Encyclopedia of Private International Law

Volume 1

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Goldschmidt, Werner

The influence of the late German-born professor *Werner Goldschmidt's* thinking and doctrine is very considerable in → Argentina and Latin America, his arrival to the New World marking a turning point in the system and philosophy of private international law with his 'trialistic theory of the juridical world' and his characterization of private international law as 'the law of tolerance'.

I. Life and work

Werner Goldschmidt was born in Berlin on 9 February 1910, the son of the also great German jurist of Ashkenazi Jewish descent *James Goldschmidt* (1874–1940) who made important contributions to German criminal law and criminal procedure law, and the brother of comparative law jurist *Robert Goldschmidt* (1907–65) and philosopher *Victor Goldschmidt* (1914–81). Between 1928 and 1931, *Goldschmidt* studied jurisprudence at the universities of Berlin, Kiel and Hamburg, graduating as '*Doktor der Rechte*' in 1931. *Goldschmidt* would later write about his personal experience and the mark left on him by his German education (Werner Goldschmidt, *Justicia y verdad* (La Ley 1978) 524). Following graduation, *Goldschmidt* lectured at the University of Kiel, until 1933 when he had to emigrate to → Spain due to the racial policy of Nazi Germany.

In 1935, *Goldschmidt* published a book in Barcelona titled *La consecuencia juridica de la norma del derecho internacional privado* (Werner Goldschmidt, *La norma de colisión como base del derecho internacional privado* (Bosch 1935)), which features two ideas that he would further develop in his later work: the system and the philosophy. *Werner Goldschmidt's* 'system' is based on the normological method, introduced to private international law by *Zitelmann*, which consists of beginning always with an analysis of the conflict rule and its order. *Goldschmidt* would remain faithful to this system and to the 'philosophy' that follows. Together with the method and the normological system, *Goldschmidt* would introduce his 'theory of juridical use', according to which when a conflict rule points to the law of a foreign country reference is made to the foreign law as would be most likely applied by the courts of that country had they been competent, hence foreign law being a 'notorious fact' that must be applied *ex officio* by the courts. With it comes *Goldschmidt's* 'tolerance' as the philosophical foundation of private international law, as well as the distinction between the 'nature' of foreign law as a problem for the general theory of private international law, and the 'treatment' to be given to foreign law in a case which is a problem for international procedure law (a different branch of the law) (Alicia Perugini de Paz y Geuse, 'Desarrollo histórico de la obra de W Goldschmidt' (1980) 32 REDI 143, 144).

In 1935, *Goldschmidt* published a course taught at the Federación de Asociaciones Españolas de Estudios Internacionales, titled *La norma de colisión como base del derecho internacional privado*, in which he develops his general theory of private international law. Here *Goldschmidt* gave the name 'indirect norm' to the conflict rule (Alicia Perugini de Paz y Geuse, 'Desarrollo histórico de la obra de W Goldschmidt' (1980) 32 REDI 143, 145), so called because, instead of solving directly the issue at hand like the rules used by private and public law, the general rule of private international law selects the law of the country that is to be applied using the 'indirect method'. The name 'indirect norm' is still widely used notably in Argentina. Also here *Goldschmidt* resolves the → *renvoi* problem by application of his theory of juridical use.

Among *Goldschmidt's* writings during his time in Spain, two must be singled out. His article 'Derecho internacional privado y derecho comparado' (Werner Goldschmidt, 'Derecho internacional privado y derecho comparado' (1947)

45 *Información Jurídica* 83) develops the three methods used by the indirect norm – indirect, analytical-analogical and synthetical-judicial – which indicate to the legislator and the competent court the solution to be given to private law cases containing a foreign element. Finally in 1948 and 1949, when *Goldschmidt* had already moved to Argentina, the two volumes of the first edition of his *Sistema y filosofia del derecho internacional privado* (Werner Goldschmidt, *Sistema y filosofia del derecho internacional privado*, vol 1 (Bosch 1948); Werner Goldschmidt, *Sistema y filosofia del derecho internacional privado*, vol 2 (Bosch 1949)) came to light. The book provides a rationalization and complete account of the Spanish system of private international law, based on the normological method. Central to *Goldschmidt's* philosophy is natural law and the respect for the other. This work follows the normal pattern of threefold division of the law: norm, social conduct and justice. In the first part, *Goldschmidt* examines the history and theories of private international law, together with its objects and methods. In the second part, under the general heading of 'The norm of private international law', he deals with the questions of characterization, the → connecting factor and *ordre public* (→ Public order (*ordre public*)). Volume II, comprising the third part of his work, considers the individual rules of private international law. This book, more theoretical than most Spanish writings on private international law and revealing *Goldschmidt's* mastery of comparative law (→ Comparative law and private international law), is provided also with a practitioner's outlook. It is worth recalling that after receiving his law degree at the University of Madrid in 1945, *Goldschmidt* exercised the profession of lawyer in addition to continuing doing research and publishing several scholarly writings. *Goldschmidt's Sistema y filosofia del derecho internacional privado* has been praised with providing a bridge between continental law systems, in particular those based on Spanish civil law, and common lawyers (Ronald H Graveson (1951) 14 MLR 102). In addition to that of *Graveson*, the many book reviews written by prominent scholars are a testimony to the importance of *Goldschmidt's* work (Gerhard Kegel (1949) 15 RabelsZ 166 and (1952) 17 RabelZ 300; Adolf Schnitzer (1949) 45 *Schweizerische Juristen-Zeitung* 95; Ernst J Cohn (1949) 31 *Journal of Comparative Legislation* 120; Mariano Aguilar Navarro (1949) 2 REDI 1039 and (1950) 3 REDI 229; John Kunz (1950) 2 ÖZföR 385 and (1951) 3 ÖZföR 284; Kurt Lipstein (1951) 4 ILQ 147).

