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Relevant aspects in the use of technological means in international judicial cooperation developed in the inter-American sphere

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ABSTRACT: The purpose of this study is to analyse some relevant aspects of the use of technological means related to the processing, through letters rogatory (i.e., letters of request) of acts of interjurisdictional cooperation in the inter-American sphere, taking into account the impact of technology on private international law. The impact of technology is clear in one of the final topics analysed in this paper; the use of technology facilitates the provision of proper interjurisdictional assistance in a more expeditious, agile, effective manner, which at the same time protects the environment by eliminating the use of paper support. It should be noted that the pandemic produced by COVID-19 accelerated the implementation times of these new tools, which are extremely necessary, in this specific case in the inter-American space.

KEYWORDS: International judicial cooperation – computer systems – technological means – integration law – European Union law.

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1. Introduction

The purpose of this study is to analyse some relevant aspects of the use of technological means related to the processing, through letters rogatory, of acts of interjurisdictional cooperation in the inter-American sphere, taking into account the impact of technology on Private International Law.

It is well known that from the new normative conception of the science of Private International Law, developed by Miguel Ángel Ciuro Caldani following the initial approach of Werner Goldschmidt, the object of this subject is no longer limited to the conflict of laws (which is located in the core sector), but also includes conflicts of jurisdiction and acts related to interjurisdictional cooperation, whether through the provision of judicial assistance or what is related to procedural transposition (which are located in a peripheral sector, although not foreign to this branch of Law).[1]

It is undeniable the impact of technology in the last of the topics analysed, as a way to provide the necessary interjurisdictional assistance in a more expeditious, agile, and effective manner, while protecting the environment by eliminating the use of paper.

It should be noted that the COVID- 19 pandemic accelerated the implementation times of these new tools – which are extremely necessary – here specifically, in the inter-American space.

It is then interesting to see how the issue is treated in spaces that generate sources, which can undoubtedly establish a dialogue between them – given the existence of several of them – such as the work of Montevideo developed between 1889 and 1940; that which comes from the Organisation of American States (OAS) with *Conferencias Interamericanas Especializadas en Derecho Internacional Privado* (CIDIPs); or those that are generated in regional integration spaces such as the Common Market of the South (MERCOSUR), the Andean Community (CAN) or the Central American Integration System (SICA).

In particular, how the work of the American Association of Private International Law (ASADIP), the Inter-American Juridical Committee (CJI) of the OAS, and the Conference of Ministers of Justice of Ibero-American Countries (COMJIB) can influence the development of interjurisdictional cooperation in Latin America, and how they can interact in a dialogue of sources, noting the non-existence of the aforementioned treatment in the formal sources mentioned above.

2. Complementary sources of formal sources in the inter-American sphere

2.1. Principles on Transnational Access to Justice (TRANSJUS) of the American Association of Private International Law (ASADIP)

As current data to be taken into account with regard to the consolidation of acts of interjurisdictional cooperation, it is worth mentioning the work of ASADIP, which has created the ASADIP Principles on Transnational Access to

[1] See Miguel Ángel Ciuro Caldani, *El Derecho Internacional ante los procesos de integración* (Rosario: Fundación para las Investigaciones Jurídicas, 1998); see, from the same author, *El Derecho Universal (perspectiva para la ciencia jurídica de una nueva era)* (Rosario: Fundación para las Investigaciones Jurídicas, 2001). See also José Carlos Fernández Rozas, Sixto Sánchez Lorenzo, *Curso de Derecho Internacional Privado*, 2th edition (Madrid: Civitas, 1993). See also Alfredo Mario Soto, Flavio Floreal González, *Manual de Derecho de la Integración*, 2th edition (Buenos Aires: Editorial La Ley, 2017).

Justice (TRANSJUS), through the work of renowned and prestigious jurists in Private International Law, Integration Law and Comparative Law from all over America.

These consist of general principles, drafted in 2016, in the form of recommendations to be made to judges and legal practitioners – which, of course, are not binding – but can be an important guide or vector to make interjurisdictional cooperation effective.

Since they are not binding, these principles are comparable to soft law, which is more typical of systems such as the Anglo-Saxon common law, although they are also beginning to be used in countries that have always been culturally related to civil law or European continental law.[2]

Specifically, with regard to the channelling of acts of interjurisdictional cooperation, Chapter 4 deals with this in a proper manner. In particular, we are interested in dealing with what is established in sections 5 through 9 of the aforementioned chapter.

