law roots almost impossible. Clearly, the overwhelming number of “Public” laws enforced to “facilitate” the transition from one ruler to the other, also had repercussions on the practical approach, \textit{i.e.} legal education was totally reformed and courts were managed by American judges in their entirety.\textsuperscript{53} These two facts alone had an enormous impact on the Americanization of the Boricua system as

\begin{itemize}
\item \textsuperscript{47} Carmelo Delgado Cintrón, \textit{supra} note 16, at 53-54.
\item \textsuperscript{48} \textit{Id.} at 54.
\item \textsuperscript{49} \textit{Id.} at 115.
\item \textsuperscript{50} \textit{Id.} at 55.
\item \textsuperscript{51} Triás Monge, \textit{supra} note 39 at, 7.
\item \textsuperscript{52} Mouchet & Sussini, \textit{supra} note 1, at 69 and Carmelo Delgado Cintrón, \textit{supra} note 16, at 57.
\item \textsuperscript{53} Carlos Mouchet & Miguel Sussini, \textit{supra} note 1, at 17.
\end{itemize}
Puerto Ricans lost control of their laws, lawyers and courts for years. On August 1899, General Order N° 128 determined that the only lawyers that could validly practice on the Island were those who had law diplomas from American universities. A few months later, the recommendations of the commission created by Governador Guy Henry came to fruition and the Spanish inspired judicial system was dismantled entirely. From a technical point of view, the Boricua system was not considered deficient. It was, however, different from the Common Law model and this was enough to bother the U.S. judges and lawyers that controlled the judicial scene, especially in the newly created insular federal tribunals.

The military occupation officially ended in April 30, 1900, because this form of government was not sustainable anymore; the majority of the Boricua population was strongly against it and the U.S. still feared losing control over its new territory due to the rejection of the modifications made to the legal system. The Puerto Rican point of view regarding all these actions was recorded by San Juan’s newspapers. They played an important role in echoing, publicizing and defining pro-American and anti-American reactions to the steps taken by the military government.

As a precautionary measure in that same year, the American Congress passed the Foraker Act, meant to produce acceptance and trust in the new system. The Foraker Act was the first organic law aimed to delimitate Puerto Rico’s fundamental structures and its relations

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54 Although it is true that only the upper classes of the society had access to legal education and therefore had any chances of becoming lawyers, the society as a whole suffered the Americanization. The changes in lifestyle affected everyone living at the Island, rich and poor likewise.


56 Ennio Colon et all, *supra* note 55, at 301.


59 Traditionally, the “San Juan News” and “El País” were considered pro-American, while “El Territorio”, “La Correspondencia de Puerto Rico” y “El Diario de Puerto Rico” were fundamentally pro-Boricua. Carmelo Delgado Cintrón, *supra* note 16, at 55-56, 341.
with the U.S.; giving the Island a civil government. The Act defined institutions like the *Gobernador* and the *Consejo Ejecutivo*, the *Asamblea Legilativa* and the court system.\(^{60}\)

Regarding substantive law, this mandate in its section 8 established that U.S. law would be applicable as long as it was not incompatible with local laws.\(^ {61}\) Boricuas considered this Act as subordinating because, in practice, it imposed limitations that severed the remaining self-determination power people *felt* they had.\(^ {62}\) For example, the *Gobernador*, the *Consejo Ejecutivo* and the judges of the *Tribunal Supremo* would be elected by the U.S. president; also the majority of the members of the *Consejo* had to be Americans.\(^ {63}\)

In execution of the Foraker Act a new commission was created to review, compile and systematize the laws of Puerto Rico. Its efforts, however, were futile because it worked in the middle of confusion and time pressures.\(^ {64}\) The American members of this commission did not speak Spanish and the Boricua did not speak English.\(^ {65}\) People in general deeply resented the commissions; and they viewed them as a direct and unnecessary intrusion from the U.S.\(^ {66}\) In 1901, another commission was assembled;\(^ {67}\) its task was to harmonize the old Spanish Codes (Penal Code, Penal Procedure Code, Civil Code (C.C.) and Civil Procedure Code) with the new system. The harmonization of the Civil Code—which contained the PIL rules - was under the supervision of the Boricua member. In the final report he recommended to keep the C.C. and harmonize it by including minor formal and substantive changes to the Spanish version in force.

\(^{60}\) Rodríguez Ramos, *supra* note 1, at 13.

\(^{61}\) Mouchet & Sussini, *supra* note 1, at 27.

\(^{62}\) According to Delgado Cintrón, if compared the Spanish *Carta Autonómica*, the Foraker Act did not recognize the existence of a local government or gave Boricua people a sense of equality to Americans; on the contrary, it took all their power away and relegated them to a second hand citizen status. Carmelo Delgado Cintrón, *supra* note 16, at 64.


\(^{64}\) The members of this commission were Leo S. Rowe from Pennsylvania, Joseph Daly from New York and Juan Hernández López from Puerto Rico. See: Mouchet & Sussini, *supra* note 1, at 71. Rodríguez Ramos, *supra* note 1, at 14 and Carmelo Delgado Cintrón, *supra* note 16, at 66.


\(^{66}\) Rodríguez Ramos, *supra* note 1, at 15.

\(^{67}\) The members of this second commission were the same, except that Joseph Daly was substituted by J.M. Kennedy. Once again, none of the American representatives spoke Spanish or the Boricua representative spoke English. Mouchet & Sussini, *supra* note 1, at 72 and Carmelo Delgado Cintrón, *supra* note 16, at 68.
since 1890.\textsuperscript{68} The commission stressed that changes could not be made violently because they would awake “a spirit of passive resistance” which would not be of use for anybody.\textsuperscript{69} By 1902, the recommendations were considered and the C.C. was modified with great resistance from Puerto Ricans.\textsuperscript{70} Most of the substantive changes were inspired by the Louisiana C.C., \textsuperscript{71} whilst the formal changes were based on the U.S. Code and on its annotated version.\textsuperscript{72} In the opinion of Hernández López –the Boricua member of the commission- many of the adaptations were not technically necessary; yet they were done to evidence solidarity and unification between the two cultures.\textsuperscript{73} According to Rodríguez Ramos\textsuperscript{74} there are no reasons to believe that the commission acted in bad faith; most likely they were trying to improve the situation. Yet, the intense pressures made by American lawyers for the commission to declare Puerto Rican laws inapt cannot be overlooked.\textsuperscript{75}

The substantive changes incorporated to the C.C. were not as severe if compared to the ones made by the legislative and judicial branches – particularly the \textit{Tribunal Supremo}- to the traditional legal system.\textsuperscript{76} The legislative translated many American laws to Spanish and passed them as “Puerto Rican Acts”; such statutes were subject to the American \textit{stare decisis}, which

\begin{itemize}
\item \textsuperscript{68} Carmelo Delgado Cintrón, \textit{supra} note 16, at 69.
\item \textsuperscript{69} Rodríguez Ramos, \textit{supra} note 1, at 16 and Carmelo Delgado Cintrón, \textit{supra} note 16, at 362.
\item \textsuperscript{70} Carmelo Delgado Cintrón, \textit{supra} note 16, at 69.
\item \textsuperscript{71} Many of the changes were made without considering the pre-existent institutions and others were done even though they were contrary to traditional legal customs in Puerto Rico. José Ramón Vélez Torres, \textit{La presencia de los sistemas de derecho civil y de derecho anglosajón en la jurisprudencia puertorriqueña} 79 Revista Jurídica Universidad de Puerto Rico 69-70 (2010). Rodríguez Ramos, \textit{supra} note 1, at 20 and Carmelo Delgado Cintrón, \textit{supra} note 16, at 70.
\item \textsuperscript{72} Ennio Colón et al, \textit{supra} note 6, at 369.
\item El Código de los Estados Unidos (U.E.C. por sus siglas en inglés) es una compilación de todas las leyes federales vigentes, publicada cada seis años desde 1926, cuando fue aprobada en el Congreso. Por su parte, el Código Anotado de los Estados Unidos (U.S.C.A.) comprende el texto completo del U.E.C., junto con notas sobre decisiones estatales y federales que interpretan y aplican secciones específicas del Código, referencias a otras secciones que tienen relación con ésta, notas históricas y referencias bibliográficas.
\item \textsuperscript{73} Rodríguez Ramos, \textit{supra} note 1, at 15.
\item \textsuperscript{74} \textit{Id.} at 17.
\item \textsuperscript{75} Carmelo Delgado Cintrón, \textit{supra} note 16, at 67.
\item \textsuperscript{76} It must be remembered that tribunals are one of the most important components of successful colonization, since they have the task to express and decide according to the ideology of the dominant political class. This applies not only to American colonialism but Spanish as well. Carmelo Delgado Cintrón, \textit{supra} note 16, at 101-102, 111.
\end{itemize}
clearly antagonized with the Civil Law tradition. On its turn, the judicial branch interpreted and applied the remaining Civil Law rules using Common Law criteria, creating deformed legal monsters that did not belong anywhere. This later occurrence meant that although the C.C. was still in force, its realm was only nominal since its interpretation and application were a lost battle against Americanization. For example, early decisions of the Tribunal Supremo sustained that applying the C.C. was not mandatory.

On March 2, 1917 the U.S. Congress passed the Jones Act, meant to serve as the Puerto Rican Constitution. It was divided in four parts, regulating the people’s rights, the Executive Branch, the Legislative Branch and the Judicial Branch. Although it substituted the Foraker Act, it maintained its spirit, especially regarding its previously mentioned section 8: article 56 established that the laws in force in the Island at the moment of the Jones Act’s enactment would remain in force until their derogation or modification. This Act is considered to have a more liberal character than the Foraker Act and even than the Carta Autonómica because it gave citizenship to the Island’s inhabitants. As will be explained infra, this assertion is not so simple, because the concession of citizenship was not automatic.