When *Goldschmidt* established himself in Argentina in 1947, where he would spend the rest of his life, he seized the opportunity to study Argentine law. Appointed professor of private international law by the University of Tucumán between 1949 and 1956, he was afterwards professor at the national universities of Corrientes, Santa Fe and Rosario, in addition to teaching at several private universities. Since 1959 and for almost 20 years he was also the legal adviser to the Procuración del Tesoro de la Nación (Argentina's attorney general). Since 1968 he was professor at the University of Buenos Aires, being bestowed emeritus professor status in 1983. The year prior, *Goldschmidt* had also been made emeritus at the University of La Plata.

During his Argentina period, *Werner Goldschmidt's* publications in Argentina, Latin America and beyond were vast and rich. Two must be highlighted: *Introducción filosófica al derecho*, published in Buenos Aires in 1980 (Werner Goldschmidt, *Introducción filosófica al derecho* (Astrea 1980)), in which he fine-tunes his 'trialism' or 'trialistic theory'; and *Derecho internacional privado*, *Goldschmidt's* ultimate private international law treatise, whose first edition came to light in 1970 (Werner Goldschmidt, *Derecho internacional privado* (1st edn, Depalma 1970)). Building upon prior publications, notably his *Sistema y filosofia del derecho internacional privado* (Werner Goldschmidt, *Sistema y filosofia del derecho internacional privado*, vol 1 (Bosch 1948); Werner Goldschmidt, *Sistema y filosofia del derecho internacional privado*, vol 2 (Bosch 1949)), and *Suma del derecho internacional privado* published for the first time in 1958 (Werner Goldschmidt, *Suma del derecho internacional privado* (Abeledo-Perrot 1958)), but also 'Système et philosophie du droit international privé' (Werner Goldschmidt, 'Système et philosophie du droit international privé' (1955) 44 Rev.crit.DIP 639 and (1956) 45 Rev.crit.DIP 21), *Goldschmidt* creates his treatise in the image and likeness of the juridical world, which in the author's view comprises a sum of allotments and powerlessness between human beings, described and integrated by norms and evaluated, the former and the latter, by justice (trialistic ontology). The book is conceived as a structure of normological, social and dikelogical dimensions (trialistic methodology), every subject being addressed first from the standpoint of the sources of law – the norm – and their interpretation (normological juristic),

second from the point of view of case-law and specialized doctrine (sociological juristic), and last seeking to integrate any historical and dikelogical gaps (dikelogical juristic). The originality of *Goldschmidt's* work lays not only in having developed in an organized theory legal 'tridimensialism' applied by other authors in different contexts, but also in applying it directly to a given branch of the law (Henri Battifol, 'Goldschmidt (Werner): Derecho Internacional Privado, 3e éd, Editions Depalma, Buenos-Aires, 1977, XXX+646 pages' [1978] Rev.crit.DIP 236).