Article 4.5 states: *"The requested State shall interpret and apply the rules on inter-jurisdictional cooperation in a particularly flexible manner, minimizing the relevance of formalities. The courts of the requested State may act ex officio, making normative adjustments as necessary in order to carry out the corresponding procedural measures. Where the law does not prescribe a specific form, method or means for the cooperation sought by the requesting State, the courts of the requested State shall have the authority to adopt any appropriate measures to carry out the requested assistance, always with a view to protecting the fundamental procedural safeguards."*

It is interesting to mention here the reference to the minimisation of formalities, allowing the use of technological means (it is inferred), particularly in current times where agility is the premise.

On the other hand, Article 4.6 mentions: *"With a view to ensuring security and maximum efficiency of inter-jurisdictional procedural measures, judges and other judicial officials may establish direct and impromptu means of judicial communication, using any appropriate mechanism to achieve certainty and security. Accordingly, judges and other judicial officials may hold common hearings via videoconference or other available means, or coordinate their decisions so as to avoid conflicts and ensure the effectiveness of such decisions. The parties shall have access to the communications between the courts or, where this is not appropriate, they shall be informed of such communications."*

It should be noted that, apart from direct communications between jurisdictions or legal operators, this section already tells us about the possibility of using technological means outside of traditional paper-based formalities, such as videoconferences or any other available means.

In addition, Article 4.7 states: *"As long as the security of the communications can be guaranteed, judges and other judicial officials shall promote and foster the use of new information and communication technologies, such as telephone communications, videoconferencing, electronic messaging and any other means of communication appropriate for effecting the requested cooperation."*

Here, the use of new information and communication technologies is already expressly mentioned, which is obvious in the current times.

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[2] Ricardo Alonso García, «El "soft law" comunitario», *Revista de Derecho Privado y Comunitario*, Rubinzal – Culzoni Editores, Santa Fe, tomo 2 (2002): 667-707. In turn, see Baldassare Pastore, "Soft Law y la teoría de las fuentes del Derecho", *Soft Power, Revista euro-americana de teoría e historia de la política y del derecho,* vol. 1, no. 1 (2014).

Special mention should be made of Article 4.8, which states: *"Judges and other judicial officials shall endeavor to use international liaison mechanisms facilitated by international networks of public officials, utilizing their respective roles in order to promote access to justice."*

It is observed how the liaison mechanisms facilitated by the international networks of public officials are treated, and it is understood that what is established by the Treaty of Medellin, within the scope of the COMJIB, is important for the Region, by creating the IBER@ system, which will be explained further below.

Finally, Article 4.9 tells us: *"In the processing and enforcement of acts in relation to judicial proceedings involving foreign elements, including those of the type referred to in these Principles, and pursuant to Article 1.3, judges and other judicial officials shall seek to both take into account and apply those principles, standards, guidelines and guides of good practices developed by associations and institutions of recognized international standing."*

This can also be related to the soft law mentioned above, in the sense of applying guidelines or guides of good practices developed by institutions and entities of recognised international prestige, as procedures or "manuals."

2.2. Inter-American Juridical Committee (CJI) of the Organization of American States (OAS)

Continuing with the development of sources that deal with the issue at the regional level, it is worth highlighting the work of the CJI under the OAS.

This institute is the Organisation's advisory body on legal matters, responsible for promoting the progressive development and codification of international law, in addition to studying the possibility of standardising the legislation of the Continent's countries.

It has made progress in the study of the management of new technologies and their relevance for international legal cooperation, especially based on the use of soft law (flexible law) in relation to technological tools, without the need to modify or replace the conventional texts in force.

Precisely one of the current approaches in relation to the subject is entitled *"Las nuevas tecnologías y su relevancia para la cooperación jurídica internacional"*, a work in progress by Uruguayan Professor Cecilia Fresnedo de Aguirre.

2.3. Conference of Ministers of Justice of Ibero-American Countries (COMJIB), Treaty on the electronic transmission of requests for international legal cooperation between Central Authorities

Special treatment in the current use of the means provided by technology is given by the Treaty of Medellín (Colombia) regarding the electronic transmission of requests for international legal cooperation between Central Authorities, within the scope of the COMJIB, undoubtedly another source to take into account in the treatment of interjurisdictional cooperation, providing a common legal framework not only in Latin America but also in those European countries that are part of the Iberian Peninsula, such as Spain and Portugal, including Andorra.

