ISSN 1075-1343 (print)
ISSN 2318-1516 (online)

PANORAMA OF BRAZILIAN LAW

"A step towards realizing a long standing dream: to provide the world a window to Brazilian law"

Year 1 | Number 1 | 2013

PBL

Panorama of Brazilian Law

Year 1, No 1, 2013

Rua Benjamin Constant, 43/702 - Glória
20241-150
Rio de Janeiro - RJ
Brazil

www.panoramaofbrazilianlaw.com

ISSN 1075-1343 (print)
ISSN 2318-1516 (online)

Year 1, No 1, 2013

A FINAL FOREWORD

"'A Panorama of Brazilian Law' is a step towards realizing a long standing dream: To provide the world with a window to Brazilian law".

These were the concluding words of the Foreword I wrote for the collection of essays on various fields of Brazilian law, as co-editor of the "Panorama of Brazilian Law", together with Professor Keith S. Rosenn of the University of Miami, which was published in 1992.

21 years have passed and now a group of the next generation of Brazilian law scholars has undertaken to resuscitate and keep alive the idea of the Panorama by means of a permanent electronic journal.

Professor Carmen Tiburcio, who contributed to the original Panorama and later substituted me as head of the Private International Law Department of the Rio de Janeiro State University, together with Raphael Carvalho de Vasconcelos and Bruno Rodrigues de Almeida, both professors of international law at the UFRRJ are leading this important initiative.

Today, much more than two decades ago - Brazil, one of the BRIC countries - has become an important player in the international economy and its legal system an important factor in the proper development of international commercial relations.

May this effort prosper for years and generations to come.

Jacob Dolinger, 2013

EDITORIAL NOTE

In 1992, a group of prominent Brazilian scholars led by Professors Jacob Dolinger (Universidade do Estado do Rio de Janeiro) and Keith Rosenn (University of Miami) created the journal Panorama of Brazilian Law as an attempt to provide reliable legal information on Brazilian Law for non-Portuguese speakers. The publication, originally planned as an Yearbook, presented papers related to several branches of Brazilian law written by respected authors. Due to several reasons, this groundbreaking project did not go ahead and the inaugural issue was the only one released.

The new Panorama of Brazilian Law intends to rescue the 1992's goals and ideas not just through this print version but also setting the periodic in the electronic magazine format (www.panoramaofbrazilianlaw.com) which allows a broader perspective for the knowledge and broadcasting of articles featuring any branch of Brazilian Law written in selected foreign languages.

For this inaugural edition, papers written in English, French, German, Italian, Spanish and Swedish were able to submission. Papers selected are original and unpublished. Versions of papers originally released in Portuguese were also accepted.

The Scientific Council is responsible for the Editorial Line of the magazine, whose goals are to spread information about Brazil's legal order and juridical environment among non-Portuguese speakers.

Formal aspects and criteria for publication are found at the www.panoramaofbrazilianlaw.com website under "about" > "submissions" > "author guidelines". The call for papers for its forthcoming volume 2 is already available.

The tolerant and plural perspective of the project, which is opened to all branches of Brazilian law, was determinant for choosing not to establish an hermetic format concerning the logical organization of the articles – neither with respect to its distribution along the yearbook nor in the organization adopted by authors in its papers.

The access to the online magazine is completely free of costs or registration.

The editors of Panorama of Brazilian Law are very glad to reestablish the project and hope to provide foreign researchers an ultimate way to access Brazilian law.

Rio, July 2013

Carmen Tiburcio
Raphael Carvalho de Vasconcelos
Bruno Rodrigues de Almeida
Deo Campos Dutra

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PRIVATE INTERNATIONAL LAW IN BRAZIL: *A BRIEF OVERVIEW*[1]

Carmen Tiburcio

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Abstract: The paper is intended to provide an overview of Private International Law in Brazil. With this purpose, it presents in broad lines the subject matters of the discipline, undertaking, whenever possible, comparisons with the contours given to it in the United States. In sum, the text deals with the acquisition of Brazilian nationality, the status of aliens, the determination of the applicable legislation to legal relationships with international connections – which includes the exam of Brazilian connecting rules and principles of Private International Law – and the exercise of Brazilian jurisdiction.

Keywords: Brazil - Private international law - Subject matters.

1. INTRODUCTION TO THE SUBJECT

In Brazil, contrarily to what happens in the US, most legislation is federal, in accordance with article 22 of the 1988 Brazilian Constitution, which determines:

> *Article 22. The Union has the exclusive power to legislate on:*
> *I - civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labour law;*
> *II - expropriation;*
> *III - civil and military requisitioning, in case of imminent danger or in times of war;*
> *IV - waters, energy, informatics, telecommunications and radio broadcasting;*
> *V - the postal service;*
> *VI - the monetary and measures systems, metal certificates and guarantees;*
> *VII - policies for credit, foreign exchange, insurance and transfer of values;*
> *VIII - foreign and interstate trade;*

1 This paper is an adaptation of a speech given to visiting students of Loyola University to the Law School of the State University of Rio de Janeiro. The author wishes to acknowledge the research assistance of Gabriel Almeida and Vitoria Alvarez in the preparation of this paper.

IX - guidelines for the national transportation policy;
X - the regime of the ports and lake, river, ocean, air and aerospace navigation;
XI - traffic and transportation;
XII - beds of ore, mines, other mineral resources and metallurgy;
XIII - nationality, citizenship and naturalization;
XIV - Indian populations;
XV - emigration, immigration, entry, extradition and expulsion of foreigners;
XVI - the organization of the national employment system and conditions for the practice of professions;
XVII - the judicial organization of the Public Prosecution of the Federal District and of the territories and of the Public Legal Defense of the territories, as well as their administrative organization;
XVIII - the national statistical, cartographic and geological systems;
XIX - systems of savings, as well as of obtaining and guaranteeing popular savings;
XX - consortium and lottery systems;
XXI - general organization rules, troops, war material, guarantees, drafting and mobilization of the military police and military fire brigades;
XXII - the jurisdiction of the federal police and of the federal highway and military polices;
XXIII - social security;
XXIV - directives and bases of the national education;
XXV - public registers;
XXVI - nuclear activities of any nature;
XXVII - general rules for all types of bidding and contracting, for the direct and indirect public administration, including foundations instituted and maintained by the Government, in its various spheres, and companies under government control;
XXVIII - territorial defense, aerospace defense, maritime defense, civil defense, and national mobilization;
XXIX - commercial advertising.
Sole paragraph - A supplementary law may authorize the states to legislate upon specific questions related to the matters listed in this article.

For this reason, in Brazil we do not have conflicts of domestic laws with regard to all the above mentioned subjects.

2. SUBJECT MATTERS OF PRIVATE INTERNATIONAL LAW

In the US

In the US, the subject of Private International Law comprises primarily the study of conflicts among domestic legislation, such as

between the legislation related to torts, contracts or matrimonial regime of the state of Massachusetts and the state of Virginia, or between Boston and New York. Therefore, most cases will have to answer which law to apply to a contract or accident linked to more than one American State. This is the situation, for instance, in the famous case *Milliken v. Pratt*[2], decided by the Supreme Court of Massachusetts in 1878. In this case, the plaintiffs, partners doing business in Maine, had a guaranty, signed by the defendant, a married woman, in Massachusetts and sent to the plaintiffs in Maine. The legislation of Maine authorized a married woman to bind herself by any contract as if she were unmarried, while the legislation of Massachusetts did not admit this possibility, giving rise to a conflict between the law of Massachusetts (according to which the contract of guaranty would be deemed invalid) and the law of Maine (according to which the contract would be deemed valid). The court applied to the case the law of Maine, as the contract was understood to have been executed there.

As an exception to the general rule mentioned above, American conflict's textbooks also deal with conflicts between laws of different countries, such as in the case Babcock v. Jackson[3], when the New York Court had to decide which law to apply to a car crash. The accident happened in Ontario, Canada, involving American citizens residing in Rochester, NY, who worked and were insured in that state, whose car was also licensed and insured in NY and who went in a short journey to Ontario, as they left from NY and were to finish the journey also in NY. In this case, the law of Ontario determined that *"the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in the motor vehicle"*[4]. Conversely, NY law admitted that Mr. Jackson – the driver – could be held liable for the accident. Therefore, there was a conflict of laws of different jurisdictions (between NY and Ontario legislation) and the NY Court in the end decided to apply NY law, despite the fact that the accident occurred in Ontario. In this decision, the *lex loci delicti commissi* rule was not applied, reason why it is often quoted as the starting point of the American conflict's Revolution: getting away from fixed rules, such as the law of the place of the accident, the law where the contract was executed and going towards the idea of proximity, applying the "center of gravity" or "grouping of contacts" theory of the Conflict of Laws, later adopted in the Second Restatement of Conflicts of Laws.

2 125 Mass. 374 (1878).

3 Decided by the Court of Appeals of New York, 12 N.Y. 2d 473 (1963).

4 Highway Traffic Act of Province of Ontario [Ontario Rev. Stat. (1960), ch. 172] § 105, subd. [2].

In Brazil

Private International Law in Brazil is dedicated to the study of legal relationships related to more than one jurisdiction (country). That is to say that, whenever a situation has contact with more than one jurisdiction, such as because of the *foreign* nationality/domicile of one or both parties, the fact that the contract was executed or is going to be performed *abroad*, among many other situations, this relationship will be regulated by Private International Law.

Thus, Private International Law in Brazil comprises the study of four independent subject matters: 1) nationality under domestic and international law; 2) alien's rights, also under domestic and international law[5]; 3) determination of the applicable legislation to legal relationships connected with foreign countries; and 4) matters related to jurisdiction in international litigation. In this sense, Private International Law textbooks deal with the four subjects[6]. This same criterion is adopted in several other countries, such as France, Belgium, Spain and Italy[7].

The first two subject matters, nationality and the status of aliens, are also studied by Constitutional and Public International Law, in their domestic and international aspects. The third subject matter, determination of the applicable legislation, is studied solely by Private International Law, while the fourth subject matter, jurisdiction, is also studied by Procedural Law.

Nevertheless, it should be noted that the determination of the applicable legislation and matters related to jurisdiction in international litigation are the most important subject matters of Private International Law. These two subjects – applicable law and jurisdiction – are independent from one another and cannot be confused. Chronologically

5 As regards these two objects see Carmen Tiburcio, Nationality and the Status of Aliens in the 1988 Brazilian Constitution. In Jacob Dolinger (coord.) *A Panorama of Brazilian law,* 1992, at 267 to 286. See also Carmen Tiburcio, The Human Rights of Aliens under International and Comparative Law, 2001.

6 Jacob Dolinger, *Direito internacional privado – parte geral*, 2012, at 19; Haroldo Valladão, *Direito Internacional Privado*, vol. III, 1978, at 121; Clóvis Bevilaqua, *Princípios elementares de Direito Internacional Privado*, at 92-5 (no date); Oscar Tenório, *Direito Internacional Privado*, vol. I, rev. by Jacob Dolinger, 1976, at 22; among many others. Some other authors deal with international litigation in their books, but without affirming it is one of the main subjects of Private International Law. This is the case with Eduardo Espínola, *Elementos de Direito Internacional Privado,* 1925, at 730; Wilson de Souza Campos Batalha, *Tratado Elementar de Direito Internacional Privado,* vol. 1, 1977, at 85; Amílcar de Castro, *Direito Internacional Privado,* ed. reviewed by Osíris Rocha, 1996, at 51.

7 Henri Batiffol and Paul Lagarde, *Droit International Privé*, 1970, at 3 to 7; Yvon Loussouarn and Pierre Bourel, *Droit International Privé*, 1980, at 5; François Rigaux, *Derecho Internacional Privado* (translated by Alegria Borras Rodrigues), 1985, at 99-100; Gaetano Morelli, *Elementi di Diritto Internazionale Privato Italiano*, 1986, at 187.

speaking, one first has to determine the jurisdiction to adjudicate at international level. After it has been established that the local judiciary has jurisdiction to adjudicate over the situation, one can proceed with the determination of the applicable legislation to the legal relationship connected to abroad.

That is to say that if a transnational case is brought before the Brazilian Judiciary, the local judge will apply Brazilian connecting factors to indicate the applicable legislation to the merits of the case whereas, if the same case is brought before the French Judiciary, the French judge will apply French connecting rules to the same case. As connecting factors are basically domestic, elaborated by the local legislative, like any other legislation, these connecting rules vary from one country to the other. As a result of this, the same case may be decided differently depending on where the suit is brought.

To illustrate this assertive, we may take the example of a situation related to a company, created in Belgium and having its seat in France, submitted both to the Brazilian and French Judiciary. If this situation is brought before the Brazilian Judiciary, the company will be regulated by the law of its constitution, as article 11 of the Introductory Law to the Norms of Brazilian Law states: "*Organizations destined to goals of collective interest, such as corporations and foundations, are governed by the law of the State in which they are constituted*". As the company was constituted in Belgium, it will be regulated by Belgian legislation. Therefore, the Brazilian judge will have to apply Belgian legislation.

However, if this same situation were submitted to the French Judiciary, the solution would be quite different. The French judge would apply the French Private international law's connecting rule to the situation, which establishes the applicability of the law of the company's seat[8]. As the seat in our hypothetical situation is France, the French judge would apply its own law to the case.

Therefore, we have one situation with two different solutions, depending on where the suit is brought. This gives rise to the possibility of "forum shopping"[9].

2.1. Nationality

Brazilian nationality can be acquired at birth or thereafter. Nationality acquired at birth is called original nationality, and it is

8 Bernard Audit, *Droit International Privé*, 2006, at 871-872..

9 Forum shopping occurs when there are two or more possible jurisdictions where a legal case can be adjudicated. The plaintiff or the defendant choose which jurisdiction is going to view their case more favorably and is more likely to decide in their favor and that is where they file suit. See Russell J. Weintraub, *International Litigation and Arbitration: practice and planning*, Carolina Academic Press, North Carolina, 1994, at 157 et seq.

normally obtained on the basis of ius soli - criterion by which the individual acquires the nationality of the territory of birth – or *ius sanguinis* – when the individual acquires the nationality of his or her parents, irrespective of the place of birth. When nationality is obtained later, it is acquired through the procedure of naturalization, by which Brazilian nationality is granted to an individual provided he or she fulfills certain requirements.

Acquisition and loss of Brazilian nationality are regulated in the constitutional text since the 1824 version. The main criterion is *ius soli*, that is to say: everyone born in Brazil bears Brazilian nationality, with the sole exception of children born of foreign parents, both performing diplomatic functions. There is also the possibility of acquisition as per the ius sanguinis criterion, in three different situations: (1) children born abroad, of either a Brazilian father or mother, at the service of Brazil; (2) children born abroad, of either a Brazilian father or mother, registered in a Brazilian competent office, generally the Brazilian consulate abroad, or (3) children born abroad, of either a Brazilian father or mother, not registered in a Brazilian competent office, and who come to Brazil to reside and opt, at any time, after their majority, for the Brazilian nationality. In other words, nowadays, Brazil adopts both the *ius soli* and the *ius sanguinis* criteria. This is all based on the need and desirability of avoiding statelessness. The text in force provides:

> *Article 12. The following are Brazilians: by birth:*
> *a. those born in the Federative Republic of Brazil, even if of foreign parents, provided that they are not at the service of their country;*
> *b. those born abroad, of a Brazilian father or a Brazilian mother, provided that either of them is at the service of the Federative Republic of Brazil:*
> *c. those born abroad, of a Brazilian father or a Brazilian mother, provided that they are registered in a competent Brazilian office or come to reside in the Federative Republic of Brazil and opt, at any time, after majority is attained, for the Brazilian nationality;*
> *II. naturalized:*
> *a. those who, as set forth by law, acquire Brazilian nationality, it being the only requirement for persons originating from Portuguese-speaking countries the residence for one uninterrupted year and good moral repute;*
> *b. foreigners of any nationality, resident in the Federative Republic of Brazil for over fifteen uninterrupted years and without criminal conviction, provided that they apply for the Brazilian nationality.*
> *Paragraph 1. The rights inherent to Brazilians shall be attributed to Portuguese citizens with permanent residence in Brazil, if there is reciprocity in favour of Brazilians, except in the cases stated in this Constitution.*
> *Paragraph 2. The law may not establish any distinction between born and naturalized Brazilians, except in the cases stated in this Constitution.*

Paragraph 3. The following offices are exclusive for born Brazilians:
I. those of President and Vice-President of the Republic;
II. that of President of the Chamber of Deputies;
III. that of President of the Federal Senate;
IV. that of Justice of the Supreme Federal Court;
V. those of the diplomatic career;
VI. that of officer of the Armed Forces;
VII. that of Minister of State for Defence.
Paragraph 4. Loss of nationality shall be declared for a Brazilian who:
I. has his naturalization cancelled by court decision on account of an activity harmful to the national interests;
II. acquires another nationality, save in the cases:
a. of recognition of the original nationality by the foreign law;
b. of imposition of naturalization, under the foreign rules, to the Brazilian resident in a foreign State, as a condition for permanence in its territory, or for the exercise of civil rights.

2.2. Status of aliens

The basic rules regarding the status of aliens are comprised primarily in the Constitution and also in infra-constitutional legislation (Law n. 6.815/80).

Since the Imperial Constitution of 1824, the right to leave the country has been granted to nationals[10]. The Constitution of 1891, in a period of encouragement of immigration, admitted that both nationals and aliens could enter the country at any time, independently of a passport[11]. The 1934 Constitution also allowed aliens to enter and leave the country, provided that they complied with the legal requirements[12]. This Constitution also adopted the quota system, admitting back then that only 2% of each nationality group that was in Brazil for the previous fifty years was allowed to enter the country[13]. The 1937 Constitution maintained the same rules[14]. The 1946 Constitution, for its turn, kept an identical legal treatment with regard to entry and exit of the country and abandoned the quota system[15]. The 1967, 1969 and 1988 Constitutions adopted similar rules about the entry, exit and movement within the Brazilian territory and the applicability of the requirements established

10 Article 179, VI.
11 Article 72, para. 10.
12 Article 113, para. 14. The Constitution of 1934 suppressed the expression "independently of a passport".
13 Article 121.
14 Article 122.
15 Article 142.

by ordinary legislation[16].

Infra-constitutional legislation currently in force[17], establishes that an alien does not need an exit visa to leave the country[18] and has to possess a visa and a passport in order to enter Brazilian territory[19]. It also determines the possibility of *deportation*, if an alien enters illegally or overstays the visa[20], of *expulsion*, if the alien's presence is considered contrary to national interest, public policy and good morals[21] and of *extradition*, if the alien has committed a crime abroad[22].

In what concerns the rights of aliens, it should be noted that resident aliens in Brazil enjoy the same rights to life, freedom, security and property as nationals[23]. All fundamental rights granted by the Constitution are ensured to all resident aliens as well, such as the right to equality of treatment, right not to be tortured, freedom of expression, right to privacy, right to the free exercise of any work, right of association, right to own property, right of access to justice, right to social assistance, and right to education, among many others. The fact that the Constitution guarantees these rights only to resident aliens, however, does not mean that non-resident aliens are left unprotected by the Brazilian legal system[24]. Several times, the Supreme Court has extended many of the rights mentioned in the Constitution to all aliens, including tourists and aliens who are not even in the country, such as the right of access to justice, the right to own property, and the right to protection of intellectual property[25].

The guarantee of fundamental rights to all non-resident aliens has not always been the rule. One of the first cases examined by our Courts after the 1891 Constitution was a writ of *habeas corpus* on

16 Article 150, para. 26; Article 153, para. 26; Article 5, para. XV respectively of the 1967, 1969 and 1988 Brazilian Constitutions.

17 Alien's Act, Law 6815 of 1980.

18 *Id.* Article 50.

19 *Id*. Articles 2 to 21 and Article 54.

20 *Id*. Articles 57-64.

21 *Id.* Article 65-75.

22 *Id.* Articles 76-94.

23 Constitution of 1988, article 5: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to equality, to security and to property (…)".

24 Celso Bastos, *Curso de Direito Constitucional*, 2010, at 284. Celso Bastos points out that the Constitution extends all fundamental rights to anyone in the country, reasoning that the drafters of the Constitution, when mentioning resident aliens, did not employ the term in its technical sense of being legally domiciled in Brazil, but intended to extend rights to all those physically present in the country.

25 STF, DJU of 07.11.1957 1957, RE 33.319/DF, Rel. Min. Candido Motta; STF, DJU 26.10.1960, RE 44.621/SP, Rel. Min. Candido Motta; STF, DJU 8.10.1962, RMS 8.844/SP, Rel. Min. Ribeiro da Costa; STF, DJU 25.05.2001, RE 215.267/SP, Relª. Minª. Ellen Gracie.

behalf of the Portuguese Imperial Family, banned from Brazil after the proclamation of the Republic. Decided by our Federal Courts in 1903, this case held that only resident aliens were beneficiaries of the rights expressed in article 72 of the 1891 Constitution[26]. Because the Imperial Family was not resident in the country and since the remedy of habeas corpus was one of the fundamental rights listed in that provision, the Imperial Family had no right to *habeas corpus*[27].

Some legal commentators argue that the constitutional provision granting fundamental rights was a generic one, and the subsequent provisions to this article could either extend these rights to non-resident aliens or deny them even to resident aliens. Consequently, there are some rights among these provisions that should be granted to any human being[28]. Other commentators reach the same result for a different reason. They interpret the text of the Constitution literally as conferring rights only on resident aliens, but they conclude that non-resident aliens are also granted these fundamental rights as a consequence of international human rights conventions, duly ratified by Brazil, that affirm these rights on a universal basis, that is, to every person[29].

However, aliens may suffer some limitations regarding the acquisition of real property in rural areas[30], Brazilian ships[31] or communications media[32].

There is a lively debate among Brazilian scholars as to whether ordinary legislation may add further distinctions between resident

26 Constitution of 1891, article 72: "The Constitution assures to Brazilians and to foreigners resident in the Country the inviolability of the rights concerning liberty, individual security and property".

27 Habeas corpus No. 973, 91 O Direito, 1903, at 414 to 434.

28 Pontes de Miranda, *Comentários à Constituição de 1967 com a Emenda nº 1 de 1969,* 1974, at 695 and 696.. Along the same lines, see Jacob Dolinger, *Comentários à Constituição de 1988*, 1997, where the author classifies the fundamental rights as generic, to be granted to anyone, specific, to be granted to Brazilians and resident aliens and restrictive, granted only to Brazilians.

29 Luiz Olavo Baptista, O Estrangeiro: Reflexões para a Constituinte. In Jacob Dolinger (coord.), *A nova Constituição e o Direito Internacional,* 1987, at 135-7.

30 Constitution of 1988, article 140: "The Directing Board of the National Congress shall, after hearing the party leaders, designate a Committee comprised of five of its members to monitor and supervise the implementation of the measures concerning the state of defense and the state of siege". ; Law 5709 of 1971; Decree 74.965 of 1974.

31 Constitution of 1988, article 178, sole para: "In regulating water transportation, the law shall set forth the conditions in which the transportation of goods in coastal and internal navigation will be permitted to foreign vessels".

32 Constitution of 1988, article 222: "The ownership of journalism firms and radio and television broadcasting firms is restricted to native-born Brazilians or those naturalized more than ten years ago, or to legal entities constituted under Brazilian laws and that is headquartered in the Country".

aliens and nationals. Some believe that apart from the distinctions or allowances made in the constitutional text for enactment of implementing ordinary legislation, no other distinctions are possible[33]. Other authors take the opposite position[34]. Those who contend that ordinary legislation cannot discriminate against resident aliens without an express constitutional authorization base their understanding on the principle that expressly prohibits discrimination based on origin, one of the objectives of the Federal Republic of Brazil, according to the constitutional text[35]. Likewise, Article 5 of the present Constitution assures in general terms to Brazilian and resident aliens the right to life, freedom, equality, security and property, which are the bases for all fundamental rights. Since it is granted to aliens the constitutional right to be treated equally[36], ordinary legislation not expressly authorized by the Constitution that establishes discriminatory treatment will be considered unconstitutional.

The same argument can be used with respect to the right to work, conferred on both Brazilians and resident aliens[37]. Some contend that any legislation establishing discriminatory limitations on the right of aliens to work is unconstitutional[38]. Consequently, proponents of this view consider unconstitutional the statute that conditions the practice of law by aliens on reciprocity[39], all the provisions of Aliens Act prohibiting the exercise of functions not expressly mentioned in the

33 Carmen Tiburcio, *The human rights of aliens under International and Comparative Law*, 2001.

34 See Oscar Tenório, *Direito Internacional Privado*, vol. I, 1976, at 268-269; Wilson de Souza Campos Batalha, *Tratado Elementar de Direito Internacional Privado*, vol. 2, 1977, at 28-29.

35 Constitution of 1988, article 3, IV: "The fundamental objectives of the Federal Republic of Brazil are: IV – to promote the well being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination".

36 Constitution of 1988, article 5, I: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: I – men and women have equal rights and duties under the terms of this Constitution".

37 Constitution of 1988, article 5, XIII: " All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: III – the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish".

38 This position is defended by Carmen Tiburcio, *The human rights of aliens under International and Comparative Law*, 2001, and by Haroldo Valladão, *Direito Internacional Privado*, vol. I, 1980, at 424; Soares, Os estrangeiros e as atividades a eles vedadas ou restringidas: proibição constitucional à discriminação pela lei ordinária de brasileiros naturalizados. In Jacob Dolinger (coord.), *A nova Constituição e o Direito Internacional*, 1987, at 118-123.

39 Estatuto da OAB, Law No. 4.215 of 1963, articles 48, 49 and 51. This law was revoked by Law No. 8.906/1994, which does not mention the exigency of reciprocity.

Constitution[40], and all prohibitions to exercise some professions such as public interpreter[41], customs dispatcher[42], as well as the Labor Laws provision[43] that requires that two-thirds of all workers be Brazilian nationals[44].

This argument has been present since the beginning of the century when the question was raised whether it was constitutional to expel resident aliens by means of the assimilation provision of the 1891 Constitution[45], and the silence of the constitutional text to admit expulsion. Pedro Lessa, Ruy Barbosa and Germano Hasslosher, very known Brazilian legal commentators, believed that since the Constitution established completely equal rights between resident aliens and nationals, and since nationals could not be expelled, the same would apply to resident aliens , as there was no express constitutional authorization for their expulsion[46].

2.3. Determination of the applicable legislation[47]

a) Connecting Rules

Persons

For the determination of the applicable law to a transnational legal relationship, each country adopts connecting rules. Hence, Private International Law rules are essentially domestic[48]. In Brazil, these rules are basically comprised in the Introductory Law to the Norms of Brazilian Law[49].

Primarily, we have the rule that refers to the individual. Article

40 Aliens' Act, articles 106, VI, VII, VIII and IX.

41 Decree No. 13.609 of 1943.

42 Decree Law No. 4.014 of 1942, article 19.

43 Art. 354 of the Consolidação das Leis de Trabalho (The Code of Brazilian Labor Law).

44 While the 1969 Constitution, article 165, XII expressly admitted proportionality of Brazilian workers, the present Constitution is silent on this point.

45 Constitution of 1891, article 72.

46 See Jacob Dolinger, *Das Limitações ao Poder de Expulsar Estrangeiros*, *Estudos jurídicos em homenagem ao Professor Haroldo Valladão,* 1983.

47 For a more detailed view of the Brazilian system of conflict of laws, see João Grandino Rodas, *Choice of Law Rules and the Major Principles of Brazilian Private International Law*, 1992, at 309 to 347.

48 There are also many private international rules established in international sources, such as conventions and treaties. This is the case of all Hague Conventions on Private International Law and the Interamerican Conventions on Private International Laws, ratified by several countries.

49 These rules have been translated into English by Paul Griffith Garland, *American-Brazilian Private International Law*, 1959.

7 of the Introductory Law states: *"The law of the country in which the person is domiciled establishes the legal rules concerning the beginning and end of legal personality, his name, capacity, and family rights"*. Therefore, if in Brazil we have to determine whether someone has legal capacity to enter a contract, to marry or to sell realty, it is necessary to apply the law of the State where the person is domiciled to regulate these aspects. Thus, if the marriage is to take place in Brazil and the bride is domiciled in Argentina, the law of Argentina will apply as regards the capacity of the woman to marry.

Family

With regard to the validity of the marriage, article 7, para. 1 of the Law applies: *"In the case of marriage celebrated in Brazil, Brazilian law shall be applied with regard to disqualifying disabilities and the formalities of the ceremony."*

Despite the fact that the provision only mentions 'marriages celebrated in Brazil', legal commentators have extended this rule to mean the adoption of the law of the place of marriage celebration, *lex loci celebrationis*[50]. Thus, the validity of a marriage is always to be determined by the law of the place where it was celebrated: a marriage celebrated in Havana, Cuba, is valid if in accordance with Cuban laws, even if these laws are different from Brazilian laws.

Property

Property is to be regulated by the law of its situs, in accordance with article 8 of the Introductory Law: *"To characterize property and govern the relations concerning it, the law of the country in which it is situated shall be applied."*

The *lex rei sitae* is a rare example of uniformity of the connecting rules, as it is of universal acceptance, adopted in the great majority of countries. It determines that immovable (and movable) properties are regulated by the law of the place where they are located; therefore all property located in Brazil, even if owned by foreigners, is regulated by Brazilian law. That is to say that issues such as the manner of acquisition of real estate and limitations which may be imposed on the property are to be determined by Brazilian legislation if the property is situated in the country.

50 See See Jacob Dolinger, *Direito internacional privado – parte geral,* 2012, at 213.

Contracts and Torts

Article 9 of the Introductory Law refers to the determination of the applicable law both in the fields of contracts and of torts, in the following terms: *"To characterize and regulate obligations, the law of the country in which they are constituted shall be applied."*

With regard to contracts, the applicable legislation in Brazil is the law where the contract was executed – *lex loci contractus*. It is important to observe that Brazilian legislation has not yet adopted the modern tendencies of Private International Law, towards flexible rules, to be decided on a case-by-case basis, in accordance with the principle of proximity[51].

The possibility for the parties to choose the applicable legislation – party autonomy – is open to doctrinal debate. The great majority of Brazilian legal commentators understand that, in spite of the silence of article 9 of the Introductory Law to the Norms of Brazilian Law, this principle exists in Brazilian Private International Law, as "fundamental principles cannot disappear by the simple omission of the law"[52]. Another school of thought in the Brazilian doctrine defends that party autonomy does not exist in Brazil[53].

With respect to torts, the rule which determines the application of the law of where the illicit behavior was committed – *lex loci delicti* – has always been widely accepted.

The theory that a tort should be governed by the law of the place where it was committed is as old as Private International Law itself, stemming from the times of the Italian statutory schools, even before Bartolus of Saxoferato[54].

51 Jacob Dolinger, Evolution of principles for resolving conflicts in the Field of contracts and torts, *Recueil des cours* 283, 2000, at 369 to 451.

52 Haroldo Valladão, *Direito Internacional Privado*, vol. II, 1983, at 185.

53 Amílcar de Castro, *Direito Internacional Privado*, 1977, at 411. Wilson de Souza Campos Batalha, *Tratado Elementar de Direito Internacional Privado*, vol. 2, 1977, at 247. In the original: "Face à Lei de Introdução ao Código Civil não pode pairar dúvida: inaceitável é a autonomia da vontade para a indicação da lei aplicável . A autonomia da vontade só pode exercer-se no âmbito das normas dispositivas do direito reputado aplicável". Oscar Tenório, Direito Internacional Privado, vol. II, 1967, at 182. In the original: "As obrigações contraídas no Brasil não podem cair, agora, sob o domínio da autonomia da vontade". Nadia de Araujo, Contratos Internacionais, 1997, at 10; José Inácio Gonzaga Franceschini, A lei e o foro de eleição em tema de contratos internacionais. In João Grandino Rodas (coord.), *Contratos Internacionais,* 2002, at 74.

54 See Haroldo Valladão, *Direito Internacional Privado*, vol. II, 1983, at 198 et seq; M. Gutzwiller, *Le Développement Historique du Droit International Privé*, 29 Collected Courses, 1929-IV, at 298.

Inheritance

With regard to inheritance, article 10 of the Introductory Brazilian law rules: *"Succession by death or through absence is governed by the law of the country in which the deceased or absentee was domiciled, whatever may be the nature and location of the property involved."* Along these lines, if the deceased was domiciled in Canada at the time of death, Canadian legislation will determine who are to be heirs and their quota, even as regards immovable property located in Brazil.

Legal Entities

Finally, in relation to legal entities, Brazilian legislation distinguishes between their existence, capacity and doing business. About their existence, article 19 of the former Introductory Law of 1916 states that foreign legal entities are recognized automatically without any requirements. Therefore they are granted juridical personality for the practice of any act which does not entail the practice of their business. In what concerns their capacity, article 11 of the Law in force sets forth: *"Organizations destined to goals of collective interest, such as corporations and foundations, are governed by the law of the State in which they are constituted."* In this context, their capacity and structure are regulated by the law under which the company was constituted. Lastly, doing business in the country, that is the actual achievement of company purposes, is regulated by Brazilian law[55].

It is also worth mentioning the Project to a new Introductory Law to the Brazilian Civil Code number 4905 of 1995, which also follows this trend of adopting the law which has the closest contacts to regulate contracts and family relationships. Notwithstanding its modernity, the government withdrew the project, claiming the subject needed to be reexamined[56].

b) Dépeçage

In Brazil, the same legal relationship can be submitted to different connecting factors, according to the aspect being analyzed.

When different aspects or issues of a complex legal relationship are ruled by different legal systems we have the *dépeçage* phenomenon. Thus, it is the technique of applying the rules of different States to determine different issues. That is to say, when a case presents more than one legal issue and each is analyzed separately, situations arise in which it is claimed that each issue should be regulated by a different

55 Article 1137 of the Brazilian Civil Code.

56 Jacob Dolinger, *Direito internacional privado – parte geral,* 2012, p. 326.

choice of law rule[57].

Accordingly, the law of the forum may apply to the procedure and as regards the substance of the relationship other laws will apply. Moreover, aspects related to the capacity of the Parties will be governed by the law of the domicile; formal aspects of the transaction will be regulated by the law of the place where the transaction took place, the *locus regit actum*; issues related to the contractual aspects of the relationship will be ruled by the *lex contractus* and aspects related to the *in rem* rights regarding immovable property will be regulated by the *lex rei sitae*.

The Rome and Inter-American Conventions on the Law Applicable to Contractual Obligations as well as Regulation (EC) No 593/2008 of the European Parliament and of the Council foresee the possibility of different aspects of the same contract ruled by different laws[58].

c) Principles of Private International Law

The final and decisive determination of the applicable legislation to a legal relationship connected to abroad is a complex proceedings: it starts with the application of connecting factors together with Private International Law principles. These principles can affect the final solution of the case.As put by Jacob Dolinger:

> *"Since the connecting rules could lead to the application of a law that is not compatible with the forum's basic philosophy or could contain an indication that would go beyond what was initially intended as far as giving up on the application of the forum's law, the system evolved to a point where it worked with a 'check and balance' methodology that functioned in two steps:*
>
> *1) Whenever a legal situation occurred to which one or another system of law could apply, each containing different, antagonical rules of substantive law, the solution would be to apply the forum's conflict rules, i.e., the superimposed rules of Private international law of the forum, which would indicate the applicable system of law to the particular situation.*
>
> *2) However, in some cases problems would arise, either because the solution to be reached through the conflicting rule would not be acceptable to the forum, or because the forum's conflict rule would conflict with the conflict rule of the other jurisdiction with which the legal situation was related, or a conflict would occur between the systems of both jurisdictions regarding*

57 Cramton, Currie and Kay, *Conflict of Laws,* 1981, at 383 to 384. See also Michael H. Hoffheimer, Conflict of Laws, 2010, at 4.

58 Rome Convention Arts. 3.1 and 4.1; Interamerican Convention Arts. 8 and 9.3, Regulation (EC) No 593/2008 of the European Parliament and of the Council, article3.1.

> *the exact characterization of the legal relationship. In these situations the conflicting rules would not be enforced and a different solution had to be found for the choice of the applicable law[59]".*

These principles that affect the applicability of the foreign law indicated by the connecting rule normally present a negative function. As a rule, they limit the functioning of the connecting rules, hindering or correcting their application or changing the result that the rules would normally produce. These controls have also been known as "escape devices"[60], "escape mechanisms"[61] or "disguised exception clauses". The most important of these principles are the following: *renvoi, fraude à la loi*, characterization, preliminary issue, vested rights and public policy.

Renvoi results from the fact that not only substantive legal provisions, but also connecting rules of two different States could conflict. Thus, when local connecting factor indicate the applicability of foreign legislation to the case under analysis, the judge may either follow one of the two solutions: ignore the foreign State's connecting rule and apply only foreign substantive law or apply the foreign State connecting rule, which is called *Renvoi*.

Brazil does not accept Renvoi, as article 16 of the Introductory Law establishes: *"When in the terms of the preceding articles, a foreign law is to be applied, only its content shall be considered, without considering any remission made by it to another law."*

Fraude à la loi means that the application of the law indicated by the forum's conflict rules should be refused when this indication results from the endeavors of a party that deliberately moves the normal center of gravity of a legal relationship from its natural seat to another one with the aim of evading the normally applicable law and of obtaining the advantages determined in the chosen foreign law. Thus, although not expressly determined in the Brazilian legislation, all acts performed

59 Jacob Dolinger, Evolution of principles for resolving conflicts in the field of contracts and torts, 283 *Recueil des Cours*, 2000, at 238-9. This author analyses all Private International Law principles under a philosophical and comparative perspective.

60 Symeon C. Symeonides, Exception Clauses in Conflicts Law–United States. In: D. K. Iatridou, *Les Clauses d'Éxception en Matière de Conflits de Lois et de Conflits de Jurisdictions – ou le Principe de Proximité*, 1994, at 80 writes: "The only time American conflicts law came close to having a rule system was during the dominance of the first Restatement of conflicts. Unfortunately, the rules of the first Restatement were too rigid and mechanical and left no room for evolution. This rigidity made necessary the utilization of the few available escape devices: characterization, ordre public, the substance versus procedure dichotomy, and, occasionaly, renvoi."

61 Id. at 85.

with fraud shall be deemed void and ineffective[62].

Characterization is a principle common to various areas of law. Every aspect of the legal relationship has to be defined, classified, characterized in order to apply their corresponding rules. This principle was applied in the US in the case *Haumschild v. Continental Casualty Company*[63]. The plaintiff, Mrs. Haumschild, claimed from her husband and from the insurance company the recovery of damages for personal injuries suffered as a result of a car accident. The accident occurred in California and the couple was domiciled in Wisconsin. Under Wisconsin law, a wife may sue her husband in tort but not so in California. The law, as it stood at the time of the judgment, was that interspousal immunity from tort liability was governed by the law of the place of injury, so the plaintiff would not be entitled to compensation. The Wisconsin Supreme Court decided, however, that interspousal immunity is a matter that lies in the sphere of family law rather then in tort law, and as an issue of family, the applicable law is the one in force in the married couple's domicile. This characterization caused a complete change in the analysis and solution of the case. Here we have the characterization principle moving the subject-matter away from one to another field of law and, as a result of that move, changing the outcome of the situation.

The problem is to which legal system should one resort in order to find out the category to which the legal issue pertains: the *lex fori* system or the *lex causae* system, that is, the classificatory system of the foreign law considered applicable. Brazilian legislation does not have a rule to solve that problem, but the great majority of legal commentators and court decisions have adopted the classification of the legal issue in accordance with the *lex fori*[64].

As regards the principle of preliminary issue, sometimes the answer for a legal problem will depend on the solution of a previous matter, such as the validity of a marriage (preliminary issue) in relation to an inheritance case (principal matter). That is to say, as Brazilian law determines the applicability of the law of the last domicile of the deceased, if that foreign law indicates that the spouse should be considered as heir, which law should determine whether the deceased was validly married? One theory advocates that the foreign law indicated by the connecting rule must be complied with as a whole, meaning that the preliminary matter (validity of the marriage) has to be governed by the same legal system that regulates the principal matter, namely by the conflict rules of the foreign jurisdiction and not by the forum's connecting rules.

Another theory, more widely accepted, is that the preliminary issue has to be governed by the conflict rules of the forum because this

62 See Jacob Dolinger, *Direito internacional privado – parte geral*, 2012, p. 430- 451.

63 7 Wisc. 2d 130, 95 N.W. 2d 814 (1959).

64 Jacob Dolinger, *Direito internacional privado – parte geral*, 2012, at 375 et seq.

preliminary matter could arise as a principal matter in another case at the same jurisdiction and both decisions could not be in disagreement[65].

It is important to note that Brazilian legislation does not have an express provision dealing with this matter.

Vested rights, as a principle of Private international law, is a corollary of Antoine Pillet's theory. This French scholar advocated that a right that has been validly obtained in one jurisdiction, in accordance with the laws in force there, should be universally respected[66]. Therefore, even if the connecting rules of the forum determine a different solution, the rights acquired under a foreign legislation should be respected as a result of the compliance with this principle.

In Brazil, respect for vested rights is determined in the Constitution, in the following terms: "Art. 5, XXXVI: *no law may impair a vested right, a perfected juridical acta and res judicata*." This principle applies not only in the domestic sphere but also in what concerns private international law issues[67].

Ordre public or public policy is the major principle of Private international law. Its function is to guarantee that foreign laws are not applied in the forum wherever and whenever they violate the moral, economical, philosophical-legal basic local standards. The applicability of this principle is decided by the judge on a case-by-case basis.

Brazilian Introductory Law sets forth at article 17: *"Laws, acts, and judgments of another country, as well as any kind of declaration of private intention, shall not be effective in Brazil when they offend national sovereignty, public order, or good customs."* Thus, for example, polygamous marriages, even if validly celebrated abroad, will not be able to produce effects in the country because its recognition will violate basic local principles[68].

2.4. Jurisdiction[69]

The legislation of each country determines when the local judiciary will have the power to adjudicate transnational cases. This topic is dealt with by the fourth subject matter of Private International Law: matters related to jurisdiction in international litigation.

As jurisdiction is an onerous activity, each State sets forth the situations in which it has an interest to exercise its jurisdictional activity. Therefore, not each and every situation will lead to the exercise of local

65 See Jacob Dolinger, *Direito internacional privado – parte geral*, 2012, at 448.

66 A.Pillet, *Principes de Droit International Privé*, 1903, at 495.

67 Jacob Dolinger, *Direito internacional privado – parte geral*, 2012, p. 459 to 479.

68 Jacob Dolinger, *Direito internacional privado – parte geral*, 2012, at 398.

69 For a more complete explanation of the topic see Jacob Dolinger, Brazilian International Procedural Law.In Jacob Dolinger (coord.), *A Panorama of Brazilian Law*, 1992, at 349 to 375.

jurisdiction, but only those cases connected, in some way, to the given State, as normally listed in the domestic legislation[70].

Moreover, still due to the fact that jurisdiction is an onerous activity, the judge has to take into account the effectivity principle. This principle, originally developed by Carnelutti[71], originates from the idea that theoretically the exercise of jurisdiction encounters no limitation. Each country may intend to adjudicate over all suits filed in its Judiciary, without taking into account the nationality or the domicile of the parties involved, the nature of the subject-matter under dispute, the location of the subject-matter being disputed, the place where the facts which gave rise to the dispute took place or the place where the obligation is to be performed.

As there are other States, each with its own jurisdictional power, in the event the case decided in one country has to be executed in another, the judge who originally examines the issue has to consider whether his or her future decision will be recognized abroad. If the judge reaches the conclusion that the decision will not be recognized abroad, based on the principle of effectivity, the judge has to refrain from deciding over the issue at stake. It makes no sense to admit the loss of time and money when there is no possibility of recognition in the State where the judgment would have to be enforced. As the purpose of every judicial decision is its effectivity, a decision which will not be executed, should not be rendered.

a) Articles 88 and 89 of the Brazilian Code of Civil Procedure

First of all, it is important to observe that the Brazilian system regarding jurisdiction to adjudicate at international level is entirely different from the US system.

The US system regarding jurisdiction at international level is satisfied by the existence of certain minimum contacts, as stated by the US Supreme Court in *International Shoe Co. v. Washington*:

> *"Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice"*[72].