Due to the effects of the General Order N°1, the Foraker Act and the Jones Act, Puerto Rico had a very complex set of sources of law. The American codes and statutes, the Spanish codes and statutes and the Insular special laws were applicable (even if they were Americanized). On the other hand, to apply these sources correctly the jurisprudence from the U.S. Supreme Court, some federal courts, the Spanish Supreme Court and the Puerto Rico

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77 I.e. the Uniform Negotiable Act; the Rules of Criminal Procedure; the Rules of Criminal Procedure; Environmental laws; Consumer laws; etc. Rodríguez Ramos, supra note 1, at 22.
78 Infra we will present the judicial interpretation of some of the C.C. articles. These are a good example of the previously referred legal monsters.
79 “The discussed article does not establish the rule to follow in divorce cases, but even if it expressed the opinion of the courts, there are authorities that affirm that we are not bound to follow it” Cruz v. Domínguez, 8 D.P.R. 580, 1 (1905).
80 Rodríguez Ramos, supra note 1, at 23.
81 Mouchet & Sussini, supra note 1, at 28 and Carmelo Delgado Cintrón, supra note 16, at 125.
82 Rodríguez Ramos, supra note 1, at 23.
Supreme Court were to be taken into consideration. The value of court decisions also suffered an evolution. In 1900, Bank v. Castro was decided and the judge considered that quoting previous decisions to support a point was more appropriate than quoting the law; later on, in 1902, the judge of Marimón v. Pelegrí stated that U.S. precedents were binding in Puerto Rico and in 1903 the expression “stare decisis” was used for the first time in Ex Parte Mauleon. Nevertheless, this rampant voyage to Common Law conversion stalled when the Tribunal Supremo decided that the only binding American decisions in Puerto Rico were those of the U.S. Supreme Court (for state courts) and the U.S. Circuit Court of Appeals for the 1st Circuit (federal courts) and that is the way it has remained ever since. The decisions from the Tribunal Supremo are binding to all lower courts, but this is not an exclusive feature from this jurisdiction, since many other Civil Law countries follow this orientation as well.

After considering the information related to this stage, it can be concluded that the U.S. tried – at least from a formal point of view- to maintain the Private Law as it was before their arrival, yet, it was not practically feasible mainly because lawyers and judges who controlled politics and courthouses had an American education and did not have any incentives to familiarize themselves with Civil Law. For them, it was easier to transpose their laws and methodology even to the remaining Civil Law statutes that survived the massive “adaptation” process that took place in the unincorporated territory of Puerto Rico. It can also be concluded that most of the C.C. articles regulating PIL were Americanized by expressly modifying them or altering them via judicial interpretation. The above-mentioned context gathered all the necessary elements for the Island to begin the transition from a Civil Law

83 Mouchet & Sussini, supra note 1, at 28-29.
86 Ex parte Mauleón, 4 P.R.R. 119, 9 (1903).
87 Manuel Rodríguez Ramos, supra note 84 at 10. Footnote 18.
88 In this sense Trías Monge stated: “By mere capriciousness or silliness or because the juridical echolalia that we face whenever we are told sweet principles of American Law we have substituted our Private International Law by the correspondent American Law, without caring about which one is better fitted to our realities”. Trías Monge, supra note 39, at 11.
jurisdiction to a mixed one; yet it was necessary to refresh the Civil Law elements that were totally overshadowed by the Common Law impositions. This was the main event taking place in the next stage.

**Stage II: Renaissance of the Civil Law tradition and the search for juridical equilibrium**

Puerto Rico’s status in 1953 was vividly described by the following quote:

“Puerto Rican jurisprudence honors them [the Codes] and follows them in most of the cases; but it [the jurisprudence] reflects a state of irresolution that may constitute its most predominant highlight. In many decided cases, the text [of the Codes] yields towards the judge and not the contrary... By leaning in American case law, The Supreme Court lets us know by implication that the codes and laws do not have enough authority to solve controversies.”

As a consequence of the changes introduced to the educational system, Boricuas that desired a functioning law diploma – and had the means to obtain it- started attending American law schools. Achieving such objective would allow them to practice at the courts of their own country and understand the legal reasoning that judges utilized to decide cases in their land.

Many students came back home and achieved public positions; some of them even were Chief Justices of the Tribunal Supremo. As will be explained in the following paragraphs, this meant a substantial change in the interpretation and application of the law, which slowly returned to the “hands” of natives.

Starting in 1960, the doctrine and jurisprudence exuded a Civil Law aroma in Puerto Rico. For example, in 1965 – as mentioned *supra* the highest tribunal established that Spanish was the one and only official language to adjudicate justice (at least in state courts). In 1973,

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89 Carlos Mouchet & Miguel Sussini, *supra* note 1, at 77-78. This view, however, was not shared with the same passion by everybody; the Puerto Rican author Rodríguez Ramos wrote in 1949 that the Tribunal Supremo usually turned to the codes and that it tended not to modify them because it understood it was not its function. He acquiesced that there were some “exceptional cases” were the judges ignored the written law. Based on my own research, I tend to agree more with Mouchet and Sussini than with Rodríguez Ramos, at least regarding the application of the codes to solve PIL cases. Rodríguez Ramos, *supra* note 1, at 351. In the same sense: Manuel Rodríguez Ramos, *supra* note 84 at 8-9.

90 It must be kept in mind that until the second half of the XX century, Puerto Rico did not have law schools. The first group of Boricua law school students graduated in 1916. José Trias Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 Tul. L. Rev, 341 (2003-2004).
the same tribunal determined that Puerto Rico belonged to the Civil Law tradition and therefore “Since ours is a civil law jurisdiction, when there exists statutory law it should be resorted to in the first place and as main source for the solution of the cases”\(^\text{91}\) and that “Court decisions may be analytical when it is genuinely necessary to interpret and they may be supplementary when it is indispensable to supplement, but they are not a substitute for the positive law”.\(^\text{92}\)

In 1975, the *Tribunal Supremo* reaffirmed Puerto Rico’s character as a Civil Law jurisdiction when it decided that “It is an error to resort to Anglo-Saxon common law to decide situations which, as the one at bar, are regulated by the civil law.”\(^\text{93}\) The same decision highlighted the importance of following the hierarchy of the legal sources in Civil Law:

“...it is necessary to resort to our basic private law-- suppletory of the special laws when they exist--our Civil Code. In this case there are provisions from said Code which apply to this matter and the same are binding for the parties and for the judge. It is also known that when there is no law applicable to the case, the court shall decide in accordance with equity, as defined by Art. 7 of the Civil Code, § 7. The Code, of course, does not refer to the Anglo-Saxon “Equity,” but to the civil-law equity...”\(^\text{94}\)

By 1979, the *Tribunal Supremo* created one of its most known and controversial decisions: *Valle v. American International Insurance Co.*, determining that:

“In recent decades the Supreme Court of Puerto Rico has struggled to stop that trend, which started at the beginning of the century. Consequently, all cases cited which tend to solve civil-law problems through common-law principles are reversed. In the appropriate cases, it shall lie (sic) to employ the common law in its multiple and rich versions --the Anglo-American, the original English, the Anglo-Canadian, and others--as a point of reference for comparative law, and the use of examples from other juridical systems shall also be permissible.”\(^\text{95}\)


\(^{92}\) Id.

\(^{93}\) Dalmau v. Hernández Saldaña, 103 D.P.R. 487, 488 (1975). This decision was quoted on 2007 by the *Tribunal Supremo* in the case Municipio de San Juan v. Professional Research, 171 D.P.R. 219, 247-48 (2007), in which it was established that “...when a special statute does not contain applicable norms to a particular situation we must turn to the Civil Code to supplement the deficiencies of the said special statute”.

\(^{94}\) Dalmau v. Hernández Saldaña, 103 D.P.R. at 488.

This was a revolutionary decision because it expressly revoked all the previous case law that would be used as a legal foundation to make decisions and constrained lawyers and judges, changing the methodology to decide tort cases. It was also relevant because it forbade the use of Common Law maxims to solve cases; instead, it promoted founding court decisions in the written law.\textsuperscript{96} The criterion laid down by this decision has not been officially overruled by the \textit{Tribunal Supremo}, yet it has been harshly criticized by lower courts, especially federal ones.\textsuperscript{97} This decision was elaborated by José Trías Monge, whom after graduating from Harvard Law and Yale came back to the Island to become a Professor in \textit{Universidad de Puerto Rico}, Attorney General of Puerto Rico, Secretary of Justice and Chief Magistrate of the \textit{Tribunal Supremo} (from 1974 to 1985). During the years he held this last position, its influence magnified the Civil Law renais\textsuperscript{s}sance, whose main success was not to turn Puerto Rico into a 100\% Civil Law tradition but rather into a more balanced mixed jurisdiction.

Trías Monge expressed his concerns regarding the pollution of Puerto Rican Law not only through the decisions of the \textit{Tribunal Supremo}, but also by writings and conferences targeted to students and other members of the Boricua intellectual elite.\textsuperscript{98} He particularly emphasized the universities’ responsibility in the development of a proper and balanced education for law students, who had to be trained not only as American practitioners but also as Civil Law lawyers. One of the most revered fruits of his labor is the \textit{Centro de Estudios Jurídicos Avanzados de la Pontificia Universidad de Puerto Rico}, which took as its own cause the requirements of the Chief Magistrate by sponsoring papers and conferences where the Americanization of Puerto Rican law was a recurrent subject.

\textsuperscript{96} Rodríguez Ramos, \textit{supra} note 1, at 356.
\textsuperscript{97} In this sense see Matos-Rivera v. Flav-O-Rich, 876 F. Supp. 373, 377 (D.P.R.1995), which determined that “Although this approach [the one from the Valle case] may be popular for its semblance of containing the encroachment of common law into the area of civil law, said approach’s isolationism is unrealistic. For Puerto Rico, the approach fails to honestly deal with the reality of civil-law methodology, Puerto Rico’s legal, political, social and economic systems”.
\textsuperscript{98} E.g., Trías Monge, \textit{supra} note 39, at 21-22.
Although Trías Monge was a passionate advocate of Civil Law, he was not obsessed with it to the point of considering necessary the eradication of Common Law. On the contrary, the jurist wished to achieve equilibrium between the two legal families and bring justice to the Island’s history. In the interview made to Professor Luis Muñiz-Arguelles –who worked as Trías Monge’s law clerk in the Tribunal Supremo between 1975 and 1977—99 the Professor mentioned that, in his opinion, the Chief Justice utilized Civil Law as a political pawn to resist the idea of allowing mediocre interpretations to promote the preeminence of one system over the other. Above all, he was opposed to accepting that political assimilation would translate into juridical assimilation.100 In the specific field of PIL, from Muñiz-Arguelles’ perspective, Trías Monge always promoted the American methodology. His efforts as a pragmatist are better exposed in the case law related to international contracts, as will be analyzed infra.