The third and fourth editions of *Derecho internacional privado*, which appeared in 1977 and 1980 respectively, carry the subtitle '*Derecho de la tolerancia*' (private international law as 'the law of tolerance'). For *Goldschmidt*, the specific value of private international law is the 'positive respect for foreign law'. In application of this value, private international law proceeds to apply foreign law by means of imitating it (theory of juridical use), except for when the public policy of the forum comes into place. If we identify respect for foreign private law, except for our *ordre public*, with the concept of tolerance, we can safely say that private international law, being the law of extraterritoriality of foreign private law, constitutes the 'law of tolerance' (Werner Goldschmidt, *Derecho internacional privado. Derecho de la tolerancia. Basado en la teoría trialista del mundo jurídico* (3rd edn, Depalma 1977) Preface to the third edition). While until 1974, *Goldschmidt's* private international law can be described as classically based on the application of the conflict rule; since 1977 it becomes polemic, by combatting the French and North American doctrines of that time seeking to assimilate private international law to a private law, and by putting justice into the equation. *Goldschmidt's* latest work would follow this trend, including his very last book, *El S.O.S. del derecho internacional privado clásico*, published in 1979 (Werner Goldschmidt, *El S.O.S. del derecho internacional privado clásico* (Belgrano 1979)).

Werner Goldschmidt died in Buenos Aires, Argentina, on 21 July 1987, wrapped in respect and prestige, his theories and teachings having a lasting influence on Argentine and Latin American private international law that can still be felt today, as evidenced by the fact that his *Derecho internacional privado* arguably continues to be the most widely used private international law textbook in Argentine universities and it continues to be cited by courts and authors alike.

MARIO JA OYARZÁBAL

II. *Goldschmidt's* contribution to private international law

In the paragraphs that follow, *Werner Goldschmidt's* main contributions to private international law will be succinctly described, to wit: the 'normological system', that considers the general rule of private international law (as a logical entity) the point of departure of the private international system; the 'theory of juridical use', as the basis for the application of foreign law (→ Foreign law, application and ascertainment) with full positive respect for its mode of being and particularism; the consideration of foreign law as a 'notorious fact' as part of the evidence stage of a juridical relationship; the doctrine of 'prospective' fraud on the law, as a way of protecting the law of a country from manipulation aimed at a future violation of its norms; a philosophy radically opposed to chauvinism and universalist when it comes to the application of foreign law that opened the door and favoured international legal cooperation in all of its modalities; and his contribution to unification and codification of private international law in Argentina. This enumeration draws partially from Professor *Horacio Piombo's* inaugural address at the University of La Plata in August 1997 (unpublished).

1. The deliberate and radical use of the normological method as the presentation method

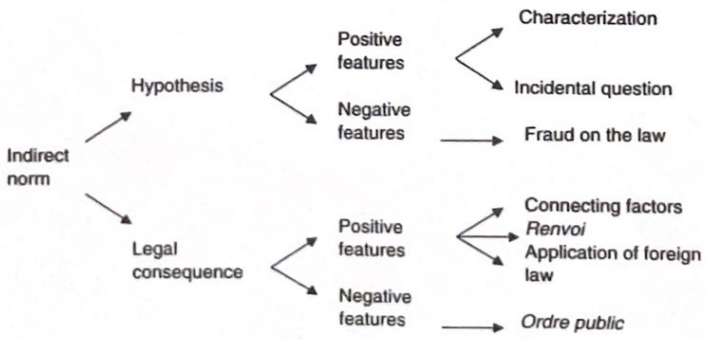
Werner Goldschmidt's writings on private international law start with the analysis of the conflict rule as the basis of the private international law system. Invoking as a model the normological system of criminal law, *Goldschmidt* places the accent on the structure of the legal norm, which constitutes the 'legal and logical abstraction/description of a projected allotment [of power and powerlessness between human beings]' (Werner Goldschmidt, *Derecho internacional privado* (Depalma 1992) 6). As such, every norm consists of two parts: the first part describes the social relation that needs an allocation (hypothesis); while the second part provides the solution (legal consequence). The hypothesis of the private international law norm describes the case containing a foreign element (the facts), while the legal consequence defines the expected result. Private international law norms vary according to the → territoriality or extraterritoriality of their legal consequences. The legal consequence employs a different method depending on whether the solution it adopts is territorial or extraterritorial.

In territorial solutions, the legal consequence indicates the rights and duties of the participants in relations arising under the circumstances envisioned in the hypothesis (direct method). The 'direct method', typical of private and public law norms, is the one employed by peremptory norms (*lois de police*) as well as by international (treaty-based) uniform norms.

In extraterritorial solutions, on the contrary, the legal consequence, far from addressing the problem posed in the hypothesis, confines itself to indicating the law that must resolve it (indirect method). The general norm of private international law (or conflict rule) is, thus, an 'indirect norm', because it employs the 'indirect method', a method that, depending on the circumstances, requires to be complemented by auxiliary methods to wit: analytical-analogical (employing 'by analogy' the 'analysis' categories of civil law, as determined by the legislator; eg to determine the validity of a contract, the parties' capacity (→ Capacity and emancipation) may be subject to the law of their domicile, the formal validity of the contract may be subject to the law of the place of celebration, and its substantive validity to the law of the → place of performance) and synthetical-judicial (because no legislator can foresee *a priori* the incompatibilities that the application of the analytical-analogical method may cause, the adaptation or synthesis can only be provided *a posteriori* by the judge).