70 Most countries list in their domestic legislation the situations in which the local Judiciary has jurisdiction at the international level, but there are also cases in which this is decided on a case-by-case basis.

71 *Limiti della giurisdizione del Giudice Italiano*, VIII Riv. Dir. Proc. Civile, 1931, at 218.

72 326 US 310, 316 (1945).

The criterion of doing business in the US is also used as a guiding rule to establish jurisdiction, meaning that if the company does business in the forum, receiving profits, it also has obligations, including to submit itself as a defendant. This was stated by the US Supreme Court in the same case mentioned above, in the following terms:

> *To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of the state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue*[73].

This criterion is still valid, as applied by the Supreme Court in *Helicopteros Nacionales de Colombia v. Hall*[74] and *Asahi Metal Industry Co. v. Superior Court*[75].

In Brazil, the exercise of jurisdiction of the Brazilian Judiciary is regulated by articles 88 and 89 of the 1973 Brazilian Code of Civil Procedure, which presents a considerably more restrictive approach than the US. Article 88 sets forth the hypotheses in which Brazil has concurrent jurisdiction, that is to say, cases in which Brazil has jurisdiction at international level, but where another State may also have jurisdiction. This article deals with three possibilities of concurrent jurisdiction: 1) when the defendant is domiciled in Brazil; 2) when the obligation is to be performed in Brazil; 3) when the suit originates from a fact which occurred or an act which was performed in Brazil. The sole paragraph of this article determines that a foreign company which has an agency, or a branch in Brazil, is deemed domiciled in the country.

Thus, the first case in which Brazil has jurisdiction at international level is when the defendant is domiciled in Brazil. This rule is traditional in Brazilian civil procedure, since the Introductory Law to the Brazilian Civil Code, of 1916, already provided that Brazilian judges had jurisdiction in cases in which the defendant was domiciled in the country. It should also be observed that the concept of domicile is to be defined by Brazilian legislation in accordance with article 70 of the Brazilian Civil Code of 2002[76].

It is important to stress that Brazil transient jurisdiction is not

73 Id, at 319.

74 466 U.S. 408 (1984).

75 480 U.S. 102 (1987).

76 Pontes de Miranda, *Comentários ao Código de Processo Civil*, 1996, at 224; Celso Agrícola Barbi, *Comentários ao Código de Processo Civil,* vol. I, 2010, at 303 e José Carlos Barbosa Moreira, *Temas de Direito Processual,* 5 ª série, 1994, at 142.

admitted. In the Brazilian system, the defendant has to be domiciled in the country, that is to say, reside in the country permanently for article 88, I, to be applied.

As regards the sole paragraph of article 88, concerning companies, it should be pointed that some legal commentators make it clear that this rule will only apply to suits which originate from transactions executed by these branches or agencies, as only these ones will interest the Brazilian legal system. If it were not understood in this manner, as put by Celso Agrícola Barbi, a Canadian domiciled in Canada could bring suit in Brazil against an American corporation, based on facts which happened in the US and without any relation to Brazil, as long as this American company had a branch in Brazil, which is totally unacceptable[77].

The second case in which Brazil has jurisdiction at international level is when the obligation has to be performed in Brazil, as provided by article 88, II. This hypothesis is also traditional in our legislation, as the Introductory Law to the Brazilian Civil Code of 1942 already referred to it. This provision applies, for instance, to suits originating from contracts which are supposed to be performed in Brazil.

The third hypothesis deals with suits resulting from acts which were performed or facts which happened in Brazil. Hence, if the suit originates from a contract executed in Brazil or from a tort which occurred in the country, the Brazilian judiciary has jurisdiction over the case. Legal commentators interpret this provision as determining that the causa petendi (the reason of the suit, its factual basis) must have happened in Brazil[78].

Article 89 of the Brazilian Code of Civil Procedure lists the situations in which Brazil has exclusive jurisdiction at international level: 1) when the suit is related to immovable property; 2) in cases of probate of property located in Brazil, even if the deceased was a foreigner and was domiciled abroad.

77 Celso Agrícola Barbi, *Comentários ao código de Processo Civil*, 2010, at 303: "Pessoa Jurídica Estrangeira – Dispõe o parágrafo único do artigo do art. 88 que, para fins do item I ora em exame, reputa-se domiciliada no Brasil a pessoa jurídica estrangeira que aqui tiver agência, filial ou sucursal . Naturalmente, dentro dos princípios que levam os países a limitar sua jurisdição, deve-se interpretar este parágrafo como aplicável às demandas oriundas de negócios dessas agências, filiais ou sucursais, pois só essas causas é que podem interessar à ordem jurídica do país . Do contrário, um canadense residente em seu país natal poderia vir acionar aqui uma empresa norte-americana por questões surgidas nos Estados Unidos e sem qualquer ligação com nosso país apenas porque a ré tem agência em nosso país."

78 Hélio Tornaghi, *Comentários ao Código de Processo Civil*, vol. I, 1974, at 306: "*A causa de pedir deve ter ocorrido no Brasil. Nisto pode resumir-se o inciso III*". José Carlos Barbosa Moreira, *O Novo Processo Civil Brasileiro*, 2012, at 17: "*Todo pedido tem uma causa. Identificar a causa petendi é responder à pergunta: por que o autor pede tal providência? Ou, em outras palavras: qual o fundamento de sua pretensão?*"

b) Other situations in which Brazil may be considered to have jurisdiction

All States which adopt the criterion of listing the situations for which the local judiciary has jurisdiction regarding cases connected with another country may question whether the listed cases are the only ones admitted or if there are also other cases in which jurisdiction can validly be exercised. In this sense, Gaetano Morelli, the Italian commentator who best studied the subject of international litigation, defended the idea that in Italy, articles 105 and 106 of the Italian Code of Civil Procedure (not in force anymore) listed the only cases in which the Italian Judiciary could exercise its jurisdiction over cases with foreign connections[79].

In Brazil, the great majority of legal commentators adopt the same interpretation. Celso Agrícola Barbi argues that the Brazilian Code of Civil Procedure lists, in articles 88 and 89, the only cases for which Brazil has jurisdiction at international level and any case not included in the listed situations cannot be examined in a Brazilian Court[80].

José Carlos Barbosa Moreira shares the same viewpoint as he calls these cases "limits to the exercise of jurisdiction in Brazil"[81]. Notwithstanding, he admits some exceptional circumstances in which the Brazilian Judicial authority may accept jurisdiction, even if the situation is not expressly listed[82]. These exceptions are based on principles and are as follows: 1) based on the principle of party autonomy, when both parties submit to the Brazilian Judiciary the ratification of an agreement (voluntary jurisdiction); 2) also based on the principle of party autonomy, when there is a choice of forum by both parties; 3) based on the principle of access to courts to all, if there is not any country with jurisdiction to examine the case, the Brazilian Judiciary will adjudicate to avoid denial of justice. To illustrate this last hypothesis he quotes the example of a divorce filed by the husband, domiciled in Brazil, against his wife, domiciled in Portugal. As in accordance with Portuguese legislation, Portugal would not have jurisdiction over the case, Brazilian courts should accept to judge the case, despite not being listed in articles 88 or 89, because otherwise there would be no competent court to decide over the issue.

At first, the Superior Court of Justice had reached the same

79 Gaetano Morelli, *Derecho Processual Civil Internacional* (translated by Sentis Melendo), 1953, at 87- 88.

80 Celso Agrícola Barbi, *Comentários ao Código de Processo Civil*, 2010, at 302.

81 José Carlos Barbosa Moreira, *Temas de Direito Processual Civil*, 5ª série, 1994, at 139.

82 Id, at 144.

conclusion put forward by the majority of Brazilian doctrine, by affirming that the competence of the Brazilian Judiciary could only be established in the cases listed in articles 88 and 89 of the Code of Civil Procedure, stating as follows:

> *"The jurisdiction of Brazilian courts to adjudicate is affirmed in each of the hypotheses listed in articles 88 and 89 of the code of Brazilian procedure. The Brazilian legal system does not adopt the criterion of connection to determine the jurisdiction at international level. Therefore, there is no jurisdiction of Brazilian courts due to connection[83]."*

The Court of Appeals of Rio de Janeiro, in 1998, regarding a situation where none of the hypotheses listed in articles 88 and 89 were present, decided that the Brazilian Judiciary should refrain from examining the case[84].

The rule of article 5, XXXV, of the Brazilian Constitution is not interpreted as guaranteeing to everyone (nationals and resident aliens) the right to sue in Brazil under whatever circumstances. This provision is to be read as guaranteeing the right of access to courts in general terms, which can be denied in specific cases, if certain conditions established by the procedural legislation are not met.

It is to be noted that, in 2008, the Superior Court of Justice, contrarily to the lines exposed above, held that articles 88 and 89 of the Code of Civil Procedure do not establish an exhaustive list of situations in which the Brazilian Judiciary has jurisdiction. In the case at stake, a French Jew, naturalized Brazilian required compensation from the German Government, asking for the damages suffered by him and his family during the Second World War, when the French territory was occupied by the Germans. According to the Court, even if not expressly listed in articles 88 and 89 of the Code, it is important to verify the interest of the Brazilian Judiciary in judging the case as well as the possibility of executing the decision in Brazil. In the case at stake, the Court decided that Brazil had jurisdiction over the hypothesis as there was interest and the decision could be enforced in Brazil[85], which is

83 STJ, DJU 3.11.1990, REsp 2170/SP, Rel. Ministro Eduardo Ribeiro. In the original: "A competência da autoridade judiciária brasileira firma-se quando verificada alguma das hipóteses previstas nos artigos 88 e 89 do CPC. O direito brasileiro não elegeu a conexão como critério de fixação da competência internacional que não se prorrogará, por conseguinte, em função dela."
84 Ap. 1827/97, DOERJ 15.04.1999, Parte III, Seção I, page 241, em. 12, Rel. Desembargador Sayão.
85 STJ, RO 64/SP, published in the DJU of 06.06.2008, Rel. Ministra Nancy Andrighi. In the original: "**Direito Processual e Direito Internacional. Propositura, por francês naturalizado brasileiro, de ação em face da República Federal da Alemanha, visando a receber indenização pelos danos sofridos por ele e por sua família, de etnia judaica,**

the most correct approach in this matter. However, due to sovereign immunity the case was dismissed.

c) Recognition of foreign judgements[86]

As known, US courts, since *Hilton v. Guyot*[87], recognize foreign judgments without reexamining the merits of the decision, but verify certain aspects of the alien decision, such as whether the procedural rights of the defendant were respected.

In Brazil the subject is ruled by art. 15 of the Introductory Law, in verbis:

> *A sentence rendered abroad shall be executed in Brazil provided it has the following requisites:*
> *a) Having been rendered by a competent court;*
> *b) The parties having been cited and having taken part in the action or having allowed judgement to go by default;*

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durante a ocuparação do território francês na Segunda Guerra Mundial. Sentença do Juízo de primeiro grau que extinguira o processo por ser a autoridade judiciária brasileira internacionalmente incompetente para o julgamento da causa. Reforma da sentença recorrida. - A competência (jurisdição) internacional da autoridade brasileira não se esgota pela mera análise dos arts. 88 e 89 do CPC, cujo rol não é exaustivo. Assim, pode haver processos que não se encontram na relação contida nessas normas, e que, não obstante, são passíveis de julgamento no Brasil. Deve-se analisar a existência de interesse da autoridade judiciária brasileira no julgamento da causa, na possibilidade de execução da respectiva sentença (princípio da efetividade) e na concordância, em algumas hipóteses, pelas partes envolvidas, em submeter o litígio à jurisdição nacional (princípio da submissão). - Há interesse da jurisdição brasileira em atuar na repressão dos ilícitos descritos na petição inicial. Em primeiro lugar, a existência de representações diplomáticas do Estado Estrangeiro no Brasil autoriza a aplicação, à hipótese, da regra do art. 88, I, do CPC. Em segundo lugar, é princípio constitucional basilar da República Federativa do Brasil o respeito à dignidade da pessoa humana. Esse princípio se espalha por todo o texto constitucional. No plano internacional, especificamente, há expresso compromisso do país com a prevalência dos direitos humanos, a autodeterminação dos povos e o repúdio ao terrorismo e ao racismo. Disso decorre que a repressão de atos de racismo e de eugenia tão graves como os praticados pela Alemanha durante o regime nazista, nas hipóteses em que dirigidos contra brasileiros, mesmo naturalizados, interessam à República Federativa do Brasil e podem, portanto, ser aqui julgados. - A imunidade de jurisdição não representa uma regra que automaticamente deva ser aplicada aos processos judiciais movidos contra um Estado Estrangeiro. Trata-se de um direito que pode, ou não, ser exercido por esse Estado. Assim, não há motivos para que, de plano, seja extinta a presente ação. Justifica-se a citação do Estado Estrangeiro para que, querendo, alegue seu interesse de não se submeter à jurisdição brasileira, demonstrando se tratar, a hipótese, de pratica de atos de império que autorizariam a invocação desse princípio. Recurso ordinário conhecido e provido".

86 See Jacob Dolinger, Brazilian Confirmation of Foreign Judgments, 19 *The International Lawyer*, vol. 19, 1985, at 853 to 873.

87 159 US 113 (1895).

c) Being in final form and being invested with the necessary formalities for execution at the place where it was rendered;
d) Being translated by an authorized interpreter;
e) Having been homologated by the Federal Supreme Court.

Therefore, these requisites are cumulative and the lack of one of them will prevent the foreign judgment from being recognized.

As regards the first requirement established in letter a – competence –, it should be observed that we do not verify the rules of domestic competence of the foreign country, but whether the foreign country had jurisdiction at the international level. This is verified in accordance with the Brazilian legislation on jurisdiction: articles 88 and 89 of the Brazilian Code of Civil Procedure. That is to say that, in the situations listed in article 88, when the Brazilian Judiciary has concurrent jurisdiction, decisions issued by foreign countries may be recognized, if there has been submission to the foreign Judiciary. Whereas, as regards the hypotheses enumerated in article 89 of the Code, foreign decisions can never be recognized, as Brazil has exclusive jurisdiction over these matters.

The second requisite – service – is understood as requiring that the defendant in Brazil be served through a rogatory letter, as a rule. Brazil does not admit consular service[88], postal service[89] or service through affidavit[90]. Thus, if the defendant in Brazil is served through

88 STJ, SEC 861/PT, DJU 05.05.2005, Rel. Min. Ari Pargendler: "Homologação de Sentença Estrangeira. Citação.. A citação de réu domiciliado no Brasil deve se processar por carta rogatória, imprestável a comunicação que, a esse propósito, lhe fez consulado de país estrangeiro. Homologação indeferida"; see also STF, SE 3894-3 published in the DJ of February, 26, 1988, Rel. Min. Octavio Gallotti: "Em sentença estrangeira de divórcio, cuja homologação se indefere por falta de citação, via rogatória, da requerida, sabidamente domiciliada no Brasil, não supre essa exigência a notificação diretamente praticada, no Brasil, por funcionário de Consulado do Estado estrangeiro onde tenha sido proferida a sentença homologanda, pois é incompatível com a soberania brasileira a prática direta de ato processual emanado de Juízo estrangeiro, dentro do território nacional, com dispensa de rogatória".

89 STJ, AgRg na SEC 568/US, DJU 01.08.2006, Rel. Min. Francisco Peçanha Martins: "Homologação de Sentença Estrangeira. Agravo Regimental. Citação feita através de correio. Inexistência. Resolução nº 6 de 04/05/2005. Precedentes do STF e do STJ. A citação das pessoas domiciliadas no Brasil deve se processar por meio de carta rogatória, sendo imprestável a comunicação realizada através do correio, em atendimento às garantias constitucionais. Agravo regimental improvido."; STF, SE 3534, published in the RTJ 117/57, Rel. Min. Sydney Sanches, decided on February, 26, 1986: "Sentença estrangeira. Ré domiciliada no Brasil e aqui citada para os termos do processo, em que proferida, por carta registrada (correio) com aviso de recepção e não por carta rogatória. Nulidade da citação não sanada porque a ré não compareceu ao processo e aqui impugnou, com esse argumento, a homologação da sentença."

90 See also RTJ 92/1074, RTJ 95/1011, RTJ 95/1017, RTJ 98/44, RTJ 99/ 28, RTJ 125/76, RTJ 127/94, RTJ 133/607.

postal service and does not appear before the foreign court, the decision to be issued by the foreign court will not be recognized in Brazil.

The other requirements are self-explanatories.

In addition to the above mentioned requirements, the foreign decision shall not be contrary to the Brazilian international public policy[91]. That is to say that, if the foreign decision violates Brazilian fundamental moral, religious, philosophical, economical or juridical principles, it is not enforceable in the country.

After the enactment of Constitutional Amendment n. 45/2004, the competent authority to recognize foreign judgments is the Superior Court of Justice, which enacted Resolution no 9, setting forth the procedure for recognition as well as reproducing these requirements established in the Introductory Law.

d) Rogatory letters[92]

The great majority of all requests made by foreign judicial or administrative authorities are made through letters rogatory, unless there is a specific provision determining otherwise.

CONCLUDING REMARKS

Private International Law is dedicated to the study of legal relationships related to more than one jurisdiction. Consequently, whenever a situation has contact with more than one country, such as because of the *foreign* nationality/domicile of one or both parties, the fact that the contract was executed or is going to be performed abroad, among many other situations, this relationship will be regulated by Private International Law.

There are four subject matters dealt with by this area of law in Brazil: nationality, status of aliens, determination of applicable law and jurisdiction. Whereas the first two subject matters are mainly regulated by constitutional and infraconstitutional legislation, the other two are mostly regulated by infraconstitutional rules.

The determination of the applicable legislation to a legal relationship which has connections with more than one country is not only the most important subject matter of study but also the only one regulated solely by Private International Law, as the other three are also studied by other areas of law. In what concerns this aspect, it should

91 See article 17 of the Introductory Law to the Brazilian Norms, mentioned *supra*.

92 For a more complete analysis of the topic see Jacob Dolinger and Carmen Tiburcio, The Forum Law Rule in International Litigation – Which Procedural Law governs Proceedings to be performed in Foreign Jurisdictions: lex fori or lex diligentiae?, 33 *Texas International Law Journal*, 1998, at 425 to 462.

be considered that Brazilian conflict rules still follow the traditional approach, as they are rigid and not flexible such as the American and most of the European rules. However, the flexibility of the system derives from the applicability of the principles of Private International Law, such as renvoi, characterization, preliminary issue, fraude à la loi, vested rights and public policy. Those principles may derogate the solution indicated by the connecting rules and they are resorted to on a case-by-case basis.

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THE RELATIONSHIP BETWEEN CORRUPTION AND FOREIGN INVESTMENTS IN BRAZIL: *SOME RESPONSES AGAINST CORRUPTION*

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Abstract: Mobilizing investment and ensuring that it contributes to sustainable development should be one of the priority targets for all countries. The financial-economic market growth is one of the key features of contemporary society, where social, political, and economic activities easily acquire worldwide dimension. Investment Law focuses various aspects of such drives, among other rule of law in different jurisdictions which faces recent developments, as well as multilateral agreements and the soft law that serves as a background for legal transplants and innovation. The analysis made by investors includes risk evaluation. Among other jurisdictions, Latin America and specially Brazil may be included among the hot spots for investments. Between other topics, corruption rating and scandals are scrutinized by investors, showing a widespread example of the dynamic and speed of worldwide negative impact of such events. As a result, fighting corruption has become a policy priority for countries over the past two decades and extensive reform efforts have been launched. Corruption undermines policies and programs that aim to reduce poverty; therefore attacking corruption is critical to achieving poverty reduction, and attracting investments. This article aims to discuss the characteristics of a foreign and international investment and underlines some aspects of corruption; worldwide responses against corruption are also reported, taking into account the fact that the world is globalized and interdependent; An overview of anti-corruption efforts in Brazil is provided.

Keywords: Investments - corruption - efforts against corruption.

1. INTRODUCTION

The growth of the financial-economic market is one of the key features of contemporary society, where social, political, and economic activities easily gain global dimension[1]. In this sense, events and decisions that take place in one part of the world, almost immediately, impact individuals and communities in other parts of the globe, even in distant parts[2]. The global repercussions of the current economic crises, which were, in part, triggered by corruption scandals, are an example of this dynamic.

At the same time, the phenomenon of globalization increases the flows, patterns of interaction, and interconnections between States and societies that constitute the Modern World[3] or the Postmodern World[4] [5]

1 "Theorists of globalization disagree about the precise sources of recent shifts in the spatial and temporal contours of human life. Nonetheless, they generally agree that alterations in humanity's experiences of space and time are working to undermine the importance of local and even national boundaries in many arenas of human endeavor." . STANFORD ENCYCLOPEDIA OF PHILOSOFY. Available at: <http://plato.stanford.edu/entries/globalization/> . Accessed in Feb. 8th, 13.

2 BRENDA-BECKMANN, Franz von; BRENDA-BECKMANN, Keebet von; GRIFFITHS, Anne. *Mobile People, Mobile Law*: *An Introduction*. p. 1 IN: *Mobile People, Mobile Law Expanding Legal Relations in a Contracting World*. Max Planck Institute for Social Anthropology, Germany and University of Edinburgh. UK

3 MCGREW, A. G. Global Legal Interaction and Present-Day Patterns of Globalization, 1998, p. 325. IN GRESSER, V.; BUDAK, A.C. (eds), Emerging Legal Certainty: Empirical Studies on the Globalization of the Law, Aldersshot and Brookfield: Asghate and Dartmounth, pp. 325-345 Apud BRENDA-BECKMANN, Franz von; BRENDA-BECKMANN, Keebet von; GRIFFITHS, Anne. *Mobile People, Mobile Law: An Introduction*. p. 1 IN: *Mobile People, Mobile Law Expanding Legal Relations in a Contracting World*. Max Planck Institute for Social Anthropology, Germany and University of Edinburgh. UK

4 For Erik Jayme four characteristic features of postmodernity in the law are: pluralism, communication, storytelling and return the feelings. Pluralism in this sense would be the ability of postmodern tolerance; acceptance of cultural differences. The communication would be the speed of information and willingness to communicate with other cultures, breaking traditional frames. The account would be the emergence of standards that do not require, but simply describe values, it is expected that the text should be interpreted according to a statement of values, the will of the legislature. The fourth element, 'return to the feelings', is characterized by the fact that purely legal foundations are no longer sufficient, because foreign elements to the legal world, with innovative responses, appear revising the existing law. It is the choice for the respect of the human rights. MOROSINI, Fabio. *Globalização e Novas tendências em Filosofia do Direito Internacional: a Dicotomia entre o Público e o Privado da Cláusula de Estabilização*, p. 552. IN: *O novo direito internacional – estudos em homenagem a Erik Jayme* / Claudia Lima Marques, Nadia de Araújo, organizadoras. – Rio de Janeiro: Renovar, 2005.

5 For Fabio Morosini the modern world is characterized by the idea of rationality, loaded with ideology committed to Enlightenment ideals of the French Revolution: liberty, equality and solidarity, which occupies the central rationale, objective reason. MOROSINI, Fabio.

[6], which clearly triggers new perceptions by Law.

The world has experienced, throughout the last decades, an astonishing process of internationalization. Notwithstanding the fact that communication vehicles and transports have improved since Ancient History, only now technology does, in fact, enable the unveiling of the entire Globe.

The increase of mobility has led to a growing international market; but even more than goods, investments rush, with great speed, in and out of any given territory.

If, on the one hand, globalization has enabled the enlargement of production and wealth; on the other hand, the world is now much more complex than it used to be. The years of a rigid bipolar order, during which only a few States were granted the ability to shape international order, are past. One of the benchmarks of the present era is the existence of multiple actors, with sufficient power to influence international relations, in different areas.

Emerging markets, recognized as the fastest developing nations, have, in particular, contributed to increment global demand, as well as to render more complex the ties that bind nations.

Acknowledging that new founding role, traditional international organizations (World Bank, MIF) have proceeded to corporate adjustments, so their bureaucratic bodies could reflect, with minimum coherence, the current distribution of political and economic power.

Since the world's largest oil reserves are located outside of central States, in the energy field, the impact of emerging markets' actions and policies is even more profound. The enacting of a rule in a "far Middle Eastern country" may result, and usually do, in a gain or in a loss of multi-billion dollar transactions. In parallel, in such a complex and fast changing world, the rule of law is paramount to provide stability. Only after an accurate analysis of the legal risks associated with a country, will an investor proceed to engage its capital.

Another characteristic of contemporary society is the interdependence of the various actors of the system. In an interdependent relationship States are mutually dependent, moving away from the *hard power*[7] approach, to come along with concepts such as international

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Globalização e Novas tendências em Filosofia do Direito Internacional: a Dicotomia entre o Público e o Privado da Cláusula de Estabilização. p. 551. IN: *O novo direito internacional – estudos em homenagem a Erik Jayme* / Claudia Lima Marques, Nadia de Araújo, organizadoras. – Rio de Janeiro: Renovar, 2005.

6 MIRAGEM, Bruno. *Conteúdo da ordem pública e os direitos humanos. Elementos para um direito internacional pós-moderno*, p. 307. IN *O novo direito internacional – estudos em homenagem a Erik Jayme* / Claudia Lima Marques, Nadia de Araújo, organizadoras. – Rio de Janeiro: Renovar, 2005.

7 The concept of Hard Power stems from the realism. Hard power resources include coercive

cooperation and respect for fundamental rights in order to gain their legitimacy.

According to 2012 *World Investment Report*[8] of UNCTAD[9], "mobilizing investment and ensuring that it contributes to sustainable development is a priority for all countries"[10]. The report stresses that "a new generation of investment policies is emerging, as governments pursue a broader and more intricate development policy agenda, while building or maintaining a generally favorable investment climate"[11].

In the Oil and Gas industry some key issues have emerged as priority. Among other topics, corruption scandals and rating are scrutinized by investors, showing a widespread example of the dynamic and speed of worldwide negative impact of such events. As a result, fighting corruption has become, as indicated, a policy priority for Host countries that wish to attract and keep foreign investment. The need for extensive reform efforts have been identified and implemented in many countries.

The following quotation highlights the awareness by global actors that security and stability of worldwide investments depend not simply on the use of military forces and diplomacy, but also on an interaction of economic and political factors[12]: "*the end of Cold War and the emergence of a truly integrated international economy have also contributed to the widespread perception of corruption as a problem with inherently global ramifications*"[13]. Several studies about investments have focused on the overall negative effects of corruption. And according to the Konrad-Adenauer Foundation, corruption causes,

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capabilities such as military and economic means whereas the soft power resources are based on culture, values and institutions. NYE, Joseph S. Jr. *The Changing Nature of World Politics.* Political Science Quarterly. Vol. 105, No. 2, Summer, 1990. Pp 177-192. p 182. Available at: <http://www.jstor.org/stable/2151022>. Accessed in February 11th, 2013.

8 The *World Investment Report* is an annual publication on the global and regional trends in FDI and policy developments related to national and international levels.

9 UNCTAD: *United Nations Conference of trade and development* : Established in 1964, UNCTAD promotes the development-friendly integration of developing countries into the world economy. UNCTAD has progressively evolved into an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.

10 UNCTAD. 2012 *World Investment Report*. Available at: <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>. Accessed February 7th, 2013.

11 UNCTAD. 2012 *World Investment Report*. Available at: <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>. Accessed February 7th, 2013.

12 GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. *The Globalization of Corruption*. p. 10. Available at: <http://www.iie.com/publications/chapters_preview/12/1iie2334.pdf> . Accessed Feb.26th, 2012.

13 Ibidem. p. 9.

among other effects, anti-competitive practices[14].

The interdependence of global economy has broadened in the contemporary world. Therefore, as previously mentioned, the chances of corruption effects impact economies of different countries are higher[15].

The United Nations definition of corruption is adopted as a paradigm for this article:

> *Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*
>
> *This evil phenomenon is found in all countries (...).*[16]

The non-governmental organization Transparency International[17] gave Brazil the 69th position in the corruption index[18], with a score of 3.7, where 10 (ten) is the most reliable and 0 (zero) is the most corrupt[19]. Nonetheless, the *World Investment Report* for the year of 2011 indicates Brazil as the fifth in the ranking of countries that received Foreign

14 FUNDAÇÃO KONRAD-ADENAUER. *Os custos da corrupção.* Cadernos Adenauer. São Paulo, n.10, 2000, p. 7. Apud: CHAIA, Vera. TEIXEIRA, Marco Antonio. Democracia e Escândalos Políticos. *Revista São Paulo em Perspectiva*. vol.15 no.4 São Paulo Oct./Dec. 2001. p. 62

15 GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. *Ibidem*. p. 12.

16 UNITED NATIONS. Available at: <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>. Accessed: Ago. 28th , 11

17 *Transparency International* (TI) is one global movement sharing one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. In 1993, a few individuals decided to take a stance against corruption and created Transparency International. Now present in more than 100 countries, the movement works relentlessly to stir the world's collective conscience and bring about change. Much remains to be done to stop corruption, but much has also been achieved, including: (1) the creation of international anti-corruption conventions; (2) the prosecution of corrupt leaders and seizures of their illicitly gained riches; (3) national elections won and lost on tackling corruption; (4) companies held accountable for their behaviour both at home and abroad. Available at: <http://www.transparency.org/ whoweare/organisation >. Accessed February 2nd , 2013.

18 According the data of 2010 *Transparency International Report* more than 91,500 people in 86 countrys and territories were consulted. p. 83. Available at: <http://www.transparency.org/ >. Accessed February 2nd , 2013.

19 According the data of 2010 *Transparency International Report* more than 91,500 people in 86 countrys and territories were consulted. p. 83. Available at: <http://www.transparency.org/ >. Accessed February 2nd , 2013.

Direct Investment (FDI), only behind the United States, China, Hong Kong and Belgium.

We intend to draw the attention to this contradiction: despite the records of corruption Brazil still receives a great deal of foreign investment. This article addresses the characteristics of a foreign and international investment as related to some aspects of corruption. It also surveys the worldwide responses against corruption and the anti-corruption legislation and regulatory in Brazil. Such efforts aimed, on the one hand, at complying with international treaties, but may also be viewed a drive towards attracting investments.

2. INVESTMENTS

The economic notion of investment may be defined as: monetary asset purchased with the idea that the asset will provide income or any gain in the present or in the future[20]; or also as the use of resources through revenue allocation or costs assimilation. It can also be implemented through the rise of productive assets, considering the probability that the proceeds of the investment exceed the costs[21].

The term "foreign" may allude to the personality of its owner–according to the nationality or domicile–or because of transboundary movement by means of registration of entrance in certain jurisdictions, as it is the case in Brazil[22].

However, the legal definitions may not be limited to economic ones[23]. The lack of any multilateral agreement on FDI renders it virtually impossible the adoption of an uniform concept[24]. Therefore, we refer to the notion stemming from Brazil's internal legal sources. The first relevant distinction should be made between direct and portfolio investment. The Federal Revenue of Brazil defines direct investment as the one made when the investor owns 10% or more of the shares or voting rights in a company "and" it results of long-term decisions[25]; on the other hand, when the investor owns a percentage of less than 10% of

20 DORNBUSCH, Rüdiger; FISCHER, Stanley. *Macroeconomia*. 2. ed. São Paulo: Makon, MacGraw Hill, 1991, p. 349 Apud COSTA, José Augusto Fontoura. Direito Internacional do Investimento Estrangeiro. Curitiba: Editora Juruá, 2010. p. 30.

21 SAMUELSON, Paul A.; NORDHAUS, William D. *Economia*. 16 ed. Lisboa: MacGraw-Hill, 1999 Apud COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 30.

22 COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 32.

23 Ibidem, p.30.

24 Ibidem, p. 29.

25 RECEITA FEDERAL. Consultation on the definition of foreign direct investment. Source: <http://www.receita.fazenda.gov.br/>. Accessed August 15th , 2011.

the shares or the voting rights it is considered a portfolio investment[26].

Brazil's law establishes a broad concept to foreign capital:

> *Law nº. 4131 of 1962*
>
> *Art. 1º Foreign capital is considered, for the purposes of this law, property, machinery, and equipment that enters Brazil's boundary with no initial disbursement of foreign exchange, intended for production of goods or services, as well as the financial resources or money, that comes into the country for application in economic activities since, in both cases, they belong to resident individuals or entities, domiciled or with headquartered abroad.*
>
> *Art. 2º The foreign capital invested in the country will have the same legal treatment given to national capital on equal terms, all discrimination not mentioned under this law is prohibited.*
>
> *(Free Translation)*

As for international sources, we may refer to the definition of foreign investment, according to the Organization for Economic Cooperation and Development (OECD)[27], and the International Monetary Fund (IMF)[28]. Thereunder for a FDI to exist, strictly speaking, one should consider not only that there is a company's control by a foreigner, but also that it is made on a long-term basis.

Another possible classification is an international investment, which occurs when conducted between States, or through international organizations, such as the World Bank, and the Interamerican Development Bank[29].

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26 Ibidem.

27 The Organization for Economic Cooperation and Development (OECD) is an intergovernmental international organization that brings together the major industrialized market economy. It is headquartered in Paris, France. In the OECD, representatives of member countries meet to exchange information and set policies in order to maximize economic growth and development of member countries. Source: <http://www.ocde.org>. Accessed February 2nd , 2013.

28 The International Monetary Fund (IMF) is an organization of 188 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. Source: <http://www.imf.org/external/about.htm>. Accessed February 2nd , 2013.

29 COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*.

The 2011 *World Investment Report* of UNCTAD pointed Brazil as one of the main destination of FDI, being above the global average.

All the same, due to the fact that Rio de Janeiro has been the most successful city in raising funds from the World Bank system, it also rendered the city a record in prospecting international investments[30].

Finally, foreign capital is also important for the Brazilian securities market, i.e., the foreign capital represented one-third of the portfolio investment participation in BMF & BOVESPA[31] businesses in August 2011[32].

It is true these results are closely related to major sporting events to be hosted in Rio de Janeiro and in Brazil: FIFA Confederations Soccer Cup in 2013[33], World Cup in 2014[34], Copa America in 2015[35] and, finally, the Olympics in 2016[36], but it is not only because of these events that FDI is so high. The analysis of its legal framework may provide some clues to understanding why the country holds the above referred position, of one of the major recipients of foreign investments in the world, in spite of its lack of participation in the international regime of foreign investment regulation[37].

Curitiba: Editora Juruá, 2010. p. 32

30 Segundo COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 32, Investimento internacional é "*entendido como feito entre Estados, deve ser utilizado apenas para o caso de ajuda pública oferecida por um ente soberano a outro – diretamente ou por intermédio de agências públicas – ou do investimento de organizações internacionais, como o Banco Mundial e o banco Interamericano de Desenvolvimento, bem como as garantias de Agência Multilateral de Garantia de Investimentos*."

31 BMF&BOVESPA is a Brazilian company, created in 2008, through the integration between the São Paulo Stock Exchange (Bolsa de Valores de São Paulo) and the Brazilian Mercantile & Futures Exchange (Bolsa de Mercadorias e Futuros). It is the most important Brazilian institution to intermediate equity market transactions and the only securities, commodities and futures exchange in Brazil. BM&FBOVESPA further acts as a driver for the Brazilian capital markets. See at: <http://www.bmfbovespa.com.br/en-us/intros/intro-about-us.aspx?idioma=en-us>

32 INVESTMAX. Data about business volume in BMF&BOVESPA Available at: <http://www.investmax.com.br/iM/content.asp?contentid=567>. Accessed September 5, 2011.

33 PREFEITURA DO RIO DE JANEIRO. SERIO - Secretaria Especial Copa 2014 e Rio 2016. Available at: <http://www.rio.rj.gov.br/web/serio/exibeconteudo?article-id=106002>. Accessed August 4, 2011.

34 Ibidem.

35 CONMEBOL. Copa das Confederações no Rio de Janeiro em 2015. Available at: <http://www.conmebol.com/pages/Calendario.html>. Accessed August 4, 2011.

36 PREFEITURA DO RIO DE JANEIRO. Prefeito sanciona pacote para copa do mundo e olimpíadas. Available at: <http://www.rio.rj.gov.br/web/gbp/exibeconteudo?article-id=1335050>. Accessed August 4, 2011.

37 RIBEIRO, Marilda Rosado de Sá; XAVIER JUNIOR, Ely Caetano. *International Investment Law in Brazil*. In: DAN, Wei (Ed.). Laws of Large International Contracts in Brazil. Springer, 2013 (in press).

According to the latest statistics of the United Nations Conference on Trade and Development (UNCTAD), global foreign direct investment reached US$ 1.5 trillion in 2011, despite the recent crisis in the global economy. UNCTAD statistics also included estimates that world foreign direct investment flows would grow moderately to about US$ 1.6 trillion in 2012[38]. As stated above, Brazil seems to be among key investment destinations, obtaining a higher than average contribution to their economies per unit of FDI. Moreover, transnational companies selected Brazil as the fifth most likely target for their foreign direct investment in the medium term[39]. According to the Central Bank of Brazil, foreign direct investment stock reached US$ 650.5 billion in December 2010, corresponding to 30.8% of Brazil's gross domestic product.

Further to the investment records displayed by UNCTAD, indicators such as the FDI Confidence Index (*FDI Confidence Index*), published by A. T. Kearney, kept Brazil among the 10 top destinations for FDI in the last decade and, in 2010, moved the country to fourth place, behind China, the U.S., and India, its best position since 2001[40]. This translates into more than one decade of predisposition for investments in Brazil.

All these data shows that the future is also promising for investments in Brazil. Brazil has entered, at 5th position, in a list of 21 countries ranked by international companies as top prospective investment destinations for 2012 to 2014, according to the 2012 *World*

38 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. World Investment Report 2012: towards a new generation of investment policies. New York: UNCTAD, 2012, p. 2.

39 In the top five ranking, Brazil is preceded by China, United States, India and Indonesia. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. World Investment Report 2012: towards a new generation of investment policies. New York: UNCTAD, 2012, p. 22. The 2012 World Investment Report also identified the trend that many transnational companies from developing and transition economies continued to invest in other emerging markets. For example, 65% of foreign direct investment projects by value from BRIC countries were invested in developing and transition economies.

40 The *FDI Confidence Index* (Índice de Confiança dos IED) of A. T. Kearney was made using primary data from a survey of senior executives of the largest corporations. Respondents were selected totaling a global population 1000, in 44 countries. According to the 2011 report of that institution, Brazil's abundant agricultural commodities linked to the energy sector have fueled economic growth in the country during the "commodities super-cycle." As the largest economy in Latin America, Brazil climbed to 4th place in the Index, having taken place in 2007 of 6th and 7th in 2005, and is at its highest ranking since the 3rd place in 2001. Moreover, according to this index, Brazil is the third most popular destination among investors in heavy industry, and the fifth for the light industry. Source: <http://www.atkearney.com/index.php/Publications/foreign-direct-investment-confidence-index.html >. Accessed May 05, 2011.

Investment Report by the UN Conference on Trade and Development[41]. It should also be mentioned that the 6th Business Survey by PriceWaterhouseCoopers–"*The Power of the State of Rio de Janeiro*"–, conducted in December 2009, found that 83.9% of entrepreneurs interviewed wanted to invest in state of Rio de Janeiro in the year 2010[42].

If this ranking is to be kept other elements examined hereunder show that further efforts need to be made.

3. CORRUPTION

Bribery and corruption are damaging to democratic institutions and corporate governance, substantially impairing the flow of investments. They discourage investment and distort international competitive conditions. According to the World Bank report,

> *"[f]ighting corruption has become a policy priority for the development community over the past two decades and extensive reform efforts have been launched. These reforms build on the idea that corruption is a dysfunction of public administration that emerges in the presence of monopoly and discretion, which in turn can be curbed by promoting accountability and transparency. Corruption undermines policies and programs that aim to reduce poverty, so attacking corruption is critical to the achievement of the Bank's overarching mission of poverty reduction[43]."*

Corruption can be expressed in different ways: social[44], political, economic, legal[45], religious, etc., depending on the institutional

41 UNCTAD; World Investment Report 2012 - *Towards a New Generation of Investment Policies* - United Nations: July 2012, p.53. Available at <http://www.unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf>. Accessed August 19th , 2012.

42 PRICEWATERHOUSECOOPERS. This is a questionnaire answered by approximately 30 companies about investment perspective. Available at: <http://www.pwc.com/br/pt/estudos-pesquisas/4-sondagem-rj.jhtml>. Accessed August 10th , 2011.

43 WORLD BANK. Available in: <http://www.worldbank.org/anticorruption>. Accessed in January 28th, 2013.

44 In the parish called corruption, kinship and affection ensejam favoritism by those in power. For more information: BEZERRA, Marcos Otávio, *Corrupção* – Um estudo sobre o poder público e relações pessoais no Brasil. Rio de Janeiro, Relume-Dumará e Anpocs, 1995. p. 34.

45 Work specifically on legal corruption: MAIRAL, Héctor. *A las raíces legales de la corrupción: o de cómo el derecho público fomenta la corrupción em lugar de combatirla*. Buenos Aires: RAP, 2007. Apud: SILVA, Rogério Augusto Reis; MACHADO, Sulamita Crespo Carrilho. Aspectos jurídicos da prevenção e do controle da corrupção. *Revista Eletrônica Newton Paiva*.

environment, the agent, and the content of the action[46].

One definition of corruption or fraud would be the abuse of control over resources and power of the government, for the purpose of personal gain or for a political party. This profit can be made through power or through an organization within political party, or even through political support from various individuals[47].

Zaffaroni defines corruption as the relationship between a person with public decision-making power and another that operates outside such power, under which benefits are exchanged for both parties to obtain increase of earnings or illegitimate benefits or advantages of any sort:

> *suele entenderse como la relación que se establece entre una persona con poder decisório estatal y otra que opera fuera deste poder, en virtud de lo cual se cambian ventajas, obteniendo ambas un incremento patrimonial, en función de un acto (u omisión) de la esfera de poder de la primera en beneficio de la segunda.*[48]

Corruption may be also defined as something not restricted to the public sector, since it can also take place in the private sector[49]. In this sense, fraud against businesses are torts committed by one or more individuals, whether or not in collusion with third parties, in order to obtain benefits by false representation the reality of economic and financial transactions recorded[50].

Consequently, the definition of corruption may be stretched beyond the use of public property for private purposes, to include the fraud carried out by individuals or private firms within the realm of private business.

Hence, corruption is a phenomenon difficult to define−whatever

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p 1.

46 Ibidem.

47 GEDDES, Barbara; RIBEIRO NETO, Artur. Institutional Source of Corruption in Brazil. IN: *Corruption and Political Reform in Brazil: The impact of Collor Impeachment*. Edited by Keith S. Rosenn and Richard Downes. North-south center press at the University of Miami, 1999. p.23

48 ZAFFARONI, E.R. *La corrupción*; su perspectiva lationoamericana. In: OLIVEIRA, E. (org.). Criminologia crítica. Belém, Edições Cejup, 1990, p.371.

49 BARDHAN, Pranab. *Corruption and development*: a review of issues. Journal of economic literature, v. 35, n. 3, 1997, p. 1320-1346.

50 GOMES, Marcelo A. C. Uma contribuição à prevenção de fraudes contra as empresas. Tese (Doutorado em Contabilidade) – Faculdade de Economia, Administração e Contabilidade, Universidade de São Paulo, São Paulo, 2000. p. 25

the definition one chooses for corruption, it can be questioned.

The following list of crimes is usually established as corruption by different countries: trafficking of influence; payment of bribes within the country or in international business transactions; embezzlement; abuse of power; bribery in the private sector; money laundering; and obstruction of justice.

Corruption, in any of its manifestations, represents an unsustainable burden for any society, especially for those that have large social inequalities, as it happens in Brazil.

4. EFFECTS OF CORRUPTION IN INVESTMENTS

The effects of corruption are taken into account by several studies related to investments. According to the Konrad-Adenauer Foundation corruption is the largest obstacle to the development of a society, since it deepens the gap between rich and poor, while rapacious elites devastate the public budget. Corruption causes distortions in competition because it forces companies to divert increasing amounts of money in order to obtain new contracts. Corruption also undermines democracy, the trust in the state, the legitimacy of governments, and public morality. Experience shows that corruption can undermine an entire society[51].