Another illustrious Magistrate was Jaime Fuster, who exercised his position after Trías Monge had left the Tribunal; he was well known for his dissenting opinions, characterized by a pragmatic approach and eloquent logics, seasoned with social and economic aspects of Puerto Rico’s daily life. His opinions always had predominant elements of human values and went deep into the analysis of social realism and its repercussions in the laws and the particular cases.101 In Magistrate Fuster’s view the Tribunal Supremo’s jurisprudence had to be as steady as possible to clearly signal the juridical path to be followed; therefore a trend of thought should be modified when it was absolutely necessary and only after thorough revisions; otherwise altering the precedents slightly would led to arbitrariness.102

In the university environment other personalities must be remembered for their important contributions to the renaissance period, like José Ramón Vélez Torres, who had a different point of view –more prone to alterations in legal interpretations- if contrasted to

100 Ennio Colon et al, supra note 55, at 309.
102 Id. at 26.
Fuster. He considered that the C.C. must not be understood as a “cooking recipe” providing rigid interpretations for the resolution of the cases. On the contrary, it shall be considered as an expression of “legislative guidance” which grants the interpreter enough space to maneuver in its interpretation for the particular case. Likewise, the Professor understood that the process of adoption of foreign institutions was not evil *per se*, but had to be preceded by a deep analysis and adaptation to match the idiosyncrasy of the adopting system. In his writings, Velez Torres expressed his concerns regarding the education law students were receiving in Puerto Rico; in his opinion, law schools were training them to be hounds at the chase of precedents rather than code interpreters. He also worried about the Professors’ linguistic decadence—rich in unnecessary Anglicism; which passed unfiltered to the students and reflected on the tribunals’ decisions.

In 1974 a study focused on Boricua lawyers and the sociological aspects that shape the profession in the Island was conducted. One of the most relevant questions in the questionnaire was how lawyers felt about their legal system. More than half of the enquired lawyers answered that they were satisfied with their system because it was just and democratic; although many of them recognized that it had deficiencies that should be improved. Other group of lawyers was not satisfied with the system because in their opinion it was not adapted to the social, political and economical requirements of the Island. In their view Puerto Rico’s legal system only responded to the requirement of U.S. elites. The last group of lawyers said that they agreed with the system but were aware that it was not applied correctly.

The way in which the previous question was answered directly relates to how lawyers felt about the political status of Puerto Rico. Unsurprisingly most of the enquired people felt at

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103 José Ramón Vélez Torres, supra note 71, at 69.
104 *Id.* at 74.
106 *Id.* at 84-85.
ease with the Island status. Minority groups were divided between those who felt that Puerto Rico should be an independent nation and those who considered that it should become another U.S. state.\(^\text{107}\) The relationship between the previous question and this one lays in the fact that since most of the lawyers were comfortable with the political situation of Puerto Rico, they were also comfortable with its legal system. It is also possible to conclude that the minorities that were against the system because it “served American elites” were the ones that rooted for total independence. This study helps us understand that the *renaisance fureur* was already fading and yielding space to the next stage. It also invigorates the previously made argument according to which politics directly affects the law making process, and makes us ascertain that Puerto Rico will remain a mixed jurisdiction as long as it continues to have an undefined political relationship with the U.S. If this status changes there is a chance that one of the legal traditions will have greater predominance, changing once again the Island’s law.

The renaissance officially ended in the mid 80’s and although it did not result in a complete negation of American Law, it certainly refreshed the Civil Law spirit of judges, lawyers, professors and students. This period is particularly important because it transformed Puerto Rico into a real mixed jurisdiction and not only an American colony, following the trends of the settler. In certain occasions, the Civil Law infusion might have been too strong (like in the *Tribunal Supremo*’s decisions where all previous precedents were overruled) but, as we will see in the following section, the initial rage and necessity of repossession of the territory and its laws were toned down around the 1980’s, leading to a third stage where pragmatism took over passion and self-definition was (and still is) the main task. As mentioned *supra*, during all the *renaisance* period the *Tribunal Supremo* was dominated by Magistrates loyal to the PPD; this meant that –in general- they would act as a single force, not contradicting each other and least

\(^{107}\) *Id.* at 85.
of all the Chief Justice, who, at the time, happened to be José Trías Monge, the man behind the rescue of Civil Law in Puerto Rico. ¹⁰⁸

**Stage III: Stability and self-definition**

Nowadays Puerto Rico is experiencing a period of increased stability and continuity of its legal self-definition. At the moment, the Island’s legal actors ¹⁰⁹ seem to be putting to the test all the experiences and knowledge gathered during the precedent phases; they are also making an effort to define by themselves who they are and who they want to be. Puerto Ricans seem to have understood—in the realm of applicable law to international contracts at least— that they have room to develop their own characteristics and that the duality that makes their system special allows them to be more creative and flexible than other jurisdictions can be.

This does not mean that the clashes between the legal traditions have ceased or that there is uniformity regarding the views on the rapport between Common Law and Civil Law in the Puerto Rican battlefield; on the contrary, as we argued at the beginning of this paper, in a mixed jurisdiction they never will. I only mean to express that at the moment there are no “wars of extremes” taking place and that acceptance of being a mixture has taken place: The U.S. has already secured its claim over the territory and the limits of its power are well defined. No rambunctious decrees are issued and, in fact, the Island has a certain degree of independence that has allowed it to define its own path. The Civil Law heritage is still present, yet the *renaissance* period has come to an end, leaving room to evaluate and choose what they want for the system, disregarding its origin.

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¹⁰⁸ This does not mean that there were no differences in ideology in the Tribunal, or that debates did not take place. On the contrary, as will be seen infra, the decisions made by the Tribunal do not follow a single pattern; not even when they were written by the same Magistrate. What this means is that the trend of incorporating Civil Law in the Tribunal’s decisions was shared by all the Magistrates. José Trías Monge. Cómo Fue. Memorias 269, Puerto Rico (2005).

¹⁰⁹ Within this term I include lawyers, judges, professors and students.
A good example of the present frictions are Puerto Rico’s university professors: some of them are purists –defenders of the Civil Law tradition-, others are pollutionists –advocates of the Common Law, and finally, others choose to be pragmatists -taking advantage of functional elements from both systems and coordinating them to work together.\(^\text{110}\) This variety of views reflects that there is no complete uniformity in the legal education system and students will have to choose which tendency to follow.\(^\text{111}\) Logically, judges are not immune to this triple approach and so their decisions echo; yet, as previously mentioned, in a mixed jurisdiction such polyvalence is to be expected and should not be considered as a negative aspect but rather as a paramount characteristic of the system.

In order to make final remarks for this stage, the previously mentioned interview made to Professor Luis Muñiz-Arguelles (Universidad de Puerto Rico) on November 29\(^{th}\), 2011,\(^\text{112}\) is an important source of information. According to the scholar, these days the Tribunal Supremo, is divided between the followers of American tendencies and the followers of European ones. He also thinks that there is a preeminence of the Common Law elements but, simultaneously, there is a rampant lack of confidence in any doctrine originated in America. This is possible due to a dangerous absence of understanding of law and its origins and the division amongst the Magistrates. Although Professor Muñiz-Arguelles does not see it coming in the near future, he considers that a reevaluation of the Civil Law elements would be healthy in order to avoid absurd and remind the judges of important Civil Law doctrines and principles. Finally, he considers that there is a deficiency of knowledge of even the most basic principles of PIL, which endangers the future developments of Boricua PIL.

\(^{110}\) These terms were taken from Vernon Valentine Palmer, \textit{A Descriptive and Comparative Overview} 17, 32-33 (Vernon Valentine Palmer ed., 2001).

\(^{111}\) Vélez Torres, \textit{supra} at 71, at 70-71.

\(^{112}\) It must be said that Puerto Rican students increase their contact with Civil Law culture via exchange programs, conferences given by European and Latin American scholars and by the constant new stock that furnishes the Boricua libraries with books from those latitudes. Trías Monge, \textit{supra} note 39 at 344.

\(^{112}\) See “Annex A”, questions 2), 5) and 6).
After reviewing the three stages it can be concluded that Puerto Rico’s determination of the contract’s applicable law has developed like a human being does; it began as a dependent apathetic being in the first stage; it turned into a rebellious teenager and now is a young adult, defining which way to go in life. It is still to be seen if the choices made were the correct ones. The next section comments on the evolution of Puerto Rico’s PIL regulations, its past, present and future. This section is most necessary in order to understand the case law analysis and evaluate the final remarks made at the end of this chapter.

Puerto Rico’s PIL: articles, interpretations and projects for the future

From the PIL perspective, the most relevant regulations were originally located in articles 8, 9, 10 and 11 of the Spanish C.C.; these rules, along with specific articles regulating marital relationships, represented the whole PIL system. All of them—except article 8—remained as they were during the Spanish rule—at least in writing. Article 8, regulating public order, was eliminated. The reasoning behind this action is not clear but according to Symeonides it was based on an erroneous interpretation of the terms “penal laws” and “police laws” which were taken for regulations of a penal nature instead of a civil one.117

- Article 9

113 Article 8: The penal laws, police laws and public safety laws are mandatory for all persons within the Spanish territory.
114 Article 9: The laws relating to family rights and obligations, or to the status, condition and legal capacity of persons, shall be binding upon the citizens of Puerto Rico, although they reside in a foreign country.
115 Article 10: Personal property is subject to the laws of the nation of the owner thereof; real property to the laws of the country in which it is situated.
116 Article 11: The forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed.

...Prohibitory laws relating to persons, their acts or property, and those which relate to public order and to good morals shall not be held invalid by reason of laws, decisions, regulations or agreements in force in any foreign country.
In a similar sense: Luis Muñoz Morales, supra note 43, at 137.
Article 9, regulating the personal statute, was expressly altered during the 1902 revision by changing the traditional connecting factor “nationality” for “citizenship” to determine the applicable law to personal capacity. The reason to make this change was to discourage any possibility of understanding that a Puerto Rican nationality existed; yet the connecting factor “citizenship” raised doubts due to the lack of certitude regarding the citizenship of Puerto Ricans. The obscurity of the article was improved by the 1902’s Political Code (P.C.), whose article 10 defined who were Puerto Rican citizens.

The first decisions after 1902 linked the C.C. to the P.C. and established that the characterization of “citizenship” should be made taking into consideration the P.C.’s article 10, according to which “The citizens of Puerto Rico are: 1. All persons born in Puerto Rico and subject to the jurisdiction thereof. 2. All persons born out of Puerto Rico who are citizens of the United States and who have acquired domicile in Puerto Rico...” These decisions also determined the difference between simple residence and domicile, stating that being domiciled in a place meant to live there with the intention to remain, while having a residence somewhere implied that a person was in the place only temporarily. Finally, it is important to highlight that by 1905 the unilateral nature of article 9 had changed to a bilateral one via judicial interpretation; this meant that the article determined not only the applicable law in matters of capacity to Puerto Ricans but to foreigners as well.

