Competitive Innovations in the Civil and Commercial Procedural Code

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Innovaciones en la Competencia en el Código Procesal Civil y Mercantil
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Resumen
En este artículo se presenta un panorama de las innovaciones experimentadas en lo relativo a la competencia de los tribunales en materia civil y mercantil, a partir de la vigencia en el Código Procesal Civil y Mercantil en 2010, caracterizado por la introducción del proceso por audiencias en sustitución del modelo basado en la escrituralidad, lo que ha implicando un reto de adaptación, tanto por parte de las instancias del Estado encargadas de su aplicación, así como para la comunidad jurídica del país. Para la mejor comprensión de estas innovaciones, además de la regulación normativa, se incluyen datos históricos sobre la evolución de la competencia, así como la jurisprudencia y reflexiones doctrinarias que coadyuvan a la definición de la institución procesal de la competencia y a su diferenciación de otros conceptos jurídicos, así como a la determinación de los diversos criterios de competencia de acuerdo a una visión moderna. De igual manera se hace una referencia sucinta a una serie de casos especiales como la competencia para conocer de las medidas cautelares, diligencias preliminares y ejecución de la sentencia, resaltando las modificaciones introducidas por el CPCM, así también se hace mención de los Decretos Legislativos que han establecido nuevos tribunales y reestructurado otros que ya existían, todo ello con el objeto de facilitar la aplicación de dicha normativa procesal.

PALABRAS CLAVE: COMPETENCIA – DERECHO PROCESAL – CÓDIGO PROCESAL CIVIL Y MERCANTIL – JURISPRUDENCIA – JURISDICCIÓN – EJECUCIÓN FORZOSA – PRUEVA – MEDIDAS CAUTELARES.

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Abstract
This article presents an overview of the innovations tested regarding as to the jurisdiction of courts in civil and commercial matters, from the current Civil and Commercial Code in 2010, characterized by the introduction of the hearings process is presented in replacement model-based writing, which has implying an adaptive challenge, both by state bodies responsible for its implementation, as well as for the legal community in the country. For a better understanding of these innovations, in addition, the normative regulation, including historical data on the evolution of competence, and the case law and doctrinal reflections that contribute to the definition of the procedural institution of competence and its differentiation from other legal concepts included as well as the determination of several criteria of competence according to a modern vision. Similarly, a brief reference to several special cases like the jurisdiction of the precautionary measures, preliminary proceedings, and execution of the judgment is made, highlighting the changes introduced by the CPCM, and also made mention of the Legislative Decrees have established new courts and restructured others already exist, all to facilitate the implementation of the procedural rules.

KEYWORDS: COMPETITION – PROCEDURAL LAW – CIVIL AND COMMERCIAL CODE – CASE LAW – JURISDICTION – FORCED EXECUTION – EVIDENCE – PRECAUTIONARY MEASURES.

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Introduction

The Salvadoran State is organized to achieve justice, legal certainty, and the common good. For the fulfillment of these purposes, it develops different functions, among them the function stands out in court carried out by the Judicial Branch and manifested in jurisdictional acts. This function consists of the authority that the State has to provide a response to the legal conflict that exists between individuals or between them and the State itself.

The Salvadoran legal system recognizes the principles of separation of powers and distribution of competences among the fundamental branches of Government. As a derivation of this principle, the fundamental norm has exclusively attributed to the Judiciary Branch to judge and execute what is judged, being strictly prohibited any interference of the other state bodies in the exercise of this function.[2]

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The author thanks the collaboration of Licda. Odaly Lissette Sánchez and Mr. Wilfredo Antonio Jovel, Assistants of the Research Unit of the Faculty of Jurisprudence and Social Sciences of the University of El Salvador.

2 *"The exclusivity of the Jurisdictional Body to judge and enforce the court, contemplated in the art.*

The jurisdictional process is the instrument used by the State to resolve conflicts and satisfy the claims of individuals, giving compliance through the specific procedural regulation to its constitutional function of administering justice. It should be emphasized that only through a process carried out with strict respect for the parameters provided in the Constitution can a person be deprived of the rights established in their favor by the legal system.[3]

To materialize the jurisdictional function in the civil and commercial justice system, procedural rules are established in the positive legal framework. Articles 26 to 41 of the Civil and Commercial Procedural Code (in Spanish, CPCM) regulate jurisdiction and competence, which is also governed by the provisions of the Judicial Organic Law and its Complementary Decrees, as well as Legislative Decree number 372, through which courts are created or converted, with the responsibility to judge and execute judgments in civil and commercial matters according to legally determined competence.

As a result of the aforementioned, the importance of studying competence within the framework of procedural legislation lies in the fact that this institution enables the resolution of conflicts in human life within society through the jurisdictional function of the State. It achieves this by specifically assigning a predetermined sphere of action to the courts of the Republic, which, in turn, contributes to the unrestricted respect for legal certainty. This allows every citizen to know where to turn in case their rights enshrined in the legal system are violated.

The topic becomes particularly relevant for legal professionals and law students, given the significant innovations introduced by the Civil and Commercial Procedural Code of 2010, which bring about a new distribution of

172 inc. 1 ° Cn., Excludes or prevents the possibility of usurpation of judicial powers by part of the Executive Branch and the Legislative period 2014-2019. Constitutional Chamber of the Supreme Court of Justice, final judgment of the unconstitutionality process with ref. 16-98, San Salvador, December 1, 1998, Recital III.3.D.

3 Constitutional Chamber of the Supreme Court of Justice. Judgment of the amparo process with reference number 718-2006. San Salvador, October 16, 2008, Considering resolution III.

competence. These changes pose a challenge for the state bodies responsible for its application, as well as for the legal community of the country, which needs to adapt to the new process.

I. Historical Evolution

The peaceful resolution of conflicts between members of society to achieve social peace is one of the central objectives sought by the legal system. In the course of history, evolution oriented to overcome the primitive tendency of human beings to solve their disputes through the use of force.[4] It is within the framework of this process that goes arising from the jurisdictional process in which the judge is responsible *"to whom it concerns as a connatural function the one to solve the conflicts, to give a normclear, precise and concrete that governs in the future and as res judicata the situations conflicts that arise and are debated in the process"*.[5] Currently, it is recognized that the judge must be independent, impartial, and with predetermined competence under the law, but it must be specified that these guarantees have been developing in the historical future.

As a remote antecedent, it should be mentioned that in ancient societies, in the judgment of controversies was exerted by the monarch or by his closest advisors, although progressively there was a functional specialization emerging in the figure of the judge. So, the ancient Egyptian civilization records the existence and operability of procedural rules in which competence was assigned in the task of imparting justice,[6] given that matters civilians corresponded to local courts that were called sepat. In addition, there was a higher court in the city of Memphis that had jurisdiction to know in appeal of all the cases sentenced

4 *Cfr.* QUINTERO, B. and PRIETO, E, *General Theory of Procedural Law,* Ed. Temis, fourth edition, 2008, p. 10.

5 *Ibidem,* p. 16

6 It is mentioned that ancient civilizations are as a historical precedent, though it is worthy mentioned that the characteristics of the judiciary were missing in these first manifestations of the judiciary. Independence and impartiality are inherent in the jurisdictional function in its modern conception.

in such courts.[7] This allows us to affirm that from the dawn of civilization, the need to not concentrate the function of imparting justice on a single judge was recognized as well as means of contesting judicial decisions were provided.

Beyond the Egyptian precedent, it was in the State Cities of Greece Antigua where a distribution of jurisdiction between various courts was regulated, thus *"in the city of Athens, in the democratic period, the majority of cases civil and criminal were the competence of the popular courts (Heliae), only the more serious crimes were submitted to the Areopagus Council"*.[8]

The modern process, applied in countries that belong to the legal system of continental or Romanist law, has its origins in the legislation and forensic practice of Ancient Rome, complemented by the contribution of Germanic peoples along with medieval canon law.