Consequently, the fact that the global economy has dynamic and almost sequential effects increases the negative impacts of corruption, which echo throughout the world economy[52] [53]. One recent and good example of that is the Eurozone financial crisis, which may yet drag most of countries in the world into an unprecedented recession. This is the already quoted example, collected by the non-governmental organization Transparency International (TI) (which also considerer and measures public opinion about global corruption level of perception of corruption) concerning ranking of Portugal and Greece as two of the

51 FUNDAÇÃO KONRAD-ADENAUER. Os custos da corrupção. *Cadernos Adenauer*. São Paulo, n.10, 2000, p. 7. Apud: CHAIA, Vera. TEIXEIRA, Marco Antonio. Democracia e Escândalos Políticos. *Revista São Paulo em Perspectiva*. vol.15 no.4 São Paulo Oct./Dec. 2001. p. 62

52 GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. *The Globalization of Corruption*. p. 12. Available at: <http://www.iie.com/publications/chapters_preview/12/1iie2334.pdf> . Accessed Feb. 26th , 12.

53 The authors points that when the corrupt Bank of Credit Commerce International went belly-up in 1991 the entire social security fund of Gabon was wiped out. IN: GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. The Globalization of Corruption. P. 12. Available at: <http://www.iie.com/publications/chapters_preview/12/1iie2334.pdf> >. Accessed Feb. 26th , 12.

four most corrupt countries in the Eurozone[54].

The European Commission points out that corruption costs the EU economy EUR 120 billion each year, which is comparable to the entire annual EU budget[55].

Brazil holds the 69th position in the TI corruption index[56]. Data collected by FIESP[57] show that Brazil's output per capita would increase from US$ 7,954 to US$ 9,184 if the country had a level of perception of corruption equal to the average of countries selected by them. In other words, if Brazil had the score of 7.45 rather than 3.7 it would increase more than 10% in its output per capita.

The Global Agenda Council on Anti-Corruption of the World Economic Forum shows that the cost of corruption equals more than 5% of global Gross domestic product (GDP), which represents the amount of US$ 2.6 trillion, over which US$ 1 trillion is paid in bribes each year[58].

This discussion is called the "*cost of corruption*" and it is defined by the "amount of resources that are diverted from productive activities to corrupt practices. It is a cost because it reduces the efficiency of investment". That is, money that could be used to buy goods and equipment useful for the country or invest in innovation is spent on bribes, kickbacks and other illegal corrupt activities[59].

The recently released *World Competitiveness Yearbook* for 2011-2012 pointed out that Brazil has advanced to 52nd among 142 countries, with a score of 4.3. This report defines competitiveness as the set of institutions, policies, and factors that determine the level of productivity of a country, and in an unprecedented way, Brazil came out of stage 2, which is a transition position, to the best stage of the

54 BILLITER Insight and Intelligence. EU *Anti-Corruption Report: A Next Step in Europe's Fight Against Corruption*. Available at: <http://www.billiterpartners.com/wp-content/uploads/2011/06/Billiter-Anti-Corruption-Report-A-Next-Step-in-the-EUs-Fight-Against-Corruption.pdf>. > . Accessed Feb. 26th , 12.

55 European Commission. Available at: <http://ec.europa.eu/commission_2010-2014/malmstrom/news/default_en.htm#20110606>. > . Accessed Feb. 26th , 12.

56 According the data of 2010 *Transparency International Report* more than 91,500 people in 86 countrys and territories were consulted. p. 83. Available at: <http://www.transparency.org/>. Accessed February 2nd , 2013.

57 FIESP is the Federação das Indústrias do Estado de São Paulo (São Paulo Industry Federation).

58 WORLD ECONOMIC FORUM. p. 7. Available at: <https://members.weforum.org/pdf/gac/next_steps.pdf>. Accessed Feb. 26th , 12.

59 FIESP, Federação das Indústrias do Estado de São Paulo. DECOMTEC: Área de Competitividade. Relatório Corrupção: custos econômicos e propostas de combate. Março de 2010. p. 22. Available at: <http://www.fiesp.com.br/competitividade/downloads/custo economico da corrupcao - final.pdf>. Accessed: Ago. 28th , 11

report, which is the stage 3, surpassing all the BRICS[60] countries[61]. Despite the improvement, an important topic raised by the Annual World Competitiveness Report for 2012 shows that Brazil is in a very low ranking in the category "*Burden of government regulation*". This category care about how burdensome is it for businesses in the country to comply with: (i) governmental administrative requirements (e.g., permits, regulations, reporting); (ii) the time for government's response on information; (iii) administrative barriers; (iv) lack of customer service; (v) delays, uncertainties, and frustrations involving public bureaucracy[62].

Similarly, 6th Business Survey by PriceWaterhouseCoopers– "*The Power of the State of Rio de Janeiro*"–, conducted in December 2009, noted that, for 16.1% of the investors interviewed, corruption is the main problem in economic terms in the state of Rio de Janeiro, and it should had been one of the main concerns of the government for the year of 2010. This number is 60% higher than the PriceWaterhouseCoopers 5th Business Survey[63] conducted one year before.

Moreover, the existing dynamic for internationalization of Brazilian companies increases the need for fighting corruption. When the company targets the foreign market, the assertion: "everyone is in the same boat" no longer applies. Competitors of Brazil's exporters are located in countries that are not always subject to the same bureaucratic system, and may have different levels of corruption. Excessive bureaucracy and other administrative barriers are very negative also for Brazilian companies moving abroad, not only to potential investors analyzing potential investments in Brazil[64].

5. CORRUPTION RESPONSES WORLDWIDE

In the view of all the data collected about the evil effects of corruption the United Nations pronounces:

60 BRICS: Brasil, Russia, India, China e Africa do Sul. Available at: ITAMARATY <http://www.itamaraty.gov.br/temas/mecanismos-inter-regionais/agrupamento-bric>. Accessed: Sep. 4th , 2011.

61 WORLD ECONOMIC FORUM. *World Competitiveness Yearbook* 2011-2012. Available at: <http://reports.weforum.org/global-competitiveness-2011-2012/>. Accessed: Sep. 7 th, 2011.

62 Loc. Cit.

63 PRICEWATERHOUSECOOPERS. This is a questionnaire answered by approximately 30 companies about investment perspective. Available at: <http://www.pwc.com/br/pt/estudos-pesquisas/4-sondagem-rj.jhtml>. Accessed August 10th , 2011.

64 FIAS, Corporação Financeira Internacional; BANCO MUNDIAL. *Barreiras Jurídicas, Administrativas e Políticas aos Investimentos no Brasil. Volume II Barreiras Administrativas aos Investimentos no Brasil: O caso de São Paulo e Rio de Janeiro*. May 2001. p. ix

> *Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*
>
> *This evil phenomenon is found in all countries (...).*[65]

The international effort against corruption can be exemplified by the Inter-American Convention against Corruption (1996)[66]; the UN Convention against Corruption (2003); The Council of Europe Criminal Law Convention (1998)[67] and the Council of Europe Civil Law Convention (2003)[68]; The African Union Convention on Preventing and Combating Corruption (2003)[69]; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its Recommendations (1997)[70]; the OECD Guidelines for Multinational Enterprises[71]; World Bank Procurement & Consultant Guidelines[72]; ICC Rules of Conduct and Recommendations for Combating Extortion and Bribery (1977, followed by revisions)[73]; United Nations Global Compact (UNGC), Principle 10 (2004)[74];

65 UNITED NATIONS. Available at: <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>. Accessed: Ago. 28th , 11

66 OAS. Organization of Americans States. Available at: <http://www.oas.org/juridico/english/fightcur.html> Accessed: Ago. 28th , 11

67 Council of Europe Criminal Law Convention on Corruption: Available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>. Accessed: Ago. 28th , 11

68 Council of Europe Civil Law Convention on Corruption . Available at: <http://conventions.coe.int/Treaty/EN/treaties/html/174.htm>

69 The African Union Convention on Preventing and Combating Corruption: Available at: <http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf> . Accessed: Ago. 28th , 11

70 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Available at: <http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html>. Accessed: Ago. 28th , 11.

71 OECD. Available at : <http://www.oecd.org/dataoecd/4/18/38028044.pdf>. Accessed: Ago. 28th , 11

72 WORLD BANK. Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:22526443~pagePK:84271~piPK:84287~resourceurlname:Siemens FactSheetNov11%5E$%5Epdf~theSitePK:84266,00.html>. Accessed: Feb. 16th, 13.

73 Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations: Available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf>. Accessed: Sep. 28th , 11

74 UN. United Nations Global Compact; Principle 10: "Businesses should work against

World Economic Forum Partnering Against Corruption Initiatives (PACI) Principles for Countering Bribery (2004)[75]; the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003)[76]; Global Reporting Initiative (GRI) (1997)[77]; and NGO Transparency International (TI): Business Principles for Countering Bribery (2003 followed by revisions)[78];

In its preamble the UN Convention Against Corruption reinforces the fact that corruption is no longer a local problem, it has become a transnational phenomenon that affects all societies and economies, necessitating international cooperation in order to prevent and combat it. It is an interdependent society.

Indeed, once a government ratifies any one of these treaties, both the government and the private actors faces greater pressure to comply with the treaty provisions[79].

Enforcements of extraterritorial legislation such as the "Foreign Corrupt Practices Act of 1977" (FCPA) in the United States, and the newly approved "Bribery Act 2010" in England, which came into force on July 1st 2011, are effecting also important ways of struggling against corruption.

So-called corporate governance, which consists of a series of principles and rules used in the management of the company[80], is also an important tool to fight corruption. Through this new way of managing business it is possible to increase the value of the company,

corruption in all its forms, including extortion and bribery." Available at: <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle10.html>. Accessed: Feb. 25th , 12.

75 World Economic Forum Partnering Against Corruption Initiative. Available at: <http://www.weforum.org/en/initiatives/paci/index.htm>. Accessed: Feb. 25th , 12.

76 UNITED NATION. Available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En>. Accessed: Feb. 25th , 12.

77 GLOBAL REPORTING. Available at : <https://www.globalreporting.org/Pages/default.aspx>. Accessed: Feb. 24th , 12.

78 TI. Transparency International: Business Principles for Countering Bribery. Available at <http://www.transparency.org/global_priorities/private_sector/business_principles>. Accessed: Feb. 25th, 12.

79 This does not necessarily mean, however, that compliance will result (Hafner-Burton and Tsutsui 2005) Apud LIM, Alwyn; TSUTSUI, Kiyoteru. *The Globalization of Corporate Social Responsibility: Cross-National Analyses on Global CSR Framework Commitment The Globalization of Corporate Social Responsibility: Cross-National Analyses on Global CSR Framework Commitment. Department of Sociology University of Michigan* p. 14

80 Luiz Alberto Colonna Rosman indicates that the corporate governance movement began in the U.S. as a means of separating preponderant interests of executives and owners and shareholders of the company. IN ROSMAN, Luiz Alberto Colonna. Governança Corporativa. In: Revista de Direito Renovar, nº 31/2005. Rio de Janeiro: Renovar, p. 131/132.

its reliability and amplify the investments, based on transparency (disclosure), accountability, sense of justice and equity (fairness) and obedience to the laws (compliance)[81].

6. CORRUPTION RESPONSES IN BRAZIL

Given all the data that has been presented concerning the harm caused by corruption, as well as the current need of Brazil and the state of Rio de Janeiro to attract foreign and international investments, it becomes clearer the urge to accomplish more, as an overall reaction from Brazilian institutions and society.

In order to maximize the actions to prevent corruption, Brazilian government is broadening and strengthening its relationship with other countries through international cooperation[82].

In the last decade, Brazil ratified and adopted the main anti-corruption treaties, the OECD[83], OAS[84] [85] and the UN[86] Conventions

81 LAMAS, Natália Mizrahi. *A Cláusula Compromissória Estatutária como Regra de Governança Corporativa: Uma Análise de seu Alcance Subjetivo*. Rio de Janeiro: Universidade do Estado do Rio de Janeiro, Faculdade de Direito; Agência Nacional do Petróleo, 2004. 94f. Monografia (Bacharel em Direito). Professor advisor Carmem Tiburcio, p. 24, Apud: RIBEIRO, Marilda Rosado de Sá. As empresas transnacionais e os novos paradigmas do comércio internacional. p. 455-492. IN: Novas perspectivas do direito internacional contemporâneo – Estudos em homenagem ao Professor Celso D. de Albuquerque Mello / Carlos Alberto Menezes Direito, Antônio Augusto Cançado Trindade, Antônio Celson Alves Pereira (orgs.) – Rio de Janeiro: Renovar, 2008. p. 484

82 CGU. Available at: < http://www.cgu.gov.br/onu/convencao/info/index.asp>. Accessed in February 3rd, 2013.

83 The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was ratified on June 15, 2000 and promulgated by Decree No. 3678 of November 30, 2000.

84 The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, DC, from October 1889 to April 1890. The Inter-American Convention against Corruption entered into force in Brazil on August 24th , 2002. Source: <www.oas.org>. Accessed February 2 , 2013.

85 OAS. Federative Republic of Brazil signed the Declaration on the Mechanism for FollowUp on the Implementation of the Inter-American Convention against Corruption on August 9, 2002. Source: <www.oas.org>. Accessed February 11, 2013.

86 Two years after it was signed by over 120 countries in the Mexican city of Mérida, became effective as of December 14th , 2005, in all countries signatory to the UN Convention against Corruption. Brazil was the twentieth country to ratify the document. Important legal instrument for the effective combating of corruption worldwide, the Convention has an integrated approach between prevention, criminalization, international cooperation, and asset recovery. Source: <http://www.cgu.gov.br/imprensa/Noticias/2005/noticia016205.asp> e <http://www.unodc.

against Corruption.

Brazil also applies good governance practices[87], for both private and public sector, which is seen as a good sign by investors, according to FIESP's report about the costs of corruption in Brazil. FIESP's report stated that the establishment of good governance strengthens the scrutiny of existing rules, which increases the moral costs of corrupt acts[88].

Another way to fight corruption is to decrease information asymmetries in order to simplify administrative procedures, law, and taxes issues, i.e. having less bureaucracy[89].

The Bovespa Corporate Sustainability Index can be quoted as a pioneering initiative in Latin America: it surveys the economic, environmental, social, as well as financial and corporate governance status, of major companies listed on the Stock Exchange São Paulo (BM & FBOVESPA). The index aims to acknowledge companies actively involved in social responsibility and encourage ethical corporate responsibility in all businesses[90].

6.1 Brazil's Legislative Responses

With respect to bribery of domestic public officials, Brazil is already in compliance with the UN Convention. Section I of Article 9 of Law No. 8.429/92, in addition to articles 316, 317 and 333 of the Penal Code, deal with crimes of graft[91], passive bribery, and active bribery, respectively. The Criminal Code also mentioned in its articles 337-B the active corruption in international business transactions; 337-C the influence peddling in international business transactions; and 337-D carries the definition of what is considered a Foreign Public Official. However, Brazil has not criminalized the act of bribery committed by

org/brazil/pt/press_release_2005-12-14.html >. Accessed in: August 20th , 2011.

87 IBGC. Available at: <http://www.ibgc.org.br/Secao.aspx?CodSecao=17>. Accessed in September 7th, 2011.

88 FIESP, Federação das Indústrias do Estado de São Paulo. DECOMTEC: Área de Competitividade. Relatório Corrupção: custos econômicos e propostas de combate. Março de 2010. p. 30-31. Available at: <http://www.fiesp.com.br/competitividade/downloads/custo economico da corrupcao - final.pdf>. Accessed: Ago. 28th , 11.

89 FIESP, Federação das Indústrias do Estado de São Paulo. DECOMTEC: Área de Competitividade. Relatório Corrupção: custos econômicos e propostas de combate. Março de 2010. p. 30-31. Available at: <http://www.fiesp.com.br/competitividade/downloads/custo economico da corrupcao - final.pdf>. Accessed: Ago. 28th , 11.

90 BM&FBOVESPA. Available at: < http://www.bmfbovespa.com.br/indices/ResumoIndice.aspx?Indice=ISE&idioma=pt-br>. Accessed in December 15th, 2012.

91 GRAFT is the act of using a position of trust to gain money or property dishonestly; esp., a public official's fraudulent acquisition of public funds. BLACK'S Law Dictionay. Ninth Edition. Bryan A. Garner, editor in Chief.

foreign public officials or officials of public international organization, the Brazilian law criminalized only the act of bribery to foreign public officials or officials of public organization committed by private individuals[92].

Moreover, Brazil has not criminalized the crime of corruption in the private sector[93], bribery in the private sector, and embezzlement of property in the private sector, respectively Article 21 and 22 of the UN Convention, but both are non-mandatory provisions of the convention[94].

The crime of Laundering of the Proceeds of Corruption is a mandatory provision that focuses on criminalization of actions involving the proceeds of corruption. The actions include conversion or transfer of property, concealment or disguise of the nature and source of property, and the acquisition, possession, and use of property, as well as the participation in money laundering conspiracies. Provided that it is in accordance with fundamental principles of domestic law, all offenses dealt with in Chapter III of the UN Convention shall be considered as predicate offenses, in order to punish in the case of crimes of money laundering, the individual whose property, rights, and values have its origin in corrupt acts[95].

The Law N˚9613 of 3 March 1998 addresses the problem of money laundering in Brazil. It establishes the necessary legal measures, such as the definition of the money laundering offence, the preventive measures, a suspicious reporting system, and various procedures for international cooperation[96]. The list of predicate offences, which is not exhaustive, is also mentioned in such Law, and includes the major criminal activities according to the Brazilian Penal Code, such as terrorism and its financing.

Law N˚9613 brought into Brazil's legislation a number of international initiatives such as Vienna Convention, Palermo Convention, UN Convention against the Financing of Terrorism, the FATF 40+9 Recommendations, etc.

Additionally, Brazil has a bill in progress in Congress that seeks to give effect to the UN Convention against Corruption on matters of

92 CGU. Available at: <http://www.cgu.gov.br/onu/convencao/info/index.asp>. Accessed in February 3rd, 2013.

93 To see more about the problematic of corruption in the public sector read Azevedo, Carolina Araújo de. *As transnacionais como veículo de investimento e o problema da corrupção*. Rio de Janeiro: Universidade do Estado do Rio de Janeiro, Faculdade de Direito, 2012. 172f. Dissertação de Mestrado

94 CGU. Available at: <http://www.cgu.gov.br/onu/convencao/info/index.asp>. Accessed in February 3rd, 2013.

95 Ibidem.

96 CGU. Available at: <http://www.cgu.gov.br/onu/convencao/info/index.asp>. Accessed in February 3rd, 2013.

company's liability due to corrupt acts. The bill in progress nº 6.826/2010 is an Executive Power initiative sent to Congress on February 8, 2010. At the moment, it awaits the opinion from a Special Commission within the House of representatives. (Câmara Dos Deputados)[97].

According to an official letter dated October 23, 2009, from the Comptroller General's Office, together with the Ministry of Justice, and Attorney General of the Union, the bill aims to fill a gap in the Brazilian legal system with regard to liability of legal entities due to illicit behavior in face of public national or foreign administration, mainly with regard to acts of corruption and fraud in procurement contracts. That is, in order to meet Brazil's international obligations as regards to the fight against corruption, as well as for loans received through the World Bank system, it was necessary to create an effective and specific mechanism to punish corporations guilty of corruption[98].

Brazil's bill, abandoning the position of the current law, will hold companies strictly liable for a corruption crime. This might avoid existing discussions about the need to verify the offender's culpability for the offense, in other words, once the facts, result, and causality, are proven, the legal entity may be held liable.

Furthermore, for purposes of compliance with the OECD Convention to fight corruption of foreign public officials in international business transactions, Brazil adopted the following measures[99]:

> (i) Criminalized the act of offer, promise, or give any undue advantage, whether directly or through intermediaries, to foreign officials, to facilitate the execution of transactions for commercial, or other advantage in the conduct of international business;
>
> (ii) Forbade accounting and audits practices that can be used to cover up corruption;
>
> (iii) Established agreements for legal assistance with its key trading partners, allowing extradition due to corruption;

97 CAMARA DOS DEPUTADOS. Projeto de Lei nº 6.826/2010. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400>. Acesso em: 07 set. 11.

98 CAMARA DOS DEPUTADOS. Oficio CGU/MJ/AGU – EMI n 00011/2009 – datado de 23 de outubro de 2009. Projeto de Lei nº 6.826/2010. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400>. Accessed January 12nd, 2013.

99 CGU. Available at: <http://www.cgu.gov.br/ocde/perguntasFrequentes.asp>. Accessed in February 3rd, 2013

(iv) Presented a bill that increases the penalty for the offense of bribery of foreign public officials in international business.

Other Brazil's legislative responses may be exemplified with: the Principle of Morality (art. 37, §4 of the Federal Constitution); Law n. 8.429/1992, against administrative misconduct (improbidade administrativa)[100]; and Complementary Law. 101/2001, which deals with liability in fiscal management (lei de responsabilidade fiscal)[101].

6.2. Brazil's Oversight Bodies with a View to Implementing Anticorruption Mechanisms

In order to fulfill the obligations set forth in the ratified international treaties against corruption, Brazil has various oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing, and eradicating corrupt acts[102]. The following administrative bodies are highlighted as examples of some of Brazilian responses regarding opposing corruption and money-laundering within the country.

The Office of the Comptroller General (Controladoria-Geral da União–CGU) is the agency of the Federal Government in charge of assisting the President of the Republic in a range of matters, including corruption. It acts as a central authority, with focus on prevention, auditing, investigation, sanctioning, and ombudsman. It is also responsible for pursing actions to promote transparency, and to perform all anti-corruption functions at the federal level, except asset recovery and mutual legal assistance[103].

On January 24, 2006, through Decree n. 5,683, CGU created a special unit named Corruption Prevention and Strategic Information Secretariat (Secretaria de Prevenção da Corrupção e Informações Estratégicas−SPCI) to centralize corruption intelligence and prevention actions, which before were carried out by different CGU units in a

100 That law sparked controversy as to its applicability in relation to politicians, who are, above all, public officials, but cannot be classified as such, not to be punished by the law of Impropriety. The controversy became even greater with mitigation given by the Supreme Court of Brazil, that through trial Complaint n. 2138 decided that the administrative Improbity Act inapplicable to political agents, they are subjected to the application of Law n. 1.079/1950.

101 This law brought the concern to the setting of the budget and the limitation commitments, and the redefinition of forecasts and priorities became essential requirement to balance public accounts.

102 OAS. Available at: <http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf>. Accessed in February 11, 2013.

103 CGU. Available at: < http://www.cgu.gov.br/>. Accessed in February 11, 2013.

disperse manner[104].

Linked to CGU, another administrative body that deals with corruption is the Council on Public Transparency and Fighting Corruption (Conselho de Transparência Pública e Combate à Corrupção) [105] The main functions of this collegiate body[106] are: (i) suggest and discuss actions to improvement and develop control methods; (ii) increase transparency in public management in general; as well as (iii) come up with strategies to fight corruption and impunity[107].

The Federal Police Department (Departamento de Polícia Federal − DPF) is Brazil's crime squad for investigating crimes against political and social order, or against property, services, and interests of the federation or of its independent agencies and public companies, as well as other offenses that have an impact across state lines or international borders and demand uniform punishment, as established by law[108]. DPF is an agency of the Ministry of Justice, but it has autonomy to investigate crimes over which it has jurisdiction. DPF has also created a special division for investigating crimes of corruption, which is named Federal Police Division for Combating Financial Crimes.

Also subject to the Ministry of Justice under the scope of the National Secretariat of Justice (SNJ), the Department of Asset Recovery and International Cooperation (Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional − DRCI) was created through Decree No. 4991 of February 18, 2004. Its role is asset recovery and mutual legal assistance[109].

The Federal Public Prosecutor Office (Ministério Público Federal−MPF) is part of the prosecution of the Union Prosecutor Office (Ministério Público da União−MPU), which also includes the Labor Public Prosecutor Office (Ministério Público do Trabalho−MPT), and the Military Public Prosecutor Office of the Federal District and Territories (MPDFT). The MPU and state prosecutors form the Brazilian Public Prosecutor Office (MP). Its main role is prosecution

104 CGU. Available at <http://www.cgu.gov.br/english/AreaPrevencaoCorrupcao/OQueE/>. Accessed in February 2, 2013.

105 Created through the Brazilian Decree No.4,923 of December 18, 2003.

106 The collegiate body is chaired by the Minister of State of the CGU and has 20 members, who include representatives of the federal public administration and civil society. (Law 10.683/03, Art. 17, § 2). The specific composition of the Council is defined in Article 3 of Decree 4.923/03. For the current composition, see: <http://www.cgu.gov.br/ConsejoTransparencia/Composicao.asp>

107 CGU. Decree 4.923/03. Available at <http://www.cgu.gov.br/english/ConselhoTransparencia/>. Accessed in February 2, 2013.

108 OAS. http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf

109 ASSET RECOVERY. Available at <http://www.assetrecovery.org/kc/>. Accessed in February 2, 2013.

and international cooperation for matters of corruption. It is for the Public Prosecutor Office to defend the inalienable social and individual rights, the legal system, and the democratic regime.

The Ministry of Foreign Affairs (Ministério das Relações Exteriores−MRE−Itamaraty) is responsible for advising the President of the Republic of Brazil on the formulation and execution of Brazilian foreign policy. In this sense, its focus for fighting corruption is international cooperation[110].

Ruling the capital markets and their participants, such as public companies, financial intermediaries, investors, and others[111], the Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários−CVM) is empowered to discipline, rule, and supervise the activities of all market participants. Its regulatory activities encompass all matters related to the Brazilian securities market, prevention, and investigation for corruption matters[112]. This federal agency is linked to the Ministry of Finance, and was established by the Law No. 6.385 of December 7, 1976.

The Central Bank of Brazil (Banco Central do Brasil−BACEN), created by Law no. 4,595, of December 31, 1964, is an autonomous federal institution, part of the National Financial System (Sistema Financeiro Nacional−SFN). Its mission is to ensure the stability of the currency's purchasing power and a solid and efficient financial system. And as part of the effort against corruption its leading challenge is prevention[113].

Regarding auditing powers, the Brazilian Court of Audit (Tribunal de Contas da União−TCU) is the agency responsible for auditing the accounts of administrators and other persons responsible for federal public funds, assets, and other valuables; as well as the accounts of any person who may cause loss, misapplication, or other irregularities to the public treasury.

TCU has also power to impose penalties, including fines and disqualifications from holding public office or public positions for a specified period of time. Likewise, it can declare the unfitness of contractors who commit wrongdoings in public bidding processes[114]. Such administrative and judicative authority is established, among others articles, in art. 71 of the Brazilian Constitution.

Brazil's financial intelligence unit against corruption is called

110 MRE. Available at < http://www.mre.gov.br>. Accessed in February 2, 2013.

111 CVM's duties and powers were established by both the law that created it (6385/76) and the Corporation Law (6404/76)

112 CVM. Available at <http://www.cvm.gov.br>. Accessed in February 2, 2013.

113 BACEN. Available at < http://www.bacen.gov.br>. Accessed in February 2, 2013.

114 OAS. Available at <http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf> February 3, 2013.

Council for Financial Activities Control (Conselho de Controle de Atividades Financeiras−COAF). COAF is a result of a significant reform in the anti-money laundering law, through the enactment of Complementary Law 105 of 20 January 2001, which extended COAF's access to information subject to banking secrecy, and the Law 10701/03 adding the financing of terrorism as a predicate offence for money laundering, provided additional authority for the COAF to obtain information from reporting parties, and creates a national registry of bank accounts[115].

The administrative authorities in charge of regulating the obligations of Law N. 9.163 of 1998, are, in addition to COAF, the Central Bank of Brazil – BACEN, the Securities and Exchange Commission – CVM, the Superintendency of Private Insurance – SUSEP, and the Secretariat for Complementary Social Security–SPC, designated as the respective supervisory authorities for the following:

Financial Institutions	**BACEN**
Buying and selling of foreign exchange or gold	**BACEN**
Administrators of Consortiums	**BACEN**
Leasing Companies	**BACEN**
The Mercantile Exchange	**COAF**
Credit Cards	**COAF**
Electronic or magnetic transference of funds	**COAF**
Factoring Companies	**COAF**
Lotteries	**COAF**
Real Estate	**COAF**
Bingos	**COAF**

115 COAF. Available at <http://www.coaf.gov.br>. Accessed in February 2, 2013.

Dealers of jewels, precious stones and metals	**COAF**
The Stock Exchange	**CVM**
The Mercantile and Futures Exchange	**CVM**
Insurance, Capitalization and Private pension funds	**SUSEP**
Closed Pension Funds	**SPC**

Regarding circumstances where administrative misconduct is found, or the freezing of assets is recommended, the CGU shall refer them to the Office of the Attorney General of the Union (Advogado-Geral da União−AGU) to take the required steps for the purposes of refunding the state treasury, or even take further mandatory measures according with the law[116]. AGU is the agency responsible for the supervision, and advisory of legal services. Pursuant article 131 of Brazil's Constitution[117], "the Office of the Attorney General of the Union is the institution which, either directly or through a connected body, represents the Union, and out of court, it shall, under the supplemental law, which provides for its organization and operation activities, consult and provide legal advice to the Executive Branch."

Finally, created in 2003, the Expanded scope of action for the National Strategy against Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro− ENCCLA) is a national strategy with exclusively focus on fighting money laundering. Currently, ENCCLA is made up of over 50 agencies or bodies of the Executive, Legislative and Judiciary branches plus the

116 OAS. Available at: <http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf> February 3, 2013.

117 Art. 131 of the Brazil Federal Constitution: "The Office of the Attorney General of the Union is the institution that, either directly or through a subordinated agency, represents the Union judicially and extrajudicially, and it is responsible, under the terms of the supplemental law that contains the provisions on its organization and operation, for legal consultation and advisory services to the executive branch. § 1 - The Office of the Attorney General of the Union is headed by the Attorney General of the Union, who is freely appointed by the President of the Republic chosen from citizens over 35 years of age of notable juridical learning and high standing. § 2 - Admission to the initial levels of the career systems of the institution covered by this article is by public competitive examination and credentials. § 3 - Representation of the Union in the execution of an outstanding tax debt shall be exercised by the Office of the Prosecutor General of the National Treasury, observing the provisions of the law."

Federal Prosecutor's Office, the Brazilian Court of Audit, and members of civil society. ENCCLA is Brazil's response in emphasizing the role of fighting money laundering as part of a criminal policy, putting together all public agents in charge of addressing the topic, and the civil society, in order to jointly fight corruption[118].

7. CONCLUSION

Empirical evidence and legal efforts to fight corruption, both domestically and in the international arena, show that corruption cannot be regarded as a mere nuisance to any country, since it has great influence with regard with attracting foreign and portfolio investments, as well as international investment, besides its potential to undermine society.

The problem of corruption translates into a major obstacle to be tackled seriously by the Brazil's government, at the federal, state, and local levels, and even globally.

Indeed, there is no paradox in the current situation of Brazil in relation to attracting investment despite corruption numbers. The truth is that investment is extremely necessary for economic and social development of the country, especially taking into consideration the major events that the city of Rio de Janeiro will host in the coming years (Confederations Cup Men's Football in 2013, World Cup Men's Football in 2014, Copa America Soccer Male in 2015 and Olympics in 2016), and that Brazil, among other jurisdictions, may be included among the hot spots in the E&P industry. The overall statistics show numbers of growth in the world reserves map that may be translated into a political and strategic importance of Brazil if compared to other prolific areas in the globe that present other challenges for consumer countries.

Accordingly data proves that Brazil could have an even higher rate of foreign investments if it had acted more effectively in fighting corruption.

Notwithstanding, Brazil has already developed a solid legal framework that places the country among one of the most seriously engaged on matters of fighting corruption and money-laundering in the worldwide scenario. Brazil also continues to strengthen its mechanisms to monitor and fight corruption, since the need to attract investments is undeniable.

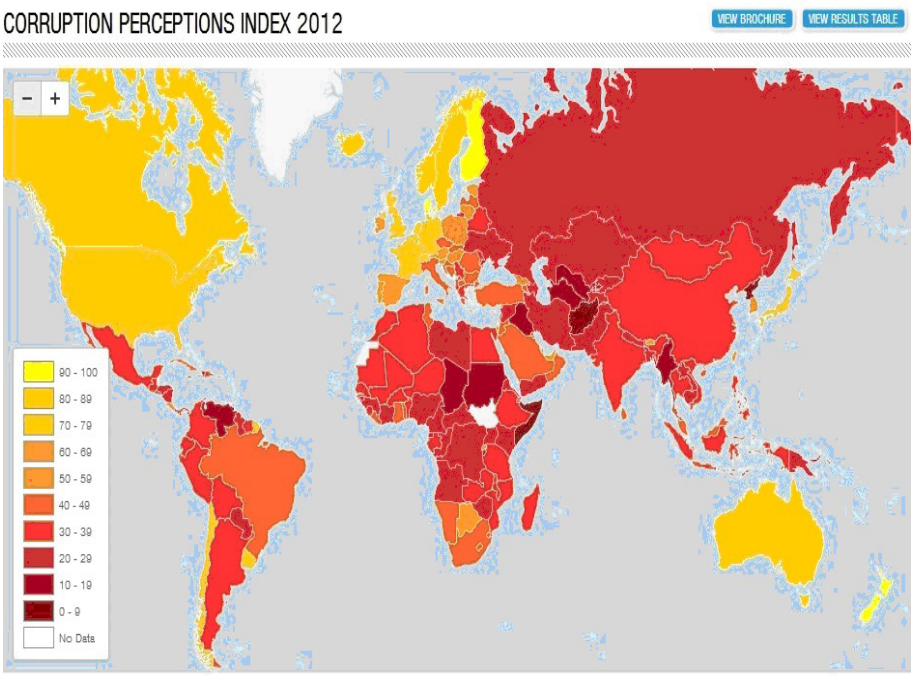
However, in order to enable all development and investment planned for this decade and change the old saying "Brazil is the country of the future" to "Brazil is the country of the present", it is extremely

118 CGU. Available at: <http://www.cgu.gov.br>. Accessed in February 11, 2013.

important that governments, businesses, and citizens, keep moving ahead with anticorruption efforts.

APPENDIX I

Corruption worldmap:



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RECENTDEVELOPMENTSANDCURRENTTRENDS ON BRAZILIAN PRIVATE INTERNATIONAL LAW CONCERNING INTERNATIONAL CONTRACTS

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Abstract: This work aims to present the recent changes and the current trends of Brazilian Private International Law in the area of international contracts with especial focus on the enforcement of Convention on the International Sale of Goods (CISG) in Brazilian legal order. Historically, the recognition of party autonomy in Private International Law has not been uniformily recognized. While since 1996, with the enforcement of the new Arbitration Law, party autonomy has been increasingly accepted in terms of international arbitration, jurisprudence on the choice of law and the choice of court clauses does not show the same progress. In fact, despite of important documents which have already been signed by the government, Brazilian Private International Law of Contracts still dates from 1942. Such contrast with internal material law represents a challenge for the full recognition of Party Autonmy in Brazilian Private International Law.

Keywords: Brazilian Private International Law - CISG - Party Auntonomy - International contracts.

1. INTRODUCTION

While we live in a world where States possess their own legal orders, applicable in principle within their borders, international trade requires that several legal systems coexist simultaneously and communicate with each other. In this context, international contracts function as bridges connecting different national systems. In many occasions, disputes might arise, bringing into question which law will

govern these agreements, the so-called conflicts of laws, the resolution of which is the main subject of Private International Law.

In search for a solution to the legal uncertainty caused by the coexistence of different legal national systems, states have used several codification mechanisms to achieve uniformity and harmony in determining the law applicable to international contracts.

With that goal in mind, several initiatives have been launched internationally, such as the 1980 Convention on the Law Applicable to Contractual Obligations (the Rome Convention). The Convention was later replaced by the Rome I Regulation (EC) 593/2008, which currently governs choice-of-law in the European Union.

In Latin America, by means of the codification efforts of the Organization of American States (OAS), the Inter-American Convention on the Law Applicable to International Contracts (the Mexico Convention) was signed in 1994. In spite of the fact that it has only been ratified by Mexico and Venezuela[1], the Convention constitutes an important development, having gone beyond the Rome Convention which inspired it[2].

Just recently, in November 2012, the Special Commission on Choice of Law in International Contracts of the Hague Conference on Private International Law has approved the Draft Principles on Choice-of-Law in International Contracts and recommended its endorsement by the Council and the preparation of a Commentary[3]. Once definitively approved by the Conference, the principles will constitute important soft law in the field, and may be used by international arbitrators and serve as model for national legislators.

At the same time, national legal systems comprise private international law rules for the solution of conflicts of laws, whenever a case may arise concerning a situation with international ties, involving different legal orders. Thus, whether using national rules or international conventions, the judge of a dispute where an international contract is the main issue shall have the tools to decide which law to apply to a given case.

For purposes of this study, what characterizes a contract as international is the presence of a foreign element that connects it to two or more national legal orders. For example, it may be sufficient that one of the parties be domiciled in a foreign country, or that the contract be

1 The Convention has been signed by Bolivia, Brazil, Mexico, Uruguay and Venezuela. So far, only Mexico and Venezuela have ratified it, according to information available at the website of the Organization: http://www.oas.org/juridico/english/sigs/b-56.html (March, 2013)

2 Friedrich K. Juenger, Contract Choice of Law in the Americas, 45 Am. J. Comp. L. 195, at 204 (1997).

3 Draft and recommendation available at the website of the Hague Conference: http://www.hcch.net/index_en.php?act=text.display&tid=49 (March, 2013).

signed in one country to be performed in another[4].

Amongst the existing rules in the matter of international contracts and applicable law, party autonomy – the freedom of the parties to determine the law applicable to their agreement – has been acknowledged as a universal principle by scholars and legislations[5]. The doctrine provides legal certainty and predictability to the parties and is widely accepted as a means for efficiency[6]. Its emergence "has little to do with a preference for private ordering or other theoretical musings", but with a very practical concern, due to the proliferation of transboundary contracts, and, consequently, the number of potential disputes arising out of them[7]. Furthermore, party autonomy and free choice of law stand on firm economic grounds[8].

In spite of encouraging improvements such as the enactment of the 1996 Arbitration Act and the recent ratification of The United Nations Convention on Contracts for the International Sale of Goods (CISG)[9], Brazilian Law still has not made a definitive and unmistakable move to embrace party autonomy in choice of law.

In recent years, Brazilian legal order has experienced profound transformations. Although the interest of people and especially international groups in the country increased significantly, propelled by the necessity of major infra-structure direct investments, at the same

4 As the rules of conflict vary from country to country, their harmonization is sought through the creation of a system of uniform law conventions.

5 Ole Lando, The EEC Convention on the Law Applicable to Contractual Obligations, 24 Common Market L. Rev. 159 1987, 169. "The parties' right to choose the law which governs an international contract is so widely accepted by the countries of the world that it belongs to the common core of the legal systems. Differences only exist concerning the limits of the freedom of the parties. Some countries seem to allow the parties an almost unrestricted freedom to choose the applicable law. Others limit their freedom either by demanding a local contact with the legal system chosen or by excluding some questions which are covered by mandatory rules or some contracts from being affected by the parties' choice of law."

6 See Dana Stringer, Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way, 44 Colum. J. of Transnat'l L. 959 (2005-2006), 960.

7Mathias Reimann, Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century, 39 Va. J. Int'l L. 571, 589 (1999).

8 Giesela Rühl, Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency, CLPE Research Paper 4/2007 Vol. 03 No. 01 1, 33 (2007). See also Erin A. O'Hara & Larry E. Ribstein, From Politics to Efficiency in Choice of Law, 67 U. Chi. L. Rev. 1151 (2000), for an analytical efficiency approach to the choice-of-law problem.

9 Brazil acceded to the CISG on 03.04.2013 with the deposit of the ratification instrument with the United Nations Secretary General. The Convention will enter into force in its territory on 04.01.2014: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (March, 2013).

time, more local enterprises are "going global", thus establishing a very strategic dual flow of interconnected legal relationships.

This paper will present the Brazilian approach to the determination of the law applicable to international contracts, describing the rules regarding international contracts, and the current stage of acceptance of party autonomy. We will also discuss how the question is treated in comparative law. In conclusion, we present solutions to ascertain the enforcement by the Courts of the choice-of-law clause in an international contract with a connecting factor in Brazil.

2. BRAZILIAN PRIVATE INTERNATIONAL LAW: PARTY AUTONOMY

Brazilian rules of international private law are encompassed in the Law of Introduction to the Brazilian Civil Code, Decree-Law no. 4.657, of 1942, under Articles 7 to 17[10]. Brazilian Private International Law follows the traditional system of conflict of law, comprising indirect rules of a bilateral nature[11].

The rule pertaining to international agreements is set forth by Article 9[12]. The provision reads as follows in its entirety:

> *"Art. 9 - In order to characterize and govern the obligations, the law of the State in which they*

10 In 2010 the mentioned legislation was renamed by the L. 12.376-2010. It is now known as "Lei de Introdução às Normas do Direito Brasileiro" - Law of Introduction to the Norms of Brazilian Law.

11 Conflict rules - of an indirect nature - are those which, instead of directly settling the quaestio juris ("issue of law"), substantially regulating the fact or legal situation, only indicates the legal system where the solution must be sought. Under another perspective there are the bilateral rules of private international law, which answer the question: "Which is the applicable law?", as opposed to the unilateral rules, which answer: "When does the national law apply?"

12 For a selected bibliography on Private International Law and International Contracts in Brazil, see: NADIA DE ARAUJO, CONTRATOS INTERNACIONAIS: AUTONOMIA DA VONTADE, MERCOSUL E CONVENCOES INTERNACIONAIS, (2009); WILSON DE SOUZA CAMPOS BATALHA, TRATADO DE DIREITO INTERNACIONAL PRIVADO, vol. I and II, 2nd. ed., São Paulo, Ed. RT, 1977; AMILCAR CASTRO, DIREITO INTERNACIONAL PRIVADO, 4th. ed. with notes by Osíris Rocha, Rio de Janeiro, Ed. Forense, 1987. MARIA HELENA DINIZ, LEI DE INTRODUÇÃO AO CÓDIGO CIVIL INTERPRETADA, São Paulo, Ed. Saraiva, 1994; JACOB DOLINGER, DIREITO INTERNACIONAL PRIVADO, 4th. ed., Rio de Janeiro, Ed. Renovar, 1996; JOÃO GRANDINO RODAS, DIREITO INTERNACIONAL PRIVADO BRASILEIRO, São Paulo, Ed. RT, 1993, and Elementos de conexão do Direito Internacional Privado Brasileiro, relativamente às obrigações contratuais, in JOÃO GRANDINO RODAS (org.),CONTRATOS INTERNACIONAIS, São Paulo, Ed. RT, 1st ed., 1985,1-36, 2nd ed. Updated, 1995,9-49.

> *are constituted shall apply. § 1. In the event that the obligation shall be performed in Brazil and depending on an essential form, this one shall be observed, being admitted the peculiarities of the foreign law, as to the extrinsic requirements to the act. § 2. The obligation arising from the contract is deemed to be constituted at the place in which the proponent resides."*

From the provision above it is possible to understand that under Brazilian law the rule applicable to international agreements will be primarily, "the law of the State in which they are constituted". However, if the agreement is entered into by correspondence, the law of the proponent will be applicable. In any event, if the obligation is to be performed in Brazil, any essential forms required by Brazilian law shall be observed.

It is important to understand that the Law of Introduction was enacted in 1942 amidst the Second World War, when an unprecedented afflux of immigrants reached Brazilian shores. As a consequence of that, Brazilian law changed substantially and adopted a territorial and nationalist approach to conflict of laws[13].

The previous 1916 Introduction to the Civil Code contained language that allowed the parties to an agreement to choose the law that best suited them[14], and with the elimination of that wording, a controversy was born. Did the legislator intend to forbid contracting

13 Lauro da Gama e Souza Jr, Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: uma leitura constitucional do artigo 9o, da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável, in O DIREITO INTERNACIONAL CONTEMPORANEO. ESTUDOS EM HOMENAGEM AO PROFESSOR JACOB DOLINGER) (Rio de Janeiro, Renovar, 2006) 599, 605. The great number of immigrants forced Brazil to change the conflict of law rule regarding personal status, from the law of the nationality to the law of the domicile. This is regarded as the greatest change embodied in the Law of Introduction to the Civil Code of 1942.