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118 The Puerto Rican citizenship had a complex evolution. When the Treaty of Paris was signed in 1898, its article IX established that Spanish citizens could keep their nationality or renounce to it and wait for the American Congress decision regarding the status of the Island’s residents. Later on, the Foraker Act’s article 70 determined that all people residing in Puerto Rico in April 11, 1899 –Except those who decided to remain loyal to Spain- and their sons would be considered Puerto Rican citizens and would have the right to be protected by the U.S. The Jones Act’s article 50 established that the Puerto Rican citizens would be considered American citizens; however, this was not automatic since Puerto Ricans would have to go through a procedure in order to apply for this “benefit”. A statute from 1934 established that all persons born in Puerto Rico during 1934 or after that date; would be considered U.S. citizens. This statute eliminated the Puerto Rican citizenship; yet Puerto Ricans were not exact equals to Americans since they had restricted rights. In the 1952 Constitution nothing was really altered because although it recognized the existence of a Puerto Rican citizenship there is no nationality; therefore Puerto Ricans are still American citizens with limited rights. Mouchet & Sussini, supra note 1, at 30-32.

119 In this sense see: Marrero Reyes v. García Ramírez, 105 D.P.R. 90, 103 (1976).


121 See: Marimón v. Pelegrí Marimón v. Pelegrí, 1 D.P.R. 225, at 201-104.
• **Article 10**

The first paragraph of article 10, devoted to the real statute, included the connecting factors nationality and *lex rei sitae*. Although the letter of the article did not change *per se*, its interpretation under the Common Law optic was very different from the Spanish one. According to the *Tribunal Supremo*, the article’s connecting factors did not only regulate property but also the parties’ capacity regarding transactions related to the property.\(^{122}\) Although “nationality” was still mentioned, the *Tribunal* determined that in cases related to the U.S. such factors must be understood as “domicile” since the federal structure of the country would lead to different laws depending on the State where the parties were “domiciled”. The reason to keep the mention to “nationality” in this article remains unknown.

The second paragraph of article 10, which established the Civil Law principle of the unity of the estate, was deleted.\(^{123}\) It was substituted by the Common Law principle according to which each property has its own applicable law, even if they are part of the same estate. On this matter the 1902 commission wrote:

> “The most important reform made to the Code’s Preliminary Title was the one that restricts the real and personal statutes, by considering and applying the American general principle according to which the rights related to the real property must be regulated in its entirety by the law of the country where they are located, this includes the contractual rights and the hereditary ones.”\(^{124}\)

Not even the renaissance period was enough to bring back the Civil Law principle of the unity of the state; therefore the severability principle remains in force to this date.

• **Article 11**

\(^{122}\) E.g., Colón et al. v. Registrar of Aguadilla, 22 P.R.R. 344 (1915) and Bracons v. Registrar of San Juan, 24 P.R.R. 703 (1917). See also: Mouchet & Sussini, *supra* note 1, at 72.


Article 11 regulates the form of acts. It was not modified by the commission and contrastingly to what happened to the other articles, tended to be interpreted and applied in a Civil Law fashion; e.g. some decisions would make reference to the French Civil Code (i.e. “The French Civil Code contemplates the rights of its citizens residing temporarily in foreign countries where the intervention of a public officer in the drafting of a will is unnecessary…”)\(^{125}\) and to traditional Civil Law interpretations of it. Likewise, extensive quoting of Civil Law doctrine was usual regarding the form of acts, just as it would be expected in a Civil Law tribunal.\(^{126}\)

During 1902, nobody seemed to notice article’s 11 second paragraph, which regulates public order; therefore, no major comments or changes were made in this regard. Guaroa Velázquez tells us that, by 1945, Puerto Rico did not have a defined criterion about public order. The author explains that since 1902, there has been confusion between the territoriality of the laws and international public order\(^{127}\) and that the effects of applying public order are not clear either.\(^{128}\) During the 70’s the Tribunal Supremo decided on public order for the first time in Hernández v. Méndez & Assoc. Dev. Corp. The case determined that domestic public order was to be analyzed in each case in order to give contents to the limitations of contractual freedom contained in article 1207 of the Civil Code.\(^{129}\) This and all the cases that followed focused on article 1207 and did not mention the second paragraph of article 11. Although the present investigation did not lead to any decision expanding this interpretation of public order to the international sphere, there are no reasons to doubt that it would be applied as well; the only aspect that rest undetermined is which would be the effects of applying public order to international cases.

- **Book 7**


\(^{126}\) E.g., Widow of Ruiz v. Registrar, 93 P.R.R. 893 (1967).

\(^{127}\) See: Marimón v. Pelegrí, 2 D.P.R. 331.

\(^{128}\) Guaroa Velázquez, Directivas Fundamentales del Derecho Internacional Privado Puertorriqueño 83-84 (1945).

\(^{129}\) Hernández v. Méndez & Assoc. Dev. Corp., 105 D.P.R. 149, 153 (1976);
As mentioned above, the written law has not completely changed since the Spanish domain; yet, as will be seen in the next section, its interpretation has evolved over the years to adapt the regulations to the modern necessities. Book 7 of the Draft made by the Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico was an attempt to harmonize Puerto Rico’s PIL adapting it to the Island’s present needs and tendencies. Book 7 was made public on April 20th 2007. It has a total of 48 articles, structured in six Titles addressing General provisions; Family institutions; Real property; Obligations and contracts; Torts; and Successions. For its drafting comparative sources from Civil and Common Law traditions were analyzed.

The Draft has extensively regulated the contractual field in nine articles. The most important ones in the context of this paper are articles 30, 31, 35, 36 and 37.

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130 Article 30. General Rule: in absence of a valid election of the applicable law, contractual obligations are ruled by the law of the State that has the strongest connection with the parties and the dispute in relation with the problem addressed.
In order to make this determination, all the relevant factic contacts, such as the place of negotiation, the place of making, the place of performance, the parties domicile, the habitual residence, the party’s place of business, or the location of the object of the contract, should be considered and evaluated taking into account:
(a) the nature, type and purpose of the contract; and
(b) the principles of article 2 and the policies there mentioned; also the policies of facilitating and planning business, promoting multistate commerce and protecting one party from the abuses of the other.

131 Article 31. Special Rules: except when the parties validly choose the applicable law, the contracts enumerated in this article will be ruled by the laws of the states mentioned below:
(a) Contracts related to real property are ruled by the law of the state where the property is located.
(b) Contracts of sale of goods not regulated by article 35 are ruled by the law of the state where the vendor has its principal place of business.
(c) Transportation contracts not regulated by article 35 are ruled by the law of the state where the carrier has its principal place of business.
(d) Franchise contracts are ruled by the law of the state where the franchise will operate according to the terms of the contract.
(e) Concession contracts are ruled by the law of the state that the party that concedes has its principal place of business.
(f) Agency contracts are ruled, in particular the obligations between principal and agent, are ruled by the law of the state where the agent usually performs his work.

Nevertheless, a party may avoid the application of the law of a particular state determined according to the previously stated rules, if he proves that an aspect of the controversy presents a stronger connection between a different state and the parties or the business per se, according to the principles of article 30.
However, article 2\textsuperscript{135} must be kept in mind because it gives the general guidelines to utilize other articles correctly. Article 2 was inspired by the cases summarized in the next section; one relevant aspect about it is that it does not refer to the dominant contact theory but rather to the most relevant connection. According to the official commentaries this change was made in order to avoid mechanic and quantitative determinations of the applicable law and rather promote a more qualitative analysis of each contact and public policy in a particular case. This sounds very similar to what was established in Federal Ins. Co. v. Dresser Industries.\textsuperscript{136}

\begin{footnotesize}
\begin{itemize}
\item Article 35. Consumer contract: Despite the rules established in chapters 1 and 2 of this Title and unless the consumer requests the application of a different law, the tribunal will apply Puerto Rico’s law to consumer contracts whenever:
\begin{enumerate}
\item[(a)] the consumer was domiciled or resided in Puerto Rico when the contract was made; and
\item[(b)] his consent to contract was obtained or was considerably induced by an offer or announcement made in Puerto Rico.
\end{enumerate}
For the purpose of this article, a consumer contract is one that results on in the delivery of goods or the rendering of a service to a person for his personal or family use, outside his professional or commercial activity.
\item Article 36. Employment contract: Despite the rules established in chapters 1 and 2 of this Title and unless the employee requests the application of a different law, the tribunal will apply Puerto Rico’s law to the employment contracts that determine that the employee will render his services mainly in Puerto Rico. A person domiciled or residing in Puerto Rico, contracted in that place to render his services outside Puerto Rico, cannot be deprived of the protection of imperative norms of Puerto Rican legislation which application may result appropriate, disregarding the place of performance of the employee.
\item Article 37. Insurance contracts: Despite the rules established in chapters 1 and 2 of this Title and unless the insurance holder requests the application of a different law, the tribunal will apply Puerto Rico’s law to:
\begin{enumerate}
\item[(a)] a life insurance contract, health insurance or disability insurance contract if the policy or its renewal was turned in or issued to be turned in Puerto Rico or if the insurance holder was domiciled there at the moment of the issuance or renovation; and
\item[(b)] all other insurance contracts, except those of maritime oceanic insurance and international commerce insurance, if the insurance holder knew or must have known that the insured risk was mainly in Puerto Rico at the moment of the issuance of the policy.
\end{enumerate}
\item Article 2. General and supletory rule: The applicable law in the cases that have contacts with more than one state is that of the state that has the most significant connection with the parties and the dispute, unless this Book provides otherwise.
In order to determine which is the applicable law, all the policies of the invoked law will be considered as well as any other relevant policy of the involved states. The strength and pertinence of these policies will also be evaluated, especially in relation to the parties and the disputes and the needs of the interstate and international systems. Such policies include the protection of the justified party’s expectations and the minimization of the adverse consequences that may bring submitting the parties to the laws of more than one state.
\end{itemize}
\end{footnotesize}
Article 30 establishes a general rule that has a double function, regulating those cases that are not contemplated in other norms and working as an escape clause in those situations where the law determined by other articles does not present the strongest connection with the contract. This latter feature of article 30 can be compared to the Rome Convention’s escape clause included in article 4(5).\textsuperscript{137} Article 30’s first paragraph’s purpose is to maintain the Draft flexible and updated because its general nature encompasses any new contract that getaway from the specific drafting of the following articles. At the same time, including an escape clause will enhance the flexibility of contractual regulations, by giving judges a chance to exercise their discretionary powers in those cases where they consider that the specific regulations do not fulfill the purpose they were created for.