The indirect norm, like all legal norms, is made of two parts: a hypothesis and a legal consequence; and both parts, in turn, shall be broken down into positive and negative features. The positive features of the hypothesis describe an aspect (analytical method) of a case with a foreign element; and they are called 'positive' because those features are to be present for the norm to apply. The first step is to identify the legal order that will define the terms employed by the indirect norm. This is the problem of characterization. The second step is to circumscribe the scope of the hypothesis, to ascertain the aspects that it regulates. This is called incidental question (→ Incidental (preliminary) question). The negative feature of the hypothesis comprises the fraud on the law (*fraus legis*); and it is said to be 'negative' because no fraud should have been committed for the norm to apply, in order for its legal consequence to follow. The positive features of the legal consequence – called 'positive' for the same reasons as the hypothesis – are two: the connection and what is being connected. The connection contains the circumstance of the case according to which the applicable law can be identified; usually referred to as the 'connecting factor'. What is being connected is the applicable law, so identified with the help of the connecting factor. Here two main questions successively arise: what part of the foreign law is applicable, its private law or its private international law (its conflict rules)? And in what capacity is that part of the foreign law applied by the judge, as a 'fact' or as 'law'? The first problem (the 'amount' of law applied) is known as *renvoi*. The second (how foreign law is to be treated) leads to the question of the proof of foreign law in a litigation, ie *ex officio* or upon request and as proven by the parties. Lastly, the negative feature of the legal consequence refers to *ordre public*, because the judge will reject the application of foreign law (→ Foreign law, application and ascertainment) if the solution provided contradicts inalienable principles of the forum law.

The following graphic features the structure of *Goldschmidt's* indirect norm:



This systematization of private international law is not a 'constitutive method' in that it does not provide solutions. It is a 'presentation method' directed to the scientist, explaining how problems are to be organized in accordance with a certain criterion. Given that science captures reality in a logical and neutral manner, and given that social reality is regulated by norms, the method that systematizes private international law must depart from the conflict rule. This is the 'normological dimension of private international law' which consists of making the analysis of the structure of the general norm of private international law (the indirect norm) the point of departure of the science of private international law (Werner Goldschmidt, 'La conception normologique en droit international privé' [1940] *Nouvelle revue de droit international privé* 16).

2. *Theory of (foreign) juridical use*

The second contribution of *Goldschmidt* is the enunciation and verification of the theory of juridical use. The theory of juridical use appears in the legal consequence of the indirect norm, together with *renvoi*. Indeed, it is considered contrary to public international law that a country intends to create law of a foreign country (→ Public international law and private international law). Conversely, there is no objection that

> the indirect norm indicates the 'foreign juridical use', namely by ordering the domestic court to decide on the case as it would be decided by the court of the country of origin of the norm, hence indicating a 'fact' and not 'law', by commanding the court to make a 'probability judgment' and not to apply legal norms. (Werner Goldschmidt, *La consecuencia jurídica de la norma del derecho internacional privado* (Bosch 1935) 12)

The theory of juridical use determines the mode of being of the law on the basis of justice; justice that in private international law lays on the 'positive respect' for foreign law (do to others as you would have done to you). In essence, once a case (or one of its elements) is characterized as foreign, respect must be paid to it. This respect must be positive and consists of giving the case the same treatment that it would be given in the country where it belongs. Hence what is called the theory of juridical use, whose content *Goldschmidt* formulates as follows:

> If a foreign law is declared applicable to a case, the case must be given the same substantive treatment that, with the highest degree of likelihood, the courts of the country of the applicable law would give the case; the point of reference being the court that would have been competent had the lawsuit be tried in that country [the country of the applicable law]. (Werner Goldschmidt, *Derecho internacional privado* (Editions Depalma 1992) 137)

Hence for *Goldschmidt*, applying domestic law is essentially different from 'applying' foreign law: we apply, 'participate in' domestic law; while we observe, imitate foreign law. While the juridical world is tridimensional (trialistic); foreign law is reduced to one dimension – the social dimension – because the legal norms are limited to their social manifestation (judicial, administrative etc), justice playing no role until their compatibility with local *ordre public* is being assessed.

Goldschmidt conceives the theory of juridical use as the correct form of *renvoi*; because the former leads to similar results as the total or double *renvoi*, but avoids the potential game of 'international ping-pong' or the vicious circle faced when both relevant countries practise it; because two legal systems can mutually refer one to the other *ad infinitum*, while courts cannot do that because of the prohibition of denial of justice.