14 Article 13 of the 1916 Introduction to the Civil Code stated that the substance and the effects of the obligations would be governed by the lex loci contractus, except when the parties had agreed otherwise The Introduction indicated a few exceptions to the principle which directed the mandatory application of Brazilian law. Those exceptions regarded, in special, contracts executed abroad, but to be performed in Brazil, obligations entered into by Brazilian citizens in a foreign country, and real property located in Brazilian territory. Original text available at: http://www6.senado.gov.br/legislacao/ListaPublicacoes.action?id=102644&tipoDocumento=LEI&tipoTexto =PUB. Regardless, as pointed out by Paul Griffith Garland, Brazilian courts at the time tended to determine the application of Brazilian law, in spite of the contractual choice, by means of the exceptions to Article 13, in special the one regarding the place of performance. See PAUL GRIFFITH GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW, 51-53 (1959).

parties from choosing the law applicable to their agreements? Brazilian scholars are generally divided in three groups, who answer the question differently.

The first group believes that the exclusion of that wording was intentional, and that party autonomy has consequently been forbidden under Brazilian law, to whom the *lex loci celebrationis* will always be applicable. This rule would be mandatory and thus cannot be derogated by the parties.

The second group defends that party autonomy has not been definitively precluded, but only limited in that parties can still make a valid choice of law, as long as it is allowed under the law of the place where the contract is concluded. Party autonomy would then be *indirect*.

The third group understands that choice of law is a doctrine alive in Brazilian law, since it has not been expressly excluded by the 1942 Law of Introduction. Scholars who share this belief point out that Article 9, § 2o, use the verb "reputa-se", which translates as "is presumed". The verb would represent the same caveat as "unless otherwise agreed by the parties", which was present in the 1916 Introduction. Bearing also in mind the provision of Article 42 of the then-valid Civil Code, which allowed parties to designate their domicile for contractual purposes, those authors affirm that party autonomy has not disappeared from Brazilian law[15].

More recently, Prof. da Gama e Souza Jr. advanced a new argument defending the validity of party autonomy in Brazilian law[16]. Prof. da Gama e Souza Jr. points out that the 1988 Brazilian Constitution has elevated civil liberties to the constitutional status of fundamental rights[17]. Among such rights is the principle of legality, which surpasses the strict boundaries of the criminal law and governs all aspects of civil life, providing that "no one shall be obliged to do or refrain from doing something except by virtue of law"[18].

Therefore, construing Article 9 in accordance with the constitutional provision, in the absence of a rule expressly precluding the contracting parties from choosing the law to govern their agreement, it must be admitted that this freedom subsists[19].

Brazilian courts have never directly faced the issue regarding

15 Jacob Dolinger, in da Gama e Souza Jr, supra note 12, at 608.

16 Id. at 611-614.

17 Id. at 613.

18 Article 5(II), of the 1988 Brazilian Constitution. In regard of the Public Administration, however, the principle reads in the opposite way: the Administration may do exclusively what is expressly allowed by the law, as provided by Article 37 of the Constitution. Full text in Portuguese available at: http://www.planalto.gov.br/ccivil_03/constituicao /constituiçao.htm (March,2013).

19 da Gama e Souza Jr, supra note 12,. at 622-623.

party autonomy, and in the few decisions where it has come up as an incidental question, courts have hesitated to follow a consistent path, tending to favor the application of Brazilian law, either as *lex loci contractus*, or as *lex executionis*[20].

In spite of opinions to the contrary, we believe that the Law of Introduction currently in force has no clear provision authorizing party autonomy as does European Law. The system adopted by the existing statute for the determination of the law applicable to contractual obligations is, in principle, the *lex loci celebrationis*. However, we believe they will be able to indirectly choose the applicable law, choosing the law of the place where the agreement is executed or by making a valid choice under the *lex loci celebrationis*.

It is also relevant to note that party autonomy is fully accepted in arbitration proceedings, pursuant to the Arbitration Act, Law n. 9307 of 1996. Article 2(1) of the Act provides that the parties will be able to freely choose the legal rules which will be applicable in arbitration. The provision was perceived as a sign that Brazil was willing to modernize its legislation, but to this day that has not happen.

There have been significant developments on certain aspects on the Brazilian practice of Private International Law, and such progressive tendencies can be noticed in the judicial recognition and enforcement of international arbitral awards.

The Draft Project on a new Code of Civil Procedure is one of these developments. The Draft´s Article 25 has embodied party autonomy in regard to choice of forum, when expressly provided for in an international contract. This express permission is in line with the Hague Conference Convention on Choice of Court Agreements of 2005, and fully support the party autonomy principle[21].

These developments raised the country awareness around the need for venues of international cooperation in civil and criminal matters. However, as it will be demonstrated properly, Brazilian PIL system still has a lot to catch up with contemporary standards and developments.

Also, the UNITED NATIONS CONVENTION ON

20 Stringer, supra note 6, at 974-976.

21 Art. 25. Não compete à autoridade judiciária brasileira o processamento e o julgamento da ação quando houver cláusula de eleição de foro exclusivo estrangeiro em contrato internacional, arguida pelo réu na contestação. Parágrafo único. Não se aplica o disposto no caput às hipóteses de competência internacional exclusiva previstas neste Capítulo. (Article 25. The Brazilian judicial authority does not have jurisdiction when there is an exclusive clause on choice of a foreign court in an international contract as long as it is presented by defendant in its first appearance. (1) This article is not applicable when the hypothesis is concerned with Brazilian exclusive jurisdiction cases.)

CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) (CISG), which Brazil has recently ratified, recognizes the principle of party autonomy. Article 6 of the Convention provides for the freedom of the parties to "exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions" in their international transactions. In the words of Ole Lando, the CISG is "The achievement that comes the closest to establishing general principles of contract law"[22].

Nonetheless, at least until the Law of Introduction is revised[23], full acceptance of party autonomy is limited to contracts that are submitted to arbitration proceedings. As from April 1, 2014, when the CISG enters into force in Brazil, it will be also accepted in contracts for the international sale of goods.

Internationally, Brazil participated extensively in the negotiations of the Mexico Convention on the Law Applicable to International Contracts, which took place in 1994, under the sponsorship of the OAS.

The Convention shall be applicable to international contracts where parties "have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party". It shall also apply to contracts to which "States or State agencies or entities are party, unless the parties to the contract expressly exclude it". As regards party autonomy, Article 7 of the Convention provides that "The contract shall be governed by the law chosen by the parties", limited by the application of mandatory rules (Article 11) or the public order of the forum (Article 18).

Under the Convention, the choice of law may be express, or "evident from the parties' behavior and from the clauses of the contract, considered as a whole", and it may be modified at any time (Article 8).

The Mexico Convention has been signed by Bolivia, Brazil, Mexico, Uruguay and Venezuela. In spite of that, the Convention has had very limited success, having been adopted so far only by Mexico and Venezuela[24]. For reasons unclear to the authors, until this day Brazil has not send it to the Legislative Power for ratification.

Case law varies widely throughout the country in regard of party autonomy. In some few decisions by the São Paulo and Rio de Janeiro State Courts, choice-of-law provisions were enforced and the principle

22 Ole Lando, Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?, 40 Am. J. Comp. L. 573, 575 (1992).

23 There have been attempts to derogate the Law of Introduction, but none has so far succeeded: Draft Act 4,905, of 1995, which was withdrawn after two years of deliberations, with positive review at the Chamber of Deputies, and Draft Act 269, of 2004, which has been filed without deliberations.

24 Information available at: http://www.oas.org/juridico/english/sigs/b-56.html, as of 11.17.2011.

was accepted. In other decisions, the courts have put the provisions aside and applied Brazilian law instead. One cannot say that there is widespread support for the principle or ascertain a judicial trend favoring party autonomy[25].

However, courts will not usually hesitate to enforce the choice of law clause whenever the parties have agreed to arbitrate their disputes. That is what Prof. da Gama e Souza Jr. refers to as the "Brazilian paradox": it is the means of dispute resolution that will determine whether party autonomy is allowed, not the contractual nature of the relationship[26].

In light of this uncertain background, in order to be able to enforce the choice-of-law provision in an international contract, cautious parties usually prefer to sign their agreement in the country of the chosen law, in spite of the applicable law provision, or do so by correspondence, attracting the rule of Article 9 paragraph 2 of the Law of Introduction.

3. CONCLUSION

It is our view that contractual choice-of-law, as recognized by the international community is not fully supported by existing Brazilian legislation. Although we can perceive a discreet shift in the judicial atmosphere geared towards the principle of party autonomy, only with an update of Brazilian private international law rules, with new ones on party autonomy, it will be possible for parties to enjoy the same certainty as they do when submitting disputes to arbitration.

Parties to international contracts with a connecting factor in Brazil, wishing to choose the law applicable to their agreement, will

25 Recent examples of such decisions are: Acordao n. 1758666, from Tribunal de Justica do Estado de Sao Paulo, April 9, 2008, where the court found that the foreign law would be applicable in principle, but applied instead Brazilian law as lex executionis; Acordao no Agravo de Instrumento n. 70005228440, Tribunal de Justica do Estado do Rio Grande do Sul, April 8, 2003, which upheld the choice-of-law clause because the choice was allowed under the lex loci celebrationis (Uruguayan Law), but stated that Brazilian law does not admit party autonomy; Acordao no Agravo de Instrumento n.1111650, Primeiro Tribunal de Alcada Civel do Estado de Sao Paulo, September 24, 2002, where the court found valid the application of foreign law, in view of an arbitration agreement; Acordao no Agravo de Instrumento n.3726256, Tribunal de Justica do Estado de Sao Paulo, December 1, 2011, which rejected the application of the foreign law chosen by the parties and applied Brazilian law as lex executionis; Acordao na Apelacao n.290653, Tribunal de Justica do Estado de Sao Paulo, November 22, 2011, where the Court upheld the choice of foreign law; Acordao no Agravo de Instrumento n.7839, Tribunal de Justica do Estado do Rio de Janeiro, October 29, 2003, where the Court rejected application to the foreign law and determined the application of Brazilian Law in view of the public interest involved in the dispute.

26 da Gama e Souza Jr, supra note 12, at 609.

have the option to submit their disputes to arbitration, where, as we have seen, party autonomy is the rule.

May the contracting parties choose not to submit disputes to arbitration, they should be cautious to either execute the agreement in the country of the chosen law or in another jurisdiction that allows for party autonomy. If the agreement is perfected between absentees, they should clarify who is the proponent and its domicile, thus attracting the rule under Article 9, paragraph 2, and the applicable law will be the one of that jurisdiction.

The last great reform on Private International Law in Brazil goes all the way back to 1942, when the Introduction Law to the Civil Code (Decree-Law nº 4.657 from September 4th, 1942), partially revoked the Introduction of the 1916 Civil Code, replacing the former criteria of lex patriae to l*ex domicilii* for solving issues regarding legal capacity, family affairs, wills and successions.

In both legislative documents, multi-connected situations are to be solved by very hermetic rules, reproducing standards from 19th century Europe. Regardless the advances verified in the United States and many other European countries (not to mention the development of European Union PIL), and even other Latin-American PIL systems, the harsh reality is that, despite honorable and commendable (but punctual) advances in certain areas, the general rules of Brazilian Private International Law are greatly lagged.

As from April 1st, 2014, when The United Nations Convention on Contracts for the International Sale of Goods (CISG) will enter into force in Brazil, parties to a contract for the international sale of goods, may also exercise their freedom in excluding the application of the Convention or derogating from or vary the effect of any of its provisions.

Therefore, under Brazilian law party autonomy may only be exercised in an indirect way. A provision stipulating the applicable law without these cautionary actions may not be enforceable in Brazilian courts, and at this point case law is not sufficiently strong to reveal a trend favoring party autonomy.

Moreover, Brazil has also signed the Mexico Convention, which provides quite broadly that "The contract shall be governed by the law chosen by the parties" (Article 7). The adoption of the convention could finally settle the issue regarding party autonomy in Brazil, at least within its scope of application, until the Law of Introduction is revised. It would also help overcome the judicial tendency to apply Brazilian law in spite of other connecting factors. Until then, however, parties who wish to choose the law applicable to a contractual agreement must also submit their disputes to arbitration or take the precautionary measures described above.

Instead of promoting such awaited qualitative changes, Brazilian government approved Law nº 12.376 (from December 30th, 2010), with the sole purpose of changing the name of the Decree-Law nº 4.657, which thus became The Introduction Law to the Rules of Brazilian Legal Order. Consequently, the two Bills dealing in Federal Legislative Houses with important and necessary reforms about Private International Law were dropped.

As we have seen, Brazilian Law still does not have a clear rule accepting the freedom of the parties to choose the law applicable to an international contract, thus providing no certainty as to the outcome of questions involving the agreement that may arise in Brazilian courts.

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THE COLLECTIVE ACTIONS HELD HOSTAGE BY THE AUTHORITARISM

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Abstract: The judicial protection of collective interests represents, at the end of the millennium, one of the most impressive conquests of the Brazilian legal system. The transindividual interests which are particular to mass society are full of political relevance and, to that extent, are capable of transforming stratified judicial concepts. The recognition of these interests and the need to protect them have highlighted their political configuration in Brazil. In this way, the theory of public liberty forged a new "generation" of fundamental rights. In the same way, one can note that, at the constitutional level, the concepts of jurisdiction and litigation were renewed, while some fundamental guarantees were reformed. The most notable revolution, however, might have taken place in the procedural sphere, departing from an individual process model toward a social process model In Brazil, the Judiciary power has also taken advantage of class action lawsuits in terms of rationalization and work projection. The social objective of the judicial function was lost in view of the fragmentation and the pulverization of conflicts, always regarded as individual. There is a notable tendency to replace atomized decisions with a molecular treatment of litigation. Nevertheless, the Executive power has revealed itself to be inattentive to the reality of collective action and has tried to reduce its effectiveness, limiting access to courts, compressing the associative moment, and diminishing the role of the Judiciary. In this perspective, many years after the introduction of judicial protection for collective and diffuse interests in Brazil, the balance would have been positive, had the government not adopted an authoritarian line when applying legal treatment to the matter. It is possible to affirm that collective actions are a part of the current legal routine, despite the attacks which they suffer. The Judiciary power is significantly implanted in this context, it is conscious of its new role and of its renewed importance, and by way of its sentences, it was capable of occupying a position of leadership which points toward future challenges. The only note that rings false in this context is the attitude of the government with relation to the use of Provisional Measures to reverse such a situation, attacking collective actions and trying to diminish their efficiency in order to limit the access to Justice, to frustrate the associative moment and to make the Judiciary seem less important. The Legislative power, complacent or

inattentive, has not been able to resist the attacks and to react to the attitudes of the government.

Keywords: Collective actions - Applicability - Panorama - Brazilian law.

1. THE SOCIAL, POLITICAL AND LEGAL SCOPE OF THE JURISDICTIONAL PROTECTION FOR THE TRANSINDIVIDUAL INTERESTS

The jurisdictional protection for the diffuse, collective and homogeneous individual interests represents, at the end of the millennium, one of the most impressive achievements of the Brazilian legal system. The transindividual interests, which are placed halfway between the public and the private interests, are peculiar to the mass society, have resulted from mass conflicts, are full of political relevance, and are capable of transforming stratified legal concepts..

From a social standpoint, they represented the acceptance and the necessity to protect scattered and informal interests, which are turned to collective needs, being, in a sense, related to the quality of life. They are mass interests that admit mass offences and that contrast groups of people, social categories and classes. Among the holders of those interests are the consumers, the environment, the public service users, the investors, the social welfare beneficiaries and all those who are part of a community and share their needs and expectations.

The recognition of those interests and the necessity to protect them highlighted their political configuration. New ways of managing public issues have emerged, and enabled the intermediate groups to strengthen their position. A participative management, as a tool to rationalize the power, inaugurated a new type of decentralization, no longer limited to the state level (as political and administrative decentralization), but extended to the social level, with tasks assigned to the intermediate bodies and to the social formations, which have autonomy and specific functions. It also meant a reorganization of the society towards associations and groups.

Consequently, the theory of the public liberty has forged a new "generation" of fundamental rights. The acceptance of third-generation rights, represented by the solidarity rights arising from social interests, was added to the classical first-generation rights, which consist of the traditional negative liberties prominent in liberal states, and include the corresponding abstention requirement by the government. It was also added to the second-generation rights, of economic and social nature, which include the positive liberties, as well as the corresponding duty of

the state to "dare", "facere" or "praestare". Then, what at first seemed a mere interest turned out to be a true right, which led to the restructuring of the legal concepts so that they could fit the new reality.

At the constitutional level, the meanings of jurisdiction and action were renewed, while fundamental guarantees, such as the adversarial system, were remodeled. It was necessary to revise the classical concept of civil liability, calculated, until that time, on the basis of the harm suffered and, therefore, the concept of civil liability for damages was introduced. Concerning the legal process, some consolidated concepts were revisited, such as the standing, the res judicata, the partially identical demands and the judge's power and the Attorney General's responsibility.

The most outstanding revolution, however, may have happened at the procedural level: from an individualist procedural model to a social model, from abstract to concrete schemes, from static to dynamic ground, the procedural law changed from individual to collective, sometimes getting its inspiration from the class actions in the common law, sometimes creating new techniques, more adherent to the social reality and to the underlying policy.

All the above changed the context of the access to justice, which was simplified by those who have the standing to bring the transindividual interests to court, and who, in turn, replaced the individual litigants, considered economically and organizationally weak, and who simply did not use to bring their claims to court. This way, a new reality to the principle of universal jurisdiction was designed, and thus, became open to new causes and new litigants.

2. A NEW JUDICIAL SYSTEM

In Brazil, the judicial power has also taken advantage of the collective actions in terms of work projection and rationalization. The Court of Appeals' overload and the feeling that the individual decisions were useless were aggravated by the contradictory decisions and the delay of having the lawsuits judged. The social purpose of the jurisdictional function, which is to pacify conflicts and to be fair at the same time, was lost in view of the fragmentation and the pulverization of the conflicts, always looked at as being individual. The substitution of the atomized decisions (as defined by Kazuo Watanabe) for the molecular treatment of the litigations, taking to court all at once conflicts that involve thousands or millions of people, meant to make the judge the main character to lead the mass actions, which are often considered politically and socially relevant due to the fact that they include mass conflicts. Thanks to the collective actions the judicial power abandoned its frequently distant and remote position in order to play the main role

in the big national controversies.

3. THE EXECUTIVE BRANCH ON THE WRONG SIDE OF HISTORY

Despite all the above, the assaults from the executive branch together with a complacent and, at the very least, inattentive legislative power have attacked the collective actions, trying to reduce its effectiveness by limiting the access to the courts, by compressing the associative moment, and by decreasing the role of the judiciary.

Some clear manifestations of those attacks are the Provisional Measure n. 1.570 of March 26, 1997 (enacted as Law number 9.424 of September 10, 1997) and the Provisional Measure number 1.798-1 of February 11, 1999;

At least in part, the government intentions were plainly frustrated. The application of the new rules will depend on the reading of the Constitution. And, once again, the judiciary branch will be in charge of developing an interpretation that may take into account the unity of the legal system as well as the exegesis which may be more consistent with the general principles of law.

Our analysis will focus, then, on those authoritarian interventions of the government.

4. THE RES JUDICATA AND ITS NATIONAL EFFECTS

Prior to the Provisional Measure number 1.570 of March 26, 1997, which was enacted as Law number 9.494 of September 10, 1997 (it will be dealt with again in number 5), the national effects of the *res judicata erga omnes* had some drawbacks in the Court of Appeals, which applied jurisdiction criteria to limit the effects of both the preliminary injunction and of the judgment.

Therefore, we assert that it does not make any sense, for instance, to file in the capital city of each state the lawsuits intended to protect the homogeneous individual interests of the Social Security pensioners and retired to award them the 147% difference they were entitled, under the pretext of the territorial limits concerning the several branches of the federal court system. It is not a problem of jurisdiction: the judge, competent to process and decide the litigation, shall make a decision (preliminary or definite), which is effective *erga omnes* and shall be extensive to all the retired people and pensioners in Brasil. Either the action is a collective one or it is not. Either the *res judicata* is *erga omnes* or it is not. And if the claim is really a collective one there will be a clear relation of pendency among the several lawsuits filed in the various federated states.

That is the reason why we are for the idea that the limitations arising from certain decisions confront the Article 103 of the Consumer Protection Code and despise the orientation provided by the Article 91, II, in which one can read that the action for damages with a national or regional scope shall be filed in the capital city of the state or in the Federal District, but the decision will, of course, be applicable all over the national territory. This rule applies to all the other cases of interests that may refer to groups and categories of people, which are more or less determinable, and located all over the national territory.

Hence, in the case of Conflict of Jurisdiction number 971-DF, judged by the First Section of the Supreme Court (STJ) on February 13, 1990, the reporting Justice Ilmar Galvão properly recognized in his vote the prevention of the 30th Federal Court in Rio de Janeiro from acknowledging and deciding on the collective action that prohibited to blend methanol with alcohol and, then, distribute and sell it as fuel to consumers all over the national territory. The reporting Justice stated:

> *"I carefully considered the possibility of admitting that a decision arising from a monocratic legal system, with the same nature sought in the analyzed actions, may be effective beyond the boundaries of the territory where its jurisdiction is exercised, and I could not find any rule capable of leading to a negative conclusion.*
>
> *The regionalization of the federal courts does not seem to me to be an obstacle to that already mentioned effect and, likewise, it is certain that, for the justice at the state-level, a judge with jurisdiction in a certain state is not prevented from issuing a specific decision that can project its effects over the people who reside in other states.*
>
> *The present case becomes greater because it is about actions to protect the diffuse interests. Therefore, it is not reasonable to expect v.g. that the occasional prohibition of toxic emanations shall be forcefully restricted to just one region, considering that everyone is free to stay there or to come and go even though they reside somewhere else."*

The reporting Justice's vote was followed by those from Justices José de Jesus and Geraldo Sobral; however, Justice Vicente Cernicchiaro's position has prevailed. He understood that the suits

should be processed apart, and the respective decisions should be effective in each court's jurisdiction.

That decision, prior to the Consumer Protection Code, has determined the opinion of many other Courts of Appeals that had once limited the extension of the *res judicata erga omnes* or *ultra partes*, due to the rules governing the courts' jurisdiction.

That attitude had influence on some pleadings, which became restricted to the territory covered by the regionalization rules of the Brazilian Courts of Appeals, in accordance with the referred orientation.

In other cases, however, the plaintiffs continued to plead correctly in more comprehensive terms. They claimed and obtained preliminary injunctions, effective all over the national territory. In many lawsuits the first instance condemnatory decisions did not make any territorial restrictions towards the extent of the *res judicata erga omnes*.

Little by little, the jurisprudence became solid towards the idea that the *res judicata ultra partes* or *erga omnes* could go further than the territorial jurisdiction in order to assume a regional or national dimension.

Just as mere examples, it is worth remembering some decisions made in national terms.

The Regional Federal Court for the Third Region sustained the preliminary injunction of the 17th Court in São Paulo concerning the suspension of bank fees, authorized by the Central Bank, imposed on savings accounts, which were inactive or without registration renewal, effective all over the national territory (Bill of Review nr. 96.03.064677-6, Third Group, reporting Annamaria Pimentel, v.u. October 30, 1996. The report pointed out that the effects of a decision or judgment should not be confused with the share of competence of the court that has made it).

Also, the section of the federal court in the state of Mato Grosso decided, in the first instance, in favor of inactive civil servants all over the country and granted preliminary injunctions in a matter about revenues to recognize the unenforceability of the social contribution taxes and to order the Federal Government not to carry out any debits from active, inactive or without registration renewal savings accounts (lawsuit number 96.003183-5 in the First Court, and lawsuit number 96.0003379-0/7100 in the Third Court, preliminary injunctions on June 21, 1996 and September 20, 1996, respectively. For the latter, the judge argued that the federal judge would have jurisdiction exercised all over the country, which is not close to our line of thinking).

For an issue concerning the financial system about the use of the INPC (National Consumer Price Index), instead of using the TR to adjust the debts, the federal court in Mato Grosso granted preliminary injunctions aiming at the suspension of the TR as an index of monetary

adjustment of all the housing loan contracts and replaced it by the INPC, providing the borrowers with informative statements showing the amount of the debt: lawsuit number 96.2838-9 (First Court, preliminary injunction on September 4, 1996) and lawsuit number 96.0002974-1/7100 (Third Court, preliminary injunction on September 26, 1996). Many banks were sued together with the Federal Government. Both decisions mentioned the concurrent and optional jurisdiction of the Federal District.

Concerning the above matter, the 10th Chamber of the First Special Jurisdiction Appellate Court, in the State of São Paulo, made a similar decision for a collective action filed by IDEC in the state courts (Ac. number 581.942-1). Because of that judgment, Banco Mercantil de São Paulo lodged a complaint with the Supreme Court of Brasil. The reporting Justice Carlos Velloso suspended, by means of a preliminary injunction, the decision that had been made by the State Court of Appeals, using as reference the precedents in which the Supreme Court of Brasil had already granted preliminary injunctions with the same understanding. The injunctions had been granted by the First Court of the federal court in Minas Gerais (claims numbers 559, 564 and 557 – MG) because, according to their understanding, the requirement of the *fumus boni juris* had been met, that is, the collective action, valid nationwide, and based on unconstitutional laws, becomes a declaration of unconstitutionality and encroaches on the jurisdiction of the Supreme Court (claim number 601-8/SP, in DJU May 7, 1996, page 14.584). In the merits, however, several claims were dismissed as the unconstitutionality had been argued *incidenter tantum*, although the decision was effective *erga omnes* [claim 597-SP (reporting Justice Néri da Silveira), claim 600-SP (the same reporting Justice), claim 602-SP (reporting Justice Ilmar Galvão), j. September 3, 1997, in "Informativo" number 82, Brasília, September 1 to 5, 1997)].

Then, it is possible to realize that the reporting Justice Ilmar Galvão's dissenting opinion, above transcribed, has clearly influenced on the jurisprudence of the other Appellate Courts.

5. THE RES JUDICATA EFFECTIVE ALL OVER THE COUNTRY AFTER THE LAW NUMBER 9.424, OF SEPTEMBER 10, 1997

The increasingly acceptance of the *res judicata* with effects all over the country, qualifying the decisions in the collective actions and projecting the effects of the preliminary injunctions, ended up confronting the interests of the Treasury Department, leading the executive branch to include in the Provisional Measure number 1.570 of March 26, 1997 (enacted as the Law 9.494 of September 10, 1997) the rule of the Article 3, which intended to keep the *erga omnes* effect

within the territorial limits of the jurisdiction.

That is what will be analyzed, as follows.

The executive, followed by the legislative branch, was unfortunate twice.

In the first place, the executive branch erred on the side of intention. To restrict the scope of the res judicata in the collective actions means to multiply the number of litigations, which, on the one hand, confronts the philosophy of the collective suits, whose aim is to give a molecular treatment to solve the conflict of interests, instead of atomizing and pulverizing them; on the other hand, it causes the multiplication of lawsuits and the overload of the Courts of Appeals, demanding multiple jurisdictional answers when just one answer would be enough. At this moment, when the Brazilian legal system is seeking a way out even for binding precedents, the least we can say about the executive branch's effort to limit those effects is that it is on the wrong side of history.

Secondly, it erred on the side of incompetence. Unaware of the interaction between the Public Civil Action Act and the Consumer Protection Code and its various provisions, the executive branch considered that it would be enough to modify the Article 16 of the Law number 7.347/85 to solve the problem. It was a clear mistake. In fact, the amendments made to the Article 16 of the Public Civil Action Act are ineffective.

Let us look at the evidence.

It has already been repeatedly mentioned the necessity to read the procedural rules in the Consumer Protection Code together with the rules in the Public Civil Action Act, according to what is established in the Article 90 of the former and the Article 21 of the latter.

This way, the article 16 of the Public Civil Action Act, in accordance with the meaning that was given to it by the Provisional Measure, cannot be interpreted without taking into consideration the Articles 93 and 103 of the Consumer Protection Code.

The Article 16, changed by the Provisional Measure, determines that:

> *"Article 16: A civil judgment shall constitute res judicata erga omnes* ***within the territorial jurisdiction limits of the court that has rendered the judgment****, except if the claim is dismissed due to insufficiency of evidence, in which case any other legitimate claimant may bring another action with the same ground, making use of new evidence." (The italicized words were added)*

However, the article has to be read together with the three items of the Article 103, which has not been amended.

A joint analysis of the above mentioned articles shows that the Article 16 of the Public Civil Action Act just regards the regime of the res judicata for the diffuse interests (at the most, collective), since the permissible prerogative of the non liquet caused by insufficient evidence is restricted to the items I and II of the Article 103, which refer to the above mentioned transindividual interests. As a matter of fact, the rule that governs the Article 16 of the Public Civil Action Act harmonizes perfectly only with the item I, Article 103, because of the expression erga omnes while the item II refers to the res judicata ultra partes. This way, in an overall view, the new rule is exclusively, all in all, in agreement with the hypothesis of the diffuse interests (Article 103, I) and, it has already shown the necessity of an analogical operation so that the Article 103, II (collective interests) may also be understood as modified. In this case the analogy may be applied, as there are no differences towards the regime of the res judicata between the diffuse and collective interests.

However, the regime of the res judicata for the homogeneous individual interests is totally different (Article 103, III) as the legislator used his own system, and this has been shown by a text that is completely distinct from the one of the provision: in one, because the res judicata erga omnes is effective only if the claim is sustained to benefit all the claimants and their descendents, and, in the other, because for this group of interests the legislator did not adopt the inexistence of the res judicata for a claim deemed groundless because of insufficient evidence.

Consequently, because of the amendment introduced to the Article 16 of the Public Civil Action Act, the Article 103, III of the Consumer Protection Code cannot be considered modified, not even by the analogical interpretation, since the situations established in both rules are far from being similar; in fact, they are totally distinct.

By the way, it could not be different. The Law number 7.347, of 1985, just governs the jurisdictional protection for the diffuse and collective interests, as one can infer from the Article 1 (item IV), and also due to the fact that the compensation for damages shall be deposited in a special fund account, created by that law, to be used to finance the restoration of the damaged property (indivisible) (Article 13). The creation of the category of the homogeneous individual interests is typical of the Consumer Protection Code and they are not governed by that law, except for the possibility of using the collective action for their protection, according to the schemes in the Consumer Protection Code (Public Civil Action Act, Article 21).

A first conclusion arises herein: the amendment of the Article 16 of the Law number 7.347/85 applies only to the res judicata in the

actions aimed at protecting the diffuse and collective interests and the modifications can be considered just for the items I and II, Article 103 of the Consumer Protection Code. However, it is not relevant the regime of the res judicata in the collective actions aimed at protecting the homogeneous individual interests, governed exclusively by the item III of the Article 103 in the Consumer Protection Code, which remains unchanged.

And, paradoxically, the jurisprudence was having a strict position towards the effects of the res judicata erga omnes all over the national territory (see number 3 above) exactly in the field of the jurisdictional protection of the homogeneous individual interests, what provoked the reaction from the executive branch.

And there is more. The amendment to the Article 16 of the Public Civil Action Act, introduced by the Provisional Measure, is not only ineffective towards the res judicata in the actions to protect the homogeneous individual interests, and this issue has already been approached, but it is also inoperative towards the diffuse and collective interests. And, this time, the reason is the reference to the territorial jurisdiction.

The territorial jurisdiction for the collective actions is expressly regulated by the Article 93 of the Consumer Protection Code. The express rule of the lex specialis is for the jurisdiction of the state's capital city or the Federal District for the lawsuits in which the scope of the damage or the risk of damage is regional or national.

Therefore, to declare that the res judicata is limited "within the territorial jurisdiction limits of the court that has rendered the judgment" is nothing but the indication that it is necessary to search for the specification of the jurisdiction legal limits, that is, the parameters of the Article 93 of the Consumer Protection Code, which regulates the national and regional territorial jurisdiction for the collective actions.

We shall add the national and regional territorial jurisdiction, both in the field of the state-level courts as well as in the field of the federal courts.

All of what has been explained shall put an end to any doubt concerning the express provision about the territorial jurisdiction, with national or regional scope, in the collective actions to protect the homogeneous individual interests, which constitutes one more argument to show how inoperative the new Article 16 of the Public Civil Action Act is to the goals that the executive branch wanted to reach when the Article 3 of the Provisional Measure was enforced.

How about the diffuse and collective interests? We have already admitted that the amendment to the Article 16 of the Public Civil Action Act, introduced by the Provisional Measure, applies to the items I and II of the Article 103, and only to them. Now, it is a matter of finding out

the range of the expression "within the territorial jurisdiction limits of the court that has rendered the judgment" for the diffuse and collective interests.

In the last analysis, it is necessary to verify if the territorial jurisdiction rule, whether national or regional, in the Article 93 of the Consumer Protection Code, is exclusive to the lawsuits for the protection of the homogeneous individual interests or if it is also intended to the jurisdictional protection of the diffuse and collective interests.

We have already said that our position is steady concerning the fact that, although inserted in the chapter about the "collective actions to protect the homogeneous individual interests", the Article 93 of the Consumer Protection Code governs every collective suit, comprising the actions to protect the diffuse and collective interests. Then, one cannot avoid using here the integrative method, aimed at fulfilling the gaps in the law, either by means of the extensive interpretation (extensive regarding the meaning of the rule) or by means of the analogy (extensive regarding the legislator's intention).

Ubi eadem ratio, ibi eadem juris dispositio. The necessary internal coherence of the legal system requires the elaboration of identical rules, which allow the verification of the identity of ground. If the Article 93 of the Consumer Protection Code were applicable only to the homogeneous individual interests, the result would be the rule of the territorial jurisdiction, with national or regional scope, just for the actions aimed at protecting those referred rights, while for the collective actions aiming at the protection of the diffuse and collective interests the national or regional jurisdiction would be vetoed. The result of this position is clearly absurd, causing it to be rejected by the reason and the common sense in order to preserve the legal system's coherence.

And there is more: the above mentioned provision tried (unsuccessfully) to restrict the jurisdiction, but a reference to the subject-matter can be found nowhere.

Now, the scope of the *res judicata* is determined by the pleading and not by the jurisdiction. The latter is a mere relation of adequacy between the proceedings and the judge and does not exercise any influence over the subject-matter. If the pleading has a wide range (with a national scope), it shall not be limited by the attempts to restrict the jurisdiction.

About the Article 16 in the Public Civil Action Act, we can conclude that:

- It does not apply to the *res judicata* in the collective actions whose aim is the protection for the homogeneous individual rights.
- It applies to the *res judicata* in the actions aimed at protecting

the diffuse and collective interests; however, the amendment introduced to the article by the Provisional Measure is inoperative, since it is the special law itself that will extend the limits of the territorial jurisdiction in the collective actions, with national or regional scope.

- Anyway, what determines the scope of the *res judicata* is the pleading and not the jurisdiction. The latter is a mere relation of adequacy between the proceedings and the judge. If the pleading has a wide range (*erga omnes*), the judge will be competent to decide on the whole subject-matter.
- As a consequence, the new text of the provision is totally ineffective.

Those considerations, reproduced from a previous work[1], are now being presented once again for deep and careful thought and to be considered by all those who are interested in the fortunes and the misfortunes of the collective actions.

6. THE ATTACK AGAINST THE COLLECTIVE ACTION CONTINUES: THE PROVISIONAL MEASURE NUMBER 1.798-1 OF FEBRUARY 11, 1999

Once again the government makes use of the Provisional Measure as a tool to mine all the work developed along the years to attach importance to the associative moment, to facilitate the access to justice and to provide the judiciary branch with modern procedural tools, suitable for the protection of the supraindividual rights or interests. And now the means is the Provisional Measure number 1.798-1 of February 11, 1999, which adds some articles to the unfortunate law number 9.494/97, whose comments were made in the previous topic.

The Article 2, introduced to the above mentioned law, has the following text:

"Article 2-A: A civil decision, issued in a collective action filed by an associative entity to protect its members' interests and rights, shall comprise only those who were substituted, and are, by the time the action was filed, domiciled within the range of the territorial jurisdiction of the court that has rendered the judgment."

We can soon realize that the rule is only applicable to the

1 Ada Pellegrini Grinover, Brazilian Consumer Protection Code, with comments made by the authors of the Bill, several authors, Rio de Janeiro, Forense Universitária, 5th Edition, 1997, pp. 722/725.

collective and homogeneous individual interests, because in the field of the diffuse interests the holders of the standing are, by definition, undetermined and indeterminable, connected by factual circumstances, being impossible to know where they are domiciled. The Article 81, sole paragraph, I, of the Consumer Protection Code and which integrates the Law 7.347/85 is incompatible with the restriction and is immune to the incidence of the new rule.

But, even for the collective and homogeneous individual interests, the rule is ineffective. Once again, the executive branch was inept; all the above mentioned considerations about the change in the Article 16 of the Public Civil Action Act apply to the new provision. It is not a matter of the decision being ineffective, but the pleading. Also, "the range of the territorial jurisdiction of the court that has rendered the judgment" is defined in the Article 93, II, of the Consumer Protection Code, and the court where the decision was issued has national or regional jurisdiction, in accordance with the provisions in the Code.

The sole paragraph in the same Article 2-A, introduced to the Law number 9.494/97 has the following text:

> ***"Sole paragraph: In the collective actions filed against entities of the direct public administration, autarchies and foundations of the Union, States, Federal District and Municipalities, the minutes of the general meeting of the associative entity that has authorized the filing of the action must accompany the petition, together with a list of the associates' names and addresses."***

The restriction, which benefits the government alone, has effects concerning the Article 82, IV, of the Consumer Protection Code that, in the case of collective actions, conveys standing to "the associations legally operating for at least one year and whose institutional goals include the protection for the interests and rights comprised by this Code[2] **are exempt from presenting the general meeting authorization**." (The italicized words were added).

The requirement of the general meeting authorization together with the list of the associates' names and addresses, which represents an obstacle for the associations to access justice and is limited to the claims against the government and its autarchies and foundations, is a clear demonstration of the privilege that does not comply with the principle of the procedural equality that arises from the constitutional principle of isonomy. It is not a prerogative that could be explained

2 Once again, the application of the rules regarding all the collective actions shall be observed, in accordance with what is established in the Article 21 of the Public Civil Action Act.

in view of the complex organization of the state or the para-state governmental agencies, allowing the unequal to be treated unequally. The government's defensive activity will not become easier because of that requirement, whose only goal is to prevent the associations from accessing justice in order to litigate.

Finally, the Article 2-B, introduced to the Law number 9.494/97 as well, refrains the satisfying provisional remedies (*rectius*, to accelerate the protection) in the cases of funds release, inclusion on the payroll, promotions, equalization of positions, salary raise or benefit improvements to the civil agents working for the Union, States, Federal District and Municipalities, including autarchies and foundations. The issue surpasses the scope of the collective actions, and shall be examined together with the other rules that restrict the general rule of the Article 273 of the Code of Civil Procedure. However, it is certain that for this matter, as well as for other topics (v.g. the motion for new trial), the constitutional principle of the isonomy, from which the procedural equality is a reflection, is heavily attacked.

7. CONCLUSIONS

Several years after the introduction of the jurisdictional protection for the diffuse and collective interests in Brasil, going through the evolutionary line that led to the recognition of the homogeneous individual rights, the balance would have been positive if the government had not attacked it in such an authoritarian way. After some arguments and certain advances and retreats that could even be predictable due to the natural difficulty to widely learn about the complexity of the new rules, we can say that the collective actions are a part of the current legal routine, despite the attacks. The remarkable quantity of demands and the adequate jurisdictional response enlightened the new procedural methods and showed the effort of the legitimate claimants (the first among them all is the Attorney General), the wide range of the actions brought to court and the recognition of the social body. We can assert that the collective actions have completely changed the Brazilian civil procedure, nowadays adherent to the social reality and the underlying policy, and to the controversies that constitute its subject-matter, leading it on the way of efficacy and effectiveness. Also, by means of the collective actions, the society has been able to exercise its citizenship rights in a more articulated way.

The judiciary branch is significantly inserted in this context, aware of its new role and its renewed importance, and by means of its judgments was able to occupy a leading position that promisingly points towards the future challenges.

The only dissonant note in this context is the government's

attitude towards the use of Provisional Measures to reverse the situation, attacking the collective actions and trying to diminish its efficacy, to limit the access to justice, to frustrate the associative moment and to cause the judiciary branch to seem less important. The legislative branch, complacent or inattentive, has not been able to resist to the attacks and react to the government's attitudes. The resource may come from the courts. The lawyers and the Attorney General should look for them as a resort, providing the courts with the adequate interpretation of the new rules, so that the jurisdictional response may reflect the main directions for the collective actions as well as the general principles that govern them, which need to be evolutionary.

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THE "SHAKESPEAREAN ROSE" BLOSSOMS DOWN THE EQUATOR: *REFLECTIONS UPON THE IMPACT OF BRAZILIAN SUPREME COURT'S DECISION RECOGNIZING THE CONSTITUTIONALITY OF SAME-SEX CIVIL UNIONS*

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Abstract: In May 5th 2011, Brazilian Supreme Court (Supremo Tribunal Federal) decided unanimously that Brazilian Constitution allows civil unions between two people regardless their gender, thus admitting same-sex partnerships as a legitimate type of family entity entitled to special protection provided by article 226 of current Brazilian Political Charter. However, the repercussions of such decision have yet to be fully realized, particularly because of paragraph 3 of the same article, which explicitly determines that the law shall facilitate the conversion of a civil union into marriage. Hence, the discussion about same-sex civil marriage has regained its momentum in Brazilian legal scenario, whether in legislative or judiciary arenas. This article means to demonstrate how the Brazilian Supreme Court has already created a legal substrate towards isonomic treatment for both different-sex and same-sex civil unions, which would make it quite illogical to admit hierarchical rankings between them.

Keywords: Legal recognition of same-sex civil unions – Same-sex marriage in Brazil – ADI 4.277.

1. INTRODUCTION

In the constitutional history of Brazil, there have been seven political charters prior to the current one[1] promulgated in October

1 Brazil's first Constitution of Brazil dates of 1824 and is the only one of the Imperial age (1822-1889).

5th, 1988. Since the first Republican Constitution of 1891 it has been explicitly established that (indissoluble) marriage was the exclusively legitimate way to start a family (art. 72, paragraph 4), which has been followed by the charters of 1934 (art. 144), 1937 (art. 124), 1946 (art.163), 1967 (art. 167) and 1969 (art.175).

However, as opposed to the provisions mentioned above, the 1988 Constitution determines the State obligation to protect the family entities and its members, thus ending the period in which marriage was recognized as the sole legitimate foundation of family[2]:

> *Article 226. The family, which is the foundation of society, shall enjoy special protection from the state.*
>
> *Paragraph 1. Marriage is civil and the marriage ceremony is free of charge.*
>
> *Paragraph 2. Religious marriage has civil effects, in accordance with the law.*
>
> *Paragraph 3. For purposes of protection by the state, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.*
>
> *Paragraph 4. The community formed by either parent and their descendants is also considered as a family entity.*
>
> *paragraph 5. The rights and the duties of marital society shall be exercised equally by the man and the woman.*
>
> *paragraph 6. Civil marriage may be dissolved by divorce.*
>
> *Paragraph 7. Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific resources for the exercise of this right, any coercion by official or private agencies being forbidden.*

2 Official English version provided by Brazilian House of Deputies (Camara dos Deputados), avaiable at: http://bd.camara.gov.br/bd/handle/bdcamara/1344.

> *Paragraph 8. The state shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family.*

Moreover, article 226 has specifically indicated the family as the institutional basis of Brazilian society, meaning to extend State protection to other sociological arrangements not based on traditional wedlock such as the civil union and the single-parent families, which have both become legitimate basis for family entities, along with marriage.

Nonetheless, there were still other household models that remained invisible to the Brazilian constitutional establishment, such as the same-sex partnerships. Thus, in order to understand the reasons indicated in the Brazilian Supreme Court's decision of May 5th 2011, it is necessary to comprehend the developments of Brazilian infra-constitutional family law.

2. A FEW NOTES ON THE CIVIL UNION UNDER BRAZILIAN LAW

Until recently, following the trend of other countries belonging to the Civil Law tradition, the Brazilian legal standard of family entity –worthy of State protection – was exclusively formalistic and matrimonial centered, relegating to marginality any relationships out of a valid wedlock[3].