As Véscovi indicates, in Ancient Rome, there were three moments key in the development of Procedural Law: *"The system known as legal actions corresponds to the monarchy. At that time the judicial function was exercised by the king. At the time of the Roman Republic, the power to administer justice went to the Consuls. In 387 BC, when the commoners reached that dignity, the patricians, to reserve the power to administer justice, entrusted itto a new magistrate named Pretor"*.[9]

The ancient Roman process included two parts to the magistrate by rights (*in jure*) and then to the judge (known in Latin *as iudex*)[10] (in judgement or known in latin as *in iudicium*), which was designated by the litigants or, failing that, by the magistrate.

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7 *Cfr.* ALONSO ROYANO, F., Law in Pharaonic Egypt, in *Space, time and form.Journal of the Faculty of Geography and History,* National University of Distance Education, Series II, Ancient History, number 11, Madrid, 1998, p. 36-38.

8 AA VV., Millennium Thematic Encyclopedia, Volume V, Ed. Cultural Recreational, Bogotá, 2001, p.1260

9 VÉSCOVI, Enrique, *General Theory of the Process,* Editorial Temis, second edition, Bogotá, 1999, p. 22.

10 Sometimes this Latin word has been translated by the Castilian words "judge" or "arbitrator", see. VÉSCOVI, E., *op. cit.,* p. 22

To take an action, *"the plaintiff fulfilled a series of legal formalities in the presence of witnesses. The process was predominantly oral. After fulfilling the previous legal formalities designated judge (iudex) and the magistrate determined loudly the controversial points"*.[11]

After the indicated procedural acts, the trial instruction continued by the judge (*iudex*), the authority to whom the witnesses repeated the words pronounced by the magistrate; then the tests were produced, and according to them, the judge (*iudex*) dictated the sentence.

In the Republican period of Rome, it was observed the emergence of a new criteria of competence as a result of the presence of foreigners in Rome, special judges were named pilgrim pastors, who corresponded to solve the disputes involving Roman citizens with foreigners from Rome.

At this stage of Roman law, thanks to the aforementioned pretors (roman magistrate) it was created the procedure form that was effective in the second period. This new procedure consisted of the magistrate, after hearing the parties in dispute, delivering to the plaintiff a written instruction called "formula" which began with the designation of the judge and included the exposition of the facts, the summary of the plaintiff's claims, and the judge's authority to condemn or absolve, and the authority to adjudicate the ownership of the disputed thing.

The form system had a short duration as it was replaced by the extraordinary procedure imposed by Emperor Diocletian. In this procedure, *"the magistrate directly knew the controversy (litigation)."* In this period, the territorial criterion of competence was applied, attributing the prosecution of civil and criminal cases of their respective province, to the local representatives of the imperial power (vicars and prefects),[12] *"there was also a functional criterion of competence, since the appeal to the emperor was foreseen"*.[13]

11 *Ibidem,* p. 23.

12 Regarding the criteria of competence in the Roman process, *vid.* ADINOLFI, G., "Extremisms on the subject of "accusatio" and " inquisitio "in the Roman criminal process", in *Revista de Estudios Histórico-Jurídicos,* number XXXI, Valparaíso, Chile, 2009, p. 37-60.

13 VÉSCOVI, Enrique, p. 25, *op. cit.*

With the invasions of the Germanic peoples (5th century after Christ), they left several important procedural institutions that have had application in subsequent procedural systems. Among the Germanic peoples, the faculty to administer justice resided in the population as a whole. The judgments solved according to the traditions preserved by the elders as they had no written laws. There was no separation between civil and criminal proceedings since the same body (popular assembly) was competent to hear both issues. This assembly had the power to settle rather than solve.[14]

In the European countries in the years after Christianization, during the government of Emperor Constantine, it was recognized as the right of the parties to voluntarily submit to the authority of the bishops to solve conflicts in civil matters, which allowed the church to exercise true supremacy in the temporal sphere. The ecclesiastical courts initially applied the stages of the Roman procedure with some new forms and institutions. The bishops had territorial competence within the scope of their diocese.

Over time, ecclesiastical courts of lesser competent hierarchy emerged in the circumscription established by the respective bishop. In this period, competence criteria were constructed, *"Canon Law established, based on the reforms of Pope Gregory VII, the possibility of appealing episcopal sentences to the Pope as the highest ecclesiastical authority"*.[15]

In the medieval period, the glossators elaborated a mixed Roman-canonical procedure also called common. Véscovi points out that the last procedure was introduced *"the German institutions as the division of the process into two parts, the solemnity of the litigation response. The fundamental principles of the evidence and the sentence, all were of Roman origin. Under the influence of canon law*

14 *Vid.* ROJAS DONAT, L., "El sistema probatorio medieval de los germanos", in *Revista de Estudios Histórico-Jurídicos,* number XXXIV, Valparaíso, Chile, 2012, p. 483.

15 Regarding on the incidence of canon law in procedural norms, *vid.* GARCÍA Y GARCÍA, A., "La compilación de Huesca de 1247 y el Derecho canónico medieval," in *Glossae. Revista de historia del derecho europeo*, Instituto de Derecho Común Europeo, Universidad de Murcia, Murcia, 1996.

that the process was written and entirely directed by the officials the secret procedure, with an evidence system measured".[16]

The procedural innovations introduced by the influence of Canon Law were known in Spain and progressively incorporated into various legislative bodies, including the *"Compilación de Huesca" (1247), the "Siete Partidas" of Alfonso X the Wise (1265), the "Ordenamiento de Alcalá" (1348), and the "Ordenamiento Real" of 1485, the latter approved by the initiative of the Catholic Monarchs".*[17]

The Spanish procedural institutions influenced by the canonical Roman tradition passed to the American countries during the prolonged colonial period.[18] After independence, the Spanish influence remained remarkably as in the Salvadoran case in, which the Code of Civil Procedures of 1882, was inspired by the Spanish Civil Procedure Law of that time.

The Code of 1882 remained in force for more than a century, underpinning a scriptural procedural model, which since the last decades of the twentieth century showed signs of exhaustion and excessive delays of trials, beginning a public discussion on the desirability of adopting the procedural model by audiences, which had already been received in various Iberoamerican countries. It was as a result of the verification of the structural problems of the previous procedural legislation that promulgated the Civil and Commercial Procedural Code, whose validity was established on July 1st, 2010, which clearly opted for a procedural model by audiences with an important component of orality.

16 VESCOVI, E., *op. cit.* , p. 27 - 28

17 GARCIA Y GARCIA, A., *op. cit.* , p. 29.

18 In the Hispanic colonies of America, it was applied preferentially the norms contained in the Collection of Indian Laws in 1542 and other legal bodies of special character, which made up the so-called Indian Right, and in a supplementary manner the rules of the Right of Crown of Castile. In this regard *vid.* RODRÍGUEZ RUIZ, N., *History of Salvadoran legal institutions,* first edition, Editorial Universitaria, 1959.

II. Concepts and foundations of the Competence

2.1 Doctrinal

The jurisdictional function is the attribution and duty of the State to solve the different conflicts that arise from the interrelation of society, that is, between its population and even with the same State, in order to protect the legal order established and enhance respect for the fundamental rights of people. To fulfill this function, it has been established the Judicial Branch, composed of a set of courts characterized by independence, impartiality, and regulatory predetermination.[19]

Given that the conflicts in society are numerous and are produced by different motivations, it arises the need for the effective application of the jurisdictional function and the material impossibility that a single judge can comply with all the processes that are promoted. For this reason, the jurisdiction is assigned to several judges, determining for each of them, their specific competence.

Indeed, jurisdiction is the faculty to administer justice that is granted to judges and it is essential to regulate its exercise. In order to reasonably distribute and delimit the scope of action of each court, the legal system provides the establishment of competence criteria. It is in consideration of the interrelationship between the concepts of jurisdiction and competence that Devis

19 The right to trial by a court predetermined by law is one of the inherent requirements of due process and is widely recognized in Comparative Law. Regarding this right, the Peruvian Constitutional Court establishes: *"[T] he jurisdiction and the jurisdiction of the judge must be predetermined by law, so the allocation of judicial competence must necessarily have been established prior to the start of the process, guaranteeing that no one can be judged by an ex post facto judge or by an ad hoc judge."* Constitutional Court of the Republic of Peru, Final judgment of habeas corpus, January 9, 2009, Exp. Number 03790-2008-PHC. On the other hand, the trial by a predetermined court has been considered as one of the judicial guarantees derived from art. 8 of the American Convention on Human Rights in multiple judgments of the Inter-American Court of Human Rights such as those issued in the *Caballero Delgado vs. Colombia* (January 29, 1997) and *Cesti Hurtado vs. Peru* (September 29, 1999).