The (foreign) juridical use has been adopted by art 2 of the 1979 Inter-American Private International Law Convention (Inter-American Convention on General Rules of Private International Law of 8 May 1979, OAS, Treaty Series, No 54, 1457 UNTS 3), which states that

> [j]udges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked;

and it has established itself as a generally accepted principle in Latin America (Gonzalo Parra-Aranguren, 'General Course of Private International Law: Selected Problems' (1988) 210 Rec. des Cours 9, 74; art 2, 1998 Venezuelan Act on Private International Law (1999) 1 YbPIL 107; art 11, 2003 Argentine Draft Code of Private International Law (available at <www1.hcdn.gov.ar>); art 2595, 2014 Argentine Civil and Commercial Code (Argentine Civil and Commercial Code enacted by Law of Congress No 26.994 of 1 October 2014, signed into law on 7 October 2014,

Official Gazette of 8 December 2014, entered into force on 1 August 2015 in accordance with Law of Congress No 27.077, Official Gazette of 19 December 2014)).

3. *Theory of (foreign law as a) notorious fact*

One of the distinctive features of the juridical use doctrine is that it considers foreign law, not as a legal order, but as a 'fact': the fact of the probable foreign sentence. But foreign law is not any fact. Foreign law constitutes a 'notorious fact', which is not to say that everyone knows it, but that it is a fact that everyone can accurately learn. As a notorious fact, the judge can take it into consideration *ex officio*, notwithstanding the fact that the parties may invoke it and provide the evidence that they deem appropriate regarding the existence and interpretation of the foreign law. In such a way, *Goldschmidt* seeks to overcome the traditional connection between considering foreign law as a fact and its subordination to the dispositive principle (not to be applied without request of – and as proven by – the interested party), by marking as exceptions to the dispositive principle notorious facts.

According to *Carlos Gattari*, who *Goldschmidt* follows, notoriety can range from immediate to remote (Carlos Gattari, 'La ley extranjera como hecho notorio' (1971) 36 *El derecho* 913). If foreign statutes and case-law are available to the judge, his judgment will reach a high degree of probability. If some information is missing, probability diminishes. But even if the applicable law were unknown to the judge, he could apply the law of a third country that is akin to the *lex causae* (eg because they share the same legal tradition); and only as a last resort will the judge apply its *lex fori*, given that there is a probability, however small it may be, that the forum law coincides with the foreign law.

4. *Prospective fraud on the law doctrine*

In the structure of *Goldschmidt's* indirect norm, fraud affects the second positive feature of the hypothesis: the facts behind the connecting factors, and it consists of their deceptive manipulation. *Goldschmidt's* most significant contribution here was to hold the prospective fraud (*'fraude a la expectativa'*) as a case of fraud, and as a means of protecting the law of a country against manipulations directed to a future violation of its norms. The prospective fraud manipulates the facts, not because the fact – legitimate at the time – would produce immediate consequences that it seeks to avoid, but because it fears of possible future repercussions that it wishes to neutralize in a proactive manner. *Goldschmidt* used the example of the Argentine residents who, before divorce (→ Divorce and personal separation) became legal in Argentina in 1987, chose to marry in Mexico to be able to divorce should they choose to do so in the future. *Goldschmidt* considered that the marriage celebrated in Mexico under prospective fraud had to be deemed as celebrated in Argentina and therefore indissoluble (Werner Goldschmidt, 'Matrimonio celebrado por poder y con fraude a la expectativa' (1979) 80 *El derecho* 242).

Not less significant is *Goldschmidt's* characterization of the signs of the fraudulent intention: one is the 'spatial expansion' of conducts (the parties appear in a foreign country, on occasions represented by agents, with no apparent justification); the other is their 'temporal contraction' (the parties act very fast).

5. *(Private international law as) The law of tolerance*

Werner Goldschmidt established his philosophy – cosmopolitan, humanistic and essentially optimistic of private international law – in 1977 in the preface to the third edition of his *Derecho internacional privado*.

For *Goldschmidt*, private international law differs from other law branches that also deal with cases containing foreign elements because of its specific value, namely the positive respect for foreign law, which signifies its imitation (theory of juridical use). Such value is pursued throughout indirect norms, which are norms that, instead of providing the solution to mixed cases (so-called because they contain both local and foreign elements), limit themselves to designating the local or foreign law that will solve them. By contrast, other branches of law also dealing with mixed cases, such as the law on aliens (→ Aliens law (*Condition des étrangers, Fremdenrecht*)), international procedure law, or uniform law, use the direct method, their value being to benefit the origin country or to integrate a group of countries, based as it is on 'intolerance' towards what is foreign. It is true that the value of positive respect for foreign law is only admissible if the foreign law does not oppose the principles of the forum law. If we identify the positive respect for foreign private law except for our public policy with the idea

of tolerance, we can affirm that private international law, being the law of extraterritoriality of foreign private law, constitutes the 'law of tolerance'. In the third edition of his *Derecho internacional privado* and in subsequent editions, *Goldschmidt* addresses private international law tridimensionally defining it as the law that resolves mixed cases with positive tolerance and hence in an indirect manner.