In order to strengthen the laicism of the recently inaugurated Republic[4], the Decree 181 of January 24th 1890, regulated the institution of civil marriage, thus establishing its exclusivity as the source of legitimate family, as well as its indissolubility (art.93)[5].

It must be also noted that this Decree has intentionally not recognized legal effects to religious ceremonies which were traditionally the majority of the weddings celebrated in Brazil, especially during the Empire (1822-1889). Consequentially, a great number of couples who have only been united solely by religious authorities were deliberately ignored by legal establishment.

For such reason, couples frequently took part on two different wedding ceremonies (one civil and another religious) in order to obtain

3 BARBOZA, Heloisa Helena. O direito de família brasileiro no final do século XX. In: BARRETO, Vicente (org.) *A nova família: Problemas e perspectivas*. Rio de Janeiro: Renovar,1997, p. 87-112.

4 Proclaimed in November 15th, 1889.

5 RINGROSE, Hyacinthe (editor). *Marriage and divorce laws of the world*. Londres: Draper Company, 1911, p.223-226.

the legal protection, and to fulfill the desire of having religious blessings bestowed upon that union, a situation that would only be remedied years later with Law 1.110 of May 23rd 1950, which specifically regulated the recognition of civil effects to religious marriages including those realized prior of such law (arts. 4 and 5)[6].

Years later, the original wording of the 1916 Civil Code (Law 3.071 of January 1st, 1916) contained several dispositions that imposed serious hindrances to a wider recognition of other kind of family groups besides marriage such as: the legal status of married women, who had their legal capability downgraded, thus needing assistance of their husbands in all legal matters (art. 6, II); the legitimacy of filiation depending on the previous existence of a valid wedlock, which resulted in hierarchical rankings between children of the same parent (arts. 337, 338, etc…), the patriarchal model of decision-making in the family group, electing the father as the "family chief" whose authority should be respected by the wife and their offspring(art. 233), and the indissolubility of the wedlock (art. 315, sole paragraph) .

The 1916 Civil Code also contained several regulations that explicitly repressed any kind of extra-matrimonial relationships as the prohibition of the husband of donating any asset from his personal patrimony to his female love affair, also known as his "accomplice" (art. 1.177) or even designating his concubine as a testamentary heiress (art. 1719, III).

These restrictions were reinforced by the prerogative of the wife to reclaim any asset donated or legated by her husband to the concubine (art. 248, IV), and even barred the recognition of out-of-wedlock offspring if the child was conceived during concubinage (art. 363, I).

However, over the next decades there have been profound changes in Brazilian family law even prior to 1988 Constitution, promoting the evolution of once hermetic standards of family legitimacy such as: the possibility of recognition of out-of-wedlock offspring (Law 883 of October 21st, 1949), the Married Woman Act (Law 4.121 of August 27th, 1962) which restated the ruling of several articles in order to put an end to the legal subordination of the wives towards their husbands, and the implementation of divorce (Law 6.515 of December 26th, 1977).

It must also be noted that in reaction to several cases of outrageous unfairness created by previous legislation, doctrine and jurisprudence of Brazilian Family Law have construed different meanings for the term "concubinage".

An *impure* concubinage consisted of a marital relationship marked by the existence of marriage impediments, which clearly hurt

6 PEREIRA, Rodrigo da Cunha. *Concubinato e União Estável.* 8th edition. São Paulo: Saraiva, 2012, p. 33.).

the moral principles of society. Thus, in such cases, the circumstantial restrictions of concubinage should be fully enforced. In practice, any relationship described in the list of article 183 would be an impure concubinage such as the cases of sexual affairs between ascendants and descendants, brother and sister, the adopter with the adoptee and their respective offspring, etc....

In contrast, despite the lack of a formal wedding ceremony, if the relationship carried no impediment to marriage, it should be considered a *pure* concubinage, also known as common-law marriage, and should not fall into the legal restrictions previously mentioned[7].

Hence, if a married man kept a clandestine amorous relationship with another woman while still cohabiting with his wife, such situation was to be recognized as an impure concubinage, and more specifically, an *adulterine concubinage*.

On the other hand, if a single woman commenced a stable, exclusive and publically known relationship with a widower, this situation was to be classified as pure concubinage (common-law marriage).

The last example could have some effects recognized by the legal order, mostly in terms of property rights, because the former Constitutional Charters have chosen marriage as the only legitimate way for a family. In fact, Brazilian Supreme Court had repeatedly ruled that, although these unions did not belong to Family Law, partners have joined economical efforts to create an informal partnership, but only because there weren't legal impediments for marriage between them[8].

It must be noted that there have always been legal scholars harshly criticizing the indissolubility of marriage under Brazilian law, not only because divorce should be considered a fundamental freedom of the individuals, it also implied in the marginalization of innumerous people, whose relationships were barred from legal recognition and protection because one or both of partners have been married to someone else, even though these people were judicially or de facto separated for a reasonable period of time and had already constituted solid meaningful relationships[9].

Once divorce was allowed in Brazil, authors have also defended

7 NOGUEIRA DA GAMA, Guilherme. *O companheirismo: uma espécie de família*. São Paulo: Revista dos Tribunais, 2001.

8 Supremo Tribunal Federal. Súmula nº 380, May 5th, 1964. In terms of social security, for instance, since 1945 it became possible for a man to designate his female partner as a beneficiary, granted that they both were not married. In 1960, civil partners could only be beneficiaries in the lack of spouses, but in 1973 legislation has been once again altered, granting the right to the partner to be designated even in addition to spouses.

9 DIAS, Adahyl Lourenço. *A concubina e o direito brasileiro*. Rio de Janeiro: Freitas Bastos, 1962, p. 60.

the recognition of civil unions (pure concubinage) when the married partner was legally separated, or didn't cohabit with his or her former spouse for a certain amount of time, cases in which the conjugal society was legally dissolved, ceasing the mutual obligations between husband and wife.

In the 1988 Constitution civil union was promoted to another venue of family entity, which does not compete, but rather coexists in perfect harmony with marriage, and for such reasons it is worth the same kind of legal protection[10].

Attending to the rule of paragraph 3 of article 226 of the 1988 Charter, Law 8.971 of December 29th 1994 effectively granted alimony and property rights to civil partners, which was later complimented by Law 9.278 of May 10th 1996, establishing reciprocal rights and duties between partners along with a property regime, and the regulation of the proceedings to perform its conversion into marriage.

Since its entry into force (on January 11th, 2003) the current Brazilian Civil Code (Law 10.406 of January 10th, 2002) also regulates civil union on article 1723 in the following terms:

> *It is recognized as family entity the stable union between one man and one woman, based on a publically known, stable and lasting relationship whose goal is the constitution of a family.*
>
> *Paragraph 1. The stable union won't be recognized in the presence of the impediments of art. 1521 with the sole exception of number VI, if the married person is judicially or factually separated.*
>
> *Paragraph 2. The cases described on article 1523 do not impede the recognition of the stable union.*

One should note that the literal wording of the new Civil Code, following the parameters of the art. 226 paragraph 3 of the 1988 Constitution, establishes a strong parallelism between the institutions of marriage and civil union, and excludes from the latter, those relationships between people who, according to Brazilian Civil legislation (article 1521 of the current Code) cannot get married to each other.

This was the way chosen by lawmakers to ensure that stable unions wouldn't be used as "second class" marriages by those legally impeded to marry. However, it must be clarified that married people, whose conjugal society has been dissolved by legal or de facto separation

10 OLIVEIRA, José Lamartine Correia de; MUNIZ, Francisco José Ferreira. *Curso de direito de família*. Curitiba: Juruá, 2002, p. 78.

are also allowed to constitute a civil union, which can be registered for the comfort of the partners or even directly recognized by a judge.

As a matter of fact, the most controversial aspect of a civil union comes exactly from the second part of article 226 paragraph 3 of the 1988 Constitution (repeated in article 1726 of the 2002 Civil Code). What would be the exact meaning of the clause through which "*the conversion of a civil union into marriage should be facilitated by law"*? Some believe that it should be interpreted in the sense that the Constitution has imposed hierarchical differences between marriage and civil law.

In any case, it must be considered that both of them are family entities, they must receive equal state protection, and for such reasons legal scholars[11] and jurisprudence still debate over the alleged equivalency between marriage and civil union in areas such as property regime, rights to succession and social assistance benefits[12].

3. LEGAL TREATMENT OF SAME-SEX RELATIONSHIPS IN BRAZIL BEFORE 2011

It must also be noted that even prior to the decision of Supreme Court in 2011, several judicial precedents have recognized certain legal effects to same-sex relationships, especially in property rights[13], succession[14] and social assistance areas[15].

However, doctrinal inputs displayed different trends on the admissibility of family entities based on a stable union by two people of the same gender under Brazilian Political Charter of 1988, varying from total disregard to full recognition.

Those who refused the constitutional admissibility of family status to such unions mainly defended that civil unions could not be recognized in those cases where partners were legally prohibited to get married, according to paragraph 1 of art. 1723 of the Brazilian

11 GAMA, Guilherme Calmon Nogueira da. *Direito Civil: Família.* São Paulo: Atlas, 2008, p. 132-145.

12 STJ, RESP 1117563/SP, leading vote by Judge NANCY ANDRIGHI, ruled on December 17th, 2009, published on April 6th, 2010.

13 GAMA, Guilherme Calmon Nogueira da. *A união civil entre pessoas do mesmo sexo*. Revista Trimestral de Direito Civil, v. 2 (April/June 2000), 2000, p.168-177. See also , DINIZ, Maria Helena. *Curso de Direito Civil Brasileiro: Direito de Família*. São Paulo: Saraiva, 2006, 21 ed., p. 368.

14 In 2003, a decision from Rio Grande do Sul has conferred inheritance rights to the same-sex surviving partner of a man. (TJ/RJ 4ª Câmara Cível, Embargos Infringentes 7000.3967676, Leading vote by: Des. Maria Berenice Dias. Judged in May 9th, 2003)

15 In 2007, the Federal High Court of Second Region has granted mutual social assistance rights to same-sex partners. (TRF 2ª Região, AC 388739, 7ª Turma, Leading vote by: Des. Sérgio Schwaitzer. Judged in September 25th, 2007).).

Civil Code. It must be pointed that gender equality is not listed among the causes of marriage prohibition (art. 1521). Nonetheless, there are scholars supporting the theory in which the institute of marriage only exists and can only be legally performed between one man and one woman[16].

Even among those defending that no prohibition of same-sex civil unions could be inferred from the Constitution, there seemed to be a slight divergence on the matter of the necessity of complimentary legislation to regulate article 223 of the 1988 Charter.

One group of scholars supported immediate and full recognition of same-sex relationships as the family entity of stable union, alleging that art. 223 should not be considered isolated, but rather in the context of the constitutional system, which prohibited any kind of discrimination[17]

Meanwhile, there were those understanding that, albeit no prohibition could be implied from art. 223, same-sex relationships could only be recognized as civil unions through legislative or judicial measures[18].

For such reasons, there was definitely no stability recognized to same-sexual relationships, which meant that protection on the basis of family entities was far from being consensual within Brazilian family law framework:

> *Taking all of these articles together, it appears that the Brazilian Constitution establishes an unclear position on this issue: while it does not explicitly recognize same-sex partnerships as either a family or a marriage as it does for heterosexual relationships, it also does not explicitly forbid their recognition. Moreover, it also includes such strong references to equality and non-discrimination that some might argue it is unconstitutional for the state*

16 GONÇALVES, Carlos Roberto. *Direito Civil Brasileiro: Direito de Família*. São Paulo: Saraiva, 2007, p. 544.

17 DIAS, Maria Berenice. Uniões homoafetivas: uma realidade que o Brasil insiste em não ver. Avaiable at www.mariaberenicedias.com.br. See also, FACHIN, Luiz Edson. Elementos Críticos do Direito de Família. Rio de Janeiro: Renovar, 1999; FONTANELLA, Patrícia. União homossexual no direito brasileiro: enfoque a partir do garantismo jurídico. Florianópolis: OAB/SC Editora, 2006; FUGIE, Érika Harumi. *A União homossexual e a Constituição Federal*: inconstitucionalidade do art. 226, §3º da CF?. Revista Brasileira de Direito de Família nº 15, mar./may, 2002.

18 MORAES, Maria Celina Bodin de. A união entre pessoas do mesmo sexo: uma análise sob a perspectiva civil-constitucional. *Revista Trimestral de Direito Civil.* v.1, (january/march 2000), 2000, p. 109-112. See also GAMA, Guilherme Calmon Nogueira da. *Direito Civil: Família*. São Paulo: Atlas, 2008, p. 155-162.

> *to treat same-sex couples differently. Either way, supporters and opponents of same-sex partnership recognition both have strong constitutional arguments supporting their positions (...) The new Brazilian Civil Code is very progressive in that it grants several rights formerly reserved only to married couples to those who can prove to the state that they are living in a "stable union" with another person. As a result, opposite couples need no longer get married to enjoy many of the benefits that come along with marriage. There is a large debate over whether same-sex couples can declare themselves as a stable union and receive the same rights and privileges. (...) Like the constitution, both of these articles discuss unions and marriage with allusions to one man and woman, but it does not say this is the only possible configuration, nor does it specifically exclude same-sex couples. Because this exclusionary statement is missing in all of these places, it is possible to make the argument that the constitutional principles of equality articulated in Articles 3 and 5 might take precedence. Either way, there is a large gap in federal law on this issue*[19]

In such context of uncertainty, two original suits (ADPF 178 and ADPF 132) had been presented to the Supreme Court and were received by the Court as a single one, in which it should be addressed the admissibility of same-sex civil unions under article 223 of the 1988 Constitution as well as the correct interpretation of article 1723 of the Civil Code.

4. THE DECISION ON ADI 4.277

On May 5th, 2011, the Supreme Court of Brazil – Supremo Tribunal Federal – rendered its unanimous decision on the matter of the constitutional admissibility of the recognition of same-sex partnerships as the family entity of civil (or stable) unions[20].

The leading vote, conducted by Justice Carlos Ayres Britto has considered that, despite the wording of article 226, paragraph 3 of the

19 SCHULENBERG, Shawn. *Policy stability without policy: the battle over same-sex partnership recognition in Brazil,* p.7-9. http://ssrn.com/abstract=1451907.

20 STF, ADI 4277. Leading vote by Justice Carlos AYRES BRITTO (p. 625-656), Full Court, judged in May 5th, 2011, published in October 14th, 2011. Full text in Portuguese available at www.stf.jus.br/portal/jurisprudencia

Brazilian Constitution (describing civil union between one man and one woman), its ruling should be considered with regards of fundamental principles such as human dignity (article 1, III), equality in law (article 5, I) and the prohibition of any kind of discrimination on the access of rights (article 5, VIII).

According to the leading opinion, as the basis of Brazilian society, the terms family and family entity cannot be dissociated, and their legal meaning has been opened to several institutions other than marriage, and it should be noticed that such entities are not solely the ones described in the paragraphs of article 226.

Hence, in order to give full effect to the constitutional principles of equality before the law, and the dignity of the individuals, same-sex relationships have to be immediately recognized as stable unions if the other elements (mutual commitment, public acknowledgement and *affectio maritalis*) are fulfilled.

The leading vote of Supreme Court has ruled that the interpretation of article 1723 of the Civil Code which best attends the principles of the current Brazilian Constitution is the one allowing the recognition and registration of same-sex partnerships as civil unions, worthy of the exact same legal protection under Brazilian legal order[21].

Five other Justices of the Brazilian Supreme Court have joined the leading vote, which construed the major opinion under which civil unions between two partners of the same gender cannot be legally discriminated from those formed by one man and one woman.

Justice Fux fully agreed with the vote of Justice Ayres Britto, and also highlighted in his own vote that for decades the rule of law has followed straight standards (heteronormativity) which kept homosexuality in marginality for far too long and should no longer remain invisible to the legal establishment[22].

Justice Carmen Lucia's vote emphasized that same-sex partnerships cannot be treated as second class unions by the legal order, which would violate the most fundamental principles of the Brazilian juridical system[23].

According to Justice Joaquim Barbosa's vote although there have been same-sex partnerships in Brazil during previous systems, the current Constitution invited all individuals to join civil and fundamental rights. Following Aaron Barak's teachings, Justice Barbosa understands that it is time to bind the gap between law and society with effective means to promote full enjoyment of legal protection for same-sex civil unions[24].

21 STF, ADI 4.277, October 14th, 2011. See Justice Ayres Britto's vote especially at page 656.

22 STF, ADI 4.277, October 14th, 2011. See Justice Fux' vote at page 690-692.

23 STF, ADI 4.277, October 14th, 2011. See Justice Carmen Lucia's vote at page 703-704.

24 STF, ADI 4.277, October 14th, 2011. See Justice Barbosa's vote at page 726-728.

Justice Marco Aurélio Mello's vote establishes the necessity of protection of homosexuals from discrimination along the lines of human dignity and equality before the Law, and he defends that a literal interpretation of article 1723 does not attend such Constitutional purposes. Hence, those stable, committed, publically known same-sex partnerships are to be fully recognized as civil unions for all legal purposes[25].

In fact, Justice Celso de Mello emphatically invoked the Principles of Yogyakarta in his vote to enforce the obligation of a democratic State to provide for non-discriminatory access to the right of founding and enjoying family and familiar relationships, and restated that it is only through judicial proactivity that the legal protection from minorities is achievable[26].

However, Justices Cesar Peluzzo, Gilmar Mendes and Ricardo Lewandowsky have dissented of the leading vote on the matter of full equality of civil unions between men and women and those between same-sex partners.

According to Justice Mendes, a same-sex civil union is another kind of family entity, which can be immediately recognized and protected, but not with basis on article 226 (3) of the Constitution (neither article 1723 of Civil Code). He establishes that full extension of different-sex civil union to same-sex civil unions should be properly enforced only by legislative measures[27].

Justice Lewandowsky considered that although constitutional provision for civil unions between one man and one woman does not eliminate the possibility of recognizing same-sex stable unions – which derives from principles such as protection of human dignity, the prohibition of any ground of legal discrimination and the obligation for protection of family entity – the rules on different-sex civil unions are not immediately applicable to same-sex partnerships[28].

Finally, Justice Peluzzo, who functioned as Chief Justice at the time of the judgment, followed the same arguments, admitting that same-sex partnerships could be recognized and registered as civil unions with means to legal protection, but not automatically with the same effects already established for different-sex civil unions[29].

As seen above, dissenting opinions agreed that the rules

25 STF, ADI 4.277, October 14th, 2011. See Justice Marco Aurélio Mello's vote at page 820-822.

26 STF, ADI 4.277, October 14th, 2011. See Justice Celso de Mello's vote and especially at page 866-872.

27 STF, ADI 4.277, October 14th, 2011. See Justice Mendes' vote especially pages 763 to 765.

28 STF, ADI 4.277, October 14th, 2011. See Justice Lewandowski's vote especially pages 713-714.

29 STF, ADI 4.277, October 14th, 2011. See (Chief) Justice Peluzzo's vote especially page 874.

pertinent to different sex civil unions cannot be automatically invoked without necessary legal instruments determining such equalization. According to such minority, same-sex civil unions are not yet possible to be converted in marriage upon initiative of the partners such as stated in the case of different-sex couples, according to the second part of article 226, paragraph 3.

5. DIFFERENT INTERPRETATIONS AND REPERCUSSIONS

As a matter of fact, the decision of Brazilian Supreme Court has been unanimous about the immediate admissibility of same-sex civil unions according to Brazilian Constitutional Law. However, the afore mentioned dissention about the applicability of the second part of article 226, paragraph 3 of the Constitution to same-sex stable unions has also opened a new chapter on the debate of same-sex civil marriage under Brazilian law.

Firstly, it must also be noted that article 22, I of Brazilian Constitution determines that legislation about substantial and procedural civil law is exclusively federal. However, given the current procedural rules, judges and courts of Member States hold the competence to decide on family matters, including the issuing of marriage licenses and the registration of civil unions.

Thus, a few days after the public announcement of the decision on ADI 4.277, the State Court of Justice of Rio de Janeiro has promoted a public collective ceremony to join hundreds of same-sex couples in civil unions[30]. On the other hand, on June 27th, 2011, a state judge of São Paulo ruled in favor of the conversion of an existing civil union between two men in marriage[31].

Nonetheless, a state judge from Rio Grande do Sul has denied the issuing of a marriage license for two women, under the argument that decision of the Supreme Court did not establish same-sex civil marriage in Brazilian legal system, a decision which has been confirmed by the Court of Appeals on that state, but the High Court of Justice (Superior Tribunal de Justiça) – which is a federal court responsible for harmonization of the enforcement of federal legislation within the member states – has reverted the ruling by majority, considering that upon ADI 4.277, the interpretation of the Civil Code which best suited the Constitution could not exclude the possibility of same-sex marriages in Brazilian system without legislative determination[32].

30 http://veja.abril.com.br/noticia/brasil/casamento-gay-reune-600-pessoas-no-rio.

31http://noticias.uol.com.br/cotidiano/2011/06/28/primeiro-casamento-civil-gay-do-brasil-acontece-hoje-em-jacarei-sp.jhtm. Acesso em 18/01/2012.

32 STJ, Recurso Especial nº 1.187.738/RS, judged on October 25th, 2011. Avaiable at www.stj.jus.br

The admissibility of same-sex marriage in Brazil, through conversion of preexisting civil unions or directly (through the issuing of licenses to same-sex couples) has once again risen in the juridical and political arena, especially because the different scenarios verified in member states throughout Brazilian territory.

The Judiciary Power of Alagoas was the first to address the matter, issuing a regulation which allowed same-sex couples to obtain marriage licenses, although the proceedings in those cases should necessarily be confirmed by a judge. In comparison, when dealing with different-sex couples, such confirmation is only necessary if any objection has been made by Public Prosecutor or a third party[33].

Meanwhile, some other member-states have enacted their own provisions about the same matter, but decided to take a further step towards full equality. Recent reforms on the states of Sergipe[34], Espírito Santo[35], Bahia[36], Distrito Federal[37], Piauí[38], São Paulo[39], Ceará[40], Paraná[41], Mato Grosso do Sul[42] and Rio de Janeiro[43] have not only admitted the conversion of preexisting same-sex civil unions into marriages, but also determined that same-sex couples can be granted marriage licenses, provided they don't fall under the cases of legal impediments (articles 1.521 and 1523 of the Civil Code).

Despite such recent advances, the majority of Brazilian member-states still haven't adopted uniform rules on this matter. In fact, even after the decision of the High Court of Justice which allowed the issuing of marriage licenses for same-sex couples, one state judge of Rio de Janeiro has ruled against the conversion of a preexisting civil union into marriage because the partners had the same gender.

According to this magistrate, there would be two different systems of civil unions in Brazilian law: one for different-sex couples

33 http://www.tjal.jus.br/corregedoria/provimentos/fdecf43ea5a3804e37b479be1b6a01e5.pdf.

34 Regulation nº 06/2012, articles 1st. (registration of same-sex civil unions and its conversion into marriage) and 3rd(marriage license proceedings for same-sex couples). http://www.tjse.jus.br/corregedoria/documentos/publicacoes/provimentos/2012/provimento-062012.pdf.

35 http://www.cgj.es.gov.br/arquivos/normasinternas/oficioscirculares/2012/Oficio_Circular_59-2012.pdf.

36 Regulation CGJ/CCI nº 12/2012. Avaiable at http://www5.tjba.jus.br/corregedoria/images/pdf/provimento_conjunto_12_2012.pdf

37 Updated on February, 19th, 2013.

38 Regulation 24/2012 from Corregedoria Geral de Justiça do Estado do Piauí, published on December 14th, 2012. Avaiable at http://www.tjpi.jus.br/corregedoria/uploads/atos/448.pdf.

39 Regulation CGJ Article 88. "The rules of this section shall be applied to the issuing of marriage license or the conversion into marriage of same-sex couples."

40 Regulation CGJ nº 02/2013.

41 Resolution 2/2013, March 26th, 2013.

42 Regulation 80/2013, April 2nd, 2013.

43 Regulation CGJ 25/2013, April 18th, 2013.

(which is convertible into marriage), and another for same-sex couples (which is NOT convertible into marriage)[44].

However, on April 18th 2013, the Court of Justice of Rio de Janeiro enforced a new system of notarial service rules for the issuing of marriage licenses, through which same-sex couples can be directly authorized for marriage, once the judge confirms that such individuals do not fall under legal impediments. This new provision could be interpreted towards the end of controversy over the conversion of same-sex civil unions into marriage on that Member State of Brazil.

Notwithstanding with more conservative orientations that want to legally prevent same-sex civil marriages, there are still important legal activists and scholars defending the possibility of marriage for same-sex couples like the Council of Federal Judges. This entity has approved on its 5th Civil Law Journey (2011) the Statement # 526, consolidating the interpretation of article 1.726 of the Civil Code which allows the conversion of same-sex civil unions into marriages, as long as they meet the legal requirements to be granted marriage licenses[45].

On May 14th, 2013, Chief Justice Joaquim Barbosa, who also holds the constitutional role of President of the National Council of Justice (*Conselho Nacional de Justiça*) adopted Regulation nº 175 which thoroughly recognizes the right to civil marriage to same-sex couples by prohibiting competent authorities to refuse the issuing of marriage licenses neither the conversion of preexisting civil unions into marriage[46].

Chief Justice Barbosa fundaments such Regulation on the grounds of the decision of Supreme Court on ADI 4.277, as well as the decision of the High Court of Justice (STJ) on RESP 1183378/RS (which admitted the issuing of marriage license to same-sex couples) and the attribution of National Council of Justice which functions as an organ with to regulate administrative and financial matters of the Judiciary Branch, according to Article 103- B, paragraph 4 of the current Constitution[47].

44http://veja.abril.com.br/noticia/brasil/juiz-do-rio-nega-a-casal-gay-a-conversao-da-uniao-em-casamento-civil.

45 Statement CJF # 526 "Art. 1.726: The conversion of a same-sex civil union into marriage is possible, provided the requirements for the issuing of marriage license"

46http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/resolucoespresidencia/24675-resolucao-n-175-de-14-de-maio-de-2013

47 It is incumbent upon the council to control the administrative and financial operation of the Judicial Branch and the proper discharge of official duties by judges, and it shall, in addition to other duties that the Statute of the Judicature may confer upon it: I – ensure that the Judicial branch is autonomous and that the statute of the Judicature is complied with, and it may issue regulatory acts within its jurisdiction, or recommend measures; II – ensure that article 37 is complied with, and examine, ex-officio or upon request, the legality of administrative acts

On May 21st, the Social Christian Party (*Partido Social Cristão*) has filed for an injunction (*Mandado de Segurança*) to suspend the effects of Regulation nº 175, stating that such prohibition extrapolates the constitutional competence of CNJ, bypassing the necessary legislative process and for such reasons it should be considered unconstitutional.

However, on May 28th, Justice Luiz Fux has denied the requested order and dismissed the case, on the grounds that not only has the petitioner clearly not chosen the proper way to address its claim, the Supreme Court has already recognized regulatory attribution of CNJ, which is not the same of usurping the competence of Legislative Branch[48].

Other legal activism groups militate in favor of profound implications of the Supreme Court's decision in Brazilian legal order, and for such reason it would be actually necessary to address not just the idea of civil marriage for same-sex couples, but most important is to guarantee that all kinds of legal discrimination on the grounds of sexual orientation are eliminated.

In fact, the Brazilian Bar Association (Ordem dos Advogados do Brazil) has developed the *"Foreproject of The Brazilian Sexual*

carried out by members or bodies of the Judicial Branch, and it may revoke or review them, or stipulate a deadline for the adoption of the necessary measures to achieve due execution of the law, without prejudice to the powers of the Federal Audit Court; Republic of Brazil III – receive and examine complaints against members or bodies of the Judicial Branch, including against its ancillary services, clerical offices, and bodies in charge of notary and registration services which operate by virtue of Government delegation or have been made official, without prejudice to the courts' disciplinary competence and their power to correct administrative acts, and it may order that pending disciplinary proceedings be forwarded to the national council of Justice, determine the removal, placement on paid availability, or retirement with compensation or pension in proportion to the length of service, and enforce other administrative sanctions, full defense being ensured; IV – present a formal charge to the public prosecution, in the case of crime against public administration or abuse of authority; V – review, ex-officio or upon request, disciplinary proceedings against judges and members of courts tried in the preceding twelve months; VI – prepare a twice-a-year statistical report on proceedings and judgements rendered per unit of the Federation in the various bodies of the Judicial Branch; VII– prepare a yearly report, including the measures it deems necessary, on the state of the Judicial Branch in the Country and on the Council's activities, which report must be an integral part of a message to be forwarded by the chief Justice of the Supreme Federal Court to the national congress upon the opening of the legislative session.

48 "[...] Ex positis , indefiro a inicial, extinguindo o processo sem resolução de mérito, haja vista inadequação da via eleita. Ad argumentandum tantum , não fosse a preliminar ora acolhida, também não vislumbro qualquer ofensa a direito líquido e certo dos membros ou filiados do Impetrante, ante o reconhecimento do poder normativo do Conselho Nacional de Justiça, nos autos da ADC nº 12. Julgo predicado o pedido de ingresso no feito, na qualidade de amici curiae , formulado pelo Partido Socialismo e Liberdade (PSOL) e pela Associação dos Registradores de Pessoas Naturais do Estado do Rio de Janeiro (ARPEN/RJ)." STF, Mandado de Segurança nº 32077. Judged on May 28th, 2013, decision of Justice Luiz Fux. Avaiable at www.stf.jus.br

Diversity Act", a highly detailed bill which investigates several areas of Brazilian law (such as civil, criminal, employment, administrative, social assistance areas) proposing punctual changes that will enforce full equality before law to all individuals, regardless their sexual orientation, including a proposal for Constitution Amendment to introduce gender neutrality rules for marriages and civil unions[49].

6. THE SUPREME COURT AND THE SHAKESPEAREAN ROSE

In the second scene of the Second Act of William Shakespeare's most famous tragedy, Juliet challenges her beloved Romeo to ponder about the meaning of customs and traditions by asking *"What's in a name? That which we call a rose by any other name would smell as sweet."*[50]

The young Capulet damsel's quick-witted question invited her lover to realize that, ultimately, the meaning of names is irrelevant, they should just be together. However, names can be essentially important to the Law, since the legal treatment of a certain situation many times depends on its juridical designation.

When Brazilian Supreme Court was summoned to decide on the matter of the Constitutional admissibility of same-sex civil unions, the relevance of names was indeed extensively debated. Terms like "family", "family entity", "man" and "woman" had their true meanings considered by Justices.

In the end, the Supreme Court was unanimous about certain aspects: families and family entities mean the same in terms of State protection; the principles of human dignity and the equality before Law indicated that, albeit the literality of article 226 paragraph 3 of the 1988 Constitution (and article 1723 of the Civil Code), same-sex couples should be recognized as civil partners if they met the other requirements for such.

However, Justices did not reach consensus about the implications of this necessary equalization.

Although the majority has ruled in favor of extending the exact same rights and duties of different-sex civil unions to couples of the same gender, some of them have stopped short of the idea of recognizing such trait, especially because of the potential marriage conversion

49 The Foreproject of Sexual Diversity Act was developed by OAB's Special Committee on Sexual Diversity, created in April 15th 2011, and composed by Maria Berenice Dias (President), Adriana Galvão Moura Abílio, Jorge Marcos Freitas, Marcos Vinícius Torres Pereira and Paulo Tavares Mariante. Special Consultants for this Committee are Luís Roberto Barroso, Daniel Sarmento and Teresa Rodrigues Vieira. English and Spanish versions of the document can be found at http://www.direitohomoafetivo.com.br/ver-noticia.php?noticia=246#t

50 SHAKESPEARE, William. *Romeo and Juliet.* Act II, Scene II (Juliet).

clause of those civil unions between one man and one woman, which could indirectly establish gender neutral rules for marriage in Brazilian law.

One might consider that one rose would still smell like a rose, even if we changed its name, following the Bard's quote to regard this decision as a great step towards the legal recognition of homosexual relationships in Brazilian system.

However, although the importance of such fact cannot be denied, in legal terms, the Shakespearean Rose could actually have different smells in Brazil, depending on the name we chose to call it, especially because even in terms of straight couples, the full equalization between marriages and civil unions is yet to be achieved.

The decision on ADI 4.277 held several important arguments in favor of full extension of civil unions' rights and duties to same-sex couples: human dignity, equality before law, right to personal expression, right to a family life regardless sexual orientation, etc...

If different rules were to be established solely for different-sex or same-sex civil unions, it would essentially break the equality clause that has been decided by the majority on Supreme Court's decision. Furthermore, such decision would actually establish hierarchical degrees in the access of rights, on the grounds of sexual orientation, something that has been unanimously rejected by the Justices.

In other terms, although this decision of Brazilian Supreme Court's must be regarded as a milestone in terms of recognition of rights of same-sex couples, the battle for civil rights of homosexual individuals is not over.

In fact, it might be just the beginning, especially because of certain issues that go far beyond the problematic of same-sex marriages (direct or converted), and need to be addressed by ordinary legislation in order to enforce the principles already recognized in this precedent.

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CROSS-BORDER CONSUMPTION AND BRAZILIAN LAW

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Abstract: The purchase of a product or service by a consumer directly abroad and the remote consumption of goods are the two main ways in which transnational consumption occurs. This new contractual dynamic – a direct result of the development of transport and communication facilities - has consequences not only for consumer protection but also for trade law. It demands from doctrine, courts and legislators an effort to solve problems arising therefrom. Important lessons can be learned from the application of economic theory to law among the difficulties to fit private international law to constitutional principles. New paradigms proposed by the courts in recent years brought great expectations in the national legal system to the evolution of consumer protection concerning international trade. Theoretical developments are now necessary to elaborate regulatory proposals under trademark and corporate law - with particular attention to financial institutions - so as to grant greater protection to the vulnerable consumer assuring security and predictability to the system, which are essential to the correct operation of the market.

Keywords: Cross-border consumption - law and economics - private international law - trade law.

INTRODUCTION

The technological development of communication and transport, the end of trade barriers and the new mechanisms of payment are just some factors involved in the emergence of cross-border consumption. The purchase of a product or service directly abroad by a final purchaser and international trade are the two main forms in which this kind of contract can be identified.

Not all social changes and developments can be predicted by

legislators at the moment they elaborate the norms, but all those future situations require legal solutions to disputes that may arise. With respect to transnational consumption, the doubts generated by legal gaps result in consequences not only in the context of consumer protection but also in several other fields related to business law. Those consequences demand, first from the courts and then from the legislators, a system of law able to solve disputes and to bring greater certainty and predictability to international trade.

Having the institutional security guaranteed by the stability of legal rules as a parameter, we propose an investigation about the answers given by law to the situations involved with cross-border consumption and a critical and proactive analysis of the preliminary solutions presented by the doctrine and the courts.

The research starts with the approach of law and economics presented in the first part of this work which also brings a brief overview of transnational consumption today.

In the second part, a report of how cross-border consumption is traditionally treated by doctrine and jurisprudence is presented also to demonstrate the difficulties to harmonize private international law with the principles of the Brazilian 1988 Constitution. The same section describes the paradigm proposed by the Recurso Especial no. 63.981/SP and the expectations arising from the evolution of consumer protection in Brazil.

The article's final part analyzes the omissions of the mentioned decision and tries to understand the theoretical developments needed and to elaborate some regulatory proposals under trademark and corporate law, with a special attention to the peculiarities of financial institutions. The present study is an attempt -from the perspective of law and economics- to identify the legal limits for the protection of transnational consumers verifying the current treatment given by the Brazilian legal system to the issue.

1. CROSS-BORDER CONSUMPTION AND THE COSTS OF LAW

Consumer law has its origin as specific legal branch -such as the rules governing labor relations- on trade law, this historically autonomous and specialized system of law which regulates the economic activities organized for profit[1].

1 FORGIONI, Paula A. *A evolução do direito comercial brasileiro*: da mercancia ao mercado. São Paulo: RT, 2009. pp. 135-136. In the beginning of the XX century labor relations were regulated in Brazil as service by the Civil Code of 1916. Ibid. pp. 151-153.VASCONCELOS, Raphael Cavalho. A liberação do setor de Telecomunicações como opção política de regulação econômica. *Ética e Filosofia Política*, v. jur., p. 01-17, 2008. p. 02. Reference to the functional

The autonomy of consumer law allowed the emergence of specific rules and principles to be applied to relations between suppliers and final purchasers of goods and services. This independent system of law experienced during the twentieth century the direct influence of the recognition of fundamental rights[2]. In fact, trade couldn't remain isolated and was gradually permeated by the so-called human rights, which were celebrated both by jusnaturalistic doctrine as by the positivist protective postwar codes as axioms imposed to law as a whole[3].

Specifically with respect to Brazilian law, the incorporation of solidarity as a principle in the 1988 constitution had a direct impact on consumer relations, which were suddenly treated as a constitutional matter and inserted among the so-called fundamental rights[4].

Alongside the new paradigms established by law, new technologies and social behaviors imposed themselves to human relations and demand today solutions to the new problems that have arisen. Technological development has shortened geographical distances and transnational exchange of goods is not anymore exclusively trade between suppliers as long as consumers are also able to easily order products directly abroad.

In this context, most synallagmatic contracts between sellers and consumers present nowadays difficulties of territorial allocation and therefore problems to be bound to a specific national legal system. Consumption, as well as what happened once between traders, turned

concept of firm from Asquini reflected by article 966 of the 2002 Brazilian Civil Code which regulates the subjective concept. BRASIL. Lei nº 10.406, de 10 de janeiro de 2002. "In verbis": "Art. 966. Considera-se empresário quem exerce profissionalmente atividade econômica organizada para a produção ou a circulação de bens ou de serviços."

2 CANÇADO TRINDADE, Antônio Augusto. A proteção internacional dos direitos humanos e o Brasil. Brasília: UnB, 1998. p. 23. Em DOLINGER, Jacob. Dignidade: o mais antigo valor da humanidade. os mitos em torno da declaração universal dos direitos do homem e da constituição brasileira de 1988. as ilusões do pós-modernismo/pós-positivismo. a visão judaica. *Revista do Direito Constitucional e Internacional*. Ano 18 – v. 70 – jan.-mar/2010. pp. 24-90. interesting analisis of the human dignity which combines the achievements of the last few centuries with a much greater hictorical concept.

3 FERRAZ JÚNIOR. Tercio Sampaio. *Direito constitucional* – liberdade de fumar, privacidade, estado, direitos humanos e outros temas. Barueri: Manole, 2007. p. 519. Também em HENKIN, Louis. The age of rights. New York : Columbia University Press, 1990. p. 02.

4 BOBBIO, Norberto. *Teoria geral da política* - a filosofia e as lições dos clássicos. Trad. Daniela Beccaccia Versiani. Rio de Janeiro: Campus, 2000. p. 481. BRASIL. Constituição, 1988. "In verbis": "Art. 5.° (...) XXXII - o Estado promoverá, na forma da lei, a defesa do consumidor. Art. 170. A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios: (...) V - defesa do consumidor.". Quanto ao termo "positivação", CANOTILHO, J.J. Gomes. Direito constitucional e teoria da constituição. Coimbra: Almedina, 2003. p. 377.

transnational and involves today commonly several distinct legal orders.

This phenomenon is very clear, for example, on internet purchases with home delivery often performed by official or authorized mail service[5]. Although tax barriers still remain for products imported from sellers established outside the current existing free trade areas and customs unions, few restrictions for products ordered by such means are left except those related to tax obligations of the consumer's domicile[6].

Besides the online market, buyers can nowadays very easily travel abroad and often include shopping in their touristic plans. The transposition of the physical barriers of the States for business or pleasure is no longer privilege of a select group of the society and the consumption of products directly abroad became more popular.

In trade performed between suppliers, the demand to make international exchange more simple by reducing transport and information costs required a greater legislative effort from States and international organizations. Results of those efforts can be recognized in the rules which promote reduction of uncertainty and contracting risks. These rules represent a considerable part of the current international legal instruments and embody a clear attempt to ensure greater security and predictability to trade with direct impact on transaction costs[7].

Economic rationality gave strong contributions to simplify international trade and influenced the political decisions taken, for example, at the Uruguay Round negotiations of the GATT. It also played an important role at the design of regional experiences of cooperation and integration such as the European Union, MERCOSUR and NAFTA[8].

With respect to consumer law, the progress in the transnational legal production was much weaker. The protective shape frequently designed by national legislators in the municipal law for consumer relations places the subject much closer to individual rights then to law and economics.

Despite of the abovementioned difficulties, the possibility of mutual contribution between law and economics to propose solutions to issues of social life is still very important and authors such as Adam Smith and Jeremy Bentham tried to demonstrate already in the

5 Within Brazil regulated by Decreto7962/13.

6 MERCADANTE, Araminta de Azevedo. Os aspectos institucionais da integração latino-americana. In: *Revista de Informação Legislativa* Abril-Junho, 1971. p. 74.

7 SZTAJN, Rachel. Os custos provocados pelo direito. *Revista do Direito Mercantil, Industrial, Econômico e Financeiro*. Nº112, Ano XXXVI, Outubro-Dezembro/1998. pp. 75-78. p. 76.

8 BACCEGA, Marcus. O comércio, suas funções e sua relevância para o direito internacional público. AMARAL JÚNIOR, Alberto (Coord.). *Direito do comércio internacional*. São Paulo: Juarez de Oliveira, 2002. p. 29-30.

eighteenth century the relevance of such an interdisciplinary analysis[9]. This propose of dialogue just became notorious on the second half of the 20th century as Ronald Coase, professor at the University of Chicago, published his "Problem of Social Cost"[10].

Traditional doctrine reacts frequently very strongly to the Economic Analysis of Law. The critics point out especially methodological differences between law and economy as a supposedly invincible theoretical factor. It is commonly argued, under this perspective, that while law deals with -ethical and moral- values, economy is founded in results and efficiency[11].

The adoption of the law and economics approach as prescriptive, if extreme, would easily contradict parameters of substantive law. In Brazil, this perspective would have, as critics very frequently mention, a strong barrier in the fundamental rights established in the Constitution. This concept tends to be, indeed, extremely superficial, since it ignores the possibility of an analytic law and economics approach to law[12].

Furthermore, it is important to eliminate the mistake of identifying the parameters of the economic approach to law simply with efficiency. On proprety rights, for example, the perspective of transaction costs can be quite useful not only to identify the possibility of promoting general welfare by legislating, but also to avoid undesirable consequences of court decisions.

2. LAW AND INTERNATIONAL CONSUMER PROTECTION

Some initiatives to increase consumer protection can be found in international law but consumer law was developed mainly within national legal systems and local codes just rarely rule cross-border trade situations[13]. The Brazilian Consumer Protection Code – in Portuguese, CDC - in force since 1990, has no specific rules to resolve conflicts arising from transnational consumer relations[14].

It is important to note that the main goal of such protective legislations is to eliminate imbalances that may exist between consumers and suppliers. Several provisions contained in the 1990 Brazilian code are based on the assumption that sellers have an advantage

9 SZTAJN, Rachel. "Law and economics". *Revista do Direito Mercantil, Industrial, Econômico e Financeiro*. Nº137, Ano XVIV, Janeiro-Março/2005. pp. 227-238. p. 227.

10 COASE, Ronald. Harry. The problem of Social Cost. *Journal of Law and Economics*, vol. 3, 1960.

11 FORGIONI, Paula. Análise econômica do direito: paranóia ou mistificação? *Revista do Tribunal Regional Federal 3ª Região*. Número 77 – maio/junho – 2006. pp. 35-61. p. 51.

12 Ibid. p. 54-56.

13 Por exemplo: Organização das Nações Unidas. Resolução nº 39/248 - 1985.

14 BRASIL. Lei nº 8.078, de 11 de setembro de 1990.

when compared to the final purchaser. This is, in fact, a circumstance present in most contracts of this kind and which without an appropriate legislation would submit the consumer to a position of vulnerability.

Many facts involved with cross-border consumption contribute to imbalance contractual relationship. Diversity of languages, difficulties in obtaining information and complexities concerning international delivery and payment procedures are just a few examples of the asymmetry inherent to international consumption[15]. With respect to information access, it is very difficult to establish long lasting relationships of trust in this sort of contracts in order to reduce transaction costs and promote security and predictability for consumers and decrease their vulnerability[16].