Echandía establishes: *"The competence is therefore the power that each judge or magistrate of a jurisdictional branch has to exercise jurisdiction in certain matters, and within a certain territory. That is why we can consider competence from a double aspect: the objective, as the set of issues or causes in which, according to the law, the judge exercises jurisdiction; and the subjective, as the power conferred on each judge to exercise jurisdiction within the limits to which it is attributed. Although these limits have different importance, they are always about the distribution of jurisdiction among the judges of the same jurisdictional branch"*.[20]

As Mario Oderigo observes, the legal regulation of competence transcends a mere arithmetic distribution of the total number of cases among the various courts, but requires the organization of judicial work according to objective and reasonable criteria. So, in the words of the aforementioned author: *"The laws have not made a simple numerical distribution, but a qualified distribution: they have made a qualified division of labor among the judges according to certain circumstances, which allow a reasonable classification of the issues, forming with them, different categories and attributed the knowledge of each of those categories to each of the judges or groups of judges. It is not that they have divided the jurisdictional function, but that they have indicated the limits within each of the judges can exercise it; they have determined the sphere of action of each judge, their competence"*.[21]

That is why not all judges know indistinctly about the legal conflicts that are presented to them, this will depend on the competence granted to know certain causes, in short, competence is the extent to which jurisdiction can be applied between the various authorities. Following the previous conception outlined, Véscovi defines competence as *"the portion or part of the jurisdiction of the various jurisdictional bodies and, at the same time, their ability to judge certain matters. It also has a negative aspect, designated with the name*

20 ECHANDIA, H. D., *Teoría General del proceso,* Third edition, Editorial Universidad, Ciudad de Buenos Aires. p. 142.

21 ODERIGO, M. A., *Lecciones de Derecho Procesal,* Parte General, Volume I, Ediciones De palma, Buenos aires, 1973. p. 243.

of incompetence, which means the impossibility of judging certain matters by the lack of such aptitude, since the function has been attributed to other organs of the jurisdiction".[22]

Essential differences between jurisdiction and competence

Of importance for the understanding of competence, is its distinction with the jurisdiction, for this reason, the opinion of the Chilean jurist Casarino Viterbo has been revisited, who summarizes the distinction between both concepts:

"a) Jurisdiction is the power that the courts have to administer justice; On the other hand, competence is the power that each court has to know regarding its businesses;

b) Jurisdiction is a generic concept: hence, it is essential for every court to have jurisdiction; on the other hand, competence is a specific concept, inherent to its own nature, and that is why a court may not have jurisdiction to know about a certain matter and therefore it does not cease to be such;

c) Jurisdiction is the whole; on the other hand, the competence is the part, and for that reason, it can also be defined by saying that it is the amount, degree, or measure of the jurisdiction that corresponds to each court, and

d) The jurisdiction indicates the sphere of action of the Judiciary against other powers of the State; on the other hand, the competence indicates the sphere of action of various courts between them".[23]

2.2 Legal

As it has been previously developed, competence implies the determination of precise limits to the sphere of action in which each judge may exercise the jurisdictional power that has been attributed to him, which contributes to the good internal order of the judiciary and allows him to attend matters adequately that are submitted to his knowledge.

22 VÉSCOVI, E., *op. cit.*, p. 133.

23 CASARINO VITERBO, M., *Manual de Derecho Procesal. Derecho Procesal Civil.* Volume I, Editorial Jurídica de Chile, Valparaíso, 2011, p. 127.

The 2010 CPCM does not present a legal definition of competence. However if it does carry out a detailed regulation of the courts' competence since it is recognized the relevance of this institution to ensure the proper order of judicial work as well as effective protection to the rights of each person who goes to the Jurisdictional Body.

Commenting on the foundation of the legal institution of competence in the CPCM, Cisco Channels states: *"For the best performance in the exercise of the jurisdictional function, it arises to judicial legal life the institution of judicial competence, understanding as such, the faculty attributed to each court or tribunal to judge and execute what is judged, meeting a clearly defined, which distribute such powers, seeking an order in the exercise of the jurisdictional function"*.[24]

To show an overview of competence regulation in the CPCM and thus integrate theoretical knowledge with the normative reality of the Salvadoran legal system, the following summary table is presented:

TRIBUNAL	COMPETENCE	ARTICLE CPCM
Supreme Court of Justice in plenary	1st From the abstentions and objections in accordance with the provisions of this code; 2nd From the cassation when the Civil Chamber has met on appeal, excluding the magistrates that make up that room; 3rd From competence of conflicts; and 4th From the other matters determined by law.	Art. 27
Supreme Court of Justice	1st Exequatur processes; 2nd Resource of cassation; 3rd Resource of appeal when the second instance chambers have met in the first instance; 4th Of the revision of firm sentences; and 5th Of the other matters determined by law.	Art. 28
Second Instance Chambers	1st Resource of appeal; 2nd Of claims against the state; and 3rd Of the other matters determined by law.	Art. 29

24 AA. VV., *Código Procesal Civil y Mercantil Comentado,* Consejo Nacional de la Judicatura, San Salvador, 2011, p. 40.

TRIBUNAL	COMPETENCE	ARTICLE CPCM
First Instance Court	1st of the common process; 2nd Of the special processes regulated in this code, notwithstanding what is established for the monitoring process; 3rd Forced execution, in accordance with the provisions of this code; 4th Of the other matters determined by the laws of the Republic. Likewise, the court of first instance of the abbreviated processes and of the audits that arise in those districts where there is no lower court of first instance.	Art. 30
Courts of First Instance for Small Claims	1st of the abbreviated process; 2nd of the monitoring processes; 3rd Forced execution, in accordance with the provisions of this code; 4th Of the executive processes whose amount does not exceed twenty-five thousand colones or its equivalent in dollars of the United States of America; and 5th Of the rest determined by the laws.	Art. 31

2.3 Jurisprudence

One of the essential components of due process is the existence of a court predetermined by the legal system to know and solve disputes raised by people in the conservation and defense of their rights.

Regarding the link between due process and competence, the Third Civil Chamber of the First Section of the Central District, on October 18th, 2012, expressed in its ruling 193-DQCM-12: *"The Due Process or Constitutionally Configured Process includes, among others, the existence of a competent tribunal, as it appears in various international treaties recognized by El Salvador, in relation to Arts. 172 to 190 of the Constitution, since it is recognized that in a Rule of Law, the administration of efficient and effective Justice, through a competent tribunal, (Guarantee of Competence), independent and impartial, constitutes a special basic judicial guarantee of the legality that the State must ensure ... Among us, the Organic*

Judicial Law contains the organizational distribution of the Judicial Branch, to which constitutionally the jurisdictional powers of judging and enforcing the judged are attributed, in the matters that in it is pointed out, although, really, as a whole, the law is intended to distribute the jurisdiction based not only on the subject (RATIONE MATERIAE), but also by degree, territory and functionality. Arts. 131 Ordinal 31, 172, and 184 Constitution".[25]

III. Competence criteria

The delimitation of competence criteria is originated as a product of the material reality in which the jurisdiction must be exercised, in which the justice applicator must know of a high number of causes as well as the territorial demarcation in which he exercises his function. As Hugo Alsina states: "*The existence of a single judge exercising the full jurisdiction in a territory, to which all individuals and matters would be subject without distinction of classes or issues, can be conceived. However, in practice, this is not always possible because if the territory is vast, the judge could not, without detriment to their functions, move from one place to another to administer justice, nor would it be reasonable for a person to be obliged to cover long distances to appear before the judge merely because a lawsuit has been filed against them, which they may be acquitted of. On the other hand, even if the territory were small, the density of the population and the multitude of disputes could seriously disrupt the judge's function due to the impossibility of examining and resolving them with due attention. Therefore, it is necessary to devise a means that facilitates the judge's task, and that means is the regulation of competence".*[26]

25 Third Civil Chamber of the First Section of the Center. Order in the incident of appeal of the definitive order pronounced by the Fifth Judge of Civil and Commercial Law. Consignment Payments. San Salvador, October 18th, 2012, Ref. 193-DQCM-12

26 ALSINA, H., *Tratado Teórico Práctico de Derecho Procesal Civil y Comercial,* Volume II, second edition, EDIAR Editores, Buenos Aires, 1957, p. 508.