Humanism, universalism and optimism impregnate *Werner Goldschmidt's* work. His humanism is present, for instance, in his dikelogy; but also when he incorporates basic principles of international human rights law in the content of *ordre public* (eg when he proposes to correct, by means of public policy pursuant to art 14.2 of the former Argentine Civil Code (available at <http://archive.org>), a → marriage that is void and null in accordance with the law of the place of celebration because spouses are of different religions); as well as when he proposes a 'forum of necessity', which would allow the Argentine authorities to assume jurisdiction when a case cannot possibly be litigated abroad, provided that the case has a sufficient link with Argentina, in order to avoid denial of justice (followed by the Argentine Supreme Court *in re Emilia Cavura de Vlasof v Alejandro Vlasof*, sentence of 21 March 1960, (1960) Fallos 246:87; with comment by Werner Goldschmidt, 'La jurisdicción internacional argentina en materia matrimonial y las Naciones Unidas' (1969) 98 *La ley* 287).

His cosmopolitism is present in his theory of juridical use, when it demands that the probable solution of the case in the country of origin be investigated, that the competent judge must 'submit himself' to the interpretation that the foreign courts give to their own law, even when both the foreign and the local statutes are identical (Werner Goldschmidt, *Derecho internacional privado* (8th edn, Depalma 1992) 144); in his defence of the *lex causae* for drawing the definitions of the elements in the indirect norm; as well as in his call for a narrow application of *ordre public* that allows for the proper extraterritorial application of private foreign law and recognition of foreign judgments and decisions, hence preventing exorbitant jurisdictions.

Lastly, *Goldschmidt's* optimism is revealed in the balance that he achieves between general (philosophical) constructions and positive law (Henri Battifol, 'Goldschmidt (Werner): Derecho Internacional Privado, 3e éd, Editions Depalma, Buenos-Aires, 1977, XXX+646 pages' [1978] Rev.crit.DIP 236, 237); as well as by his dedication to teaching law, which, for *Goldschmidt*, is something intrinsic to the nature of law, which in turn is associated with human nature (Miguel Ángel Ciuro Caldani, 'El científico y el técnico del derecho (Werner Goldschmidt, modelo de científico del derecho)' (1998) 23 *Boletín del Centro de investigaciones de filosofía jurídica y filosofía social de la Universidad Nacional de Rosario* 31); and the creation of a school of thought around his teachings.

6. Unification and codification of private international law

Finally, *Werner Goldschmidt's* contribution to codification cannot be overstated. *Goldschmidt* always underlined the urgent need for uniform private international law, as a means of integrating Argentina in the American region and the world, which obviously requires harmonization of law (Alejandro Aldo Menicocci, 'Werner Goldschmidt y la codificación del derecho internacional privado' (1990) 15 *Investigación y docencia* 23). Aware of the difficulties such harmonization would involve, *Goldschmidt* also proposed the means of overcoming them. Without renouncing the project of a uniform private international law, he deemed easier to achieve the 'basis for a uniform law' that leaves conventions into force in their place among ratifying countries, while establishing some non-negotiable standards, such as domicile as the principal connecting factor, saving the unity of the case from exorbitant jurisdictions or connections that may lead to its 'atomization'. When it comes to Argentine domestic private international law, *Goldschmidt* called for its codification, in view of the dispersion of the norms in the different statutes (Werner Goldschmidt, 'Reforma del Derecho Internacional Privado argentino' (1955) 12 *Revista Facultad de Derecho de la Universidad Nacional de Tucumán* 169).

Werner Goldschmidt's 1969 'Draft Basis for a Uniform Law (or a Convention Containing Uniform Rules or an International Model Law) of Private International Law' ([1969] *Estudios iusprivatistas internacionales* 163), and his 1974 'Draft Code of Private International Law' (reproduced in Werner Goldschmidt, *Derecho internacional privado* (8th edn, Depalma 1992) 668), which is based largely on the former, significantly influenced the work of the

Inter-American Specialized Conferences on Private International Law (→ CIDIP) which, since 1975 and originally every six years, are convened by the Organization of American States and have produced a number of conventions, protocols, model laws and other documents. More recently, the 'Draft Code of Private International Law' (available at <www1.hcdn.gov.ar>) written by a group of professors of the major universities of Argentina at the request of and which was presented in 2003 to the Ministry of Justice, Security and Human Rights, relies heavily on *Goldschmidt's* drafts, as does to a lesser degree the new Civil and Commercial Code enacted by the Argentine Congress in 2014, which entered into effect on 1 August 2015.