This instrument was negotiated at the Conference on 24th and 25th of July 2019, and is of vital importance considering the existence of the COVID-19 pandemic worldwide, which became evident in our region as of March 2020.

In addition, together with the work of the CJI of the OAS, it could serve as inspiration – if necessary – for future reforms to be carried out in both the Ouro

Preto and Las Leñas Protocols, both in force within MERCOSUR, which would be necessary in order to streamline and modernise cooperation acts.

In its preamble, the Treaty begins by referring to the "*[...] experience of more than a decade of cooperation between the Central Authorities and the national Contact Points within the scope of the Ibero-American Network for International Legal Cooperation in criminal and civil matters (IberRed) created under the Regulations approved by the Ibero-American Judicial Summit of Public Prosecutors and by the Conference of Ministers of Justice of the Ibero-American Countries in Cartagena de Indias, Colombia, on October 29, 2004.*"[3]

Another of its paragraphs, which are considered to be the most relevant, recognises "*[...] the potential of the Iber@ electronic platform as a technological tool for the transmission of requests for international legal cooperation made under a treaty in force between the Parties, which includes the system of Central Authorities and taking into account that the members of IberRed declared their willingness to institutionalize a model that has already demonstrated excellent results and adopting more agile means of transmitting requests for cooperation*."

That is, to try to standardise a single technological tool through which acts of interjurisdictional cooperation in general are channelled.

At the same time, the legislative powers that the COMJIB has are made evident, as stated in another of the paragraphs of the Preamble: «*Taking into account that, in accordance with Article 3.1.b. of the Constitutive Treaty of the Conference of Ministers of Justice of the Ibero-American Countries, its purpose is to study and promote forms of legal cooperation between the member States and to this end, among others, "it adopts treaties of a legal nature"*».

Another paragraph of the preamble worthy of highlighting in matters related to second-degree interjurisdictional cooperation is the following: "*Taking into account the intensity of the relations established between the different economic actors in the Ibero-American space, which clearly benefit from agile communication, legal certainty and the effectiveness of judicial decisions and other acts related to them*."

This paragraph highlights the need to streamline communications between jurisdictions in this new digital era, where there will be an increasing tendency to eliminate paper support, with the obvious advantages that this entails, including through environmental protection, an issue that is not minor on the current agenda of regional integration in general.

Title 1 refers to the General Provisions, and its Article 1 tells us about the purpose of the Treaty, saying: "*This Treaty regulates the use of the electronic platform Iber@ as a formal and preferred means of transmitting requests for international legal cooperation between Central Authorities, within the framework of the treaties in force between the parties and which contemplate direct communication between said institutions*."

Reference is made to communication exclusively between Central Authorities (therefore ruling out its application when diplomatic or consular channels are used, or when the corresponding letter of request or letter of rogatory is processed by the interested party itself), giving preference to the use of the electronic platform Iber@.

Article 2 also provides us with a series of definitions of the terms used in the same regulation, as autonomous qualifications, relevant to its scope of action, meaning:

> «*a.-) By "General Secretariat", the General Secretariat of IberRed - Ibero-American Network for International Legal Cooperation - provided for in the IberRed Regulations and framed within the General Secretariat of the Conference of Ministers of Justice of the Ibero-American Countries;*

[3] This excerpt has been freely translated into English.

b.-) By "Central Authorities", the institutions designated by each State for the transmission of requests for international legal cooperation within the framework of the treaty in force between the parties;

c.-) By "requests for international legal cooperation", the requests between Central Authorities whose transmission is carried out under a treaty in force in criminal, civil, commercial, labor, administrative or any other matter of law, as well as the subsequent actions derived from them or that are covered by the same treaty;

d.-) "Transmission" of requests for international legal cooperation means the sending between Central Authorities, through Iber@, of all types of requests for international legal cooperation, their response, follow-up or any communication related to them and their execution, such as clarifications, extensions, and suspensions, among others. In this sense, the spontaneous transmission of information in accordance with the treaties in force between the parties is understood to be included;

e.-) "Treaty" means an international agreement concluded in writing between States and governed by international law, whether contained in a single instrument or in two or more related instruments and whatever its particular name.»

Article 3 also begins the analysis regarding the electronic platform Iber@, a true innovation in communication systems to make cooperation acts effective in Latin America.

Its paragraph 1 clarifies: «*The Parties agree to use the electronic platform "Iber@", hereinafter Iber@, for the transmission of requests for international legal cooperation between Central Authorities, within the framework of the corresponding treaties in force between the Parties and with the legal effects provided for in said treaties*».