3.1 Territorial

This criterion is framed within the geographical limit where the court will exercise its jurisdiction since it is necessary to establish a specific range of action for the judge, and security for the population that will agree to settle their conflicts.

Devis Echandía describes the scope of the criterion of jurisdiction based on the territory: *"It relates to the territorial jurisdiction within which the judge can exercise their authority. In principle, various cases of the same nature can be heard by all judges of the same class and category throughout the country. To distribute cases, the location of the parties' domicile is taken into account, especially that of the defendant. In the absence of a domicile, it may consider their residence (Personal Jurisdiction) or the place of fulfillment of the contractual obligation (Conventional Jurisdiction), the location of the subject matter of the case, or the place where the act that generates criminal or tort liability occurred. It can also be based on the location of the business administration (General or Special Territorial Jurisdiction)".*[27]

The Supreme Court of Justice, in the conflict of jurisdiction, raised between the Civil Court of Santa Tecla and the Fourth Civil and Commercial Court of San Salvador, dated October 6th, 2011,[28] states: *"There are rules on territorial jurisdiction that use different elements to determine which court has the authority to hear a specific conflict... For a better understanding of territorial criteria regarding jurisdiction that covers most scenarios and determines the competent court, the CPCM (Code of Civil and Mercantile Procedure) separates them into two groups: general territorial criteria and special territorial criteria. Arts. 33, 34, 35 and 36 CPCM. In the present case, it concerns the application of the criteria about competence in the general cases of territoriality that are identified as follows: a) domicile of the defendant, which includes a determined address and the indeterminate when he has no domicile or*

27 ECHANDIA, H. D., *Compendio de Derecho Procesal*, Volume I, six edition, Editorial ABC, Bogotá, 1978, p. 115.

28 Supreme Court of Justice. Resolution of the conflict of negative competence between the Civil Judge of Santa Tecla and the Fourth Civil and Commercial Judge of San Salvador. October 6, 2011. Ref. 123-D-2011.

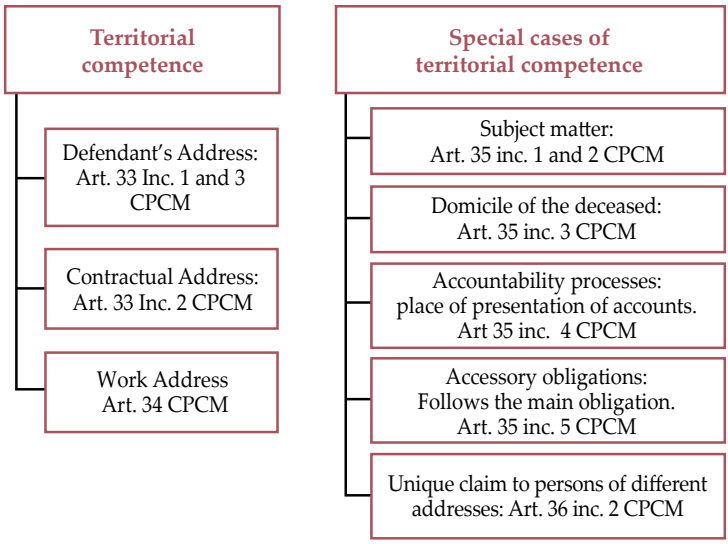
residence in the country; b) contractual domicile, will be the one in which the parties have submitted in advance by reliable instruments in which there is mutual agreement between the parties; c) Labor domicile, where the defendant carries out the work activities, and d) Place where the legal situation or regulation referred to in the process was born or should take effect".

In the conflict of jurisdiction between the Civil Judge of Zacatecoluca and the Civil Judge of Soyapango,[29] the Supreme Court of Justice establishes: *"As a basis, what is established in Art. 33 CPCM, which establishes the criteria on competence about competence in reason of the territory, and in its first paragraph states the domicile of the defendant, which includes a fixed address, and the indeterminate when he has no domicile or residence in the country. Based on this premise, the Judge is called to evaluate two aspects: 1. The contribution that the plaintiff makes from the place where it knows that the domicile of the defendant is established; under the assumption that it is he who knows the facts that motivate his action Art.7 CPCM, and also based on the principle established in Art.13 of the same legal body, which concerns exclusively the parties at the time of providing their allegations; and 2. To be known the fact of the domicile disclosed by the plaintiff, the Judge will carry out the assessment judgment to establish its competence, following what the substantive Law understands as the domicile of a person. In that line of thought, concerning what is stipulated in Article 57 of the Civil Code, domicile is comprised of two elements, namely, residence and the intention to remain in the same place. Among them, the intention to remain predominates".*

The lack of territorial competence, as established by the Civil and Commercial Procedural Code gives way to the suspension of the procedure; however, the court, at the request of the party, can perform acts aimed to guarantee the effects of the lawsuit.

To understand the legal regulation of the application of the territorial criterion on competence, it is exemplified in the following table:

29 Supreme Court of Justice. Resolution of the Conflict of Negative Competence induced between the Civil Judge of Zacatecoluca, Departamento de La Paz and the Civil Judge of Soyapango. San Salvador, 30 de julio de 2012. Ref. 128-D-2012.



Criteria for territorial jurisdiction and special cases in the Civil and Commercial Procedural Code.

3.2 Funcional

The functional criterion must be understood as the attribution that the law establishes for each of the jurisdictional bodies to know in different instances of the same process, establishing specific functions for each court. In the words of the Colombian proceduralist Devis Echandía: *"It is derived from the special kind of functions that the judge performs in a process; according to the instance or the appeal and review, and their knowledge is distributed among several judges of different categories"*.[30]

Ramos Méndez clarifies regarding this criterion: *"Functional competence results from the administrative organization of justice. By a necessary principle of coordination, the various courts are established, which must intervene in the same process throughout their various phases. The various degrees or instances of the same matter are distributed among the courts"*.[31]

30 ECHANDIA, H. D., *Compendio de Derecho Procesal,* Volume I, Six Edition, Editorial A B C, Bogotá, 1978, p. 115.

31 RAMOS MÉNDEZ, F., *Derecho Procesal Civil,* Editorial Bosch, Barcelona, 1980, p. 161.

Professor Ortells Ramos clarifies the relationship of this criterion with others such as territorial: *"The attribution of objective and territorial competence has implicit the functional competence: of knowing the first instance of the process, but there are activities in a process that the law attributes to other bodies. To make such an attribution, the law uses the existing relationship between the courts in the judicial organization"*.[32]

The specific regulation of this criterion is found in Article 38 CPCM, in relation to the provisions of the Arts. 27 to 32 CPCM.

3.2.1 Grade

As part of the functional criterion, which concerns the attribution of jurisdiction to Courts in the first and second instances, as well as the knowledge of appeal in the cases that are required, the procedural order has provided a special regulation for the processes in which the State intervenes as a defendant.

Thus, in the words of Oscar Canales Cisco, the new Code of Civil and Commercial Procedure *"reaffirms the privilege granted by the Code of Civil Procedures in favor of the State of El Salvador, as long as that it possesses the quality of a defendant in all kind of processes and in any matter and amount."*[33] Such regulation is based on the consideration of the State, as a representative of public interests, therefore special rules are laid down concerning the court competent to recognize in each of the instances.