III. *Werner Goldschmidt's* ascent, influence and demise

Until *Goldschmidt's* arrival to Argentina, the country's private international law featured two characteristics: (i) the almost exclusive influence of French doctrine, with the tripartite division of the object of private international law – → nationality, → choice of law, and competence of the courts and recognition of foreign judgments – and the confusion caused by the inclusion of the issue of the treatment of aliens (→ Aliens law (*Condition des étrangers, Fremdenrecht*)) in a private international law deeply rooted in the domiciliary principle; and (ii) no systemization of the general problems of the functioning of the conflict rule, which led to lack of coherence, and also to the difficulty in dealing with public law institutions which used the methodology of private international law to solve their own problems (Horacio Daniel Piombo, 'Derecho internacional privado. Basado en la teoría trialista del mundo jurídico (2ª ed), por Werner Goldschmidt (Ed Depalma) Buenos Aires, 1974' (1975) *La ley* 1345).

Goldschmidt's teaching and publications dynamized a profound re-thinking of private international law, and made available to Argentine jurists a doctrine tailored to its singular characteristics. Private cases with a foreign element started to be dealt with on the basis of a solidly structured general theory and a rigorous method that takes into account not only the normological dimension of the case but also the social and justice dimensions. *Goldschmidt* also introduced in Argentina a rich variety of issues that had been ignored until then by local authors, including the territorial and the temporal scopes of private international law, the hypothesis of the private international law norm, the conflict mobile and the incidental question.

Werner Goldschmidt's influence in Argentine and Latin American private international law was so considerable as to mark two distinct epochs: the one prior to his arrival to Argentina, and the one that opens up with his teachings and research. In addition to the new Argentine Civil and Commercial Code which takes on board some of *Goldschmidt's* proposals – notably the juridical use (art 2595), *ordre public* as a group of principles (art 2600) and the *forum* of necessity (art 2602) – *Goldschmidt's* influence is palpable in the majority of private international law Argentine textbooks, the use of the normological method and the juridical use, in particular, remaining largely unchallenged.

Two of *Goldschmidt's* disciples stayed faithful to his teachings. Professor *Horacio Piombo* of the Universities of La Plata and Mar del Plata wrote *Estructura normativa del derecho internacional privado. Sistemática de la dimensión normológica* in 1984 (Horacio D Piombo, *Estructura normativa del derecho internacional privado. Sistemática de la dimensión normológica* (Ediciones Depalmas 1984)), which presents the totality of the Argentine private international law norms in force, and which *Goldschmidt* acknowledged as an indispensable complement to his book in the preface to the fifth edition of his *Derecho internacional privado*. Professor *Alicia Perugini* of the Catholic University of Buenos Aires has not stopped carrying the torch of *Goldschmidt's* ideas. In 2009, with the collaboration of a group of scholars, she published the first updated edition – the tenth – of *Goldschmidt's Derecho internacional privado*, which had remained largely untouched in the sixth through the ninth editions, *Goldschmidt* having passed away in 1987. *Goldschmidt's* third disciple, Professor *Antonio Boggiano* of the University of Buenos Aires, would eventually denounce the monopoly of the choice-of-law method, which obliterates the material norms of direct applicability and the peremptory norms that may have to be taken into consideration to resolve a private international law case, as well as the exclusion from the realm of private international law of the questions

of jurisdiction of the courts and of recognition of foreign judgments.

Indeed, the constraints of *Goldschmidt's* 'purist' system of private international law, with the indirect norm at the centre of the stage and the specific value of 'tolerance' attributed to private international law, becomes clear in that *Goldschmidt* himself acknowledged the role played by material and peremptory norms and addressed the issue of jurisdiction of the courts and recognition and enforcement of foreign judgments in his *Derecho internacional privado*, even when under a different heading as 'Related Fields', thus acknowledging the need for a wider perspective for resolving mixed cases. He understood that private international law and international procedure law are so closely related that one cannot shy away from the other (Alejandro Aldo Menicocci, 'Werner Goldschmidt y la codificación del derecho internacional privado' (1990) 15 *Investigación y docencia* 23, 25). By his own account, *Goldschmidt* pursued codification as a means of regional and universal integration; yet he focused on the harmonization of conflict norms, when uniform material norms are a better conduct for integration. Occasionally, tolerance towards foreign law gives way to practical considerations as when he proposes that connecting factors are defined by the *lex fori* to avoid a vicious circle. Finally, usual difficulty to prove intent in *actus fictus in fraudem legis* tends to increase as the temporal gap between the fraudulent act and the desired effect widens.