Taking into account its Ibero-American roots, section 2 of the same article states: "*Iber@ will be accessible, at least, in Spanish and Portuguese.*"

Regarding the legality and authenticity of documents processed by the system, section 3 states: "*Documents transmitted between Central Authorities through Iber@ will be considered original and/or authentic for the purposes set out in the treaties in force between the parties. Iber@ validates the electronic transmission, however, the analysis of the content will be the responsibility of the competent authorities, if applicable. The transmission of applications and their documentation through Iber@ will not require additional physical shipments.*"

It is worth highlighting the lack of legalisation and authentication requirements, which are typical of printed foreign public documents, thus avoiding the need for paper support in the procedures. However, the analysis of the content of the documents remains subject to the competent authorities.

Finally, with regard to the treatment of the issue by Article 3, in order to streamline communications, its section 4 states: "*Iber@ is maintained as a means for the advancement of information and requests, as well as for the exchange of queries and any information useful for investigations and judicial proceedings, between the Contact Points and Links of IberRed, without having, in addition to those that are specific to it by application of other treaties, the legal effects provided for in paragraph 1 of this article.*"

In turn, Article 4 gives us the idea of a lack of obligation in the use of the system by the State Parties, when its paragraph 1 states: "*This Treaty does not oblige the Parties to use Iber@ for the transmission of requests for international legal cooperation*", which is logical, although it would be desirable to gradually move towards uniformity, taking into account the objectives set out by the Treaty, which is why it is understood that the various integration schemes established in the Region, such as the MERCOSUR, the CAN or the SICA, should modify their legislation, adapting it to this new digital tool.

Another relevant issue that arises among the provisions of the Treaty is the requirements for the operation of the system.

This is developed in its Article 6, and indicates, for example, the need for a record of all transmissions that are carried out; the use of electronic signatures that will be necessary in digital documents; the calculation of procedural deadlines; the need to have one or more national technical contact points in charge of clarifying doubts or providing the necessary support in the technical difficulties that may arise with respect to the normal operation of Iber@, beyond making central technical support available to the parties through the General Secretariat, among other issues.

In turn, Article 10 tells us about the financing of the system, stating that the parties must agree on a Regulation, based on a proportional contribution (taking into account the economic possibilities of each State), on an annual basis, as well as the mechanisms for definition, reform and deadlines.

It is understood that this complementary source to those of MERCOSUR (such as the Las Leñas Protocols on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters; the Ouro Preto Protocol on Precautionary Measures and the San Luis Protocol on Mutual Legal Assistance in Criminal Matters) can play a relevant role in current times.[4]

It could even be thought that modifications to said Protocols would not be necessary in view of the advance of technological tools in acts of interjurisdictional cooperation, but that the State Parties as full members of MERCOSUR (*i.e.*, Argentina, Brazil, Paraguay and Uruguay), which are signatory countries of the Treaty of Medellín, should ratify the said instrument and internalise the provisions in question in their normative systems.

In fact, in Title III referring to the final provisions, in its Article 11 that deals with its entry into force, it mentions in its section 5 that "*[...] This Treaty shall enter into force ninety calendar days after the date on which the third instrument of ratification or accession has been deposited*."

In this regard, Andorra, as an adhering State, made the first deposit of the instrument of ratification in May 2020.

Subsequently, Cuba and Spain, signatory countries of the Treaty of Medellín, have made their corresponding deposits of the instruments of ratification, the first in April and the second in June 2022, which has determined its entry into force.

That is to say, the sum of the deposits of the instruments of ratification will consolidate it, a fact that is understood to be of singular value to advance in the use of technological means in the implementation of acts of cooperation, of any degree whatsoever.

[4] On this subject, see Adriana Dreyzin de Klor, "Los instrumentos de cooperación jurisdiccional del Mercosur ¿útiles a la asistencia?", *Revista de Derecho Privado y Comunitario"*, Rubinzal - Culzoni Editores, Santa Fe, tomo 3 (2009): 583-625; See also Adriana Dreyzin de Klor, Teresita Saracho Cornet, *Trámites Judiciales Internacionales* (Ciudad Autónoma de Buenos Aires: Zavalía, 2005). See also Ignacio Goicoechea, "Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial", *Revista de la Secretaría del Tribunal Permanente de Revisión del Mercosur,* Asunción, year 4, no. 7 (2016): 127-151, available at https://www.corteidh.or.cr/tablas/r36039.pdf.
See also Luciana Scotti, "Incidencias de las nuevas tecnologías en el Derecho Internacional Privado", *Anales De La Facultad De Ciencias Jurídicas Y Sociales de la Universidad Nacional de La Plata*, 17(50), 051 (2020), https://doi.org/10.24215/25916386e051.