Neither consumerist legislation nor private international law have specific rules to solve conflicts arising from transnational consumption. General conflict of laws and jurisdiction rules are applied and their structures are frequently not adjusted to the general principles of consumer protection[17]. To this respect, it is possible to conclude that private international law legislations didn't move forward to protect consumers and couldn't follow the axiological changes assimilated by the new constitution.

Even public policy – that private international law principle to protect the local morality able to restrain the application of foreign law and the recognition of foreign decisions – does not fit consumer protection properly because it lacks the power to grant new rights to individuals and can be applied just in a negative sense, i.e. preventing violations of rights[18].

There are, of course, initiatives such as those in the European Union to create a transnational minimum standard for consumer protection and the Santa Maria Protocol, which bounds jurisdiction to the consumer's domicile within MERCOSUR[19]. Situations not ruled by those regional norms shall end up being solved in Brazil under the traditional private international law system establishing, for example, the applicable law of the domicile of the party that made the offer – the provider – or of the place of the conclusion of the contract - when the

15 MARQUES, Cláudia Lima. *A insuficiente proteção do consumidor nas normas de Direito Internacional Privado*: da necessidade de uma Convenção Interamericana (CIDIP) sobre a lei aplicável a alguns contratos e relações de consumo. São Paulo: RT, 2002. p. 06. "In verbis": descreve tal assimetria como um "desequilíbrio intrínseco informativo e de especialização entre os parceiros contratuais internacionais face ao status leigo e vulnerável do parceiro-consumidor"

16 FORGIONI, Paula. *Teoria geral dos contratos empresariais*. São Paulo: RT, 2009. p. 95,

17 MARQUES, Cláudia Lima. Op. Cit. p. 22.

18 Ibid. pp. 21-22.

19 Ibid. p 35.

product was bought abroad.

With respect to the jurisdiction, the provisions available are established in article 12 of the Introduction to the Civil Code of 1942 - known in Portuguese as "LINDB" - and in the articles 88 and 89 of the Brazilian Civil Procedure Code[20]. None of them, in an unsystematic interpretation, presents the possibility to appoint the Brazilian courts as the competent ones to analyze the abovementioned situations related to consumption.

Since CDC entered in force - and its role to promote fundamental constitutional guarantees was recognized - a great part of the scholars understands that the most favorable law shall be applied to protect consumers also in transnational transactions. According to this doctrine, the competent jurisdiction might in all cases be established by the general rule of the consumer's domicile of the CDC[21].

There is a strong reaction to the use of Brazilian classical private international law rules to appoint the applicable law and jurisdiction to cross-border consumption controversies because they would tend to benefit providers[22]. The systematic interpretation of the CDC in connection with the constitutional protective axioms is, in fact, much more consumer-friendly than the solution given by the Article 9 of the

20 BRASIL. Decreto-Lei nº 4.657, de 04 de setembro de 1942. "In verbis": "Art. 12. É competente a autoridade judiciária brasileira, quando for o réu domiciliado no Brasil ou aqui tiver de ser cumprida a obrigação. § 1o Só à .autoridade judiciária brasileira compete conhecer das ações, relativas a imóveis situados no Brasil. § 2o A autoridade judiciária brasileira cumprirá, concedido o exequatur e segundo a forma estabelecida pele lei brasileira, as diligências deprecadas por autoridade estrangeira competente, observando a lei desta, quanto ao objeto das diligências." BRASIL. Lei nº 5.869, de 11 de janeiro de 1973. "In verbis": "Art. 88. É competente a autoridade judiciária brasileira quando: I - o réu, qualquer que seja a sua nacionalidade, estiver domiciliado no Brasil; II - no Brasil tiver de ser cumprida a obrigação; III - a ação se originar de fato ocorrido ou de ato praticado no Brasil. Parágrafo único. Para o fim do disposto no no I, reputa-se domiciliada no Brasil a pessoa jurídica estrangeira que aqui tiver agência, filial ou sucursal. Art. 89. Compete à autoridade judiciária brasileira, com exclusão de qualquer outra: I - conhecer de ações relativas a imóveis situados no Brasil; II - proceder a inventário e partilha de bens, situados no Brasil, ainda que o autor da herança seja estrangeiro e tenha residido fora do território nacional."

21 BRASIL. Lei nº 8.078, de 11 de setembro de 1990."In verbis": "CAPÍTULO III Das Ações de Responsabilidade do Fornecedor de Produtos e Serviços Art. 101. Na ação de responsabilidade civil do fornecedor de produtos e serviços, sem prejuízo do disposto nos Capítulos I e II deste título, serão observadas as seguintes normas: I - a ação pode ser proposta no domicílio do autor; [...]"

22 BRASIL. Decreto-Lei nº 4.657, de 04 de setembro de 1942. "In verbis": "Art. 9o Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituírem. § 1o Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato. § 2o A obrigação resultante do contrato reputa-se constituída no lugar em que residir o proponente."

LINDB which establishes for those cases the jurisdiction and the use of the law of the place where the transaction takes place[23].

With respect to consumption at distance it is also possible to defend under the traditional choice of law system the unrestricted application of the rule that indicates the law of the party that made the offer – the provider - to the solution of disputes allowing the recognition of choice of forum clauses. At an internet transaction, for example, the provider is the one who makes the offer and his law of residence would govern the dispute, a solution incompatible with the current consumer protection standards[24].

3. HUMAN RIGHTS AND CROSS-BORDER CONSUMPTION: NEW PERSPECTIVES

The lack of specific rules to protect cross-border consumption in the system formed in Brazil by the CDC and all the fundamental principles which recognize the vulnerability of the final consumer, require doctrine and jurisprudence to develop legal mechanisms able to fill in the gaps and to ensure compliance with the constitutional standards.

With respect to the acquisition of products abroad by consumers domiciled in Brazil, a very outstanding judgment that reflects the understanding of Brazilian courts was pronounced ten years ago by the Superior Tribunal de Justiça (not by the Supreme Court – Supremo Tribunal Federal!) - Appeal no. 63.981/SP. The mentioned decision reverted the opinion settled by the first instance which rejected the accountability of Panasonic do Brasil LTDA for defects in products produced by its equivalent corporation in the United States and acquired abroad by a final consumer[25].

23 Sobre o assunto, CANARIS, Claus-Wilhelm. *Pensamento Sistemático e Conceito de Sistema na Ciência do Direito*. Introdução e tradução de António Menezes Cordeiro. 3ª. ed. Lisboa: Fundação Calouste Gulbenkian, 2002.

24 MARQUES, Cláudia Lima. A proteção do consumidor de produtos e serviços estrangeiros no Brasil: primeiras observações sobre os contratos à distância no comércio eletrônico. *Revista de Direito do Consumidor*, São Paulo: Revista dos Tribunais, Ano 11, nº 41, p. 39-80, jan./mar. 2002, p. 67.

25 SUPERIOR TRIBUNAL DE JUSTIÇA RECURSO ESPECIAL Nº 63.981 SP (1995/0018349 8) – Relator: Min. Aldir Passarinho Júnior. "In verbis": "EMENTA DIREITO DO CONSUMIDOR. FILMADORA ADQUIRIDA NO EXTERIOR. DEFEITO DA MERCADORIA. RESPONSABILIDADE DA EMPRESA NACIONAL DA MESMA MARCA ("PANASONIC"). ECONOMIA GLOBALIZADA. PROPAGANDA. PROTEÇÃO AO CONSUMIDOR. PECULIARIDADES DA ESPÉCIE. SITUAÇÕES A PONDERAR NOS CASOS CONCRETOS. NULIDADE DO ACÓRDÃO ESTADUAL REJEITADA, PORQUE SUFICIENTEMENTE FUNDAMENTADO. RECURSO CONHECIDO E PROVIDO NO MÉRITO, POR MAIORIA."

The members of the court accepted the arguments of the purchaser referring to several characteristics of international trade nowadays and based their decision on the identity between the corporations and the need to correct the imbalance between consumer and supplier in those international contracts[26].

The judgment can be, however, strongly criticized for its flimsy analysis of certain key issues directly related to the dispute. The argument of illegitimacy sustained by the Brazilian corporation that the trade relation was established between the consumer and another company was not properly analyzed. The ministers apparently considered that a judge is able to lift the corporate veil to correct consumer vulnerability without checking properly the relation between the national firm and the foreign one[27].

The decision has also absolutely ignored trademark law and the position of the Brazilian courts on the harmonization of consumer protection and the protection of famous mark remains unclear, for example, with respect to the territorial exhaustion doctrine[28].

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26 SUPERIOR TRIBUNAL DE JUSTIÇA RECURSO ESPECIAL Nº 63.981 SP (1995/0018349 8) – Relator: Min. Aldir Passarinho Júnior. "In verbis": "I Se a economia globalizada não mais tem fronteiras rígidas e estimula e favorece a livre concorrência, imprescindível que as leis de proteção ao consumidor ganhem maior expressão em sua exegese, na busca do equilíbrio que deve reger as relações jurídicas, dimensionando se, inclusive, o fator risco, inerente à competitividade do comércio e dos negócios mercantis, sobretudo quando em escala internacional, em que presentes empresas poderosas, multinacionais, com filiais em vários países, sem falar nas vendas hoje efetuadas pelo processo tecnológico da informática e no forte mercado consumidor que representa o nosso País." SUPERIOR TRIBUNAL DE JUSTIÇA RECURSO ESPECIAL Nº 63.981 SP (1995/0018349 8) – Relator: Min. Aldir Passarinho Júnior. "In verbis": "III Se empresas nacionais se beneficiam de marcas mundialmente conhecidas, incumbe lhes responder também pelas deficiências dos produtos que anunciam e comercializam, não sendo razoável destinar se ao consumidor as conseqüências negativas dos negócios envolvendo objetos defeituosos."

27 SUPERIOR TRIBUNAL DE JUSTIÇA RECURSO ESPECIAL Nº 63.981 SP (1995/0018349 8) – Relator: Min. Aldir Passarinho Júnior. "In verbis": "Contra razões às fls. 161/171, sustentando, preliminarmente, a falta de prequestionamento. Acrescenta que a ação deveria ter sido promovida perante a Justiça Norte Americana, contra a empresa vendedora, e não contra a ré, que não participou da produção, venda e nem assegurou garantia ao produto. Afirma que apesar de vinculadas à mesma matriz, no Japão, tanto a Panasonic Americana como a Brasileira, ora recorrida, são empresas distintas, que elaboram mercadorias próprias, prestando, cada qual, a sua garantia de forma independente. [...]"

28 SUPERIOR TRIBUNAL DE JUSTIÇA RECURSO ESPECIAL Nº 63.981 SP (1995/0018349 8) – Relator: Min. Aldir Passarinho Júnior. "In verbis": " Por outro lado, o sucesso de suas atividades muito está a dever ao elevado conceito que essa marca mundialmente desfruta, sendo, inquestionavelmente, beneficiada em razão desse conceito e da propaganda mundial que é feita em torno dela. Ora, aproveitando, essa empresa nacional, todas as vantagens que são decorrentes desse conceito mundial, evidentemente que ela tem que oferecer algo em contra partida aos consumidores dessa marca, e o mínimo que disso possa decorrer é o de reparar o

Despite of those critics, the court has changed the Brazilian paradigms for international consumer protection. On recognizing the passive legitimacy of the Brazilian corporation, the decision pointed a tendency to the expansion of the competence established in article 101, I of CDC granting Brazilian jurisdiction to disputes arising from cross-border consumption when the consumer has his domicile in Brazil[29].

The recognition of this privilege for consumers is already consolidated in Brazilian doctrine and when definitely incorporated by the courts shall embrace both situations of consumer contracts settle at distance and of consumption abroad[30].

4. COSTS AND LIMITS OF TRANSNATIONAL CONSUMER PROTECTION

As pointed above, consumer contracts were detached from trade law due to its particular characteristics clearly incompatible with equal treatment and absolute submission to the clauses agreed in a contract. Characteristics strongly related to the frequent imbalance between suppliers and final consumers of products and services.

Besides that, a trader – a firm or an individual one – constantly analyzes the risks and therefore the costs of the liabilities assumed or to be assumed. In fact, transaction costs are an intrinsic aspect of trade[31].

In a context of strictly economic analysis of costs involved, law can play an important role establishing clear legal parameters allowing the parties to foresee consequences and possible liabilities related to commitments to be assumed. The predictability of the enforcement of legal rules is highly desirable to promote efficiency and certainty for trade[32].

The law and economics approach does not necessarily require rules to prescribe behaviors but the economic rationality can be used as an instrument to promote certainty and predictability to the system. This theory can indeed be used to verify desirable practices - and therefore to be encourage – to achieve collective welfare.

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dano sofrido por quem compra mercadoria defeituosa, acreditando no produto."

29 It must be mentioned that the decision didn't analyse the international competence of Brazilian courts and just recognized the passive legitimacy ad causam of the national company.

30 Still controversal in Brazilian doctrine.

31 NORTH, Douglas. Institutions, transaction costs, and the rise of merchant empires. In: TRACY, J.D. (ed). *The Political Economy of Merchant Empires* – State Power and World Trade, 1350-1750. Cambridge: Cambridge University Press, 1991. p. 22.

32 COASE, Ronald Harry. The nature of the firm. Economica, New Series, Vol. 4, Nº 16. (Nov. 1937), pp. 386-405. em pp. 390-391 CHEUNG apud FARINA, Elisabeth Maria Mercier Querido. *Competitividade*: mercado, estado e organizações. São Paulo: Singular, 1997. p. 57. FARINA, ibid, p. 58.,. FORGIONI, Paula. Op. Cit., pp. 75-76.

With respect to Brazilian law, the constitutional doctrine seems to have great difficulty to embody law and economics principles. Such resistance is mainly due to the apparent incompatibility between economic rationality and the moral prescriptions of the Brazilian 1988 Constitution[33]. When specifically applied to property relations, however, the law and economics approach could be actually very welcome and provide great services to society.

Even if restricted to property issues, there is still a strong prejudice toward the law and economics doctrine - conceived as pragmatic, utilitarian and consequentialist. It is necessary to point out that the establishment of the result as a parameter for analysis does not necessarily opposes the whole theory to the founding principles that guide a legal system. This is not the case to omit constitutional guarantees or to dismiss the application of principles pursuing greater efficiency in legal relations but, instead, to seek in the analytical models of economy the most appropriate balance to law.

The excessive "constitutionalization" of private law proves to be as harmful as the unrestricted application of efficiency to seek individual protection in an unsystematic and unpredictable way disregarding the stability so essentially required by private relations. Harmony between principles and predictability must be, in this context, pursued to maintain the coherence of the legal system and the improvement of its role to regulate social relations.

Security and predictability are so the guidelines of law and economics theory but efficiency alone, however, clearly favors suppliers when used as a parameter to labor and consumer contracts. In this sense, it is to be observed that the warranties established for consumer protection can bring positive consequences to trade and dissipate transaction costs initially found.

A model of such perspective is, for example, the guarantee given to the consumer to recover amounts withdrawn from bank accounts through fraud – very common in Brazil. The financial institution generally assumes the loss immediately and avoids disputes in the courts – which always recognize the liability of the supplier in those cases. They still take, on the other hand, great advantage from the behavior of the clients, whom feel safe and encouraged to continue making use of the same means of payment. The legal security provided by the liability of the financial institutions is reflected in the expansion of transactions and it can easily represent gains able to outweigh the transaction costs assumed[34].

Economic theory does not oppose itself to the consumer

33 POSNER, Richard A., *Economic Analysis of Law.* Boston: Little Brown, 1992, pp. 154-158., "The Legal Protection of Children".

34 GRAU, Eros. *O estado, a empresa e o contrato*. São Paulo: Malheiros, 2005. pp. 15-23.

protection constitutionally recognized as a fundamental individual right in Brazil. It requires, however, the establishment of clear parameters to legal relationships to enable the appropriate cost analysis. Consumers can and must be protected but the construction of this protection shall take into account all affected individuals and corporations specially with respect to consequences related to other branches of law.

4.1. Trademarks and Consumer Law

Intellectual property rights include trademarks, copyright, patents, industrial property and –for some authors- also antitrust law[35]. Although both Industrial property and copyright regulate intangible assets, very relevant differences exist between them mainly with regard to the legal regime applied. While copyright protects the work itself, industrial property protects a technique and its surrounding elements.

The exclusive rights granted by intellectual property law can be very easily connected to protection of knowledge but it is also possible to identify concerns clearly related to antitrust. The balance between traders -according to the security and predictability required by economic theory- is so reached by granting certain rights which constitute in fact limits to trade freedom pursuit over the last centuries[36].

In this sense, trademark regulation under industrial property rights shows very remarkable concerns related to antitrust. The segregation of the trademark owner -due to the right of exclusive use of the mark in relation to products or services of a specific branch of activity (speciality)- constitutes a clear example of the interface pointed establishing limits to free market, preventing the use of registered distinctive signals by not allowed players.

Misuse characterizes therefore unfair competition but the territorial extent of the protection granted by law and its exhaustion must be established to provide predictability to antitrust law mechanisms. The general rule with this respect prevents the registered owner to block in Brazil the free movement of products placed on the market by itself or by an authorized person.

There is also a peculiar situation involving the recognition of the reputation of a particular mark, which by mitigating the principles of speciality and territoriality shall prevent unjust enrichment related to unauthorized use or unfair competition[37]. By turning the territoriality

35 It is, however, quite hard to include antitrust law in the system of intellectual proprety. The current majoritary theory places antitrust law under public law and industrial proprety under coorporation law.

36 BOBBIO, Norberto. *A era dos direitos.* Rio de Janeiro: Elsevier, 2004.

37 BARBOSA, Denis Borges. *Uma introdução à propriedade intelectual*. Rio de Janeiro: Lúmen Júris, 1997. p. 122.

principle more flexible, fame can hinder the registration of trademarks and their use even in countries where they are not explored. With respect to speciality, a well recognized distinctive element may prevent the registration or even its use also in others branches of products[38].

The arguments applied to grant protection to famous marks fit very well the aims to protect a consumer who buys abroad or orders on internet a product from a trademark present in the Brazilian market. If the industrial property rights system recognizes an advantage to the owner as a result of its fame, liabilities arising out of this global recognition may also be recognized to protect consumers.

In this context, it must be pointed that the famous mark protection theory reflects interests of owners absent of a particular market and that in the leading case here analyzed and among the aforementioned hypothetic situations, the use of the trademark in Brazil would motivate cross-border consumption. If trademark law promotes greater security to the owners and reduces their costs granting protection worldwide, they should also be in charge of any liabilities arising from its products worldwide.

Another important situation to be noted is the possibility -suggested by the doctrine and recognized in the Brazilian Intellectual Property Code- for owners to hinder the commercialization of products –even legally imported- without their consent[39]. This reflects the understanding that a trademark can be used in a given territory -usually corresponding to a specific legal order- and especially that Brazilian law adopts the doctrine of internal exhaustion, ie, the recognition of the right of the owner to fight against any violations so far he, or someone with his consent, introduces the product that uses his trademark in the domestic market.

Unlike the conclusions drawn from the famous mark protection, the internal exhaustion may serve as a counterargument to the protection of the consumer who buys the product directly overseas, for example during a trip. This second argument can so be used against consumers as a parameter for the liability of trademark owners and is founded in the lack of consent for the introduction of the product in the domestic market. This construction does not exclude, however, the famous mark protection arguments which, without much difficulty, could still thrive.

With respect to consumption at distance, the internal exhaustion would not prosper. Sending the product to the consumer implies consent to the introduction of it in the market. Finally, if there is no identity between supplier and the famous mark owner, arguments related to internal exhaustion can, in fact, be used but not against the consumer,

38 Ibid. p. 256.

39 BRASIL. Lei nº 9.279, de 14 de maio de 1996. ADIERS, Cláudia Martins. Aspectos polêmicos da propriedade intelectual. Rio de janeiro: Lúmen Júris, 2004. p. 35.

instead between suppliers and producers.

4.2. Consumer Law and Corporations

Structured between consumer law and trademark protection, the arguments that extend to global market the accountability for the product based on reputation usually don't consider, however, the frequent lack of identity between the national corporations that use global advertisement and the foreign business associations which are somehow engaged in transnational commerce.

The confusion between the corporation and its shareholders arises very frequently in jurisprudence, doctrine and even in the choices of the national legislator. The historical preference given to controllers in the legal discipline of companies leads, for example, to confusion and grants to minority shareholders often the selling of shares as the only alternative to disagreements related to decisions taken by the majority shareholders[40].

Even not being possible to bind the aforementioned preference for the controlling partners to economic theory, one can realize at the importance given to the hierarchical element on the concept of firm an identity with the effective exercise of power within a society[41]. The role of relations of power in the contracts within the company - ie "the firm" – is strongly criticized by the ones that point the necessity to extend this concept to include, for example, contractual relations established between the company and its consumers and suppliers[42].

Consistent arguments can be extracted from such doctrinal overview to recognize the accountability of national corporations that explore the famous mark in the domestic market for consumer contracts established abroad between an individual and a different – even when apparently similar - company. This can be considered as such by the inclusion of the final purchaser in the concept of firm, as sustained by the critics of the theories of Coase, or - specifically with respect to the defendant controlled by the foreign holder of the famous mark – by overvaluing the hierarchical factor.

The extension of liability becomes an increase of risks for market players and tends to be taken into account by investors at the moment they decide –or not- to join a corporation[43]. Recognizing the importance

40 BULGARELLI, Waldirio. *Regime jurídico da proteção às minorias nas S/A*. Rio de Janeiro: Renovar, 1998.

41 COASE, Op. Cit. p. 395. Também em SZTAJN, Rachel. *Teoria jurídica da empresa*. São Paulo: Atlas, 2004. p. 71.

42 Critics to this theory points the inclusion in the concept of firm of contracts that are not part of it.

43 SZTAJN, Rachel. Op. Cit.. p. 75.

of individuals as human beings, legal rules shall protect vulnerabilities and economic analysis does not oppose itself to it and merely requires from law the establishment of clear rules able to bring greater certainty and predictability and to reduce, consequently, transaction costs. The certainty in the enforcement of rules in case of noncompliance allows contractors to adapt themselves to it and this predictability tends to neutralize effects previously considered harmful.

To reduce transaction costs does not mean thereby to eliminate them. The permanent improvement of exchange of scarce resources requires the existence of transaction costs, which - once removed - would lead to random exchanges with consequent loss of allocative efficiency[44]. Assuming that some risks can not be completely eliminated or even reduced, economic theory points the necessity of legal intervention to correct certain market failures[45].

In the context here analyzed, the domestic recognition of full accountability of a corporation controlled by a foreign famous mark owner tends to ignore, for example, the position of minority shareholders. Once settled transnational protection in those terms, domestic investors - which are not part of the group of controllers – would be liable for risks assumed by controllers in another jurisdiction.

Minority shareholders shall be properly informed about the worldwide use of the trademarks associated to the company and periodically communicated about the liability supported by other corporations for product failures or defects related to the use of those famous mark abroad. The reduction of information asymmetry could prevent the attraction of speculative investors to the minority block of shareholders. In fact, the relationship between controllers and minority shareholders create a natural gap in the information access but situations of strong power concentration and of appropriation of corporate institutions by a specific group can intensify this imbalance and generate an adverse selection that could keep non mere speculative investors away[46].

The international accountability of a transnational corporation that has among its partners – controllers or not - the owner of a foreign famous mark must be carefully regulated to allow investors to measure the transaction costs – risks - involved in the acquisition of shares. An alternative would be to establish compensation mechanisms able to transfer exclusively to the owner of the famous mark the responsibility

44 Ibid. p. 76.

45 FORGIONI, Paula. Op. Cit. descreve em pp. 42-43 as falhas de marcado, a saber: assimetria de informações, existência de poder econômico, externalidades e os bens públicos.

46 Estudo detalhado dos efeitos da seleção adversa em AKERLOF, George. The market for lemons: qualitative uncertainty and the market mechanism. *Quarterly Journal of Economics. 84* (1970): 488-500

for product defect related to foreign markets. An example would be the compensation of the liabilities incurred by the company with the dividends to be received by the partner that holds the famous mark privileges. Legislative efforts are in both cases needed to accommodate consumer protection and corporate law.

It is also important to consider a judiciary approach to liability to include the responsibility of licensees of a famous mark for questions arisen from consumption relations performed abroad. Even been this approach compatible with the theory of the firm from Coase, this confusion would exceed all logical interpretations of personal rights and conform an unjustifiable excess in consumer protection.

Prescribing risks without establishing an appropriate regulation can draw in great damage to the market and consequently to the society. The increase in the costs of the global firm by forcing it to assume liability for worldwide transnational consumer contracts may affect, for example, the cost for capital expansion[47]. In the case of licenses, the extension of liabilities for those contracts to mere licensees could even impair the operation of famous marks in Brazil.

4.3. Objective Limits: Transnational Consumption and Banking Services

The expansion of the liability of global corporations for worldwide consumption has, however, some objective limits related to peculiarities of specific fields of activity.

Financial institutions, for example, even if legally recognized as trade companies regulated by the Article 966 of the Brazilian Civil Code – and also by consumer law statutes – have certain characteristics that would prevent any transnational liability[48].

The main barrier for the aforementioned liability has to do with the activity of those corporations: money. The main point is that currency, at least in Brazil, is not legally recognized as a good. The special treatment given to financial activity is due to the public interest related to the control that each state may have over its currency as an instrument to regulate the economy.

The liability of a national corporation for transactions of other companies abroad could reduce the regulatory control exercised by the state on this specific sector and allow, for example, the import of foreign systemic crises. Such peculiarities must be therefore considered by the national judiciary in the evolution of consumer protection.

47 COASE, Op. Cit.

48 Superior Tribunal de Justiça – SUMULA 297: "O Código de Defesa do Consumidor é aplicável às instituições financeiras".

5. CONCLUSION

Transnational consumption - the acquisition of goods by consumers directly abroad or at a distance - is today an irreversible social phenomenon. The complexity of those new legal relations frequently represents, however, a challenge to law. Doctrine and jurisprudence are currently faced with some difficulty to harmonize the protection of vulnerable consumers with the discipline of corporation law which regulates most of cross-boarder relations.

In fact, the development of international trade law seems not to be appropriate to solve problems presented by those new contractual sinalagmas. International consumer contracts – at least in theory – lay under the system of private international law, which in Brazil did not fitted itself satisfactorily to the constitutional command of consumer protection. The courts try, for example at the Recurso Especial no. 63981, to make the protection of vulnerable consumer effective, but, in doing so, they are currently failing to present consistent answers to questions that involve trademark and corporate rights.

The use of the law and economics perspective, as here proposed, may bring positive contributions to give consistency between vulnerable protection and market interests establishing as a parameter the search for greater security and predictability to international trade.

Specifically with regard to the protection of so-called famous marks, the rights granted by industrial property law may fit the arguments for expanding the liability of transnational traders. The benefits conceded regarding the famous mark submit the owner to the liabilities derived by the universalization of his market. Trademark law can so work as a strong ally of international consumer protection.

From the perspective of corporate law, however, the solutions lately presented by the courts often represent a threat. The domestic company that uses the foreign famous mark should not be randomly confused with its foreign partner. The elimination of this confusion is important to avoid an unnecessary increase of risks by circumstances absolutely strange from the shareholders of the local company which are exclusive in the domestic market partners of the foreign corporation that holds the mark worldwide. Such an extended theoretical construction, if irresponsibly applied, could even allow the absurd expansion of the liability of mere licensees, completely strange to the original legal relationship.

The consumer protection can -and should- legitimately generate transaction costs and require the internalization of obligations by suppliers of products. Clear rules and even the possibility of compensation for third parties are, however, extremely necessary to grant certainty and predictability to trade relations. Certain sectors of

the economy, as for example banking services, require closer attention and specific regulation due to the public interest involved in the activity.

The consumer must be protected by law and this is so also when the law and economics perspective is applied. In this context, the role of the legislators becomes extremely important and urgent to fit, for example, the current private international law and corporate law rules to the constitutional provisions reflected in the Brazilian Consumer Protection Code. While such adjustments are still not available, courts must carefully solve the disputes related to this matter avoiding threats to the market and to third parties which were not involved in the original legal relationship.

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RECOGNITION AND THE RIGHT TO DIFFERENCE: *CRITICAL THEORY, DIVERSITY AND THE HUMAN RIGHTS CULTURE*[1]

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Abstract: This article intends to analyze the several historical experiences forming the culture of the actual stage of human rights culture. How Brazilian Law is absorbing this transformation is a focused analysis of this research.

Keywords: May 68 – Human Rights – Diversity.

1 This text was translated to English and revised from original version in Portuguese by Vitor S. L. Blotta.

I. THE RUPTURE OF MAY 68

Recent transformations in contemporary society gave way to redefinitions of the meaning of several historical experiences in the fields of culture, behavior, politics and law. The debates that include in recent history the reflexive receptions of the effects of May 68 in philosophy and legal theory, highlight the importance of the public sphere for the construction of new social identities, because the struggle for rights is a historical struggle. In the legal dogmatic domain, however, and even in the history of law, the impact of May 68 is rarely identified as the epicenter of a process of juridical significance. Nevertheless, the boldness of the student movements and their capacity of mobilizing public attention to relevant problems in that context can be seen as a rupture of considerable importance to transformations in contemporary societies; despite what really happened in May 68, the importance is centered on what it has symbolically left for future generations. The economic "fracture" occurred in the end of 2008 finally consolidates, as will be argued in this paper, the so-called *crisis of modernity*.

The *Dialectics of Enlightment* is a mark in this sense, considering the fact that it had identified since the 1940s the "discontents of civilization" underlying modern archetypes. It is not only from light that modernity is fed upon, but also from a dialectics of lights and shadows. The *Frankfurter Schüle* captures and describes since its first generation not only the barbarity of war and genocide, but it is also capable of highlighting the condition of the sociological forms and the values of post-war society which influenced the student protest revolts in several episodes through 1968, in many countries, especially in France and Germany[2].

Since then, the philosophical and sociological contemporary debates over the idea of "post-modernity" began, and one of the great theoretical inheritances of this period will be exactly the impossibility, in social sciences, to ignore the meaning of this expression. In this sense, even the present theories of law and legal systems of western democracies are indebted to May 68, and that is why one cannot think the categories of justice outside this historical framework of comprehension.

May of 68 can be considered a historical moment of breakdown of several behavior patterns: struggle against family authority; claims for change in the regulations of universities; amplification of the claim to a radicalization of political liberty; minority rights; redefinition of the political role of aesthetics and redefinition of morals towards ethical

2 On this topic, see Martin Jay, *A imaginação dialética: história da Escola de Frankfurt e do Instituto de Pesquisas Sociais* [*Imaginative dialectics: history of the Frankfurt School and the Institute for Social Research*] (Rio de Janeiro, Contraponto, 2008), p. 10.

pluralism; struggles for redemocratization and for the recognition of difference; and an increase of the libertarian struggle for an organized civil society. In several of their meanings, these changes redounded in very concrete accomplishments in the domains of culture and social relations. It is also undeniable that the present text of the democratic Brazilian Federal Constitution of 1988 owes a great deal to these struggles. The "Citizen Constitution", which also incorporates the legacy of the human dignity of the person from the Universal Declaration of Human Rights of 1948, represents in our context the institutional guarantee for more extended liberties, and, thus, reflects the achievements of the twenty years that preceded its promulgation.

In this context, the consideration of the recognition of difference and the peculiarity of minorities (African-American, women, handicapped persons, the "landless"…) becomes more relevant than the generic presupposition of equality (among people, citizens). It is recent thus, the perception that the notion of equality casts a shadow over the possibility of the recognition of the singularity or the particularity of each and every individual. In the broader context of the reformulation of the *kritische Theorie*, inherited from the studies of Horkheimer and Adorno, Marcuse and Habermas, it is in the works of Axel Honneth - through the category of recognition (*Anerkennung*), in a revisitation of the young Hegel – that a broad basis for the justification of the *right to difference* can be found[3].

II. THE RIGHT TO DIFFERENCE

The right to difference is, in the interior of the culture of law, an amplification of the affirmation of forms of struggle for recognition. An elastic extension of the concept of law that allows it encompass the idea of a right to difference, consolidates the ambition of differentiation inside modern societies, which tend to produce homogenization and standardization. It is in a reactive form, thus, that the struggle for difference is inscribed dialectically on the side of the identity of an interrupted struggle for equality.

The right to difference is therefore distinct from the right to equality. It is clear that legal equality doesn't guarantee the possibility of achieving complete recognition in social life. It is also acknowledged that this version of equality is proven false by the liberal presupposition that justice as legal equality is sufficient to promote equilibrium in intersubjective relations. Honneth's studies justify the presumption that, beyond the recognition of legal equality, the notion of dignity also encompasses the recognition of difference. When studying the problem

3 On this theme, see Axel Honneth, *Disrespect: the normative foundations of critical theory* (Cambridge, Polity, 2008).

of the origin of the idea of dignity, Honneth precisely identifies that "…a not inconsiderable part of the honor principles, organized according to the social layer, that have guaranteed until then the individual in terms of the social esteem migrates to the reformed juridical relation, on which it reaches universal validity with the concept of human dignity; in the modern catalogs of fundamental rights, it is guaranteed to all men, in equal measure, a legal protection of their social reputation…"[4]

If the semantic and internal contours of the term dignity absorb the idea of honor, originated from the pre-modern tradition, honor is related with distinction, and not with what is common; with that which is rare and proper of the singular: "...a person can only feel valuable when she knows herself recognized in realizations which she precisely does not share in an non-distinct manner with all the others"[5]. That is why the struggle for dignity presently finds the quality to become concrete in the dynamics of the demands for recognition and particularity, exactly for inscribing itself in a framework of a struggle for differentiation in face of a modernity that produces the homogeneous.

It is precisely this profile of resistance that has motivated the actions of social movements, especially in the last three decades, bringing new colors to this debate in the sense that they claim as main focus the rupture of equality in law as a form and standard of social treatment. When formulating integration policies that consider the principle of *difference*, they are also inscribing the logics of inequality as an important normative standard for the construction of justice, in the sense that "…equality and inequality are constructive values of justice. What is *unique* cannot be compared or classified, and, obviously, unique identities can be equal or unequal to each other"[6].

Therefore, the contemporary discourse about justice has eagerly strived over the treatment of differences. Based on Honneth's studies, it is Habermas who affirms in *Between Facts and Norms*: "The concrete conditions of recognition, sealed by a legitimate legal order, result always from a 'struggle for recognition'; and this struggle is motivated by the suffering and by the indignation against a concrete despise. A. Honneth shows that it is necessary to articulate experiences that result from attacks towards human dignity to confer credibility to the aspects under which, in their respective contexts, that which is equal has to be

4 Axel Honneth, *Luta por reconhecimento: a gramática moral dos conflitos sociais* [*Struggle for Recognition: the moral grammatics of social conflicts*] (São Paulo, Editora 34, 2003), p. 204. Free translation from the Brazilian version.

5 Axel Honneth, *Luta por reconhecimento: a gramática moral dos conflitos sociais* [*Struggle for Recognition: the moral grammatics of social conflicts*] (São Paulo, Editora 34, 2003), p. 204. Free translation from the Brazilian version.

6 Agnes Heller, Ferenc Fehér, *A condição política pós-moderna* [*The post-modern political condition*] (Rio de Janeiro, Civilização Brasileira, 1998), p. 174.

treated in an equal form and that which is different has to be treated in a different form"[7].

This perspective makes a great difference in discussions over human rights, especially because one can now notice how natural law's abstract universalism has been opening ground for a more concrete and historical view of human rights, that is, a new philosophical anthropology over which it can ground its basis. This has become visible in 2008 in Brazil, with the celebrations of the 60 years of the Universal Declaration of Human Rights (1948). The right to difference has this particular tone: the idea that it is possible to consider ourselves *equal in difference*; this was the slogan adopted by the Federal Government's Special Secretary of Human Rights (SEDH, now Human Rights Secretary, SDH), in Brazil.

It is clear, thus, that this idea has influenced the understanding and practice of human rights beyond the threshold that leads to relativism. It became difficult to be *indifferent to the right to difference*, which protects the human condition in its multiple expressions. It is the only way to recognize how human beings live and suffer concretely, and represents a new possibility of implementing human rights policies in a more precise orientation.

The right to difference is based on the idea that all are different among each other; and, properly, *this* is being human in its singularity. In order for 'human nature' to be conceptualized, however, one must respect singularities. It becomes hence necessary for one to acknowledge the *complexity* of *diversity*[8], which is the most concrete characteristic of 'human nature'. This gives way for the recognition of the Indian, the African-American, homosexual woman, children, craftsmen, intellectuals, bankers, handicaps, Spiritualists, Catholics, Protestants… because we all have 'something in common'.

We refer to the equal possibility for everyone to be responsible for respecting the other, and therefore, to be considered member of the community of those who exercise their rights, in the concrete measure of their own conditions. It is imperative, therefore, that contemporary societies create conditions to promote and allow the equal access to

7 Jürgen Habermas, *Direito e democracia* [Between Facts and Norms] (Rio de Janeiro, Tempo Brasileiro, 2003), ps. 168-169. Free translation from the Brazilian version.

8 Not for another reason, the most recent human rights norms already register and enshrine this logic as a form of concretization of human rights, having as example what can be read in the Preamble of the *United Nations Declaration on Indigenous People* (2007): "*Affirming* that the indigenous people are equal to all other peoples and recognizing at the same time the *right of all peoples* to be different, to consider themselves deferent and to be respected as such", and "*Affirming as well* that all the peoples contribute to the *diversity* and the wealth of civilizations and cultures, which constitute common patrimony of humanity" (highlights not from the original. Free translation from the Portuguese version).

recognition, having this access as the converging principle of an organized community of citizens.

III. THE AESTHETIC PERCEPTION OF DIFFERENCE

The best form of respect towards the human condition is the recognized guarantee of the place of the other's *difference*. There is no *otherness* without diversity (ethnic diversity, cultural, ideological, aesthetic…)[9], and this is a conclusion that invites us to endow a decentered worldview, the only way to apprehend effectively an intersubjective exchange. This dissolution the self-centered view is one of the effects of the approximation process between the categories of just and beauty.

And here, particularly, aesthetic theories have special contributions to make, because aesthetic practices have overflows of significations. If well observed, art comes do be an invitation to an "*otherization*"; a "look around", a sensation of other faces, other forms, other interpretations, other visions, other logics. Art has therefore much to tell about human beings, those who have already passed and those who are still among us. It has something about a dissonance of taste, tendencies, wills… There are tendencies, schools, movements, styles, cultures, methods, forms, logics [all of them always "in plural"], when it comes to art. The Brazilian samba of Adoniran Barbosa is as much art as the Portuguese fado, and as much as the illuminist sonatas for clavier and strings.

There is not one universal form of art and neither unified global art, only the one produced by impositions of the cultural industry as an anti-democratic form of standardization of taste. That is why art says something; what it says, will not silence: it says that we are profoundly different from the other, and says, also, in a thundering tone, that there is a lot of beauty inside the differences. Reading beauty in the difference of the other's art is to open one's self to the contribution that each one is capable of bringing in the projection of forms to beauty, and, therefore, to existence.

Certainly, aesthetics, as a form of expression that says something about ourselves, allows us to a form of self-contemplation. Its role is to take us *to* ourselves, so we can know each other, our internal

9 Diversity here is not only the diversity of the peoples, but the diversity of what takes place in the same social group, in a society or culture: "Indeed, the problem of diversity is not raised only by cultures which have reciprocal relations; it also exists in the midst of every society, in all groups which constitute it: casts, classes, professional or confessional domains etc. develop certain differences to which each group attributes an immense importance" (Claude Lévi-Strauss, *Antropologia estrutural dois* [*Structural Anthropology* II], (Rio de Janeiro, Tempo Brasileiro, 1993), p. 332. Free translation from Brazilian version.

emotions, behavior patterns, personality traces, virtues and vices, skills and competencies, genius and revolt, romanticism or idealism. The profusion of tendencies, styles and tastes obliges us to recognize that there is no aesthetical pattern or an obligatory pattern to measure the beautiful/hideous (the hideous can be beautiful and the beautiful can be hideous).

If this is so, the aesthetic consciousness brings us the consciousness of *diversity*. According to Pablo Picasso, it is possible to say that: "art is the lie that allows us to know the truth". In the philosophical domain, what it makes us know is that we are not equal. Moreover, one must emphasize this point: we cannot be equalized, not even by the *social planification*, and neither by the *capitalist standardization*. Otherwise, we take the risk to lose ourselves from ourselves; *from* our self-identity, sentiments, talents and absolutely singular perspectives that are proper of the individual and our historical human condition.

These significations have to be interpreted and reconstructed, especially when, through the approach of a critical aesthetic theory, one seeks to reveal the proximities between the term *taste* and the term *just*, at least in the Portuguese and English languages. One of these significations apprehended from aesthetic practices is that *dissent* is an element of social life. Dissent is manifested in several ways as a will for differentiation - the taste of different things, different wills or normative judgments. It is hence a form of apprehending social and human dissonances.

Dissent is an unavoidable element of social life and should be absorbed by political practices. Otherwise, the valuable transformations occurred in the recent and historical struggles of May 68 in Paris and Frankfurt might be neglected[10]. This historical event and its social results have restored the possibility of another reading of Friedrich Nietzsche, to whom: "It is in the possession that the difference between men is more strongly revealed. And this difference manifests itself in the diversity of their value judgments, in the fact that they are different and do not have the same opinion about certain values"[11].

In this sense, this is what aesthetics allows us to notice: the *difference* of the other, even though we would only like picture the *equality*; the equality that makes us common for being human, for example[12]. Democratic, free and open is the world where dances, cults,

10 See Eduardo C. B. Bittar, *O direito na pós-modernidade e reflexões frankfurtianas [Law in post-modernity and frankfurtian reflections*] (Rio de Janeiro, Forense Universitária, 2009), p. 10.

11 Friedrich Nietzsche, *Além do bem e do mal* [Beyond Good and Evil] (São Paulo, WVC, 2001), p. 129. Free translation from version in Portuguese.

12 Claude Lévi-Strauss, *Antropologia estrutural dois* [*Structural Anthropology* II] (Rio de Janeiro, Tempo Brasileiro, 1993), p. 331. Free translation from Brazilian version.

traditions, spiritual ecstasies, common knowledge, science, cultural forms and popular folklores all have their place. This is a world where the love for the *non-similar* is also possible; an exchange that enlaces the otherness by the striking power of aesthetics and the communication promoted by the symbolic language of art.

It is Adorno who affirms that "Love is the capacity of noticing the similar on the *non-similar*" (highlight not from the original)[13]. The love related to various styles or cultural initiatives, several anthropological identities and forms of manifestation of humanity is a love towards human condition itself. This love can be pictured in the human eye.

In the center of this problem are the questions of how the human *look* constitutes itself in order to see the other, and how this act of "looking" can consider the other not as strange or foreigner - as alienated from the practices of myself -, but as an autonomous self formed in the midst of peculiar and unique practices that are as valid as one's own. The question of the *look* towards the other and the interpretation of the other's culture intermesh and reach the debate over ethnocentrism and its expressions. According to Richard Rowland, ethnocentrism "…the tendency to consider the culture of one's own people as the measure of all things – is a temptation that must be avoided"[14].

These problems justify the idea of *estrangement*: language, clothes, practices, wisdoms, creeds, identities, tastes, eating habits, moral standards etc. From the perspective of psychological-social behavior, differences frighten, because their misunderstandings generate fear and exclusion. However, as asserts Rowland, "One must not consider inferior that which is only different"[15].

The refusal of ethnocentrism is a civilizational effort, considering that the "primary drive" also leads us towards the non-acceptance of the other. This shows the actuality of Claude Lévi-Strauss' classical study, *Race et histoire* in orienting the "anthropological look" towards the preservation of difference and the respect towards the identity of the other. The refusal of ethnocentrism is part of a campaign to characterize human dignity as a common value among peoples and their differences.