On the other hand, article 31 has a different approach. It determines via connecting factors the applicable law to specific types of contracts; although this article’s approach may seem very classic, its last paragraph it reminds us of the possibility of turning to the escape clause if the contract has a very significant connection with another jurisdiction. According to the official commentaries, this norm seeks to augment predictability and lessen the heavy burden placed on judges by articles like 30 and 2, which require more insight and analysis.\textsuperscript{138}

Article 35 rules consumer contracts by defining Puerto Rico’s law as the default applicable law if the parties have not selected a different one -whenever the consumer is domiciled or resides in the Island at the moment of making the contract. The same laws will apply if the consumer’s will was biased by an offer made in Puerto Rico. If there were consumer contracts that would not fit into the article’s scope, they would be regulated by article 30. It is

\textsuperscript{137} Article 4 Applicable law in the absence of choice

... 5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

relevant to mention that the last paragraph of article 35 includes an autonomic characterization of what a consumer contract is. This type of definitions are rarely found in PIL regulations because they are difficult to create and can swiftly become obsolete; yet they are appreciated by those who apply the statutes that contain them, because they expressly define what is and what is not a consumer contract. There are no precise cases amongst the ones we will analyze infra that have specifically inspired this regulation; yet it must be noted that the article is compatible with the spirit and purpose of the rest of Book 7.\(^\text{139}\)

Article 36 regulates employment contracts. This norm does not follow a bilateralized conflictual structure either; rather, it has unilateral\(^\text{140}\) (first paragraph) and material\(^\text{141}\) (second paragraph) approaches which led to a wider protection of workers, even if the employment is to be executed outside of Puerto Rico. The influence of Green Giant Co. v. Tribunal Superior’s dissenting opinion dominates the article and becomes necessary since the scenery of Boricua migrant workers has not changed much since this decision was rendered in 1975. Lastly, article 37 regulates insurance contracts using a unilateral structure, similar to the one presented in article 35 and 36, which is consistent with the necessity to protect Puerto Rico’s citizens laid down in Maryland Casualty Co. v. San Juan Racing Association.\(^\text{142}\)

Even though the Draft offered an alternative regulation more harmonious with the present requirements of Puerto Rico’s PIL and its judicial evolution, its discussion and enforcing process has stalled with no real perspectives of being restarted in the near future. Professor Luis Muñiz-Arguelles manifested in his interview that the reasons behind the end of the

\(^{139}\) See: Tatiana B. De Maekelt, Teoria General del Derecho Internacional Privado 328 (2 ed. 2006).
\(^{140}\) In the sense that it only regulates the application of Puerto Rico’s Law to internationalized cases by opposition to more neutral norms that include connecting factors and determine the applicable law disregarding if it is Puerto Rico’s or not. See: Fabiola Romero, Derecho Internacional Privado. Guia y Materiales para su Estudio por Libre Escolaridad 1-88 (1992).
\(^{141}\) Material norms are those that directly solve an internationalized situation. They are contrasted with Coflictual norms which do not solve the situation but merely determine the law that will. Id.
discussion of the Draft are more political than juridical, since it became a battlefield for the two main parties and the Drafting Commission’s President was arrested on corruption and fraud charges. On the other hand, in his opinion, the fact that the Draft has been discussed as an all-encompassing proposal and not by area of law has been another factor that complicated the process. If Book 7 were to be analyzed individually, the odds of its enforcement would increase.\textsuperscript{143}

Professor Muñiz-Arguelles participated in the drafting of Book 7; in his opinion many of the proposed articles are good and modern. His main critic to it is that article 2 risk the possibility of efficiency in resolving cases, even the most simple ones could become complex and expensive in the light of that article because such norm is designed to be applied by knowledgeable judges, characteristic which is not always found in judges, particularly in Boricua judges who, in many cases, are ignorant of the most basic principles of PIL.\textsuperscript{144}

In the next section many of the cases considered by the draft will be analyzed in order to establish the trends followed by the Tribunal Supremo and examine how the different periods considered supra influenced the decision making process of the highest state court of Puerto Rico. In the following section we will also comment on the jurisprudence of the federal courts and its relationship with the trends pursued by the Tribunal Supremo.

\textsuperscript{143} See “Annex A”, question 4).  
\textsuperscript{144} See “Annex A”, question 5).
Case Law Analysis

Puerto Rico’s C.C. is silent regarding the method to determine the applicable law to international contracts or torts; therefore the developments in case law have been fundamental to define these areas.\(^{145}\) This section will analyze the leading cases decided by Puerto Rico’s *Tribunal Supremo*\(^ {146}\) in the contractual field as well as the development of the application of the dominant contacts theory in that court’s jurisprudence. A similar analysis of the Puerto Rican Federal case law produced in the past two years will be also included. This last element will be key to contrast the methods both tribunals follow in the application and interpretation of the dominant contacts theory.

The first decision of the *Tribunal Supremo* to establish the applicable law to international contracts was *Maryland Casualty Co. v. San Juan Racing Association*.\(^ {147}\) In this case claimant and defendant signed an insurance contract that was intended to last three years. After the first year, defendant ceased to make payments to claimant who sued in Puerto Rico for lack of payment. The contract was originally signed in the U.S. but shortly after was amended in Puerto Rico. Defendant alleged that he did not owe anything to claimant since the applicable law was the Puerto Rican one and according to it, the one and only payment made covered the three years contract. Claimant sustained that the applicable law was the one from Pittsburg and therefore the payment made only covered one year out of the three.

This case was decided in September 1961 by Magistrate Dávila. He acknowledged the existence of multiple criteria to determine the applicable law to international contracts such -as

\(^{145}\) Although this paper is limited to international contracts I will make references to torts’ case law because state and federal courts indistinctively utilize precedents from both subjects to back up the application of the theory of dominant contracts. Such interdependency is based on the historical development of both areas in Puerto Rico.

\(^{146}\) These cases represent the totality of cases decided by the *Tribunal Supremo* regarding the applicable law to international contracts.

the application of the law of the state where the contract was made or the law of the place where the last effective act to contract took place, but did not explain why he discarded them. In contrast, he chose to apply the dominant contacts theory based upon the fact that other American jurisdictions and the U.S. Supreme Court had been deciding similar cases applying this theory. In Dávila’s opinion, enhancing the State’s power to apply policies that protect its citizens is one of the most important features of the dominant contacts theory. There was no mention of the institution of public order.

Given Puerto Rico’s evolution as a mixed jurisdiction, Magistrate Davila’s exclusive reliance on Common Law to support the selection of the dominant contacts theory as the mechanism to determine the applicable law may have yielded into a one-sided result. The duality of Puerto Rico’s tradition would have been more rightly realized in an opinion that considered the two systems that have continuously shaped the Island’s law. Although Magistrate Davila attempted to include Civil Law elements in his analysis by quoting the well-known Civil Law scholar Castán; his quote was limited to the definition of adhesion contracts. No Civil Law references were made regarding the applicable law to international contracts. Even though this decision was rendered at the beginning of the renaissance period, it certainly reflects the lingering Common Law influence dominating the first stage of Puerto Rico’s metamorphosis under the American rule; besides at this point the strong influence of Trías Monge was still not present at the Tribunal.

148 See Maryland Casualty Co. v. San Juan Racing Association, 83 P.R.R. at 562.
149 The contacts with the U.S. were the place where the contract was made and the place of payment. The contacts with Puerto Rico were the place where the contract was amended, the place of business of the insurance holder, the place where the insured property is located and one of the places where the insurance company could perform their business. After performing the dominant contacts test, Magistrate Davila concluded that Puerto Rican Law had to be applied. The American cases he relied on in order to choose the dominant contacts theory were Travelers Health Assn. v. Virginia, 339 U.S. 643 (1950); Hoopeston Co. v. Cullen, 318 U.S. 313 (1943); Zogg v. Penn Mutual Life Insurance Company, 276 F.2d 861 (2d Cir. 1960); Kievit v. Loyal Protective Life Ins. Co., 170 A.2d 22 (N.J. 1961) and Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954). Maryland Casualty Co. v. San Juan Racing Association, 83 P.R.R. at 566.
150 Maryland Casualty Co. v. San Juan Racing Association, 83 P.R.R. at 565.
151 Id. at 566.
Subsequently in 1975, *Walborg Corporation v. Superior Court of Puerto Rico*\(^{152}\) was decided; the case can be summarized as follows: Due to the unilateral termination of a distribution contract by the distributor, the dealer filed suit in Puerto Rico’s state courts. The distributor requested the dismissal of the action, alleging that the controversy should be submitted to arbitration according to the arbitration clause included in the distribution contract. The Court analyzed its competence to hear the case and the applicable law to the controversy. Trías Monge chose to follow the theory of dominant contracts as it was laid out in *Maryland Casualty Co. v. San Juan Racing Association* and determined that the applicable law was Puerto Rico’s since most of the case’s contacts (celebration, execution and performance of the contract) were located in that jurisdiction.

The decision is peculiar because -although it was written by the father of the Boricua Civil Law *renaissance*- it has no more explicit engagement with Civil Law elements than *Maryland Casualty Co. v. San Juan Racing Association*. Chief Justice Trías Monge does not utilize the C.C. or any Civil Law sources (either legal or scholarly) to base his decision; on the contrary, the only juridical basis for the determination of the applicable law is a precedent and Common Law scholars.\(^{153}\) The Magistrate also reiterated\(^{154}\) that choice of law clauses are ineffective when they “collide against fundamental considerations of public policy of the forum”. To support this affirmation once again the judge used American authorities (including the Restatement of the Laws, Second, Conflict of Laws, sec. 187) and the *Maryland Casualty Co. v. San Juan Racing Association* decision. Once again there was no mention of the institution of public order.

*Walborg Corporation v. Superior Court of Puerto Rico* introduced a new aspect in the Island’s jurisprudence when it stated that: “The clauses in which the law is selected are usually

\(^{152}\) *Walborg Corporation v. Superior Court of Puerto Rico*, 104 D.P.R. 184 (1975).

\(^{153}\) *Walborg Corporation v. Superior Court of Puerto Rico*, 104 D.P.R. at 192.