Under this criterion, proceedings against the State, regardless of the amount, regardless of the amount shall be at first place to the Second Instance Chambers with territorial jurisdiction in the Capital of the Republic, as provided in CPCM by Art. 29, 2nd ordinal in relation to Art. 39; for such cases, the appeal will be heard by the Civil Chamber of the Supreme Court of Justice, Art. 28 3rd ordinal; the Supreme Court of Justice in Plenary Session will hear the appeal

32 ORTELLS RAMOS, M., and others, *Derecho Procesal Civil,* fifth edition, Editorial Aranzandi, Valencia España, 2004, p. 226.

33 *Cfr.* CANALES CISCO, Oscar, en AA. VV., *Código Procesal Civil y Mercantil Comentado, op. cit.*, p. 45.

in cassation, excluding the Judges of the Civil Chamber, in accordance CPCM with the provisions of Art. 27 2nd ordinal.

Based on article 39, paragraph 2 of the CPCM, municipalities, the Instituto Salvadoreño del Seguro Social, as well as decentralized entities of the State are excluded from this special rule, which may be sued according to the common functional criterion. The aforementioned privilege does not apply either when it is the State who sues a single individual, since in such case the lawsuit will be filed according to the common rules of competence.

3.3 Materia

The diversity of situations that may be subject to judicial protection is attributed to the knowledge of a court through the criterion of competence based on the matter, which takes as its basis the nature of the conflict that is submitted to the knowledge of the judicial body, it means , the legal relationship from which the litigation arises and the characteristics of the matter in dispute.[34]

As Véscovi says, this is a variable criterion, which is oriented to organize the courts according to the specialization of the judges and magistrates regarding the nature of the process. This criterion, in some positive legal systems such as the Uruguayan one, has led to semantic confusion with jurisdiction, however, in most positive systems the two concepts are clearly differentiated.[35]

In the 20th century, specialized labor and family courts emerged. The modern trend towards specialization in the administration of justice has been maintained with the establishment of new courts dedicated to matters such as childhood and adolescence, agrarian and environmental, among others.

Modernly, the doctrine tends to consider that competence by reason of the matter is part of what is called objective competence, as they attend circumstances not related to the parties, but to the nature and object of the

34 ROMERO SEGUEL, A., *Curso de Derecho Procesal Civil,* Volume II, Editorial Jurídica de Chile, third edition, Valparaíso, 2009, p. 51

35 VÉSCOVI, E., *op. cit*., p. 135

claim, and regarding the competence by matter, it is attended *"to the content of the legal relationship"*[36] that originates the conflict between the parties.

3.4 Amount

The amount as a factor of determination of absolute competence consists in estimation of the amount of money or economic value claimed in a given matter. In civil and commercial matters, the amount is determined by the value of the disputed *res judicata*.[37]

As the doctrine points out, this is a highly casuistic criterion, and the amounts established to distinguish the different disputes are expressly determined by the legal precepts.[38] The value of the litigation determines not only the competence of the knowledgeable Court, but also the procedure to be followed, since multiple cases are subject to special processes such as the abbreviated for its low value. The most generalized criterion is the one to attribute matters of lower economic value to judges of a lower ranking on the hierarchical scale. It has been excluded from this criterion the causes in which the contentious object has undetermined value and those that refer to very personal rights.

In modern doctrine, the quantity criterion is located as part of the objective competence since it attends to a circumstance of the procedural object, such as the economic value of the *res judicata*. However, the prominent prosecutor Francesco Carnelutti held an opposite opinion and rejected that the amount is part of the objective competence classifying it as a kind of functional competence.[39]

In the Civil and Commercial Procedural Code of 2010, an innovative aspect worth highlighting regarding the criterion of amount is that the legislator

36 *Cfr*. CANALES CISCO, Oscar, en AA. VV., *Código Procesal Civil y Mercantil Comentado, op. cit.,* p. 43.

37 ROMERO SEGUEL, A., *op. cit.,* p. 55.

38 RAMOS MÉNDEZ, F., *Derecho Procesal Civil,* Editorial Bosch, Barcelona, 1980, p. 154.

39 *Cfr.* QUINTERO, B. y PRIETO, E., *op. cit.,* p. 274.

updated the fixed amounts to the present reality of Salvadoran society for determining competence by amount. For example , the CPCM provides for the expedited process to hear claims whose amount does not exceed twenty-five thousand colones or its equivalent in dollars. The Courts of First Instance for Small Claims are competent to hear this type of process (art. 31 concerning to art. 241 CPCM). This in contrast to the previous Civil Procedures Code that established very small amounts that were completely inapplicable in the Salvadoran reality of the last decades.[40]

As a second innovative aspect of the 2010 Code, the legislator has taken the precaution of considering the constant transformation of economic affairs, and that is why in Art. 700 CPCM has been planned to periodically update the sums set within the amount criterion, which will prevent monetary inflation from depriving the legal regulation of this criterion of meaning.

IV. Unavailability of Competence

The legal regulation of competence is based on reasons of public order, so it cannot be delegated by the holder of the authority to which it is attributed,[41] as was allowed in Roman times. Hence, it has to be exercised exclusively by the court previously established in the law.[42] The delegation's ban does not oppose the institution of the procedural commission since, as Véscovi observes, *"it is admitted that courts, for reasons of judicial assistance, commit others to carry out some of the procedural actors that cannot carry out for themselves. For example, everything that must be done outside the jurisdiction of each court can be committed to the respective location"*.[43]

40 *Cfr.* Arts. 502 y 503 del Código de Procedimientos Civiles de 1882.

41 "Through the appointment of rigor the State legitimizes the judges for the exercise of jurisdiction with competence in a certain court, which will be exercised in accordance with the rules that define the exercise of the function. Neither jurisdiction nor competence may be delegated by those who are invested with such attributes. " FALCÓN, E., Derecho Procesal Civil, Comercial, Concursal Laboral y Administrativo, Tomo I, Rubinzal Culzoni Editores, Santa Fe, 2003, p. 103.

42 *Cfr.* QUINTERO, B. y PRIETO, E, *op. cit.*, p. 292-293

43 VÉSCOVI, E., *op. cit.*, p. 145.

As Santiago Garderes affirms: *"Historically, it is recognized that the norms that deal with the distribution of the competence criteria are unavailable. The refusal to alter the competence rules has a solid foundation based on the principle of legality in Art. 3 CPCM, consisting of the impossibility of the procedural subjects to alter the processing of the process before a competent Judge and under the provisions of the CPCM. This rule regarding the unavailability accepted in repeated pronouncements by ordinary national jurisprudence was taken up by the new procedural law in art. 26 CPCM., In the same, expressly recognizes that competence in general is unavailable, except competence due to territory"*.[44]

The exception to the general rule of non-transferability of competence is provided in Article 26 of the CPCM, where it is allowed only in the case of jurisdiction based on territory. Regarding this exception, the jurisprudence of the Supreme Court of Justice in the conflict of competence with reference 128-D-2012 establishes: *"The availability of territorial jurisdiction is the prerogative of the defendant, who shall be responsible to controvert such situation and denounce the lack thereof in accordance with Art. 42 Inc. 1 CPCM.- Having announced the plaintiff the defendant's domicile, it has met one of the requirements for the admission of the demand, developed in Art. 276 ord. 3rd CPCM; which determines -in principle and as a general rule- the jurisdiction, as has been sustained on many occasions by this Court (eg, judgments 34-D-11 and 70-D-2011); since the consignment of the address contributes to determining the passive element of the claim; In addition, the manifestation of the domicile of the defendant constitutes a matter of fact and not of law, for which reason it corresponds to the plaintiff to declare it, and the judge should not inquisitively try to determine it by other means, but must respect the principle of good faith, according to what the actor has stated"*.[45]

44 AA. VV., Código Procesal Civil y Mercantil Comentado, *op. cit.*, p. 29.

45 Supreme Court of Justice, July thirty, two thousand and twelve. Conflict of negative jurisdiction between the Civil Judge of Zacatecoluca, department of La Paz and the Civil Judge of Soyapango. Ref. 128-D-2012.