A society that is socialized with these preoccupations cultivates the necessary spirit for the exercise of a democratic pluralism that surpasses the totalitarian homogeneity of the modern order, to which is valid the deadly equation of Auschwitz: the conversion of the inconvertible – from Jew to non-Jew, that is, from Jew to ashes and dust. This democratic effort, in an Adornian reading, is an effort for

13 Theodor Adorno, *Minima moralia* (Lisboa, Edições 70, 2001), p. 196. Free translation from Brazilian version.

14 Richard Rowland, *Antropologia, história e diferença* [Anthropology, history and difference] (Porto, Afrontamento, 1997), p. 07. Free translation from Brazilian version.

15 *Id. Ibid.*, p. 08.

the no-return; or the libidinous effort for the refusal of a regression to something that could produce another Auschwitz. This effort is justified against the dissemination of an unilateral seed and the taste for a singular doctrine, which can only lead to the affirmation of the political forms of profound disrespect towards diversity.

IV. LOVE AND RECOGNITION

Because of its natural complexity, approaching human dignity demands several precautions. Considering it as the principle that "meta-formats" and adjusts the Rule of Law with a group of affirmative demands over the human condition, one might say, along with Erich Fromm, that a human rights centered culture is one that signs positively towards an "erotization" of the world[16], to a "biofilia" (sympathy towards life) and to tolerance, denying the modern paths of biopolitics and the extermination of the other as a form of achieving the same emancipatory projects[17].

The critical revisionism of modernity implicates the consciousness of the necessity of a place for love in the interlude of social relations. Still with Fromm, this suggests a reflection over the care for oneself as an ethical practice, and the care for the other as an expression of active responsibility. Love, indeed, as the first form of belonging to the world, refers to this form of contact, at first established in the motherly embrace, provider of the first hour of existence. It is exactly in a psychoanalytic orientation based on Freud, Mead and Winicott that Axel Honneth affirms: "For Hegel, love represents the first step of reciprocal recognition, because in its concretization the subjects confirm themselves mutually in the concrete nature of the needs, recognizing themselves hence as needy beings; in the reciprocal experience of loving dedication, both subjects know each other united in the fact that they are, in the needy state, dependent on the respective other."[18] The perception of total dependency is what marks the first contact with the world.

Aside from the need, however, love presupposes a second movement to be concretized as recognition, which is, beyond the proximity, a form of distinction. "Once this experience has to be mutual in relation to love, recognition means here the double process

16 Francisco Doria, *Marcuse* (Rio de Janeiro, Paz e Terra, 1983), p. 202. Free translation from the Brazilian version.

17 Erich Fromm, *A arte de amar* [The art of love] (São Paulo, Martins Fontes, 2006), p. 98. Free translation from Brazilian version.

18 Axel Honneth, *Luta por reconhecimento*: a gramática moral dos conflitos sociais [*Struggle for Recognition: the moral grammatics of social conflicts*], (São Paulo, Editora 34, 2003), p. 160. Free translation from the Brazilian version.

of a simultaneous liberation and an emotional connection with the other person; not a cognitive respect, but an affirmation of autonomy, accompanied or even supported by dedication, is what aims one that speaks of recognition as a constitutive element of love"[19]. The care of the one who loves is the care for the one that is close when he or she is needed to be close; from one who does not interfere when it is necessary not to.

The ethics of care is based on the strategy of love, and for that, it must be apprehended as a basis for the development of a human right culture. This does not mean - and this warning is present in Honneth's works - that is possible for one to extend love for all, because it is developed in a small group of human bonds. This also does not mean that the culture of law must orientate and base itself by the difficult logics of love, considering when it occurs or not. Nowadays, in order to sustain the justification of the development of a human rights culture on the basis of an ethics of care means to extend the tactics and strategies of love's actions to the field of public policies and forms of distribution of rights.

Love promotes life, and this character is proper of the biofilic logics, for "…aside from the element of action, the active character of love becomes evident in the fact that it always implies certain basic elements, common to all forms of love. They are *care, responsibility, respect and knowledge*..."[20]. In this sense, love and law also reveal an inseparable kinship.

If there are no human rights without respect, respect means the capacity of loving and letting the loved one develop integrally, and not to dominate, castrate, manipulate; an ethics of care exhales respect, because it cultivates the power of affection as a way of "looking with attention" (*respiecere*)[21]. That is why the education and the methodology of (and for) human rights must prepare for a life with diversity, on the basis of dialogue and respect, turned to the otherness, as a form of social solidarity that rests on tolerance.

In fact, in this sense, "biofilia" as an orientation for education on human rights, supports the accumulation and the production of social and reflexive efforts in practical and theoretical perspectives, in the sense of proliferating the conditions for the cultivation and pro-active development of concrete dimensions of human dignity.

The active character of a politics of love involves necessarily

19 Axel Honneth, *Luta por reconhecimento*: a gramática moral dos conflitos sociais [*Struggle for Recognition: the moral grammatics of social conflicts*] (São Paulo, Editora 34, 2003), p. 178. Free translation from the Brazilian version.

20 Erich Fromm, *A arte de amar* [The art of love] (São Paulo, Martins Fontes, 2006), p. 33. Free translation from the Brazilian version.

21 *Id. Ibid.*, p. 35.

a pro-active attitude towards the world, which, among other things, pronounces itself over barbarity, repels injustice and inequality, promotes a culture of non-violence and becomes intolerant towards human suffering. Therefore, a human rights culture must involve tactics of erotic energy gathering which pulse in favor of biofilia and the politics of love; that which is conjunctive and not disruptive[22].

The care towards the human condition expresses the need for us to cultivate an open spirit, supporting the principle of life (*eros*) and being attentive towards the respect for the multiplicity of faces and tastes, talents and hearts, body forms and styles, thoughts and skills, abilities and limitations, looks and perspectives, vices and virtues, attractions and visions, empathies and antipathies, tendencies, worldviews and wills. In this sense, as states Nietzsche, in *Beyond Good and Evil*: "Living is wanting to be different from Nature, to form value judgments, to prefer, to be unjust, limited, or simply to be different!"[23].

Where a tolerant spirit, comprehension and dialogue are not present, imposition, castration, limitation, restriction and determination reign. The results of this process can only be hate, competition, rebellion, elimination, oppression and totalitarianism. Love and affection distinguish themselves from these oppressive forms of expression of the spirit exactly because they enable the existence of the other as other. Love for the same is simply a narcissistic love; that is, it is not love, but self-contemplation. The acceptance of diversity follows the path towards the construction of a loving spirit as a practice of finding comfort with the other as *different*. Otherwise, love for the other as "the same" is simply selfishness disguised as love.

Thus, true love doesn't mean either the heavy judgment or the severe critique; not even the maintenance of tradition *for* tradition, or the acid and excluding look towards the otherness. These are all germinal elements responsible for provoking suffering[24]. Love is the only language capable of making heterosexual parents deal with homosexual daughters and sons, as well as for a mother to keep loving her incarcerated son who confessed his crime.

Not for another reason, the philosophical thought of Axel Honneth considers the categories of love, law and solidarity as the three fundamental bases for the construction of the recognition of the other, and, therefore, the three pillars that constitute the necessary

22 Erich Fromm, *A arte de amar* [The art of love] (São Paulo, Martins Fontes, 2006), p. 38. Free translation from the Brazilian version.

23 Friedrich Nietzsche, *Além do bem e do mal* [Beyond Good and Evil] (São Paulo, WVC, 2001), p. 27. Free translation from Brazilian version.

24 See Axel Honneth, *Sofrimento de indeterminação*: uma reatualização da filosofia do direito de Hegel [Suffering from indetermination: a reactualization of Hegel's Philosophy of Law] (São Paulo, Esfera Pública, 2007), p. 37.

intersubjectivity which enables social bonds. Without them, suffering appears as the matrix of social struggles and injustices.

This reflections points to the faith in the heritance of the Enlightnment, and in this sense we can conclude the same than Stephen Eric Bronner, in *Abolishing the ghetto: anti-semitism, racism, and the other (Reclaiming the Enlightenment,* 2004): "That is still the case: recognizing the dignity of the other is the line in the sand marking the great divide of political life"[25].

CONCLUSION

This investigation aimed at a movement towards the affirmation and philosophical justification of human diversity. In dialogue with references from anthropology, it also reiterates the commitment of the political construction of an non-authoritarian *look*, fundamental value for the construction of the democratic spirit. The notion of dignity was approached as being capable of encompassing in its core the ideas of equality and difference, as well as the ideas that a culture of human rights oriented by an ethics of pluralism and diversity shall cultivate: democratic openness, acceptance of the otherness, multiple forms of expression, inclusion of minorities, protection of the diversity of social language games, ethical-anthropological porosity, social and cultural sensibility.

From this analysis, it is possible to affirm that a human rights culture based on diversity depends on a *look* towards other human beings that can detach itself from the category of universality and reach the recognition of humanity as it presents itself materially and historically: as individuality. In this sense, the impacts of the post-modern thought call for a culture of diversity and pluralism that has human dignity as justification and legitimation of a human rights culture, where diversities can structure themselves in founding practices of democratic, pluralist, dialogical, open and tolerant forms of shared life.

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25 Steven Eric Bronner, *Reclaiming the Enlightnment* (New York, Columbia University Press, 2004), p. 81-94.

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IMPACT OF INTERNATIONAL TREATIES AND CONVENTIONSONTHEBRAZILIANARBITRATION LAW

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Abstract: The arbitration as an alternative dispute settlement established itself nationally and internationally as a legitimate instrument to promote and expand access to justice. In this sense, the aim of this work is to analyze how the international treaties and conventions influenced the creation and development of the national arbitration law and its application in Brazil. Thus, we will seek to delimit what were the conventions, treaties, protocols and other international acts that had implications, positive or negative, when the adoption of Law n. 9307/96 by the Brazilian legislature, thereby seeking to analyze whether this law could actually absorb the parameters, criteria, nature and effects allowed by the international legal order. The correlation is also relevant to explain how Brazil has followed the international dynamics on bound rules to legal relations. Later, there will be an approximation, succinctly, on the main aspects of the law in relation to the object, subject, form of expression and effects of the use of arbitration and its respective application in Brazil.

Keywords: Impacts - International regulation - Brazilian legal system - arbitration.

1. INTRODUCTION

The arbitration as a dispute settlement consolidated its application both in the national and international levels. The discussion and subsequent acceptance of new methods to resolve conflicts has

reached a significant degree of normativity as international conventions and treaties on the subject were created, as well as domestic laws conducive to the establishment of the means of arbitration.

In this sense, the study of the influence and impact of international law on the national system deserves special attention by the doctrine, in order to establish which measures, the effects and scope of the international provisions that had major repercussions on the creation of Brazil's own specific law that focuses on the issue of arbitration. Therefore, the aim, of the present work is to try to define what were the conventions, treaties, protocols and other international acts that had implications, positive or negative, when the adoption of Law n. 9307/96 by the Brazilian legislature, seeking to analyze whether this law could actually absorb the parameters, criteria, nature and effects allowed by the international legal order. The correlation is also relevant to explain how Brazil has followed the dynamics on the international standards related to legal relations.

In this paper, we will analyze the main treaties and conventions in the field of arbitration, especially those that were incorporated in Brazil, so we can devote ourselves to the object of the research concerning the impacts and implications of these acts of international character on the formulation of the national arbitration law. Later, there will be an approach, briefly, on the main aspects of the law in relation to the object, subject, form of expression and effects of the use of arbitration and its respective arbitration in Brazil.

The methodology of the present work shall be centered on established techniques for an interdisciplinary research involving issues of international law and its treatment and incorporation by internal system, especially because of the specific and unique character examination of an extra-judicial mechanism and therefore not necessarily bound to a direct state activity. In this sense, there shall be used methods that allows analyzing the construction of international normativity concerning arbitration and its adoption by the Brazilian order. The historical and inductive methods will establish the conceptual assumptions and practices applicable to the use of this innovative mechanism as concretizing the fundamental right of access to justice within the legal relations of a private nature.

For a proper understanding of the subject, the present paper will begin with the definition of a theoretical framework that allows specifying a concept for arbitration, but without disregarding the existence of understandings or differing opinions on this definition.

2. ARBITRATION AS A DISPUTE SETTLEMENT MECHANISM

The legal institution of arbitration is one of the oldest forms of conflict resolution in the history of law. Existing since the dawn of civilizations, it has records on Greeks reports, Romans and even biblical or mythological, where to a third party was delegated the responsibility to resolve controversies over the existence of rights, executing justice privately. Although the Commercial Code of 1850 represents the first legal instrument to address arbitration in Brazil, by providing, in Article 245, that conflicts arising from commercial leases should be decided in arbitration, there are records of its use yet by the times of Portuguese colonial domination. Later, the contents of the article were incorporated to the Civil Code and the issue of arbitration was included in various legal devices, which either encompassed it or restricted it during the course of political history.

Arbitration or arbitral judgment can be defined as an extrajudicial form of dispute resolution, whereby arbitrators resolve divergences concerning available property rights, based on the arbitration agreement covenanted between the parties. Still, according TEIXEIRA[1] it is "(...) a non-statal form of controversy composition, as it develops 'under the State's auspices and guarantees, but with the decision delegated to a particular, whose decisions are stabilized once uttered, including with typical sanctions of a state solution. "

The understanding of CASELLA and ARAÚJO states that[2]

> *Arbitration is a legal mean of dispute resolution, present or future ones, based on the will of the parties involved, which elect themselves and directly, or through certain mechanisms determined by them, arbitrators to be judges of the disputes, trusting them the mission to mandatorily decide the*

1 "(..) uma forma paraestatal de composição de controvérsias, pois se desenvolve 'sob os auspícios e garantia do Estado, mas com a decisão delegada a particular, cujas decisões se estabilizam uma vez proferidas, inclusive com sanções típicas de solução estatal." TEIXEIRA, Sálvio de Figueiredo apud FIGUEIRA JR., Joel Dias. *Arbitragem, Jurisdição e Execução: Análise crítica da Lei 9.307*, de 23.09.1996. 2ª ed. São Paulo: Revista dos Tribunais, 1999, p. 123 (our tanslation).

2 "A arbitragem é um meio jurídico de solução de controvérsias presentes ou futuras, baseado na vontade das partes envolvidas, as quais elegem por si mesmas e diretamente, ou através de mecanismos por elas determinados, árbitros para serem os juízes as controvérsias, confiando-lhes a missão de decidir de forma obrigatória o litígio através da prolação de um laudo arbitral. Ao final da arbitragem, idealmente, espera-se que o laudo seja cumprido espontaneamente. Sua natureza em nada se modifica em virtude de ser as arbitragem interna ou internacional." BORBA CASELLA, Paulo e ARAÚJO, Nádia de. *Arbitragem: a nova lei e a praxe internacional.* Borba Casella, P. (coord.). São Paulo: LTr, 1999, p. 90 (our translation).

> *dispute through the delivery of an arbitral award. At the end of the arbitration, ideally, it is expected that the award is accomplished. Nothing in its nature is modified by virtue of being a domestic or international arbitration.*

When entering the subject of the legal nature of arbitration, soon it is possible to find out that the doctrine remains divided into two antagonistic trends: a contract theory (or private) and the theory tribunal (or publicist, or even institutional).

The contractual characteristic of arbitration arises from the arbitration agreement between the parties. For the followers of the private tradition, "the enforcement of the award, which must be made by the judiciary, constitute mere obligation, assumed the arbitration agreement"[3]. However, recognizing the State, the judicial nature of arbitration, "the predominant act of the institute is the award, the result of a public activity delegated to the arbitrator"[4].

There are still those who try to reconcile the two trends, printing a sui generis nature to the institute. The idea is based on that the arbitration is born of the free will of the parties (privately), and yet, however, has a function of a public nature, as it regulates a procedural law relationship. To those who defend the mixed nature of arbitration, besides the contractual nature, the institution has also has feature public as to this part of the doctrine, the effects of award would result from the law.

3. INTERNATIONAL REGULATION ON ARBITRATION

During the twentieth century, with the inclusion of the world into an international economic order and with the constant changes generated by a globalized capitalism, in a society where the speed and complexity of personal and economic relations are intensified, the need to enable mechanisms, adapted to this new reality, to solve legal disputes is created. In this way, arbitration is presented as a mean easily adaptable to this new enviroment, being celebrated in several international Conventions, such as the Geneva Protocol concerning Arbitration Clauses (1923), which recognized the validity of the arbitration clause as legally valid when arbitration is international, the

3 "a execução forçada do laudo, que deve ser efetuada pelo Judiciário, constituiria mera obrigação de fazer, assumida na convenção arbitral". SANTOS, Ricardo Soares Stersi dos. *Mercosul e Arbitragem Internacional Comercial: aspectos gerais e algumas possibilidades*. Belo Horizonte: Del Rey, 1997, p. 133 (our translation).

4 "o ato predominante do instituto é o laudo, resultado de uma atividade pública delegada ao árbitro". *Ibidem.*

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which came to replace the first, given its scope, since it was sponsored by the United Nations and has been ratified more than 100 countries; the European Convention on International Commercial Arbitration (1961) and the Convention of Panama (1975), that became regional instruments for the arbitration, the Washington Convention for the Settlement of Investment disputes between States and Nationals of Other States (1965) and the Model Law on Commercial Arbitration UNCITRAL (1985), which was prepared by the United Nations and became an important harmonizing instrument of international arbitration legislation.

Therefore, it is important to analyze the influence of Private International Law and its Treatises on the development and implementation of the Brazilian Arbitration Law, Law no. 9307 (September 23, 1996), from the perspective of Brazil's need for inclusion and adaptation to the international scene. Although this law does not inaugurate arbitration in the national legal plan, it is responsible for the most modern systematization of the subject and, thus, to understand the influences under which Brazilian jurisprudence was situated in relation to arbitration at the time of this law's elaboration, will reveal the mechanisms that provided the development of its application in the country, either by strengthening the reliability of Brazil for international trade, either by its alternative for the overloaded national court system.

When proceeding with the development of this analysis, we seek to define and examine the existing international treaties relating to arbitration that influenced Brazilian legislators, in order to demonstrate its role in the modernization of the model of the arbitration judge and to enable understanding the importance of adjusting to international parameters for the diffusion and adoption of this alternative method of dispute resolution.

Although it is necessary to emphasize that Brazil took its first step regarding international instruments on arbitration in 1932, with the accession and ratification of the Geneva Protocol of 24 September 1923, relating to arbitration clauses, until the enactment of Law 9307, the theme was neglected in this country.

From the 1980s and on, given the observed need to consolidate an effective alternative mechanism for conflict resolution, three law drafts on arbitration were presented in Brazil, in order to modify the treatment of this institute in Domestic Law, but they weren't successful. Thus, following the understanding of Delgado[5]

5 "A história recente registra que a Lei nº 9.307, de 23 de setembro de 1996, teve origem no Projeto de Lei do Senado de nº 78, de 1992. Antes, três projetos tinham sido apresentados e foram arquivados. (...) O Projeto em referência foi apresentado pelo então Senador Marco Maciel. Contribuíram para o aperfeiçoamento do texto da Lei, valiosas sugestões, de juristas

> *Recent history registers that the Law No. 9307 of September 23, 1996, was originated by the Senate's law draft No. 78, 1992. Before, three projects were presented and were filed. (...) The Project in reference was presented by Senator Marco Maciel. Contributed to the improvement of the text of the law, valuable suggestions of legal scholars, including Drs Carlos Alberto Carmona and Peter Martins Batista, as well as Dr. Selma M. Ferreira Lemes. The author of the project, in the explanatory memorandum, stated that the legislative proposal took into account the guidelines of the international community, especially those set by the UN Model Law on International Commercial Arbitration formulated by UNCITRAL.*

As a United Nations agency responsible for the modernization and harmonization of the rules pertaining to international trade, UNCITRAL (United Nations Commission for International Trade Law) drafted, with a committee made up of 58 countries and 18 international organizations, the Model Law on arbitration above. Its final text was approved by the General Assembly of the United Nations on December 11, 1985, by resolution 40/72 and the success of the legislation was notable for having the accession of the countries that currently handle the majority of international trade.

In addition to troubleshoot previous legislation's failures, the text of the Model Law has influenced most countries' internal laws on arbitration promulgated after its approval, as well as a review of arbitral rules in most arbitration chambers on the planet, because of the extent and relative completeness of its approach, which goes from formation to execution of sentences.

In addition, as understood Delgado[6] referencing to Garcez, it is

estudiosos do tema, incluindo-se os Drs. Carlos Alberto Carmona e Pedro Batista Martins, bem como, a Dra. Selma M. Ferreira Lemes. O autor do projeto, na exposição de motivos, esclareceu que a proposta legislativa apresentada levava em conta diretrizes da comunidade internacional, especialmente as fixadas pela ONU na Lei-Modelo sobre Arbitragem Comercial Internacional formulada pela UNCITRAL". DELGADO, José Augusto. *A Arbitragem no Brasil – Evolução histórica e conceitual*. P. 7, our translation. Available at: http://www.escolamp.org.br/arquivos/22_05.pdf

6 "Um estudo levado a efeito pelo Professor Pieter Sanders (Professor emeritus na Universidade de Rotterdam, artigo constante do vol. II nº 1 do Arbitration International, LCIA, 1995), registra que o impacto da Lei-Modelo é tão elevado que praticamente nenhum Estado que tenha modernizado seu sistema legislativo sobre arbitragem, após a sua edição, teria, inter alia, deixado de levá-la em consideração. Alguns Estados adotaram a Lei-Modelo por inteiro,

possible to understand how the Model Law's influences spread through national laws:

> *A study carried out by Professor Pieter Sanders (professor emeritus at the University of Rotterdam, Article constant vol. II No. 1 Arbitration International, LCIA, 1995), notes that the impact of the Model Law is so high that virtually no State that has modernized its system of arbitration law, after its release, would, inter alia, have failed to take it into consideration. Some states have adopted the Model Law as a whole, others have adapted most of its provisions, so that there are countries that can be characterized as Model Law countries (...). Until 1995, when the study of Professor Pieter Sanders was conducted, 22 countries had enacted domestic laws on arbitration adapting them substantially to the standards of Model Law.*

In order to understand Model Law's influences and the impacts on the Brazilian national legal system, we shall proceed to an analysis, article by article, of the national legislation to find out the compatibility between both legal instruments.

3.1. Influences of International Law on the Formulation of National Arbitration Law

Brazilian legislators also adhered to the importance of the Model Law, during the process that enacted the national law. According to Professor Selma Lemes' article, member of the jurists Commission who contributed to the drafting of the Law 9.307/96, it would be possible to establish a framework with the following overview of the Model Law influences on Brazilian law:

Main provisions of the Model Law incorporated into domestic law

outros se adaptaram a maior parte de suas provisões, de forma que existem países que podem ser caracterizados como países da Lei-Modelo (Model Law countries) (...). Até 1995, quando o estudo do Professor Pieter Sanders foi realizado, 22 países haviam promulgado leis internas sobre arbitragem adaptando-as, substancialmente, aos padrões da Lei-Modelo." Ibidem, p. 5, our translation.

Disposal	Model Law	Brazilian Arbitration Law
Recognition of mandatory and binding effect of the arbitration clause and its enforceability; wide range of parts to fix the procedural rules.	Article 8	Article 3 to 7
Procedure for the nomination of arbitrators.	Article 11	Article 13
Revelation of the referee prior to any facts that denote justified doubts as to his impartiality and independence	Article 12 and 13	Article 14, paragraph 1
Principles of autonomy of the clause of commitment and Principle of competence-competence	Article 15	Article 8 and sole paragraph
Authorization for the arbitral tribunal to request precautionary measures	Article 17	Article 22, paragraph 2 ° and 4 °
Principle of due process	Article 18	Article 21, Paragraph 2
Motivated decision: the arbitrators shall base the decision rendered in the arbitration award	Article 31	Article 26, section III
Choice of law rules that apply in arbitration	Article 28	Article 2
Recognition and enforcement of foreign arbitral award	Section 35 and 36	Article 38 and 39
Revision procedure after award is planned based on (i) rectification to correct clerical error or clarify obscurities applied to the tribunal and (ii) action for the annulment of the arbitral award	(I) Article 33 (Ii) Article 34	(I) Article 30 (Ii) Article 32 and 33

Source: own elaboration based on Lemes (1997).

The author also cites the influence of domestic laws of other countries in Brazilian law:

> *The Brazilian arbitration rules also had inspiration in the 1981 French law as it establishes the arbitration agreement, which has also a prevision in art. 7, Model Law, (art. 3 Brazilian law), as well as in many devices of the Spanish Law No. 36/1988, for example, art. 56.1, equivalent to art. 34 Brazilian Law*[7].

In lectures, the author also stated that, during the development of the Brazilian law, there was no estimation of when international conventions would be incorporated into the domestic legal system. From this point, it is possible to realize the wisdom of the legislator, which provides in Article 34 of this law that effective international treaties on domestic law would prevail upon the national law, highlighting the supplementary nature of the legal order for the items shown in the Chapter and anticipating the effects of future treaties' incorporation.

In fact, the committee rapporteur made extensive research in the international legal framework, and sought, beyond what had already been written, to incorporate important devices of widely accepted Conventions, in order to facilitate transactions and international legal traffic. Thus, there is also the influence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which can be noted as it extinguishes the need of a requirement of dual approval of sentences and it inserts the device of reversal of the burden of proof. Carlos Alberto Carmona also states on the influences that "it can be seen that in the six sections of art. 38 and art. 39 all cases of refusal of approval provided in art. V of the New York Convention were related."[8]

During the drafting process of the Brazilian Arbitration Law, Brazil ratified some relevant conventional international acts dealing directly or indirectly the subject, namely:

- Protocol of Las Lenas[9], signed on July 27, 1992: which proposes cooperation rules and Jurisdictional Assistance in Civil, Commercial,

7 LEMES, Selma. Princípios e origens da Lei de Arbitragem. *REVISTA DO ADVOGADO* – Associaçao dos Advogados de Sao Paulo, n° 51, outubro/1997. Pags 32 – 35.

8 "verifica-se que nos seis incisos do art. 38 e no art. 39 foram relacionados todos os casos de recusa de homologação previstos no art. V da convenção nova-iorquina." CARMONA, Carlos Alberto. *Arbitragem e Processo – Comentários à lei 9.307/96.* 2ª ed. São Paulo: Atlas, 2004, p. 295, our translation.

9 Incorporated by Decree n. 2067, of November 12, 1996.

Labor and Administrative issues, in MERCOSUR. It indicates strategies for resolving conflicts between individuals or corporations.

- International Commercial Arbitration Agreement of MERCOSUR[10], signed in 1998: Standardize implementation of the arbitration between the Parties, it has been prepared based on the UNCITRAL Model Law, and has as its object to "regulate private arbitration as an alternative dispute resolution for controversies arising from international commercial contracts between individuals or legal entities of private law "(art. 1), therefore being excluded the arbitration in disputes between an individual and a State Party and those arising between States, since in these cases the mechanism under the Protocol of Olivos should be triggered.

- Inter-American Convention on Commercial Arbitration[11] signed in Panama on January 30, 1975: which was modeled after the New York Convention, 1958, and provides to the signatories countries the general enforceability of arbitration agreements and arbitral awards.

- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards[12], signed in Montevideo on May 8, 1979: that regulates the enforcement of judgments and arbitral awards in other member states of the OAS.

All these Conventions affected, in a greater or lesser extent, the development and subsequent application of national law, but, among those cited, it should be said that the Panama Convention, was the main source of inspiration to the Brazilian legislator, as it brings very similar provisions to contained in the New York Convention, although we must emphasize that the first one has a smaller scope, since the latter has been adopted by over 130 countries, including Brazil, albeit belatedly. Even though the New York Convention can be considered a legal source of inspiration, it was only adopted in the domestic sphere in 2002, through Decree No. 4,311.

From this brief analysis, we can see the influence of the International Law Conventions on Arbitration in the composition of the national law. Even before the incorporation of some normative instruments to the domestic legal system, certain guarantees were necessary to the national legislation so that the country could have a higher reliability at an international level as far as it is concerned on legal protection of arbitration issues.

It is also worth mentioning, however, that even if the Brazilian Arbitration Law bring in your text exactly the same provisions contained in other international conventions, this would not be sufficient to create

10 Incorporated by Decree n. 4719, to June 4, 2003.

11 Incorporated by Decree n. 1,902, of May 9, 1996.

12 Incorporated by Decree No. 2,411, of December 2, 1997

a trust in the legal protection for the community international, as a rule, the content of the internal laws of the countries are not known, internationally. Therefore, we understand the importance of both the consonance of domestic legislation with international acts applied, and adherence to international treaties National widely adopted.

Now, the question of legal certainty should also be analyzed from the perspective of the application and subsequent interpretation of recognition and admissibility of the effects of the report on legal relations. Even if there is a specific regulation mechanism regarding the use of arbitration, this only gains momentum as the judicial authorities are inclined by the due observance of the will of the parties to submit to this form of dispute resolution, and manage to admit that under private sphere, individuals can condone the way that best suits them, subject to the limits laid down by the system, as discussed earlier. The adoption of a law according to the most advanced international standards do not have the power to provide the necessary legal certainty if the Brazilian institutions fail to understand the importance of the institute even for achieving the fundamental right of access to justice.

Therefore, in order to help understand how the subject has been treated in Brazil, we shall now proceed to an analysis of the national arbitration legal framework and its application.

4. GENERAL ASPECTS OF ARBITRATION LAW AND ITS APPLICATION IN BRAZIL: OBJECT, SUBJECT, FORM OF EXPRESSION AND EXECUTION

Law of arbitration in Brazil was born of efforts by the Liberal Institute of Pernambuco, which brought together representatives of professional associations and lawyers, and introduced a bill that would allow the use of arbitration mechanisms in Brazil[13]. The influence of international regulation is felt not only at the time of preparation and discussion of the bill, but also thereafter, when the effects of the implementation of the report on the national legal system, since by signing the Convention of New York, "Brazil has consolidated arbitration in international forums, providing even the recognition of international arbitral awards."[14]

13 CARMONA, Carlos Alberto. *Arbitragem e Processo – Comentários à lei 9.307/96.* 2ª ed. São Paulo: Atlas, 2004

14 "o Brasil consolidou a via arbitral em sede internacional, propiciando, inclusive, o reconhecimento das sentenças arbitrais internacionais." GAIO JR., Antonio Pereira. Lei n. 9.307/96 : natureza, historicidade e constitucionalidade da arbitragem no Brasil. In: *Arbitragem*. GAIO JR., Antonio Pereira e MAGALHAES, Rodrigo Almeida. (coords). Belo Horizonte: Del Rey, 2012, p. 13, our translation.

Generally, all matters dealing with available rights, of patrimonial character, which can be transacted, except disputes affecting public order, may be submitted to arbitration in Brazil.

The inalienable rights, such as issues relating to the status and capacity of persons, or those relating to family subjects, should be protected by the state jurisdiction. Likewise to be resolved, are the contentions that involve things that are forbidden or out of the trade; and those arising from natural obligations and criminal matters. Processes, whose solution is through voluntary jurisdiction, also claim to judicial intervention, "so that it ensures and grants the legality to the fact situation that, by mutual agreement, the parties have reached."[15]

In labor matters, there is in principle, the possibility of adopting arbitration for collective bargaining, as it allows the use of other alternative forms as conciliation, following the provisions of art. 114 of the Brazilian Constitution, which understanding confirmed by the Superior Labor Court on different occasions[16].

As for the person's ability to hire the 'derogation of state justice', Brazilian law establishes that the applicable law shall be the one from the country in which the individual is domiciled (LICC, art. 7º). This is a priori the analysis to be made when the setting of the arbitration agreement.

"The arbitration judgment conceived as a result of a free agreement between the parties, only becomes permissible between people who enjoy the legal autonomy to govern their legal relationship"[17]

15 PUCCI, Adriana Noemi. *Arbitragem Comercial nos países do Mercosul*. São Paulo: LTr, 1997, p.46.

16 Vide Agravo de Instrumento em Recurso de Revista n° TST-AIRR-1475/2000-193-05-00.7, onde o Tribunal afirmou que « Na hipótese, o art. 5º, XXXV, da Constituição Federal dispõe sobre a garantia constitucional da universalidade da jurisdição, a qual, por definir que nenhuma lesão ou ameaça a direito pode ser excluída da apreciação do Poder Judiciário, não se incompatibiliza com o compromisso arbitral e os efeitos de coisa julgada de que trata a Lei nº 9.307/96. É que nos termos do art. 9º da mencionada lei, o compromisso arbitral é a convenção através da qual as partes submetem um litígio à arbitragem de uma ou mais pessoas; Portanto, a arbitragem caracteriza-se como forma alternativa de prevenção ou solução de conflitos à qual as partes aderem, por força de suas próprias vontades. As partes, por conseguinte, têm a faculdade de renunciar ao seu direito de recorrer à Justiça ou de exercer o seu direito de ação, visto que o inciso XXXV do art. 5º da Constituição Federal não impõe o direito à ação como um dever, no sentido de que todo e qualquer litígio deve ser submetido ao Poder Judiciário. Dessa forma, as partes, ao adotarem a arbitragem, tão-só por isso, não praticam ato de lesão ou ameaça a direito. Assim, reconhecido pela Corte Regional que a sentença arbitral foi proferida nos termos da lei e que não há vício na decisão proferida pelo juízo arbitral, não se há de falar em afronta ao mencionado dispositivo constitucional ou em inconstitucionalidade da Lei nº 9.307/96. »

17 "O juízo arbitral concebido como fruto da livre convenção entre as partes, só se torna admissível entre as pessoas que gozem da autonomia jurídica para disciplinar as suas relações

and should the subject, hold still, the power of disposal over the object of the contract. It can be said that only people who can compromise, may submit a dispute to arbitration.

The legal entities of private law may compromise since their legal representatives, agents and prosecutors are duly authorized through special powers.

As to whether people of public law to submit to arbitration awards, it is necessary to highlight "the issue of immunities from jurisdiction and execution, under which it is customary in an international level, that sovereign states are not subjected to jurisdiction of another State, and do not accept being executed because of proceedings pursued in another, unless the State itself to accept voluntarily submission to foreign jurisdiction."[18]

Thus, the state, by contracting with individuals or with another sovereign state, hardly accept to submit to the laws or courts of another country, presenting the concept of arbitration, as the most viable for both parties, as it allows the preservation of neutrality in the procedure.

In Brazil, in contracts of eminently public feature, the public interest must prevail over the particular.

> *Regarding the public-law legal person (Union, States, Municipalities and autarchies), they are excluded from the legal possibility of solving internal conflicts through arbitration in face of unavailability of Treasury properties, whence the public interest is intrinsic to the deal itself. Nonetheless, the principle is not absolute, because the exception can find legal prediction, with internal requirement (eg laws, decrees bidding documents with clause, etc (...)*[19]

jurídicas" THEODORO JÚNIOR, Humberto. *Curso de Direito Processual Civil – volume I*. Rio de Janeiro: Forense, 2005, p.316, our translation.

18 "a problemática das imunidades de jurisdição e de execução, em virtude das quais é costume, em nível internacional, que os Estados soberanos não se submetam à jurisdição de um outro Estado, e tampouco aceitem ser executados em razão de processos tramitados em um outro, salvo se o próprio Estado aceitar, voluntariamente, a submissão à jurisdição estrangeira" PUCCI, Adriana Noemi, *op. cit*., p. 51-52, our translation.

19 No que tange às pessoas de direito público interno (União. Estados, Municípios e Autarquias), estão excluídas da possibilidade jurídica de solucionar conflitos internos através da arbitragem, em face da indisponibilidade dos bens da Fazenda Pública, donde decorre o interesse público que é ínsito à própria lide. Nada obstante, o princípio não é absoluto, porquanto a exceção pode encontrar previsão normativa lato sensu, com requisito interno (v.g. leis, decretos editais de licitação com cláusula compromissória, etc.) FIGUEIRA JR., Joel Dias. *Arbitragem, Jurisdição e Execução: Análise crítica da Lei 9.307, de 23.09.1996*. 2ª ed. São Paulo: Revista dos Tribunais, 1999, p. 176, our transalation.

So the question encircles much more to know which subjects may be the object of an arbitration award, than to know who will appear as part of, so that in international contracts signed by state bodies there should be an express provision authorizing arbitration.

In relation to the form of expression of the will of the parties to submit to arbitration a solution, generally, this can occur in the inclusion of an arbitration clause, considered as a device inserted in the contract, or standalone instrument that you mention, just prior to the installation of the suit[20], in which the parties claim to the arbitration judge, the discussion about the existence, validity and effectiveness of the made Convention. Or also, through arbitration commitment, made subsequently to the emergence of conflict, ie, after verification of the divergence of interests on a particular property, the parties may, by means of arbitration commitment, choose to arbitrate as a competent mechanism to its resolution[21].

The Brazilian Arbitration Law equaled the two species, assigning them the generic name of the arbitration agreement. Thus, according to Freitas Camera "The law of arbitration creates a generic figure of the arbitration agreement, the private legal act whose purpose is the establishment of arbitration."[22]

It is noteworthy that the principle of autonomy of the arbitration clause, inserted in the Brazilian Arbitration Law was formulated from the laws of countries such as Italy, Germany, Belgium, France, Spain and also UNCITRAL Model Law. This postulate is a corollary of the principle Kompetenz-Kompetenz, originated in German jurisprudential construction, whereby the referees have the ability to judge their own competence. Thus, in the words of Silva Oliveira[23], discussing the

20 The insertion of the clause can be made at the time of contract formation, or also after its completion through standalone instrument.

21 VALLADARES, L. C. P., DIZ, J. B. M. Considerações sobre o Acordo de Arbitragem do MERCOSUL e a Lei de Arbitragem brasileira. *Revista Parlatorium*. FAMINAS: Belo Horizonte, v. 5, p.13 - 40, 2010

22 "A lei da arbitragem cria a figura genérica da convenção de arbitragem, ato jurídico privado cujo o efeito é a instauração da arbitragem."CÂMARA, Alexandre Freitas. *Arbitragem – Lei 9.307/96.* 4ª ed. Rio de Janeiro: Lúmen júris, 2005, p. 2, our translation.

23 "Costuma-se tributar à Corte Suprema da antiga Alemanha Ocidental, em decisão proferida em 4.5.1955, a formulação da regra Kompetenz-Kompetenz, da mesma maneira que se costuma citar a Convenção de Nova Iorque sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras, de 10.6.1958, como fruto de inspiração de tal regra. No entanto, é nas disposições das Regras sobre Arbitragem da UNCITRAL, de 1976, e da Lei-Modelo sobre Arbitragem Comercial Internacional da UNCITRAL, de 1985, que se verifica a asserção mais contemporânea daquilo que por uns é chamado de princípio e, por outros, de regra, ou seja, quando o meio de solução de controvérsias é a arbitragem, compete ao árbitro ou à corte arbitral definir sua própria competência. Essa assertiva, recorrente no âmbito da arbitragem internacional, foi expressamente adotada pela Lei nº 9.307, de 23.9.1996, também chamada

above mentioned principle:

> *It is often attributed to the Supreme Court of the former West Germany, in a decision issued on 04.05.1955, the wording of the rule-Kompetenz Kompetenz, the same way they usually cite the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10.06.1958, as a result of inspiration from such a rule. However, it is the provisions of the UNCITRAL Arbitration Rules, 1976 and the Model Law on International Commercial Arbitration UNCITRAL, 1985, that there is a more contemporary statement of what is called by some as principle, and by others as a rule, indeed, when the means of dispute resolution is arbitration, the arbitrator or the court shall define its own jurisdiction. This assertion, appellant in international arbitration, was expressly adopted by Law No. 9307 of 23.9.1996, also called Marco Maciel Law or Law of Arbitration in its Articles 8, paragraph, and 20, caput.*

Regarding the recognition and enforcement of the final report, they equate to a sentence, having thus the same effects executives that the latter has. Therefore, the winning party may have appeal to the judiciary for the magistrate to execute the award, if the required party does not voluntarily comply the arbitration award.

In Brazil, the Arbitration Act overcame the called 'double approval', which required prior approval in the country of origin and after, the report would be approved before the Supreme Court, obtaining the exequatur. After that, the competent judge could run it. The art. 35 of the Arbitration Law provides that "to be recognized or enforced in Brazil, a foreign arbitral award is subject only to the approval of the Supreme Court."

Nevertheless, an interesting question worthy of note concerns the application of the Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative executed on Las Lenas that in art. 20, states that the judgments and arbitral awards rendered in the jurisdictions of the States Parties of MERCOSUR possess extraterritorial validity, as well, regardless of subsequent approval. However, this understanding is not peaceful. Thus, there

Lei Marco Maciel ou Lei de Arbitragem, em seus artigos 8º, parágrafo único, e 20, caput." OLIVEIRA, Henrique Silva. Considerações sobre o princípio Kompetenz-Kompetenz na lei de arbitragem. Trigueiro Fontes Advogados, Curitiba, junho de 2005.

are those who defend the extraterritorial effect to the decisions of the signatories of this agreement, for which, if this were not the correct understanding, there would be no justification for the Protocol[24]. Others believe that the major novelty of Protocol Las Lenas, was to authorize the recognition and enforcement of foreign judgments and awards through Letters Rogatory, through the Central Authority, constituting only as a facilitator.

There is even a judgment of the Supreme Court where the highest organ of the Brazilian Judiciary held a restrictive interpretation on the application of the Protocol of Las Lenas, expressing the belief that the exequatur given to for enforceability of letters rogatory could not be accomplished without submitting to the examination the President of the Court. The Supreme Court ruled in Special Appeal no. 7618/97 that it was harmful to Brazilian sovereignty and violated the text of the Basic Law of the Republic, to have any permission, requested by a letter rogatory issued by the judicial organ of another country, intended to permit in the country, the investigation, by foreign magistrates, of witness domiciled in Brazil, especially when it meant that the hearing - that should be done by the Brazilian federal judge - was held on a diplomatic mission maintained by the State that issued the letter to the Government of Brazil.

5. CONCLUSION

One cannot deny that arbitration represents an innovation for the legal settlement of disputes. The formation of an extrajudicial procedure establishing parameters to resolve a conflict is, by itself, an important element in the setting of legal relations, especially those linked to the private sphere. It is undeniable that as well CAPPELLETTI expresses this movement of alternative forms of dispute resolution:

> *"representa la búsqueda de instrumentos alternativos para la solución de los conflictos llevados a efecto fuera de las arenas judiciales, a través de sistema informal, no contencioso, donde se busca el consenso o cualquier forma amistosa que vincule las partes, amenizando los espíritus más belicosos y reduciendo, así, los argumentos plantados por emulación; el resultado, consecuentemente, es bien más aceptado para el no vencedor."*[25]

24 MAGALHÃES, J. C. de. O Protocolo de Las Leñas e a eficácia extraterritorial das sentenças e laudos arbitrais proferidos nos países do Mercosul. *Revista de Informação Legislativa Senado Federal*, ano 36, n. 144, Brasília, out/dez 1999, p. 281-287

25 CAPPELLETTI, Mauro e GARTH, Bryant. *El acceso a la justicia: la tendencia en el*

There is no doubt that the judicial system now faces a major crisis that hinders and weakens the access to justice, pillar of one of the most important fundamental human rights. Establishing a procedure more suited to the international legal practice, Brazil is "tuned" to the needs of individuals and companies, creating greater opportunity for investment and business by enabling people to, per se, establish the mechanisms to be used in case of conflicts.

Brazil, after the enactment of Law 9307 of 1996, also accompanied the dynamic creation of international mechanisms to resolve disputes and to establish arbitration as a legitimate mean of conflicts' composition and it has also provided for the adoption, in the midst of that law, of essential elements so that referred mechanism could be applied in legal relationships between individuals. These aspects were, to a greater or lesser extent, a result of internationally recognized instruments like the case of those adopted under the UNCITRAL, according the discussion above.

In addition, the Brazilian law in providing for arbitration as a proper mean for dispute settlement, set important parameters that, no doubt, and despite possible improvements to be made to the latter, printed more legal certainty, generating the degree of confidence necessary for individuals and companies who want to adopt the arbitration in legal relationships held by them. It also represents a unique opportunity for the disputes arising under private to develop with a degree of autonomy, subjected, of course, to the limits laid down in the legal system itself.

Finally, the possibility of using arbitration by private means opening the system to eminently private relations, ensuring the full realization of one of the fundamental pillars of a democratic state, namely, the existence of mechanisms for dispute settlement as part essential to the broader principle of access to justice.