\(^{154}\) Such decision was first taken at *Maryland Casualty Co. v. San Juan Racing Association*, 83 P.R.R. 538.
considered valid when the jurisdiction selected has substantial connection with the contract.” Although this decision is not curious because such limitation to the party autonomy was recognized by the Spanish Civil Code (article 10(5)) and the Restatement Second of Conflicts of Laws (§ 187(2)(a)), not a single Civil Law author or Act was mentioned in this regard and no Comparative Law analysis was performed, considering that none of the international conventions in force at the time required this nexus and that some national systems had determined that a substantial connection between the chosen law and the contract was not necessary.155

The decision reveals that Chief Justice Trías Monge, like the jurisprudence of Puerto Rico, was a jurist characterized by duality and constant development. With one hand, he was spearheading the colony’s renaissance and with the other he was employing the common law methods, precedents and interpretation like many of his fellow jurists. In fact, in his own book the Chief Magistrate did not highlight this decision for its applicable law component but rather for its relevance to the development of the enforcement of arbitration clauses in Puerto Rico.156 These characteristics of duality and constant development are particularly notorious regarding the reasoning behind the application of the dominant contact’s theory. For example, in this case, which was the first international contracts’ case where he delivered the Tribunal’s opinion, there is no balance between the legal traditions and American approaches dominate the scene 100%. Surprisingly, this unilateralism changed in less than three months when the Chief Justice delivered a dissenting opinion in the decision for Green Giant Co. v. Tribunal Superior.157

155 See for example, the Peruvian Civil Code, which article 2095—in principle—does not require the chosen law by the parties to have connections with the contract.
156 José Trías Monge, supra note 108, at 283.
157 The case presented two different issues: 1) Are section 16 of the Puerto Rican Constitutional article 16 and a statute establishing working hours in Puerto Rico to be considered of extraterritorial application? and 2) What is the applicable law to this employment contract? Green Giant Co. v. Tribunal Superior, 104 D.P.R. (1975).
In this case two Puerto Rican workers subscribed employment contracts in Puerto Rico to be executed in the U.S. The parties did not select the applicable law. The plaintiffs alleged that the contract was ruled by Boricua law and the defendants argued that Maryland and Delaware’s law applied. The opinion was written by Magistrate Torres Rigual and the majority agreed with it. The Magistrate followed the previous cases in contracts but disregarded his own decision in Dalmau v. Hernández Saldaña and applied the dominant contacts theory to determine the applicable law to the contract.\textsuperscript{158} Torres Rigual also established that what mattered was the quality of the contacts with a given jurisdiction not their number; therefore he considered that the place of performance was, in this case, the strongest contact between the contract and a jurisdiction and in consequence Maryland’s law was applicable to the contract. In the application of the dominant contact theory the Magistrate made a thorough analysis of the public policies of each one of the involved forums but did not apply article 7 as he had done in Dalmau v. Hernández Saldaña.

Trias Monge wrote a dissenting opinion which procedural basis was that the standard to grant summary judgment was not accomplished. He also profited from the opportunity to manifest his views regarding the Americanization of Puerto Rico’s PIL.\textsuperscript{159} In this sense, he expressed that blindly following American trends to shape Puerto Rico’s PIL was a mistake.\textsuperscript{160} Although he admitted that contracts were not expressly regulated by this code, he proposed to turn to the C.C.’s article 7\textsuperscript{161} to create a solution based on the concept of “equidad”.\textsuperscript{162} The

\textsuperscript{158} Some of the contacts debated in the decision were the place of recruitment was Puerto Rico, the existence of a recruitment office in the Island, the place of commencement of the contract (Puerto Rico), the jurisdiction chosen by the parties to solve controversies was Puerto Rico and the place of domicile of the workers was located in the Island. The only contact with the U.S. that was mentioned was the place of performance.

\textsuperscript{159} Green Giant Co. v. Tribunal Superior, 104 D.P.R. at 513.

\textsuperscript{160} He quotes the following cases to exemplify how Americanized the Boricua PIL was: Cruz v. Domínguez, 8 D.P.R. 580; Colón v. Registrar, 22 D.P.R. 369, 374-375 (1915); Lopkez v. Fernández, 61 D.P.R. 522 (1943). Green Giant Co. v. Tribunal Superior, 104 D.P.R. at 503.

\textsuperscript{161} Article 7. Refusal of court to render decision; application of equity in absence of statute: Any court which shall refuse to render a decision on the pretext of silence, obscurity or unintelligibility of the laws, or for any other reason, shall be held liable therefore.
Chief Magistrate’s interpretation of article 7 led him to a complex analysis of Comparative Law – that included Common and Civil Law views- in the search for general principles of law and accepted usages and customs that could assist in the determination of the applicable law to employment contracts.\textsuperscript{163} After his analysis, Trías Monge concluded “the truth is that there is such a wide variety of doctrines that the result depends ultimately on whichever is chosen. In cases like this one, we must act cautiously to choose a norm that accurately responds to the goals and context in which it operates”.\textsuperscript{164} To solve this particular case he recommended the creation of a special rule for mass employment contracts to work abroad temporarily.

In his dissenting opinion, Trías Monge did not reject the application of the dominant contact theory; instead he criticized the way it was applied, alleging that Magistrate’s Torres Rigual analysis of the contacts disregarded important information such as “the needs of the interstate and international systems”.\textsuperscript{165} Another aspect highlighted by the Chief Justice was the methodology used to interpret the law. According to Trías Monge, “the legislative intent is but one aspect to be considered within some of the theories of conflict of laws which we must examine. Besides, the examination of the history of the protective legislation of the Puerto Rican migrant workers carries us prima facie to an opposite conclusion.”\textsuperscript{166} The divergence could be regarded as a manifestation of his reluctance to follow American judicial norms because, in many cases, U.S. judges assume the literal meaning of words as the primary source to interpret the law and the legislative history is relegated to a secondary source.\textsuperscript{167}

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\textsuperscript{162} I will not translate “equidad” as “equity” since the concepts are not exactly the same. For a deeper discussion on the subject in Puerto see: Rafael Atiles Moreu, \textit{Procedimiento y Hermenéutica Legal}, 8 Rev. Jur. U.P.R. 133 (1938-1939).

\textsuperscript{163} Green Giant Co. v. Tribunal Superior, 104 D.P.R. at 503.

\textsuperscript{164} “In occasions such as this one special caution is required in order to ensure that the selected norm fulfils appropriately the goals of the law and the context where it takes place”. Green Giant Co. v. Tribunal Superior, 104 D.P.R. at 506.

\textsuperscript{165} Green Giant Co. v. Tribunal Superior, 104 D.P.R. at 509-510.

\textsuperscript{166} Green Giant Co. v. Tribunal Superior, 104 D.P.R. at 511.

\textsuperscript{167} Rodriguez Ramos, \textit{supra} note 1, at 357.
If compared to Walborg Corporation v. Superior Court of Puerto Rico, Trías Monge’s dissenting opinion reveals a distinctive comparative approach and a deep respect and regard for Civil Law doctrine and solutions in the international contracts sphere; this commitment to Civil Law doctrines and solutions would later typify Trías Monge’s jurisprudence. Resorting to C.C.’s article 7— as Torres Rigual had proposed so many years ago—represented the correct application of the hierarchy of sources from a Civil Law perspective. Although the response to his dissenting opinion has a different view, using Comparative Law to determine the general principles, customs and usages is a coherent and solid legal strategy even in the Constitutional field.

There are no conclusive reasons to explain why Trías Monge choose to apply the dominant contacts theory in Green Giant Co. v. Tribunal Superior to determine the applicable law to international contracts if, as he admitted, the judge could create a rule for this case and there were many available solutions. Probably he might have refrained from applying other solutions because this theory gives the judge enough “wiggle room” to decide according to justice and not only to law. Also, the dominant contacts theory has some similarities with Civil Law methods utilized in the contractual area such as the escape clause of Rome Convention’s article 4 which, by the time this decision was taken, was already in discussion; and finally, at

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168 It is relevant to stress that Trías Monge’s opinion raised an answer from one of the Magistrates, he considered—among other things—a mistake to utilize Comparative Law to solve constitutional matters because they entail a different social background and to invoke article 7 to solve a matter addressed by a specific statute. Green Giant Co. v. Tribunal Superior, 104 D.P.R. at. 513-517.


170 According to Plender and Wilderspin, the Rome Convention “was conceived as a natural sequel of the Brussels Convention” (1968). The project that resulted in the Rome Convention was a proposal made by the Belgium Government in 1967 which purpose was to eliminate the inconveniences arising from the diversity of conflicts of laws, particularly in the contracts field. It started to be promoted by the Director-General for the Internal Market and Approximation of the Legislation of the Economic Community in 1969; the outcome of such discussions was
this point the dominant contacts theory represented the status quo in international contracts.

Result

Almost two years later, Trías Monge delivered the decision Archilla v. Smyth Worldwide Movers. The facts of the case were as follows: The Archilla’s—a married couple domiciled in Puerto Rico—celebrated a contract with a Puerto Rican moving company to move their furniture from Puerto Rico to Colombia. Since the goods were lost and damaged, the couple initiated a lawsuit against the movers. The court had to determine the applicable law to the contract of carriage of goods by sea. It chose to do so by applying the dominant contacts theory considering.

This decision is characterized by a high quality analysis and clear structure, which can be found, in the first place, in the application of the hierarchy of the sources of law which seemed to follow Hans Kelsen’s scheme; therefore treaties were taken as the primary source of law. The Commerce Code and the C.C. were the second sources to be considered and since these positive statutes do not regulate the issue at bar, the decision-maker proceeded to elaborate a rule for the particular case based on the Restatement, Second: Conflict of Laws (See comment on this point infra). In the second place, the method of analysis included the historical approach and examined international conventions that served as basis for the American laws discussed (this approach gives continuity to the criticism Trías Monge made in the Green Giant Co. v. Tribunal Superior decision). In the third place, there was a balance between the quoted:


Archilla v. Smyth Worldwide Movers, 106 D.P.R. (1977). In this case the Tribunal Supremo did not determine the applicable law or analyzed the particular dominant contacts; it simply remanded the case and instructed the trial court to apply the dominant contacts theory in order to determine the applicable law.


In the previous judgments treaties were overlooked. Even if they did not exist, the decisions did not even say so.
Civil and Common Law scholars, and a comparative study that included references to the Italian, German, Dutch, Belgian, English, French, Spanish and American systems of conflicts of laws in the field of Maritime Law. Lastly, it is relevant to mention that when analyzing the American maritime rules, the Magistrate showed objectivity by making reference to the positive and negative aspects of the system.

Although this decision has a strong civilian influence, the applicable law was not expressly determined based on *equidad*—as proposed in *Green Giant Co. v. Tribunal Superior*. Even though the judge utilized the Restatement Second, as the foundation of his decision, it could be said that he did apply general principles of law as the C.C.’s article 7 requires because the Restatement is a summary of black letter rules that could be considered as principles of law.\(^{174}\) In this opinion Trías Monge continued to develop in greater depth the reasons that led him to maintain the dominant contacts theory as the method to determine the applicable law to international contracts by stating his acceptance of the ideas of Leflar, Currie, Cheatham, Reese, Cavers, Yntema, and Ehrenzweig; and affirming that “We [the Tribunal Supremo] deem that instead of setting up a general rule by way of presumption and subject to exceptions, the correct step is to weigh the relative importance of the interests involved therein in each particular case.”\(^{175}\) Furthermore, he considered that “Mechanical rules produce only a false sense of security, frequently acquired at the expense of justice and of the due consideration to transportation between countries.”\(^{176}\) These remarks would characterize the Chief Justice’s decision in *Federal Ins. Co. v. Dresser Industries, Inc.*\(^{177}\) This case continues to evidence the evolution of the reasoning behind the application of the dominant contracts theory. In this instance, Trías Monge explained that although the *Tribunal Supremo* could determine the applicable law following article 10.5 of the Spanish C.C., historic antecessor of the Puerto Rican

\(^{174}\) Trías Monge affirmed “Consequently, it is our duty to formulate the conflict of laws rule which may be applied in this type of cases.” *Archilla v. Smyth Worldwide Movers*, 106 D.P.R. at 550.