However, it is *Goldschmidt's* juridical use which has attracted the most attention and received the fiercest criticism. *Alberto Juan Pardo*, former Professor at the University of Buenos Aires, underlines the 'flaws' of this theory, in particular its premise that foreign laws when applied abroad lose their legal standing (Alberto Juan Pardo, *Derecho internacional privado. Parte general* (Ábaco 1976) 245). It is significant that the 1998 Venezuelan Act on Private International Law (Act of 6 August 1998 on Private International Law (Official Gazette No 36.511)), while prescribing that foreign law shall be applied as it would be in its country of origin, nevertheless considers it as law and not as a fact (Tatiana B de Maekelt, 'Nueva Ley venezolana del derecho internacional privado' in Fernando Ignacio Parra-Aranguren (ed), *Libro homenaje a Gonzalo Parra-Aranguren*, vol 2 (Addendum 2001) 100). Now, if foreign law can be imitated without losing its legal standing, why is there the need to stress the difference between domestic law as law and foreign law as a mere juridical use? If foreign law is to be applied *ex officio*, what is achieved by opposing authentic law to juridical use as the expression of foreign law (Mariano Aguilar Navarro (1949) 2 REDI 1039, 1046)? Furthermore, it has been argued that this theory can lead to total uncertainty, proposing as it does a too radical induction system; and that its results are no different than those of the → *renvoi* doctrine (Jacques Maury, 'Règles générales des conflits de lois' (1936) 57 Rec. des Cours 325, 389; Henri Battifol, *Aspects philosophiques du droit international privé* (Dalloz 1956) 111).

It was Professor *Boggiano* who, by introducing the 'plurality of methods' to Argentine private international law, placed the first challenge to *Goldschmidt's* 'system'. But it was Professor *Diego Fernández Arroyo* who, taking account of the new developments in private international law throughout the work of international organizations and in the context of the European Union legal structure, triggered a much needed reshuffle of Argentine private international law, and more importantly by leading an alternative school of thought which has broken free from *Goldschmidt's* rigid framework.

Lastly, the challenge has come from an all too familiar ghost: civil and commercial law specialists. The new Argentine Civil and Commercial Code, which came into effect in 2015 perpetuates the current state of affairs by depriving domestic Argentine private international law of the autonomy long predicated by *Goldschmidt* and leaving other issues out or unregulated, for the price of having at last in Argentina a regulation – a modern and overall good one – of the general issues arising in the field of private international law starting by the determination of the competence of Argentine courts and incorporating some of *Goldschmidt's* dearest doctrines like the juridical use and the forum of necessity. Surely *Goldschmidt*, had he lived, would have had mixed feelings about this.

MARIO JA OYARZÁBAL

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Guarantees

I. Definition and concept

1. Notion

A guarantee is a form of security given to the creditor of a claim. In case of a debtor's non-payment, the guarantor is held personally liable for repayment of the debt. A guarantee is therefore an undertaking to assume another's debt in the case of default (Roy Goode, *Goode on Commercial Law* (4th edn, Penguin 2010) 878). Typically it secures a monetary obligation. In exchange for his services, the guarantor will often be paid a fee by the debtor. Guarantees may also be given free of charge, eg by family members.

2. Parties

A guarantee involves three parties: the debtor, the creditor and the guarantor. The creditor usually seeks payment from the debtor before approaching the guarantor. If the debtor defaults, then the guarantor is obliged to perform. After having paid, the guarantor earns a right of redress against the debtor. Yet still, he may not be able to recover because the debtor may lack sufficient funds. A guarantee therefore involves a high degree of risk to the guarantor because he may be left to pay somebody else's bill. Legal systems respond to this risk by seeking ways to protect the guarantor.

3. Similar phenomena

Guarantees must be distinguished from other legal tools that serve similar goals.

Such tools include comfort letters and letters of intent. These letters are frequently used in corporate practice. Unlike guarantees, they merely offer non-binding assurances to the creditor but do not necessarily imply an assumption of debt. The author is obliged to pay only up to the extent that his intent to be legally bound can be proven.

An indemnity is also similar to a guarantee. It requires that one party undertake an obligation towards another in order to indemnify him against any loss he may suffer. Such loss may be caused by the default of the other's debtor. In this case, the distinction between the indemnity and the guarantee is particularly subtle (see Roy Goode, *Goode on Commercial Law* (4th edn,