V. Creation and conversion of the Civil and Commercial Courts

Within the Salvadoran legal community the renewal of procedural regulations in civil and commercial matters was eagerly awaited, since serious problems were evident in the application of the Code of Civil Procedures of 1882, especially referring to excessive judicial default as well as lack of speed in the processing of processes in which scripturality prevailed. Against this background, the country's legal community hoped that the new procedural legislation would respond to the challenges posed by the current development of Salvadoran society since the previous regulation responded to the reality of the 19th century; Thus, after having developed the constitutionally established stages for the law formation process and having passed a *vacatio legis* for more than one year, the Civil and Commercial Procedural Code entered into force on July 1st, 2010.

The 2010 Code came to structurally transform the entire processing system, establishing greater speed, concentration and procedural economy, turning the previous Code of Civil Procedures extremely rigorous and formalistic. These changes constitute a modernization and progress for the Salvadoran order.

As part of the implementation of the 2010 Code, the creation of new courts were necessary, along with the conversion of existing ones, to ensure the correct application of the new Code. Given the above conditions, the Legislative Decree number 372 was established, dated May 27th, 2010, which creates civil and commercial Courts in the most populated cities of the country, and at the same time is responsible for the conversion of those already established in the municipalities of smaller population, so that they assume the causes initiated from the entry into force of the new procedural legislation.

Documents emanating from abroad

Judicial decisions issued abroad, as acts of the sovereignty of another State, to enjoy the same effectiveness as the resolutions issued by the national courts need the recognition of the Salvadoran state authority.

Exequatur, also called *auto de pariatis,* is the process of recognizing foreign judgments and judicial decisions prior their execution, provided that it meets the requirements established by the Salvadoran legal system.

Exequatur may also be given under an international instrument, in compliance with the requirements outlined in that instrument. Article 28 numeral 1 of the Civil Procedure Code attributes exclusively to the Civil Chamber, the knowledge of *exequatur* processes.

In the Fifth Book of the CPCM, within the legal regulation of Forced Execution in Articles 555 to 558 it is deduced that the foreign judicial resolutions that end a process, if they are recognized in El Salvador, they are also enforcement titles (Art. 555).

When there is no international treaty applicable to the recognition of a foreign title in El Salvador, it may be produced if at least it meets the requirements determined by art. 556 CPCM:

1st. *That the sentence with the authority of res judicata in the State where it was pronounced comes from a competent court according to Salvadoran norms of international jurisdiction.*

2nd. *That the defendant, against whom the execution is intended to be carried out, would have been legally summoned, even if it had been declared rebel, provided that the possibility of exercising its defense had been guaranteed and that the resolution had been legally notified.*

3rd. *The sentence meets the necessary requirements to be considered as such in the place where it was issued, as well as the authenticity conditions required by national law.*

4th. *That the sentence does not affect the constitutional principles or public order of Salvadoran law, and the fulfillment of the obligation it contains must be lawful in El Salvador.*

5th. *There is no ongoing process in El Salvador, nor a final and conclusive sentence issued by a Salvadoran court that has res judicata effect.*

The jurisdiction for the recognition of judgments, judicial decisions and arbitration awards from abroad corresponds to the Civil Chamber of the Supreme Court of Justice. This is a reform that brought Art. 557 in harmony with Art. 28 of the Code of Civil and Commercial Procedure since, at the time, this code came into force, the cited Article 557 conferred jurisdiction on the Supreme Court of Justice, as it happened in the previous Code of Civil Procedures.

The acknowledgment must be requested by the party that is interested in and of the request, a hearing must be given to the opposing party, placing it before the Court so that it can make allegations about the concurrence of the legally established requirements.

When no allegations have been formulated, or evidence has not been practiced, the Civil Chamber shall issue a judgment recognizing the foreign resolution and granting it full effect, or denying such recognition within ten days.

It will be allowed to present evidence, in which case an evidentiary period will be opened. If useful and pertinent evidence has been proposed, its practice will be ordered in a hearing, which must be carry out within a period not exceeding twenty days, and after being concluded it, the sentence will be issued. There is no appeal against the judgments of the Civil Chamber that resolve the *exequatur* process.

VII. Forced execution

The judicial authority must be exercised not only to judge and issue a ruling but also to bring about the effective enforcement of that mandate, for which the figure of execution is necessary. Execution is a way to enforce what is established in a judgment and prevent the judge's activity from being limited to mere rulings that do not materialize.

All of this is aimed at achieving effective judicial protection, as it is the duty of the State to ensure the secure fulfillment of the rights that citizens seek to have protected, recognized, and enforced. We should not only limit ourselves

to accessing justice but also strive for its ultimate realization, considering that the Constitution of the Republic implicitly includes in Article 2 the State's obligation to ensure effective judicial protection.

"The executive activity is presented as a necessary continuation of the process in order to comply in all its aspects with the judicial sentence, especially in front of a rebellious conduct of the convicted person. Execution is based here on the existence of a jurisdictional title: the judgment or any other jurisdictional resolution.

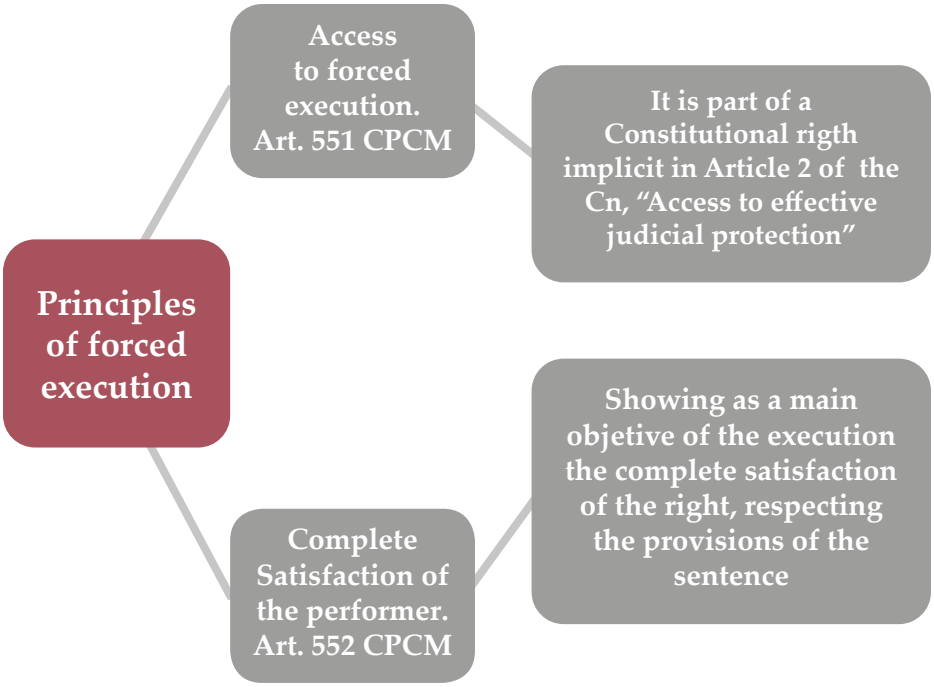
The existence of this phase of the procedural activity is essentially subordinated to the need for effective legal protection. It matters little to obtain a favorable judicial decision or to possess any other executive title if one cannot achieve effective realization of these titles or obtain the benefit that they protect. While it is true that the legal system relies on the process, this requirement is fully fulfilled in its significance during the process of execution. Without execution, the law becomes something that vanishes in ethereal declarations or more or less fortunate formulations. At this level, the law would fail to fulfill the purpose that justifies its own existence".[46]

The execution of the sentence is only carried out in convicting sentences, since in merely declaratory and constitutive sentences, they do not need the execution stage, since it is in charge of exercising effective compliance with that issued by the court and in declaratory and constitutive sentences, the same sentence makes them effective.