\(^{175}\) *Id.* at 549

\(^{176}\) *Id.*

C.C., via *equidad* (art. 7); “they” (the *Tribunal*) were inclined to favor a functional approach leading to the application of the dominant contacts theory.

In this case the claimant, an insurance company, sued the constructor of a transmission tower after twelve years of its construction. Defendant alleged that the period of limitation had run out and that the complaint was barred by a release signed between the defendant and the insured party according to which they discharged defendant from all past or future claims under the construction contract. In order to determine the applicable statute of limitations the judge had to establish the applicable law to the contract. In this case the judge decided to apply Puerto Rican law because he considered that all the contacts but one (place of the suit settlement) were located in the Island. No enumeration of the considered contacts was made.

The most outstanding aspects of this decision are the language it used to refer to the dominant contact’s theory and the superficial public policy analysis that was done in order to determine the applicable law to the contract at bar. The language is relevant and particular because it seems to have been carefully chosen: Trías Monge did not state that the dominant contacts theory was the only way to determine the applicable law to international contracts in Puerto Rico; on the contrary it was just said that the Tribunal “has been inclined to favor it”. This could be interpreted as leaving an open door for other methods if needed. On the other hand, there was almost no analysis of the public policies present in the case. It seems like the Chief Justice determined the applicable law by a quantitative analysis of the contacts and not a qualitative one. This is different from the type of examination he proposed on *Green Giant Co. v. Tribunal Superior*.

As previously mentioned *Federal Ins. Co. v. Dresser Industries, Inc* was the last decision Trías Monge delivered in the field of applicable law to international contracts; also it was the last reported decision of record where the *Tribunal Supremo* decided a claim related in the applicable law to international contracts. It is relevant to stress that the dominant contacts
theory was applied in the area of torts as well; the first decision to do so was *Widow of Fornaris v. Amer. Surety Co. of N.Y.*;\(^{178}\) In this case a plane departed from Puerto Rico to St. Thomas with four passengers. During the trip coming back presumably there was an accident and the plane never landed in Puerto Rico. The pilot was the vice-president of the defendant Radiotelephone Communicators. This Company was incorporated in the Island and owned the plane; which was registered and was usually located. The plaintiffs were residents and citizens of the commonwealth. The issue was to decide if the applicable law was the one from Puerto Rico or St. Thomas to calculate the amount of damages payable to the surviving members of the victim’s families. The C.C. does not regulate international torts; therefore the *Tribunal Supremo* could not rely in an express rule to solve the case and needed to refer to contractual case law in order to do so. After this case, torts and contract decisions are both quoted alike as supporting precedents for the application of the dominant contacts theory.\(^{179}\)

Subsequent to commenting on these five decisions, the line that defines the evolution of the applicable law to international contracts becomes clearer but not less winding. Puerto Rico’s faith was sealed since the first decision on this matter (*Maryland Casualty Co. v. San Juan Racing Association*) because the dominant contacts theory continued to be applied over time. What changed was the reasoning behind its application; as could be seen from the following decisions the Magistrates –Trías Monge in particular – struggled to justify the application of the theory, making efforts to explain how a Common Law based doctrine would

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\(^{178}\) *Widow of Fornaris* was produced during the decadence of the Stage I and the awakening of Stage II, yet it is deeply Americanized: there was no balance between the common law authorities and precedents and the civil law sources quoted through the decision;\(^{178}\) some Civil Law authorities were taken out of context and their opinions appeared distorted;\(^{178}\) the trends followed by Spanish courts were acknowledged yet disregarded based upon the fact that the Civil Law solutions treat cases mechanically, do not consider public policy, considers only one contact (the place where the damage took place) and it’s a rigid system that favored facility and certainty over justice. Magistrate Torres Rigual made an exhaustive job criticizing the Civil Law mechanisms, yet he did not mention the developments (such as the application of escape clauses) in the area aimed to transform the *lex loci delicti* in a more flexible method to determine the applicable law in tort cases. *Widow of Fornaris v. Amer. Surety Co. of N.Y.*, 93 P.R.R. (1966).

be utilized in a C.C. context. Sometimes this struggle left room to discuss other important matters, such as the correct application of the dominant contacts theory. The public policy analysis made in Green Giant Co. v. Tribunal Superior was not emulated in Archilla v. Smyth Worldwide Movers or Federal Ins. Co. v. Dresser Industries, Inc.; this void diminishes the strength of the decisions because the main goal of the theory (to explain why the law of a jurisdiction is chosen over another one) is somehow lost.

Article 7 of the C.C. was completely overlooked in Maryland Casualty Co. v. San Juan Racing Association and Walborg Corporation v. Superior Court of Puerto Rico; probably because these decisions did not consider the C.C. as the first source of law and rather turned to precedents to determine the applicable law. Yet, after Trías Monge’s dissenting opinion in Green Giant Co. v. Tribunal Superior, it became usual to find it mentioned as a foundation to apply the dominant contacts theory in the decisions delivered by the Chief Justice. In Archilla v. Smyth Worldwide Movers there was no express link between the article and the theory, however, it could be inferred that by applying the Restatement of Conflicts of Laws; the Magistrate was using the general principles of laws to establish the law of the contract. Using article 7 as the foundation to determine a contract’s applicable law gives a huge discretionary power to the judge because the regulation is wide enough to apply any theory he considers appropriate for a particular case.

Another aspect that must be noted is the ascending importance that was given to Comparative Law in the evolution of the case law. In Maryland Casualty Co. v. San Juan Racing Association, the existence of alternative methods of resolution used by other jurisdictions was acknowledged yet not analyzed. Later on, in Walborg Corporation v. Superior Court of Puerto Rico Comparative Law was completely absent; yet ever since Green Giant Co. v. Tribunal Superior it gained an important place in the process of determination of the applicable law. Even though it did not make the Magistrates change their preference regarding the methodology to determine the applicable law to international contracts, it enhanced the
Magistrates’ and the general public’s views by showing them how other jurisdictions address the same matter. The use of Comparative Law also improved the application of the dominant contacts theory; in Green Giant Co. v. Tribunal Superior, for example, Comparative Law led the dissenting Magistrate to a different analysis of the public policies and in Federal Ins. Co. v. Dresser Industries, Inc. such comparative analysis led the Chief Magistrate to discard the application of the Spanish C.C. As can be seen, Comparative Law has been an important tool for Puerto Rico’s PIL assisting it to define what its judges would like to take or reject from the legal traditions that directly influenced their laws.

Reading these decisions, I have wondered why article 11’s last paragraph\(^{180}\) regulating public order was never considered. Applying this article would not necessarily have changed the results of cases like Green Giant Co. v. Tribunal Superior and Widow of Widow of Fornaris v. Amer. Surety Co. of N.Y., but it would have improved the methodology to decide and would have coherently complemented article 7’s application.

The designation of Trías Monge as Chief Justice had a deep impact in the course of Puerto Rico’s PIL, in particular to the applicable law to international contracts. He considered the rescue of Civil Law as his personal crusade and incorporating it into the decisions that he delivered was a constant labor. In his own opinion, previous to 1974, the Tribunal was an “assimilation agent” that was devastating Puerto Rico’s Law.\(^{181}\) Different ideologies are reflected in the decisions produced by different Magistrates, this should be considered both normal and healthy in a tribunal that does not follow the *stare decisis* doctrine, what is not

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\(^{180}\) See note 115.

Article 11’s structure is not clear and does not regulate public order in a direct and express way, however, the commentaries of article 7 of the Draft leads us to believe that it dealt with this general institution. Asamblea Legislativa y Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico, Borrador del Libro Séptimo sobre Derecho Internacional Privado del Código Civil Revisado 1, 43. [http://www.oslpr.org/DocumentosBorradorCodigoCivil.asp](http://www.oslpr.org/DocumentosBorradorCodigoCivil.asp) (Last visited on Aug 5, 2010).

Draft’s article 7. El orden público: La ley extranjera que resulte aplicable en un caso o en un problema particular sólo puede rechazarse si su aplicación lleva a un resultado manifiestamente incompatible con el orden público internacional puertorriqueño.

\(^{181}\) José Trías Monge, *supra* note 108, at 269.
clear now (and may never be cleared out since Trias Monge is dead) is why the Chief Justice did not always follow a single trend in his decisions. The lack of uniformity in his reasoning is less than desirable and leaves Trias Monges’ efforts to incorporate Civil Law in a vulnerable situation since the theory can be applied with or without it with the same practical result. It is important that Puerto Rico’s Magistrates have decided to maintain uniformity through the years regarding the criteria to establish the applicable law in the contractual field. Nevertheless, it is also relevant to remember that the Tribunal Supremo has never closed the door to other theories (see Federal Ins. Co. v. Dresser Industries, Inc., supra). Today, after a long time, the majority dominating the Tribunal Supremo belongs to the PPN; it is yet to be seen what will be their position regarding the discussed issue. We trust that decisions like Green Giant Co. v. Tribunal Superior and Archilla v. Smyth Worldwide Movers guide their future decisions.

Finally, it is necessary to stress once again that the evolution of the applicable law in international contracts had a direct impact on the Draft. Reviewing this project demonstrates how much Puerto Rico has progressed in its self definition process as a mixed jurisdiction: the Draft does not follow a single system; it rather takes what is best of the Common Law and the Civil Law tradition to merge it into a mixture that addresses the particular needs of the Island. It also reveals the deep respect that Comparative Law has gained in the legal community and the enormous influence that judges have in shaping a system. It is truly a shame that the discussion of this Draft was not concluded.