3. The experience in Europe

Making a comparative analysis in relation to the use of digital means in interjurisdictional cooperation at all levels within the European Union (EU), the existence of the e-CODEX system can be appreciated.[5]

It came into force through Regulation (EU) 2022/580, its objective being to facilitate the digitalisation of cross-border judicial communication and provide better access to justice for natural and legal persons.

The e-CODEX system (communication system for digital justice through electronic data exchange) allows digital connectivity between the national judicial systems of the Member States of the EU.

It makes it easier for its users (competent judicial authorities, legal professionals and individuals) to send and receive electronically documents, legal forms, evidence or other information quickly, safely and reliably.

The Regulation establishes the legal basis of the e-CODEX system, determining the rules in the following areas: definition, composition, functions and management of the e-CODEX system; Responsibilities of the European Union Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) in relation to the e-CODEX system; Responsibilities of the European Commission, the Member States and the entities operating authorised e-CODEX access points; and Security aspects of the e-CODEX system.

The e-CODEX system consists of an e-CODEX access point, comprising of the following: an interoperable gateway allowing the secure exchange of information via a telecommunications network with other gateways; a connector to link the IT systems connected to the gateway in order to exchange data with other such IT systems; digital processing specifications; and supporting software products, documentation and other assets listed in the Annex to the Regulation.

Member States and the Commission have a number of responsibilities: authorising e-CODEX access points for the connected systems following national and EU legislation; and maintaining a list of authorised e-CODEX access points and the digital processing specifications applied by each authorised e-CODEX access point (this list and any changes to it shall be notified to eu-LISA); monitoring its authorised e-CODEX access points, ensuring ongoing compliance with the conditions under which authorisation was granted; and designate e-CODEX correspondents to request and receive technical support from eu-LISA. Furthermore, eu-LISA shall ensure that the software and digital processing specifications used by the access points are secure and reliable, and shall assist in developing new use cases.

It is noteworthy that eu-LISA has taken over responsibility for the e-CODEX system as of this year, after the Commission has declared the handover process to be successfully concluded and after consultation with the entities currently managing the e-CODEX system and eu-LISA.

[5] For further background on the subject, see Alegría Borrás Rodríguez, "Competencia Judicial y ejecución de decisiones en la Comunidad Económica Europea", in *Iniciación al Estudio del Derecho Comunitario Europeo* (Madrid: C.S.P.J., 1984), 129-153. See, from the same author, "Competencia judicial internacional y ejecución de resoluciones judiciales en materia civil y mercantil: del Convenio de Bruselas de 27 de septiembre de 1968 al Convenio de Lugano de 16 de septiembre de 1988", *Not. C.E.E.*, no. 50 (1989): 93-103. On the new system, see https://eur-lex.europa.eu/ES/legal-content/summary/e-codex-computerised-system-for-the-cross-border-electronic-exchange-of-data-in-the-area-of-judicial-cooperation-in-civil-and-criminal-matters.html.

It is interesting to analyse the compatibility that legal systems such as Iber@ and e-CODEX may have, since at least the European countries that make up COMJIB will have the possibility of using both, which will require harmonisation in that regard.

4. Conclusion

We can conclude that technological progress is taking the right course in relation to international interjurisdictional cooperation in the inter-American sphere, both in terms of judicial assistance and procedural transposition, in this new digital era.

The use, in particular, of the TRANSJUS Principles regarding access to justice, developed within the framework of ASADIP, as well as the recommendations of the CJI within the framework of the OAS and, of course, the Treaty of Medellin that has emerged as a work of the COMJIB will undoubtedly help expedite acts of international judicial cooperation, making it important that the signatory countries gradually ratify this last instrument, which has been in force since June of this year. It is understood that it will also be interesting to analyse the possibility of compatibility of computer systems related to civil and commercial interjurisdictional cooperation, in the Ibero-American and European spheres, specifically between e-CODEX and Iber@.

More than ever, the communion of sources becomes relevant for the proper treatment of the subject matter, a reality that cannot be denied at the risk of bureaucratising the cooperation systems, going back in time and discouraging the due obligation of cooperation that jurisdictions must provide in the international sphere in current times.