"In the civil process, when a judgment has passed in the authority of res judicata, the coercive profile of the State begins to appear in its monopolistic use of force, since if the debtor does not comply with the obligation declared in the sentence, the creditor can initiate the forced execution of his credit. This new stage, which starts from the acquisition of firmness by the judicial ruling, is of execution, because it tends to enforce-execute-the provisions of the sentence, it is procedural because it consists of a series of procedural acts, some investigative, others directly enforceable, ordered for this purpose, and it is forced, because the use of coercion predominates

46 RAMOS MENDEZ, F., *Derecho Procesal Civil,* Editorial Bosch, Barcelona, 1980. p. 951.

over the assets and, sometimes, also over the person of the debtor, whose will will be dispensed with".[47]



Articles 554 and 555 of the CPCM give rise to Forced Execution, dividing the types of titles into National and Foreign, with the exception of Article 457 which specifies the executive process. It is therefore appropriate to differentiate between the executive process and forced execution. The former is a special process carried out to comply with a title that entails execution, whereas forced execution is a process by which a judgment is made effective in application of the principle of effective judicial protection, which obliges the State to judge and enforce what has been judged.

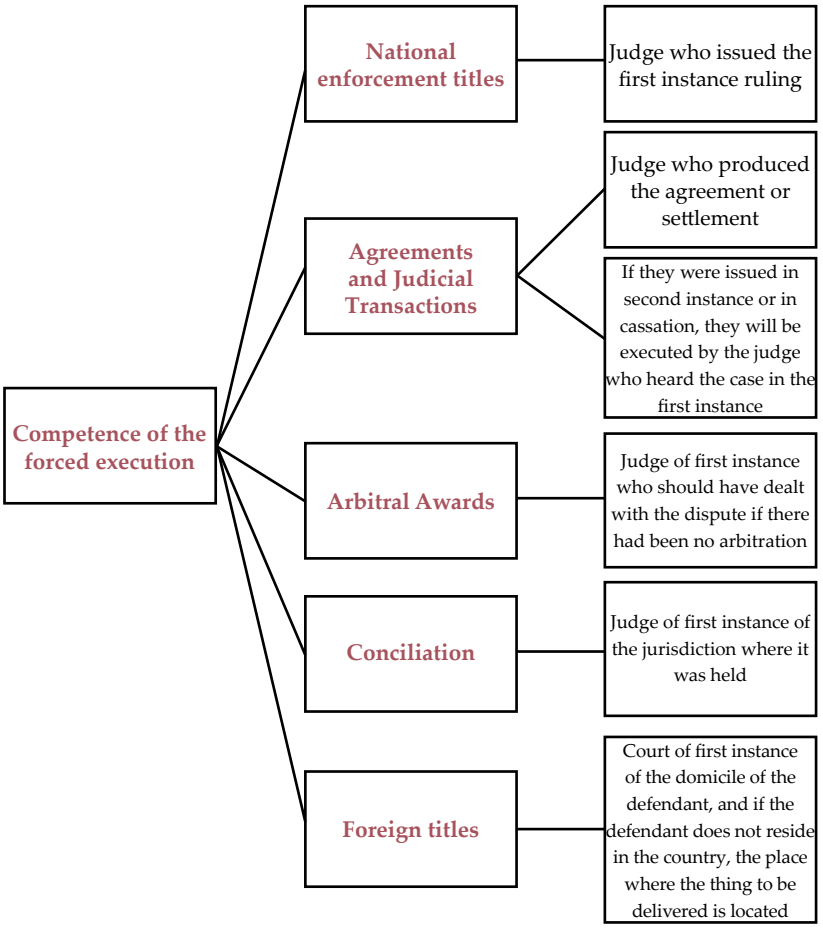
47 ARAZI, R., *Derecho Procesal civil y comercial, parte general y especial*, second edition, editorial Astrea, Buenos Aires, 1995. p. 600

As explained above, it must be a sentence of conviction, since it is not necessary to enforce a declaratory or constitutive process; it must be a judgment that has passed with the authority of *res judicata*. For this case, the CPCM exposes three scenarios in articles 229, 230, and 231, which are as follows: when the appeals filed have been resolved and no other appeals are available in the case; when the parties expressly consent to it; and when the deadline for filing an appeal has passed without filing the corresponding appeal. These scenarios serve as impediments for another process involving the same parties and the same claim.

One of the main innovations is the *"Provisional execution of judgements on appealed"* provided in Article 592 CPCM; this mechanism operates at the request of a party and is brought before the judge who had decided in the first instance:

As a general rule, there is no need for the presentation of a surety, except when the judge decides otherwise, taking into account the economic capacity of the applicant. If the judgment is reversed, the applicant is liable for damages to the respondent, and the judge will take the necessary actions to reverse the executed actions, either by returning the money or the property. If it is not possible to return the property, it will be replaced with its equivalent in money.

Regarding the competence of forced execution, it is found regulated from Articles 561, 254 and 562 CPCM.



VIII. Other cases of competence regulation

8.1 Preliminary Proceedings

To enter the study regarding who is responsible for knowing about preliminary proceedings, the following shows what is understood by our Civil and Commercial Procedural Code by "preliminary proceedings":

According to Valentín Cortés and Víctor Catena, the preliminary proceedings are *"actions that are postulated by the judicial bodies and are intended to obtain information about circumstances related to the personality of the future defendant or other extremes that whoever intends to file a lawsuit needs to know for initiation successfully from a civil process, as well as obtaining documents or objects that are necessary to enter in such process"*.[48]

At the same time, we find a definition that helps us to clarify the term in the CPCM, that states: *"Proceedings constitute a true autonomous process and subsist independently, they can never be considered as accessory procedures to a main process, it means, as an incidental question. All the inquiries to complete the information for the preparation of the claim, the availability of the evidentiary means and the litigation object must be within the reach of the parties, before the initiation of the process, otherwise the claim will be rejected"*.[49]

We must bear in mind that when speaking of preliminary proceedings we are not leading to the end of precautionary measures, since as it has been expressed in the previous definitions, they refer to the search for the effective presentation of a claim, seeking to prepare all the information and documents necessary to help the future plaintiff to successfully file his claim, as expressed in Article 255 of the CPCM, the proceedings preliminary purposes are to *"prepare the process"*, and if these measures are not used within a month they lose their effectiveness.

48 CORTÉS DOMÍNGUEZ, V. y CATENA MORENO, V. *"Derecho Procesal Civil, Parte General"*, third edition, Editorial Tirant lo Blanch, Valencia, 2008, p. 118.

49 Código Procesal Civil y Mercantil Comentado, *op. cit.*, p. 251

On the other hand, when talking about jurisdiction for the knowledge of preliminary proceedings, we find in article 257 of the CPCM that these should be handled by the court of the domicile of the person who must testify, exhibit, or intervene in the proceedings, and if this information cannot be found by the applicant subsidiarily, the court where the future lawsuit is to be filed shall be competent.

The CPCM in the same article 257 expresses two specific assumptions for the application of the subsidiary criterion[50] of competence (the court where the future claim will be processed will have competence):

Art. 256 Ord. 2nd CPCM: *"The integration of legal representation of minors, incapacitated individuals, and minor children who litigate against their parents shall be provided by the Fiscalía General de la República or through the means established by law".* Art. 256 Ord. 6th CPCM: *"The judicial determination of the group of affected individuals in processes for the defense of collective interests of consumers and users. In such cases, the court may request the adoption of appropriate measures to ascertain the members of the group, according to the circumstances of the case and based on the information provided by the petitioner, including requiring the defendant to collaborate in such determination"*.

8.2 Evidence assurance

The assurance of the evidence consists of the request that is made before the court to achieve the effective protection of a test that will be poured into the judgment. It can be requested either before filing the lawsuit or in the course of the process, the ultimate goal is to ensure that the evidence can be shown through the trial without any alteration.