- Puerto Rico’s Federal Court’s Jurisprudence

It cannot be forgotten that Puerto Rico falls within the U.S. jurisdiction, therefore, as previously mentioned, federal courts have jurisdiction over the Island. With this in mind, federal case law must also be analyzed and its relationship with state jurisprudence established. To fulfill this goal the present study considered the jurisprudence produced during 2009 and
2010 by Puerto Rico’s District Court. During these two years the court decided five cases (Westernbank Puerto Rico v. Kachkar, William L. Bonnell Co., Inc. v. Gandara, Bianchi-Montana v. Crucci-Silva, TC Investments, Corp. v. Becker and Rivera-Adams v. Wyeth) where at least one of the points of discussion was the applicable law to an international contract. In all these cases Puerto Rico’s law was within the possible applicable regulations. After examining them the following conclusions can be drawn:

1) In every case the Federal Court was sitting in diversity and applied the choice of law rules of the forum state following the Klaxon doctrine; therefore the dominant contacts test was utilized at all times to determine the applicable law to the contracts at bar.

2) Like in Puerto Rico’s state courts, the Federal Court applied the same test to tort cases and used contractual and tort cases interchangeably to justify the application of the dominant contacts test.

3) In all cases the District Court based the use of the dominant contacts theory on the Restatement Second of Conflicts of Laws. To support this choice all the cases except Westernbank Puerto Rico v. Kachkar cited Green Giant Co. v. Tribunal Superior, such quote

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182 No decisions on the relevant subject matter have been taken during 2011, therefore we chose to analyze the previous two years.


188 See: Rivera-Adams v. Wyeth, citing Widow of Fornaris v. Amer. Surety Co. of N.Y. Nevertheless, in footnote N° 5 of that decision the court admits that the in certain occasions (e.g. Montalvo v. Gonzalez–Amparo, 587 F.3d 43, 46 (1st Cir.2009) and Marcano Diaz v. E. Airlines, Inc., 698 F.Supp. 18, 21 (D.P.R.1988)) the First Circuit has applied the lex loci delicti test to tort cases.


189 In Westernbank Puerto Rico v. Kachkar defendants requested the court to disregard a choice of law clause and apply the dominant contacts theory instead. The court replied that this theory was only applicable whenever the parties had not chosen the applicable law to their relationship or when a choice of law clause turned out to be
was done directly or through other cases. No mention of C.C.’s article 7 was ever made. Clearly the court chose \textit{Green Giant Co. v. Tribunal Superior} as the leading case to determine the applicable law to international contracts in Puerto Rico; however, what is not clear is why. All cases, from \textit{Maryland Casualty Co. v. San Juan Racing Association} to \textit{Federal Ins. Co. v. Dresser Industries, Inc} invariably use the dominant contacts theory to define the applicable law to contracts, what changes is, as stated \textit{supra}, the reasoning behind its application.

Nevertheless, the District Court seldom quoted the other cases.\textsuperscript{190} in 1978, it decided Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority\textsuperscript{191} and for the first and only time quoted \textit{Maryland Casualty Co. v. San Juan Racing Association}, decided seventeen years before. \textit{Walborg Corporation v. Superior Court of Puerto Rico} was never quoted as a source of decision for the dominant contacts theory; it was rather quoted as the leading case to determine the validity of choice of law clauses.\textsuperscript{192} \textit{Federal Insurance Company v. Dresser Industries, Inc.}, was quoted for the first time in 1990 in \textit{In re San Juan Dupont Plaza Hotel Fire Litigation}, nine years after this decision was issued by the \textit{Tribunal Supremo}, only to confirm the tribunal’s trend in \textit{Green Giant Co. v. Tribunal Superior}. \textit{Archilla v. Smyth Worldwide Movers} was quoted once in 1998 to support the fact that “The courts of the Commonwealth of Puerto Rico have consistently followed the choice of law rules laid out in the Restatement (Second) of Conflict of Laws.”\textsuperscript{193} In this opportunity \textit{Archilla v. Smyth Worldwide Movers} was quoted along

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\begin{itemize}
\item \textsuperscript{190} At this point of the analysis, case law produced before 2009 will be mentioned.
\item \textsuperscript{191} See: Smarte Carte, Inc. v. Colon., 47 F.Supp.2d 183, 186 (D.Puerto Rico 1999). The Federal Court has not always considered that Puerto Rico’s \textit{Tribunal Supremo} always applied the dominant contact’s theory; in Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority it mentioned that the \textit{Tribunal Supremo} had applied the “interest analysis methodology” in Maryland and the “dominant contacts” in Green Giant. In order to make its final decision the tribunal quoted Green Giant. There is no explanation on how are the theories different or why is one chosen over the other. Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority, 79 F.R.D. 72, 78 (D.Puerto Rico 1978).
\item \textsuperscript{192} In \textit{In re San Juan Dupont Plaza Hotel Fire Litigation}, 745 F.Supp. 79, 82 (D.Puerto Rico 1990).
\item \textsuperscript{193} \textit{Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc.}, 145 F.3d 463, 479 (1st Cir.1998).
\end{itemize}
with Green Giant Co. v. Tribunal Superior, Widow of Fornaris v. Amer. Surety Co. of N.Y., and other cases that did not specifically decided on the applicable law to international contracts.

4) The District Court –like the Tribunal Supremo- has been capricious regarding the way in which it applies the dominant contacts test. For example, in William L. Bonnell Co., Inc. v. Gandara\textsuperscript{194} the application of the test seemed to lack a deep analysis of the public policies relevant to each jurisdiction involved in the case. It could be ascertained that the Court decided based on a quantitative analysis rather than a qualitative one because only factual contacts are counted and no discussion regarding the value or meaning of public policy was made. A few months later the same Court made a better assessment of the test in TC Investments, Corp. v. Becker,\textsuperscript{195} where the Restatement Second’s test was executed with greater care and the quantitative and qualitative analyses were both performed thoroughly and correctly balanced. Nevertheless, just two days later, the court applied the same test without going into much depth in Bianchi-Montana v. Crucci-Silva.\textsuperscript{196} Once again the flexibility offered by the dominant contact theory became an element of uncertainty and a potential tool for the judge to apply whatever law he considers relevant in a case.

In contrast, Green Giant Co. v. Tribunal Superior was used for the first time by the District Court in 1995 to support the affirmation that Puerto Rico applies the dominant contacts theory to determine the applicable law of international contracts.\textsuperscript{197} From that point on it was consistently quoted until the present time. I could not find any reason to characterize Green Giant Co. v. Tribunal Superior as the leading case instead of Maryland Casualty Co. v. San Juan Racing Association. Technically, this was the first decision on applicable law to contracts decided by the Tribunal Supremo and Green Giant Co. v. Tribunal Superior did not overrule it. The only reason I could think of to justify this choice would be that from Green Giant Co. v.


\textsuperscript{195} TC Investments, Corp. v. Becker, 733 F.Supp.2d at *266.

\textsuperscript{196} Bianchi-Montana v. Crucci-Silva, 720 F.Supp.2d, at *159.

Tribunal Superior on, the basis for utilizing the dominant contacts’ test was the Restatement Second. This idea is supported by the previous quote of Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc.,198 where the District Court lets us see that, in its criteria, the only important aspect of the Puerto Rican evolution in the determination of the applicable law to international contracts is the “consistent” use of the dominant contacts theory as established by the Restatement Second of Conflicts of Laws. By only utilizing Green Giant Co. v. Tribunal Superior as the leading case in choice of law, the Federal Court leaves aside Puerto Rico’s evolution on the application of the dominant contact’s theory and proceeds just as General Henry would have done. From another point of view, Green Giant Co. v. Tribunal Superior is a comfortable choice for the District Court because it does not deal with the C.C. and its complicated article 7; instead it utilized the well-known Restatement Second of Conflicts of Laws.

5) As a concluding remark it could be stated that the Federal Court has applied Puerto Rico’s case law in form but not in substance.199 The Court has not understand the evolution that the dominant contacts theory has gone through in the state level and this results in a lack of harmony when the federal courts have to apply state courts jurisprudence. This gap could be addressed if the federal courts would like to review their position regarding state court case law.

198 See footnote 193.
199 In the previously mentioned interview made to Professor Luis Muñiz-Arguelles, he manifested a different view. In his opinion the Federal Court does follow the Tribunal Supremo’s case law.
Conclusion

In the introduction to this chapter I mentioned I would try to prove my hypothesis according to which flexible connecting factors –such as the dominant contacts theory- allow the judge to justify the choice of any applicable law he has individually and previously considered most fitted to solve a particular case. I also mentioned I would attempt to demonstrate that whatever his choice, it would not be totally objective, since history, culture and politics would influence this final determination. After analyzing Puerto Rico’s factual and legal history, its Tribunal Supremo’s decisions and interviewing one of its most prominent scholars and lawyers of the present days, I have come to the conclusion that the previously stated hypothesis is correct.

Puerto Rican judges seem to have great freedom of choice to determine the applicable law to international contracts. Is this almost unrestricted trust in the judge’s sense of justice and knowledge of the law a good idea? Perhaps not at the moment. The influence politics have over Boricua decision makers could be a dangerous element that might deviate them from making legally sound decisions. Such deviations would not be illegal from a positivist perspective, since they would be made under the umbrella of a flexible connecting factor that welcomes whichever decision a judge makes depending on how he explains his reasoning. Logically, this lack of certainty and predictability is less than desirable. The writers of the Draft seemed to have a similar perception since they chose a more conservative approach by selecting rigid and classic connecting factors complemented with an escape clause -which emulates Rome Convention’s article 4- to determine the applicable law to international contracts. Such approach can be read as a means to direct the judges in to a path of predictability, without totally encroaching their discretionary powers. On a similar position, when asked about his preferences to determine the applicable law to international contracts, Professor Muñiz-Arguelles replied that he would like Puerto Rico to use a methodology similar
to the one embraced by the Rome Convention. These scholarly elements support our conclusion and also reflect the preference of an important Puerto Rican sector.

Nevertheless, the reality is that although a segment of the legal community desires a change, those who can make it real are maintaining the status quo. Although the Tribunal Supremo has not decided cases involving the determination of the applicable law to international contracts lately, I found no elements that lead me to believe that if such a case arrives, the Magistrates would change the trends they have been following since the 60’s. Applying the dominant contacts theory gives them a discretionary power that is hard to relinquish. On the other hand, changing the Tribunal’s trend to a more classical approach would imply a huge alteration in Puerto Rican PIL in general, since it would open a window to a greater influence of the Civil Law in this subject. A change of this nature cannot be made lightly or in disconnection with other areas of politics and law; therefore in my opinion, the actual situation in the Island is not optimal for these modifications. On the other hand, the path followed by the Federal Court is clearly influenced by the American approach and, even though it applies the dominant contact theory, disregards the evolution of it in the Boricua context, utilizing the theory as other U.S. jurisdictions would. If the possibility of change in the highest State Court is lightly possible at the moment, a modification of the Federal Court’s trends is an even weaker option. In my view, unless a generalized movement towards political, social and economical change takes place in Puerto Rico, the legal scene will not be modified on its own.