50 Regarding the Preliminary Proceedings, a point of relevance for the application of the subsidiary criterion of jurisdiction, it is found that the Commented Civil and Commercial Procedural Code, *op. cit*., p. 252 states: *"Under the same idea, regarding the special and subsidiary criteria, it should be noted that it will not only take place when the required domicile is unknown, but also in cases where the territorial criterion cannot be used as a reference to establish the competence according to the general rules, as is the case of the lawsuits filed against the State of El Salvador; in this, there is no doubt that art. 257 subsection 1st tacitly refers us to what is regulated by art. 39 CPCM ".*

"Unlike preliminary proceedings, precautionary and evidence preservation measures aim to advance or guarantee, even before the start of the procedure, the gathering of evidence related to the merits of the case that may be at risk of not being able to be obtained if subject to regular temporal provisions... The evidence preservation measures seek to ensure that, during the ordinary procedural phase, it makes sense to propose and it is possible to conduct relevant and useful evidence".[51]

Regarding the competence of the assurance of the evidence, article 323 of the CPCM is clear when explaining two assumptions:

- *If the assurance of the evidence is requested when the process is in progress, the competent judge to know about it will be the judge who is hearing the case (the court that is solving the dispute).*
- *If the assurance of the evidence is requested before the filing of the claim, the knowledge of this is the competence of the court that must know the main process.*

8.3 Advance Evidence

The advance of evidence is a mechanism provided by the legal system in the interest of justice and truth, which consists of a request made by one of the parties before or during the pre-trial phase, aiming to produce a specific means of evidence and document such production so that it can be evaluated at the appropriate procedural moment.

The justification for authorizing the advance of evidence lies in the existence of a certain risk that it may not be able to be submitted to the process due to some subsequent circumstance. As Montero Aroca states, the anticipation of evidence *"consists of the practice of any means of evidence prior to the trial, in fear that its own source will be lost, making its contribution to the process impossible. It is not about securing the source, but about practicing the medium".*[52]

51 CLEMENTE CASAS, I. "Diligencias preliminares y medidas de anticipación y aseguramiento de prueba", in *"Revista Actualidad Jurídica"*, number 12, Madrid, 2005. p. 93. Available in: http://www.uria.com/documentos/publicaciones/1477/documento/foro7.pdf

52 Cited by REYES HURTADO, M., *Tutela jurisdiccional diferenciada,* Palestra Editores, Lima, 2006, p. 443.

Based on the art. 328 CPCM, the competence to know about the request of the advance of evidence corresponds:

- *The judge who is already handling the ongoing process but has not yet entered the evidentiary phase.*
- *The judge who would be competent to handle the process according to the general rules if the request is made prior to the lawsuit.*

8.4 Precautionary Measures

As Santiago Garderes observes: *"the process is usually conceived as a slow and sometimes ineffective instrument"*. This same author indicates that *"even the most agile procedural structures will have to take a time that, considering the circumstances of the case, may be excessive, putting at risk the effectiveness of the judicial protection"*.[53] For his part, Kielmanovich affirms that *"it has been noted since ancient times that the natural, and we would even say inevitable, slowness of judicial procedures may entail a certain risk that the composition of the conflict will be late"*.[54]

Given the reality of procedural delays, various solutions have been proposed, such as the implementation of abbreviated processes to address the claims that present special urgency, although this does not eliminate the minimum structure of any process related to respect for the principles of bilaterality and contradiction, from there that it does not eliminate the risk of dissatisfaction with the rights that require judicial protection. Therefore, the legal order has provided for the institution of precautionary measures as a mechanism to safeguard the effectiveness of the process, despite the aforementioned delay.

Gascón Inchausti delimits this procedural institution, stating: *"These are provisional arrangements, agreed by the Judge, through which is provided what*

53 GARDERES, S., en AA. VV., *Código Procesal Civil y Mercantil Comentado, op. cit.*, p. 461.

54 KIELMANOVICH, J., *Medidas cautelares,* Rubinzal Culzoni Editores, Buenos Aires, 2000, p. 14.

is necessary to ensure, during the pendency of the main proceedings, that it will be possible to carry out what was decided in the sentence, when it arrives and assuming that it is a judgment by default of the actor's requests".[55]

The doctrine recognizes a set of fundamental principles that inform the procedural institution of precautionary measures, which lists the universality of application, proportionality, defense and contradiction, speed, responsibility, consistency, and the principle of operation. Within these principles should be highlighted the universality of application, which refers to the possibility of requesting precautionary measures in all processes regardless of their specific matter, as well as their origin in any procedural stage, being appropriate even prior to the start of the process when the risk of ineffectiveness is justified due to the delay in processing it.[56]

On the other hand, the proceduralists highlight two distinctive characters of the precautionary measures: instrumentality and provisionality. Regarding the first of these characters, it is stated that *"precautionary measures are instrumental, as they lack an end in themselves, and are functionally subordinate and ordered to a main process on which they depend, to ensure compliance with the aim of ensuring the enforcement of the judgment to be rendered in that main process"*;[57] while the provisionality refers to the precautionary measures *"must subsist until the final judgment becomes firm or enforceable"*.[58]

The adoption of precautionary measures requires the intervention of the body vested with the jurisdictional function, since they affect the assets of the defendant before the existence of an enforcement order; for this reason, it becomes necessary the special motivation of the judicial resolution in which such measures are imposed, which must be based on compliance with the two basic

55 GASCÓN INCHAUSTI, F., *La adopción de las medidas cautelares con carácter previo a la demanda,* Cedecs Editorial, 1998, p. 19.

56 *Cfr.* GARDERES, S. *et. al., op. cit.*, p. 463-468.

57 KIELMANOVICH, J., *op. cit.,* p. 42.

58 KIELMANOVICH, J., *op. cit.*, p. 42.

assumptions traditionally called: *fumus boni iuris* and *periculum in mora.* The first of them consists of the reasonable appearance that the applicant is entitled to what he asks for in the proceedings on the merits, while the second budget refers to the danger related to the effect of the passage of time that leads to damaging or rendering ineffective the final resolution of the process.[59]

As indicated above, one of the principles that informs the procedural institution of precautionary measures is the universality of application, which implies that precautionary measures can be adopted before and during the processing of the process, a principle regulated in our civil and commercial process through Article 434 CPCM.

Starting from the universality of application, it should be indicated that the competence to impose precautionary measures includes both assumptions, as it is regulated in Article 449 CPCM: *"It will be competent for the adoption of precautionary measures, the judge who must know, in the instance or resource, about the procedure in which they are to be agreed "*. From the aforementioned provision it is inferred that regardless of the procedural moment in which they are requested, it will correspond to the same court that is in charge of the process, or the one that should know when the lawsuit has not yet been filed, being applicable the criteria of competence already addressed, such as the territory and the subject.

On the other hand, Article 449 CPCM, in its second subparagraph, also foresee two special cases of competence. The first concerns the fixation of precautionary measures in matters of internal arbitration, establishing that *"The jurisdiction shall belong to the first-instance judge of the place where the arbitral decision must be executed or where the measures must take effect";* the second refers to jurisdictional or arbitration processes developed abroad, for which the same regulation is established, except for the specific provisions of the international treaties ratified by the country.

59 *Cfr.* GASCÓN INCHAUSTI, F., *op. cit.,* p. 22-23.

IX. Final reflection

The Civil and Commercial Procedural Code in force since July 1st, 2010, has generated a profound transformation in the functioning of justice in the field of Private Law, introducing a process for hearings that came to replace the previous procedural regulation of a planned scriptural nature in the Code of Civil Procedures that had more than a century of validity.

This change in the civil and commercial processes that include the principle of orality aims to streamline a system stagnant in formalities that saturated the system and prevented prompt and accomplished justice. It is undeniable that it shows challenges for legal professionals, but that it represents an advance to the process.

The procedural norm of 2010, in addition to establishing hearings in the procedural process, contains significant changes in the adoption of new classifications of processes; the provision of the appeal for review of final judgments; the specific regulation of special processes such as payment orders and possession; as well as a reformulation of the norms and principles of Evidentiary Law.

Within the aforementioned set of innovative aspects, the CPCM profoundly modifies the normative regulation of competence, a legal institution that delimits spheres of action that corresponds to the various courts between them.

In the CPCM, the legislator has systematically provided for the regulation of the areas of competence of the Supreme Court of Justice, the Second Instance Chambers, First Instance Courts, and Peace Courts, all with the purpose of facilitating access to the administration of justice for individuals who seek the intervention of the jurisdictional bodies to resolve their disputes.