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THE CISG AND PARTY AUTONOMY IN BRAZILIAN INTERNATIONAL CONTRACT LAW

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Abstract: This paper focus on the principle of party autonomy in the choice of the law applicable to international contracts under CISG and Brazilian law. It analyses the different possibilities of application of this principle as well as its limits under both legal systems.

Keywords: CISG - International contracts - International sales contracts - Vienna Convention.

INTRODUCTION

The proposed subject for my contribution[1] suggests an approach under two perspectives: the examination in the light of the Vienna Convention (First part) and the examination in the light of national law systems, for the purposes of this essay, the Brazilian law system (Second part).

FIRST PART

THE CISG AND PARTY AUTONOMY

Freedom of contract constitutes the main foundation of the Uniform Law presented by the United Nations Convention on Contracts for the International Sale of Goods (CISG), which has the nature of supplementary law. Under this perspective, the freedom is characterized by the exclusion or by the voluntary submission of a sales contract to the Uniform Law[2] (A).

1 This paper reveals the essential content of my contribution during « The CISG and Party Autonomy in Contract Law », pannel on 30 April 2010, by CISG-Brasil.Net Conference, São Paulo, I Seminário Internacional "O Brasil e a CISG", in 29 and 30 April 2010. The oral style of the conference was preserved. The footnotes and bibliographical references here are limited to the essential.

2 It is very important to take into account the assertion contained in the UNCITRAL Digest 2012 (p. 33), in regard to party autonomy in international contracts: « By allowing the parties to exclude the Convention or derogate from its provisions, the drafters affirmed the principle that

The application of the Vienna Convention as a result of contractual freedom – different situations that lead to the application of the CISG (B).

A. FREEDOM OF CONTRACT

By adopting the opt-out system (2), the Vienna Convention is naturally applicable where all its applicability conditions are fulfilled (1). Contractual freedom, however, may exclude the application of the Uniform Law or lead to its application even in situations where it would not normally be applicable. (3).

The limits of this freedom are set out in Article 6 of the Vienna Convention (4). This norm authorizes parties to exclude the application of the Vienna Convention, to derogate from its provisions or to vary their effects:

> *"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".*

This Article contains the recognition of the optional nature of the Convention and the main role that party autonomy plays in international trade and, in particular, in international contracts of sale. This affirmative is found in the comments to article 6 of the *Recueil analytique de jurisprudence*, it is also illustrated by several decisions enshrined in the CLOUT system and recognized by different Vienna Convention commentators.

The supplementary nature of the Uniform Law also allows the Contracting Parties to voluntarily submit their contract to its provisions, and they can trigger its application, even if the Uniform Law is presented, at first, as inapplicable.

Therefore, it is important to analyze party autonomy as far as the exclusion of the application of the Vienna Convention is concerned, the derogation from and the modification of some of its provisions, before analyzing the different types of application of the Vienna Convention as a consequence of the contractual freedom conferred upon the contracting parties.

1. Applicability Conditions of the CISG

The field of application of the CISG is provided for in Articles

the primary source of rules for international sales contract is party autonomy. Thus the drafters clearly acknowledged the Convention's non-mandatory nature and the central role that party autonomy plays in international commerce – specifically, in international sales ».

1 to 6 CISG, and the conditions of applicability of the Convention are presented in its Article 1.

This Article presents, in its item 1, letter a, the *criterion* based on reciprocity, which means that the Convention applies when the contracting parties have their places of business in Contracting States; hence, it establishes the principle of autonomous or direct application of the Convention.

Article First, item 1, letter b, presents a rule of distribution – it is not, in essence, a private international law rule; it requires the application of rules regarding conflicts of Law of the place of the judge and the designation of the Law of a Contracting State (SCHELECHTRIEM and WITZ, p. 18). As a part of the legal system of a Contracting State, the Vienna Convention presents itself as the applicable law to international contracts for sales of goods, as a result of the distribution operated ex vi of Article 1.1, letter b.

2. The Freedom of Contract Principle in the Light of the Opt-out System

By adopting the *opt-out* system, the Convention presents the potential application of its rules. The parties may, however, exclude expressly or implicitly the application of the Vienna Convention, and this conventional exclusion may be manifested through different forms.

Expressly, the exclusion may occur by the adoption of a clause in the following terms: "the present contract is not governed by the Vienna Convention", without a correlative choice of applicable law.

The exclusion may also occur by the insertion of a clause in that nature in the general conditions, which are validly incorporated into the contract.

The express exclusion may result from the indication by the parties of the applicability of the law of a non-Contracting State, which might be cause for surprise as, everyday, new members join the circle of Contracting States.

The exclusion may occur in a phase after the conclusion of the contract: the litigation phase (*Oberlandesgerich Hamm*, 6 May 1998 – CLOUT case No. 278).

The exclusion of application of the Uniform Law may also result in the conventional submission of the contract to other rules of law, besides the Vienna Convention.

Implicitly, the exclusion of application of the Vienna Convention is also possible, although Article 6 does not mention this possibility, as did ULIS in its Article 3. The Article's silence is explained by the concern of the Vienna Convention drafters to prevent judges from accepting the exclusion too hastily, thereby compromising

the application of the Uniform Law.

As stated in the doctrine, the designation of an arbitral tribunal located in a State not party to the Vienna Convention should not be interpreted, by itself, as an implied exclusion of the Uniform Law.

The use of general conditions of sale or of purchase drafted before the entry into force of the Uniform Law, and in conformity with domestic law, should not, in the same way, produce the effect of an implied exclusion.

3. Applicability of the Freedom of Contract Principle:

a. The submission of the contract to the law of a Contracting State

The designation by the parties of a domestic Law, by observing the applicable rules of conflict of laws, does not mean, with the exception of particular circumstances, that the parties have chosen the Law applicable to internal sales.

This designation includes the Vienna Convention when its applicability conditions are met. For the choice of a domestic Law to represent the exclusion or the disregard of the Vienna Convention, it is necessary that it clearly indicate that the parties intended to exclude the application of the Uniform Law. The dominant international case law understands that the choice of a Contracting State's Law includes the Uniform Law, unless the parties have expressed their intent of applying domestic Law. As an example, consider the direct indication of an article or of several articles of a given Civil Code, related to the warranty of latent defects (SCHELECHTRIEM and WITZ, p. 17).

One should also consider that the CISG does not regulate all aspects of a contract of sale, which require the application of domestic Laws (see, v.g., Articles 4 and 5). That is the case for the validity of the contract or of any of its clauses, the prescription (limitation periods), the transfer of credit or the set off, when operated inside a contract of sale.

What should also be kept in mind is that the interpretation of the parties intentions will and declarations must be made in the light of Article 8 of the CISG, in an autonomous way, independently from national conceptions, as indicated in Article 7 of the CISG.

b. The choice of the Law of a non-Contracting State

- Effect: Exclusion of the Vienna Convention?

When the contracting parties submit the contract of sale to the Law of a non-Contracting State, does that choice of Law exclude the application of the Vienna Convention? It is necessary to verify, first, if the applicable Law clause is effective, considering the rules regarding conflicts of Law.

c. General conditions of sale or of purchase

In principle, the exclusion of the Vienna Convention is equally admissible by provisions of the General Conditions of sale or purchase, as long as these general conditions are within the contractual boundaries.

It may occur, however, that a clause of exclusion is considered not to be contained within the contractual boundaries, or that the general conditions were drafted before the entry into force of the CISG in the Law system indicated by the parties. The difficulty lies in determining the extent of the clause of exclusion in this manner.

It may also occur that the contract is submitted to new general conditions, excluding the CISG, while the parties have, until then, concluded and performed their contracts under its rules.

d. The denial or rejection, or the modification of the Uniform Law of contracts of sale

The parties may exclude the application of the Uniform Law by other means, aside from the choice of the legal system of a non-Contracting State.

The parties are allowed to exclude the application of the CISG by using an express clause. They are also free, in virtue of Article 6, to modify or to complete the Uniform Law making use of, v.g., the INCOTERMS, the UNIDROIT principles regarding international commercial contracts, or even the lex mercatoria.

Potential limits to the effectiveness of these clauses may result from the domestic Law applicable to contracts of sale. Indeed, the exam of the validity of the contractual clauses is not within the scope of the CISG (vide Article 4).

4. Limits to Exclusion

Although drafted clearly, Article 6 demands some explanations:

It is important to highlight that, by providing for different situations where the parties freely determine the Law applicable to their contract, Article 6 presents a distinction between the total exclusion of application of the CISG and the derogation of certain of its provisions.

For the first situation, the CISG does not present any restriction,

while for the derogation from some of its provisions the Convention imposes a limit that consists in the observation of Article 12. In other words: when a party to a contract bound by the Convention has its place of business or residence in a State that has made a reservation in virtue of Article 96, the parties cannot derogate from Article 12 or modify its effects.

That is, apparently, the only limit imposed by the CISG to freedom of contract by the CISG regulated. According to Article 12, the provisions of Article 11, Article 29 or of the second part of the Convention, authorizing a form other than written, either for the conclusion of a contract of sale, or its modification or termination by agreement or any offer, acceptance or other indication of intention, does not apply when one of the parties has its place of business or residence in a Contracting State which has made a declaration under article 96 of the CISG.

Article 12 is a mandatory rule of the Convention, which cannot be disposed of by the parties.

In the same way, Articles 89 to 101, which constitute public Law provisions, also cannot be derogated from by the parties, and they impose limits to the material exclusion of the CISG by them. Commentary understands that the provisions of Article 7 of the CISG cannot be derogated from by the parties. These provisions, which present rules of interpretation and gap-filling cannot be disposed by the parties.

B. SITUATIONS INVOLVING CHOICE OF THE CISG BY THE PARTIES

Assimilation within the limits presented by the rules of conflicts of Law.

The contracting parties may not only exclude the application of the CISG to its contract, they may also submit to the Uniform Law a contractual operation that is out of its scope, even when it lacks one of the conditions of applicability of the CISG.

Hence, the parties may also trigger the application of the Uniform Law, inapplicable in principle, overcoming the obstacles to the natural application of the Vienna Convention.

The validity of such conventional submission clause cannot be examined in the light of the CISG, which is silent in regards to opting in. Indeed, the CISG does not provide for (in a direct and express manner) that the application of the Convention results on the party autonomy[3].

3 See JACQUET Jean-Michel, « Le droit de la vente internationale de marchandises : le mélange de sources », In : *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle. Mélanges en l'honneur de Philippe KAHN*. Université de Bourgogne-CNRS, – vol. 20, Paris :

It is convenient to focus on the rules of Conflict of Law. Frequently they only allow the parties to choose a domestic Law. That is what happens under the Hague Convention Relating to the Settlement of the Conflicts Between the Law of Nationality and the Law of Domicile, from June, 15th, 1955, the Rome Convention of 1980 relating to contractual obligations and the *Rome I Regulation*.

Hence, a choice of Law in favor of the CISG, where the conditions are not fulfilled, would be ineffective.

It is important, in that case, to apply the objective proximity criteria and to verify to what extent the contracting parties may derogate from the domestic Law applicable, submitting their contractual operation to the Uniform Law (CISG).

In other words, the Uniform Law may substitute only the supplementary provisions of the domestic Law applicable.

The drafters of the *Rome I Regulation*, which replaces the 1980 Rome Convention, for the contracts concluded after December 17th, 2009, intended to make the voluntary submission of contracts to the CISG easier. Indeed, the initial version of the proposition authorized contracting parties to submit their contractual operations to the "rules and principles of the material law of the contracts, recognized at international and community levels". This rule, however, was not accepted in the final text of the Rome I Regulation, although it is present in the Mexico Convention (vide Article 10).

A choice of the contracting parties in favor of the CISG might be conceived to the purpose of the contract of sale of a ship. It is also possible that the CISG is applied in a distribution or framework agreement, with contracts of sale as "sales agreements" contained, therefore, in the scope of the CISG.

Such submission is also conceivable for the purposes of mixed contracts, combining a contract of sale in the scope of the CISG with an operation not in the scope of its material applicability. The parties must, nevertheless, be prudent when the qualification of the contract distances itself from a contract of sale, as the remedies and means provided to the contracting parties in case of absence or failure of performance are established considering goods as the object of the contracts.

Other forms of voluntary submission of contracts to the Vienna Convention[4].

Litec, Année 2000, p. 75-93, at. p. 89-90.

4 Ph. Kahn, Les Conventions internationales de droit uniforme devant les tribunaux arbitraux, International Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles, Symposium held at Verona University (4-6 November 1999), Revue de droit uniforme, 2000-1, p.121-127, at. p. 122-123.

a) Designation of the Vienna Convention as lex contractus[5]

b) Reference to the lex mercatoria as the applicable Law[6].

c) Reference to the standards, general principles of law and to the usus contractus[7].

The arbitrators are allowed to apply the standards[8] and general principles of law as an integral part of the Vienna Convention. In that sense, we refer to the arbitral award issued in ICC case No. 7331 (1994)[9]. In the arbitral award of ICC case No. 6281 (1989), the arbitrators applied the Vienna Convention as a statute endowed with universal values given the number of contracting states[10]. We also highlight the arbitral award of ICC case No. 9887 (1998), which applies the Vienna Convention by recognizing that it reflects the evolution of international

5 See the arbitration awards ICC n° 8213 and 8769, which the Vienna Convention was applied because the parties pointed as applicable law the set of rules such as the Vienna Convention. The partial arbitration award rendered in affaire n° 8213, published In: *Bulletin de Cour internationale d'arbitrage de la CCI*, Vol. 11/Nº 2, p. 50-53, at. p. 53, reveals that the parties had designated as applicable law the Uniform Commercial Code and the Vienna Convention. Under the terms of the contract, reproduced by the sentence, the parties agreed the following: " a) the Purchase Agreement dated […] was governed by the Law of the State of New Jersey, including New Jersey version of the Uniform Commercial Code (" NJUCC ") ; b) the Purchase Agreement date […] was governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (" UNISG ") ". See to: H. van Houtte, La convention de Vienne dans la pratique arbitrale de la Chambre de commerce internationale, *Bulletin de la Cour internationale d'arbitrage de la CCI*, Vol. 11/Nº 2 – 2º semestre 2000, p. 22-33.

6 Application of the lex mercatoria. Arbitral award ICC n. 2291/75. The arbitral tribunal has found that : *« les parties n'ayant pas pris la précaution de rédiger un contrat formel, il convient d'interpréter leurs volontés et leurs engagements à partir de leurs écrits, et en fonction des principes généraux du droit et de l'équité, qui doivent régir les transactions commerciales internationales »*. In : Clunet, 1978, p. 989.

7 See VENEZIANO Anna, « L'application des principes d'UNIDROIT dans la vente internationale », *Revue de droit des affaires internationales*, N° ¾, 2001, p. 477 - 488. See to MAYER Pierre, « L'application par l'arbitre des conventions internationales de droit privé », In : *L'internationalisation du droit, Mélanges en l'honneur de Yvon Loussouarn,* Paris : Dalloz, 1994, p. 275-291.

8 See J.-P. Beraudo, « La Convention des Nations Unies sur les contrats de vente internationale de marchandises et l'arbitrage », In : *Bulletin de la Cour internationale d'arbitrage de la CCI*, Vol. 5/Nº 1, Mai 1994, (p. 61-65, p. 63-64.

9 Bulletin de la Cour d'Arbitrage de la CCI, 1995, p. 73. J.D.I. 1995, p. 1001-1009 (note D. Hascher). Commentaire A. Mourre, Application of the Vienna International Sales Convention in Arbitration, cit., p. 49.

10 *The Hague Kluwer Law International*, 1997, p. 409. J.D.I. 1991, p. 1054 (note D. Hascher). Comm. A. Mourre, Application of the Vienna International Sales Convention in Arbitration, cit.,p. 49.

law and, in particular, of international sales law[11].

Arbitrators do not hesitate to apply the Vienna Convention as a repertory of international commercial usages. In that sense, an ICC tribunal applied the Vienna Convention to a series of contracts concluded in 1979, even before its entry into force, finding that : *« il n'existe aucune meilleure source pour déterminer les usages de commerce prévalant que les termes de la Convention des Nations Unies sur la vente internationale de marchandises du 11 avril 1980 sur base du fait […]. Ceci étant le cas même si ni le pays du vendeur ni celui de l'acheteur ne sont parties à cette Convention »*[12].

SECOND PART

THE BRAZILIAN LAW SYSTEM AND THE APPLICABILITY OF THE CISG AS A RESULT OF THE CHOICE OF THE LAW APPLICABLE BY THE PARTIES

Although the autonomy to choose the Law applicable to contracts is considered a rule of conflict by the majority of Law systems nowadays, either by force of the jurisprudence or of Conventions – see the Hague Convention of 1964 relating to the law applicable to sales of goods, Rome Convention, *Rome I Regulation*, Mexico Convention –, or by force of express normative provision, such as the Swiss Private International Law Act of December, 18th, 1987, the *Codice civile* from 1942, in its article 1322, as well as the statute of reformation of the Italian Private International Law system, of may 31st, 1995 (which was incorporated the Rome Convention in its text), in Brazil there still remains doubt as to its admissibility in the field of state jurisdiction.

For this reason, it is convenient to highlight the possibility of applying the CISG in Brazil by choice of the parties in the field of arbitral jurisdiction, before analyzing the possibility of its application by the state judge.

11 V. *Bulletin de la Cour d'Arbitrage de la CCI*, Volume 11- N° 2, p. 109-110. Comm. A. Mourre, Application of the Vienna International Sales Convention in Arbitration, cit., p. 49. Decision referred to and commented by Iacyr de Aguilar Vieira, *L'Applicabilité et l'impact de la Convention des Nations Unies sur les contrats de vente internationale de marchandises au Brésil*. Strasbourg : PUS, 2010, p. 220 and sq.

12 Sentence CCI nº 5713, Yearbook of Commercial Arbitration, 1990, p. 70.

A. ARBITRAL JUDGE – IS NOT NECESSARILY BOUND BY THE CONFLICT OF LAWS SYSTEM.

The party autonomy principle prevails in the choice of the applicable law:

We emphasize Article 2 of the Brazilian Arbitration Act, Federal Statute n. 9.307, of September, 23rd, 1996. This article gives the parties the possibility to choose between arbitration at law and arbitration by equity – and to freely choose the rules of law applicable to the arbitration, while still being bound to observe custom and usage and the demands of public policy. The parties may, also, determine that the award be enacted on the grounds of general principles of law, usage and international trade rules.

The principle of party autonomy to choose the jurisdiction and the law applicable to conflicts submitted to arbitration is also found in conventional instruments adopted by Brazil under the MERCOSUR legal order:

1) The Buenos Aires Protocol relating to International Jurisdiction on contracts matter, concluded in Buenos Aires, on August 5th, 1994, incorporated in Brazil by Decree n. 2.095, on December 17th, 1996.

2) The Agreement on International Trade Arbitration of MERCOSUR, concluded in Buenos Aires on July 23rd, 1998, incorporated in Brazil by Legislative Decree n. 265, on December 29th, 2000.

3) As lege ferenda, the principle is set forth in the Convention of Mexico from march 17th, 1994 – adopted in the CIDIP V, within the Brazilian Bar Association (OAB); Brazil has signed the Convention, but until the present it was not ratified. Ratification could lead the Brazilian's contracting parties to achieve the same level of autonomy of its commercial partners, therefore opening a safe window to the application of the principle by the State´s judges.

B. THE STATE JUDGE

The state Judge is necessarily bound by the conflict of laws system.

In Brazil, there is no express provision regarding the principle of party autonomy to choose the applicable law. In the Act of Introduction to the Civil Code (now Act of Introduction to the Brazilian Rules) there are only objective elements of connection: *lex loci regit actum* and *lex loci executionis*, relating to obligation matters.

There is no express prohibition to the party autonomy principle. A principle recognized internationally should not be prohibited without a rational justification.

The doctrine finds itself divided in the matter.

There is no jurisprudence from the Superior Courts regarding the matter at present.

We emphasize recent state court decisions, admitting the choice of law applicable to an international contract (this decisions are referred to and commented by Fernanda V. da Costa CERQUEIRA)[13].

A decision of the 1st Court of Appeals of São Paulo (Tribunal de Alçada) admitted the adoption of the principle of party autonomy by the state judge, when it expressly declared "that there is not any deterrence to the application of the foreign material law, mentioned by the parties in its contract; that the Brazilian Justice can utilize the material law rules to which the parties voluntarily submitted themselves"[14].

It is important to indicate that the Court of Appeals of São Paulo (Tribunal de Alçada, before being extinguished by the 45th Constitutional Amendment), examined yet two appeals relating to the determination of the law applicable to international contracts; resonating the major doctrine, this Court admitted the principle of party autonomy, even if in decisions that were not definite: Case Total Energie do Brasil, S.N.C. and others vs. Thorey Invest Negócios Ltda[15] and Case R S Components Ltda vs. R S do Brasil Com. Imp. Exp. Cons. Repr. Ltda[16].

We may also invoke, in favor of the acceptance of the principle of the parties autonomy to choose the applicable law to their contract, the decision enacted by the São Paulo State Tribunal of Justice in the Case Dexbrasil Ltda vs. Navisys Incorporated. In this case, the Tribunal found that the parties did not attempt against private rights or against Brazilian sovereignty by designating another law to govern their contract[17].

A decision of the Rio de Janeiro State Tribunal of Justice admitted

13 Fernanda V. da Costa CERQUEIRA, « Le régime de détermination de la loi applicable aux contrats conclus par les consommateurs en droit français et brésilien », in: Michel Storck, Gustavo Vieira da Costa Cerqueira, Thales Morais da Costa (dir.), *Actes de la Journée d'études Le droit français et le droit brésilien d'aujourd'hui : éléments de comparaison (Droit français et droit brésilien : perspectives comparées)*, Strasbourg, June 17th, 2008, Paris : Harmattan, 2010).

14 Agravo de Instrumento nº 46.457 de 29 de agosto de 2002, 11ª Câmara Cível do 1º Tribunal de Alçada de São Paulo.

15 7ª Câmara do 1° Tribunal de Alçada do Estado de São Paulo, Registro N° 00.551794-0. Judgment from September 24th, 2002.

16 12ª Câmara do 1° Tribunal de Alçada do Estado de São Paulo, AG N° 1.247.070. Judgment from december 18th, 2003.

17 Judgment from June 7th, 2002. Tribunal de Justiça do Estado de São Paulo, 30ª Vara Cível de São Paulo.

directly the principle of party autonomy[18] and recently, on October 18th, 2007, the São Paulo State Tribunal of Justice reaffirmed its attachment to the principle of parties autonomy to choose the applicable law to their contract, in a judgment regarding the determination of the law applicable to an international trade representation contract[19].

These State Court´s decisions may contribute to a better acceptance of the principle of party autonomy as part of the rules of conflict of laws in Brazilian private international law, as already happens in legal systems of nations that play an active role in contemporary international trade. Upon this acceptance depends equally the application of the Vienna Convention as foreign Law or as material Uniform Law expressly chosen by the parties.

In the absence of the determination of the law applicable to an international contract, or in case of a choice considered not valid, the interpreter or the judge must utilize the other rules of conflict of laws adopted by the domestic Law, which means applying the rules regarding the application of the law in territory, provided for in the Act of Introduction to the Brazilian Rules (art.9° LINDB).

FINAL REMARKS

While Brazil's accession to the *United Nations Convention on Contracts for the International Sale of Goods* (CISG) implies the CISG's application regardless of express adoption of the party autonomy principle, it is also certain that it will open the debate as to party autonomy in respect of the parties and will in choosing the law that applies to issues not covered by the CISG and to those expressly set aside by it, as well as on the law applicable to other kinds of international contracts.

Such accession, which gets closer every day[20], bears as unassailable consequence a renovation of Brazilian private international law, combined with a renovation of domestic contract law, in light of

18 Decision from March 27th, 2007, 15a Câmara Civil do Tribunal de Justiça do Estado do Rio de Janeiro, Agravo de Instrumento N° 2007.002.02431.

19 Tribunal de Justiça do Estado de São Paulo. Decision from October 18th, 2007. Apelação N° 7.030.387-6.

20 The adherence of Brazil to the United Nations Convention on Contracts for the International Sale of Goods was approved by the Brazilian National Congress on October 16, 2012, by Legislative Decree n. 538 of October 18, 2012. It is expect, however, the procedure for enactment by the President and the publication in the Official Gazette of the Federal Executive, in accordance with Constitutional rules (Article 49, inc. I, and Article 84, inc. VIII, of the Constitution of the Federal Republic of Brazil, of October 5, 1988). In addition, it is necessary to wait the expiry of twelve months after the deposit of the instrument of adherence, pursuant to Article 99 CISG.

the modern and rich character of Vienna Convention.

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SIDE-EFFECTS OF THE GROWING TREND TOWARDS THE INSTITUTIONALIZATION OF MEDIATION

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Abstract: For some time, Europe, Brazil and the United States have been suffering from the systemic inefficiency of their Courts, with a significant impact on the guarantee of access to justice for their citizens, making alternative dispute resolution (A.D.R.) a constant presence in both civil and common law systems of jurisdiction. The upshot has been the institutionalization of ADRs, taking the form of a routine presence in codes of civil procedure, while their practice is connected to the courts. However, both institutionalization and the obligation to take part in mediation programs before or after starting the suit are exceptional measures, which must be adopted with caution. The experience of the European Union with its Directive, the Brazilian experience of inserting mediation into the project for the new Code of Civil Procedure and the use of mediation to overcome the conflicts arising from the serious mortgage crisis in the U.S.A. will be analyzed in this article, seeking to demonstrate that the progress and diffusion of ADRs does not necessarily entail a breach with their underlying foundation, and particularly with regard to mediation, the loss of its identity, for it to be inserted into the context of access to justice.

Keywords: Mediation - identity - mandatory - institutionalization.

I. OPENING REMARKS

Recent years have seen greater intensity in the search for alternative forms of dispute resolution, either to relieve the courts of the excessive burden imposed on them, or to afford better treatment of subjects beyond their reach. Methods revealed by negotiation,

mediation, arbitration and their offshoots are considered an *alternative*[1], given that they are cheaper, more consensual and so forth.

Widely popularized by the American courts, mediation has become the focus of a movement for its institutionalization[2] into the judicial system, which has raised concern among scholars, who fear for its decadence, whereas it is known as an out-of-Court proceeding and a voluntary choice of the parties.

The growth of mediation in an institutional context may certainly expose and create greater interest in the process, but it is not the ideal mechanism for spreading the practice of mediation. Similarly, making it a mandatory procedure, whether pre-procedural or incidental, does not serve the interests of the parties; its convenience lays only in reducing the workload of the courts.

This paper will analyze the generalized institutionalization of mediation in the European Union, Brazil and the United States, and through critical reflection, will assess the paradoxical logic of making its practice mandatory by these legal systems.

II. THE SPREAD OF INSTITUTIONALIZED MEDIATION

The growth of mediation is much influenced by the context of the location where it takes place. In common law systems, such as the United States, Australia, Canada and England, mediation and other forms of ADR have been growing more quickly than in civil law systems, such as Brazil, Germany and Italy[3].

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1 *"The use of these processes has become so increasingly pervasive that the 'alternative' of ADR is increasingly being dropped in favor of such terms as 'complementary', 'additional', 'appropriate', or simply 'dispute resolution'. In addition, points out that "Interestingly, some of mediator's greatest supporters are not in favor of dropping the 'alternative' from the description of ADR because they fear that by doing so, the process will become just like more traditional methods of dispute resolution – expensive, time-consuming, and not necessarily just.*" PRESS, Sharon. Institutionalization: Savior or Saboteur of Mediation? *Florida State University Law Review*. vol. 24, 1997, p. 903.

2 *"Mediation was institutionalized in courts over the last twenty-five years, in part to provide access to justice that was otherwise unavailable in the civil justice system. Some scholars question whether this institutionalization offers anything that looks like justice." Also: "Though Pound offered several causes for this decline what we know today as "institutionalization" in the court system was the primary suspect. The very thing that made equity a system must, in the end, prove fatal to it. In the very act of becoming a system, it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall."* NOLAN-HALEY, Jacqueline M. The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound. *Cardozo Journal of Dispute Resolution*, vol. 6, 2004, p. 57.

3 See: ALEXANDER, Nadja. *Global Trends in Mediation*. New York: Kluwer Law International, 2006.

Quite often regarded as second-hand justice[4], mediation is not a new procedure, although it is still incipient in the legal arena. Advantages of mediation are laboriously propagated, especially among those who consider it a useful tool for attenuating the gravity of the problem of access to justice. Proponents emphasize its ability to afford parties greater control over resolution of the conflict: as a result, the risk and the uncertainty of a court decision handed down by a judge selected at random to resolve the conflict is set aside, and also, the parties' ability to foster creative solutions that can be broader and better-suited to address the issues that underlie the conflict[5].

This is why the mediated outcome is even more valuable and meaningful on disputes where the relationship between the parties is long-lasting and permanent. Confidentiality is another important factor, especially when we are faced with more sensitive issues, and as mediation does not mean the end of jurisdiction, if the mediation should fail, the parties would not be prevented from bringing before a judge the case still in dispute, so as to have it judged[6].

Mediating does not mean the same thing for everyone. Centralizing the concept of mediation on the figure of the third party, much is said of his important role of facilitating an agreement as a specialist on the subject in dispute, or also of the task this impartial third party has to urge the parties towards a reassessment of their respective positions with greater accuracy faced with a conflict, so as to arrive at a solution by their own means.

In a simple and direct definition, mediation is the procedure whereby the litigants are aided by an impartial third party who will contribute to the search for a solution to the conflict. This third party does not have the mission of deciding (nor was he given authorization to do so)[7]. He merely assists the parties in reaching a consensual

4 OWEN, Fiss. Alternative Dispute Resolutions Debated: Second-Hand Justice? *The Connecticut Law Tribune*. March 17, 1986.

5 Disputes involving a complex intersection of relationships have been called polycentric by Lon Fuller: "Wherever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities." And the adjudication "cannot encompass and take into account the complex repercussions "that arise from the solution of a polycentric dispute. Most important within the scope of such disputes "it is simply impossible to afford each affected party a meaningful participation through proofs and arguments" FULLER, Lon. Mediation. Its Forms and Functions, *CAL. L. REV.* vol. 305, 1971.

6 PINHO, Humberto Dalla Bernardina de. A procedural Reading of human rights: the fundamental right to proper protection and the option for mediation as a legitimate route for the resolution of conflicts. *Revista Juridica Universidad Interamericana de Puerto Rico*, vol. XLIV, n° 3, agosto-mayo, 2009-2010, p. 545/560.

7 PINHO, Humberto Dalla Bernardina de. Mediação: a redescoberta de um velho aliado na

solution. Chiara Besso[8], one of the great scholars of the matter in Italian law, describes the situation as follows: "è il procedimento nel quale un terço, il mediatore, facilita la comunicazione e la negoziazione tra le parti in conflitto, assistendole nel raggiungere un accordo, da loro volontariamente scelto;" Helena Munoz[9], commenting on the Spanish system, puts forward a similar notion.

However, the core quality of mediation is, in actual fact, the relational aspect that Lon Fuller[10] had already mentioned in an article published over thirty years ago. It is moving towards resolution[11] of the conflict, by means of a discursive practice, through dialog, and not coercive force, according to the regulatory idea of the possibility of consensus[12], wherein the legitimacy of the outcome finds its support in the very communicative process that originated it.

The idea of Luis Alberto Warat[13], to whom the aim of mediation was not the agreement, but changing the persons and their feelings, seems to match the traditional concept of Lon Fuller. Only in this way would it be possible to transform and resize the effects of the conflicting situation, accompanying the premise according to which conflicts never disappear completely, but rather are only transformed and require management and monitoring to keep them under control.

Nevertheless, mediation has taken a challenging path in both common law and civil law systems[14]. The dizzy growth we find in the

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solução de conflitos. In: *Acesso à Justiça: efetividade do processo* (org. Geraldo Prado). Rio de Janeiro: Lumen Juris, 2005, p. 108.

8 BESSO, Chiara. La Mediazione Italiana: Definizioni e Tipologie. *Revista Eletrônica de Direito Processual.* vol. VI, jul-dec. 2010, p. 33.

9 "*La mediación es un procedimiento a través del cual un tercero imparcial ayuda a las partes en conflicto a llegar a un acuerdo. La esencia de la mediación que refleja esta definición es la autonomía de la voluntad de las partes: son las partes las que llegan a un acuerdo, libremente, y auxiliadas por un tercero, que, consecuentemente, ha de ser imparcial. Por otra parte, esta perspectiva de la mediación se encuentra vinculada al conflicto que es objeto o puede ser objeto de un proceso*". MUÑOZ, Helena S.. La mediación: método de resolución alternativa de conflictos en el proceso español. *Revista Eletrônica de Direito Processual Civil*. vol. III, p. 66-88, jan-jun. 2009.

10 "*[...] the mediation has the capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.*" FULLER, Lon. *op.cit.*

11 See: RESTA, Eligio. *Il Diritto Fraterno.* Rome: Laterza, 2010.

12 OST, François. *Contar a lei. As fontes do imaginário jurídico.* Rio Grande do Sul: Unisinos, 2004, p. 151

13 WARAT, Luis Alberto. *O ofício do mediador*, v. 1. Florianópolis: Habitus, 2001, p. 31.

14 The civil – common law dichotomy has always inspired debate between the German historical school and its theory of codification as a counterpoint to the judiciary law of the utilitarian English. See: BOBBIO, Norberto. *O Positivimo Jurídico. Lições de Filosofia do*

common law systems, such as Canada, England, the United Kingdom and United States, since the seventies[15] contrasts with the reluctance of the countries that make up the civil law system to accept the practice of mediation as a means of resolving conflicts[16]. Irrespective of the differences in the stage of development of mediation, the concerns in countries which adopt the common law system or in those which adopt the civil law system converge on a common point: the use of mediation as the solution for the problems faced by the public administration, especially the Courts, in supporting the aim of access to justice.

What we observe is that besides the spread of the regulation of the ADR procedures, the mediation programs are being constantly incorporated to the Courts[17], particularly where mediation is not widely used nor naturally sought by litigants. However, what is the impact of

Direito. São Paulo: Ícone, 2006.

15 Since the mid-1970's, "there has been a movement of de-legalization and deregulation, in a reaction against legal formalism in the institutional ambient and juridical culture as a whole (hard law vs. soft law), which guaranteed incentives to the expansion of community mediation; - investments by the federal government in Neighborhood Justice Centers, outside the Judiciary, which offered free or low-cost services of mediation to the public, seeking the empowerment of the parties and strengthening access to justice. Many of the present-day programs of mediation began informally as community mediation centers (as in the States of Florida and New York), with the mediators acting in the community; - only later on were they institutionalized with their migration to the judicial environment. There was then a greater concern with the legalization and state regulation of the alternate means of conflict solution within the Judiciary, in pursuit of standardization and incentives for the programs." GABBAY, Daniela Monteiro. *Mediação & Judiciário: condições necessárias para a institucionalização dos meios autocompositivos de solução de conflitos*. 2011. Thesis for Doctorate in Law – Law School, University of São Paulo, São Paulo, 2011.

16 "It is useful to point out that not all common and civil law jurisdictions confirm these systemic patterns. The cases of the Netherlands and South Africa provide exceptions. The Netherlands, although stemming from a civil law tradition, has historically taken a proactive approach to legal reform, borrowing from both civil law and common law jurisdictions. Compared with most other civil law jurisdictions, the Netherlands has a well-established system of pre-trial conflict handling mechanisms. As a result, mediation developments in the Netherlands have been able to slide into the existing pre-trial structures and mediation has enjoyed success earlier in the Netherlands compared with other civil law countries. South African lawyers essentially apply a common law process to laws drawn from the civil codes of European jurisdictions. The system is a kind of uncodified civil law, which coexists with traditional community dispute management such as the makgotla. While the legal profession in South Africa has been hesitant to embrace the mediation of civil legal disputes going before the courts, the fall of the apartheid system has opened the entire spectrum of human rights, discrimination, constitutional, environmental and intergovernmental issues to ADR and put mediation very clearly on the South African map." ALEXANDER, Nadja. Global Trends in Mediation. *ADR Bulletin*. Vol. 6, n. 3, 2003.

17 See: PRESS, Sharon. Court-Connected Mediation and Minorities: A Report Card. *Capital University Review.* vol. 39, 2011, p. 819.

the generalized institutionalization of mediation and its incorporation[18] by the Courts? How does this emergence protect against mediation from becoming interlinked with adjudication? How long the state control of mediation programs that brought them into the jurisdictional realm on the argument of introducing and expanding the use of this method of ADR will subsist? Is it temporary? How will be like the return to its extrajudicial status after State output, supposing that this *interference* it will be temporary?

The expressive difference between the theory of mediation and these practices is the greatest challenge to be faced in the future in terms of the quality of mediation. And to face up to it, it is indispensable to redeem the rationale behind the foundations of mediation set out in the concept of Lon Fuller.

Achieving this quality does not mean anchoring the process of mediation in the submission of the parties to the rules of procedures, on the contrary: "*to free themselves from the encumbrance of rules" to achieve "a relationship of mutual respect, trust, and understanding that will able them to meet shared contingencies without the aid of formal prescriptions laid down in advance*."[19]

The institutionalization of mediation is an evident tendency. The carry out of mediation into the environment of the courts and its integration into the codes of civil procedure are heading towards a merger between regulation and mediation, making it an "*important part of a new age of civil procedure.*"[20] At first glance, its institutionalization may even mean an advance, but, in fact, it ends up by weakening the choices of the parties involved in the conflicts.

Mediation is one of the forms of dispute resolution that, as a rule, takes place out of court through private services, by the parties own initiative, although there is nothing that prevents it from taking place in a court[21], enabled by a suspension of the lawsuit, for example, while

18 See: ALFINI, James J., et.al. What Happens When Mediation is Institutionalized? *Ohio State Journal on Dispute Resolution*, vol. 9, no. 307, 1994. Taking the same line: PRESS, Sharon. Mortgage Foreclosure Mediation in Florida - Implementation Challenges for an Institutionalized Program. *Nevada Law Review*. vol. 11, Spring 2011, p. 306.

19 On top of this, as well noted by Brian Ray: "In Fuller's conception, mediation has no role to play in the interpretation and enforcement of laws; that is the role of courts and the function of adjudication: '[O]nce a law has been duly enacted its interpretation and enforcement is for the courts; courts have been instituted, not to mediate disputes, but to decide them'". RAY, Brian. Extending the shadow of the law: using hybrid mechanisms to develop constitutional norms in socioeconomic rights. *Utah Law Review*. n. 3, pp. 797-842.

20 NOLAN-HALEY, Jacqueline M. The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound. *Cardozo Journal of Dispute Resolution*. vol. 6, 2004, p. 57.

21 "*Sería más correcto hacer referencia a la mediación conectada con el Tribunal, tal como se denomina a esta clase de mediación en el sistema estadounidense (court-connected mediation), aunque en otros países de Europa en general se denomina mediación judicial, como en Bélgica*

parties will attempt to reach an agreement under mediation sessions.

However, the connected-court mediation is ceasing to be a mere option presented to the parties. The omnipresence of mediation in the Courts[22] and in the codes of procedure is a paradox, and presents a scenario that certainly strays from the traditional concept of mediation. The mediation loses its identity[23] getting more and more resembling to adjudication, with rules of application and procedure. The judges are getting more and more mediators. A private procedure settling up in a public atmosphere controlled by an instrumentalist conception, which ends up serving only the administration of justice[24].

III. THE PATH TOWARDS MANDATORY MEDIATION: A WEAK REMEDY FOR THE CRISIS OF ACCESS TO JUSTICE

The concern with access to justice arose in the mid-1970s, based on the study carried out by Cappelletti and Garth that led to a series of initiatives which developed a view to ensuring this right deemed basic and inherent to every Democratic State. Although part of this initial momentum to ensure access to justice has diminished in the course of the past thirty years in some societies, this concern has been a high priority at the present time.

The increasing demand for justice is a complex phenomenon, arising particularly from a social dependence on the Courts, either due to a culture of lawsuits[25], (especially in countries with civil law systems), or due to state encouragement, which fearing the loss of its monopoly[26],

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distinguen, de la voluntaria, o en Francia de la convencional. El término más adecuado puede ser el de mediación conectada con el Tribunal o mediación intrajudicial, pues el término mediación judicial puede llevar a la errónea conclusión de que es el Juez el que lleva a cabo la labor de mediación". MUÑOZ, Helena S., *op. cit.*

22 An interesting expression is used by John Lande to describe the contemporary legal environment: "litimediation", in which the following reiterated practice takes place: "mediation is the normal way to end litigation." LANDE, John. How Will Lawyering and Mediation Practices Transform Each Other? *Fla. St. U. L. Rev.*, 1997, pp. 839, 841.

23 See: NOLAN-HALEY, Jacqueline M. Mediation: The 'New Arbitration'. *Harvard Negotiation Law Review,* 2010, p. 3-54.

24 Id. Is Europe Headed Down the Primrose Path with Mandatory Mediation? *North Carolina Journal of International Law and Commercial Regulation*. vol. 37, 2012, p. 1-31.

25 See CHASE, Oscar G., American "Exceptionalism" and Comparative Procedure. *American Journal of Comparative Law*. Nov, 2001. Even though the text refers to the American culture of dispute resolution, it is valid for us to understand the use of the term culture and its concepts are suited to other societies. Also recommended: CHASE, Oscar G. Law, *Culture, and Ritual: Disputing Systems in Cultural Context*. New York University Press, 2005. Examining the issue from the standpoint of European law: TARUFFO, Michele. Cultura e processo. *Rivista Trimestrale di Diritto e Procedura Civile*. Milan: Giuffrè Editore, 2009. p. 63-92.

26 See. NOZICK, Robert. *Anarquia, Estado e Utopia.* Translation Ruy Jungman. Rio de

spreads the idea that alone its Judiciary Branch is capable of providing an effective solution to conflicts, perceived when it promotes, for instance, the incorporation of ADRs to the Courts[27].

Added to this are the reflexes caused by the international globalization[28] of conflicts[29] plus the fact that the rules or even common law are not suited to working with the concept of insoluble conflicts, or rather, conflicts that can hardly be resolved. The most that can be done is to monitor and undertake a work of follow-up, seeking to keep the dispute at acceptable levels of civility and sociability.

Yet the would-be solution goes no further than solving only the legal crisis, leaving moot other crisis of a different nature, and as these have not been settled jointly, the trend is towards their returning in the future, perhaps even under aggravated circumstances.

The political structures have always been attentive for the remedies (rules), but almost never to the conflicts causes, inducing to an increasing search for the *Ombudsman* State. Nonetheless, an unstoppable search for adjudicated solution faces a jurisdiction limited capacity. This limited capacity has shown that adjudication is sometimes ineffective, drags out the end of the lawsuit to an uncertain future, and do not fully resolve the problem at issue, since merely adds stability to a judicial decision. The effective conflict solution is beyond discussion.

Thus the unfitness of the judiciary to receive some cases and resolve them effectively is ratified.

Mediation has been carving out a role in this scenario as the cure for the inefficiencies of the systems of justice, and even though it is defined as a voluntary process, the label of a *good alternative* to adjudication has led many politicians and scholars to conclude

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Janeiro: Zahar Editor, 1994.

27 "*Sembra infati che la tendenza dominante nelle società asiatiche sia una sorta de litigation aversion che ha come naturale consenguenza di ADR, principalmente facendo ricorso alla mediazione e alla conciliazione. Questa preferenza viene solitamente spiegata con il riferimento alla persistenza – nello stato profondo della cultura asiatica – dell´ideale confunciano dell´armonia sociale che non dovrebbe essere turbata e messa in crisi dal ricorso ai tribunali*". TARUFFO, Michele. Dimensioni transculturale della giustizia civile. *Rivista Trimestrale di Diritto e Procedura Civille*, Dec, 2007, p. 1067.

28 Eduardo Cambi stresses that the reflexes of this globalization are also felt in countries like Brazil, in spite of the lack of an effective community directive. "*Arbitration, for example, has for some time now allowed decisions taken by arbitrators, in an international ambience, to be imposed on the decisions of national judges, fragmenting national law, as a form of responding to the requirements of the globalization of markets, as the costs, delay and appearance of highly-complex disputes make the court route less attractive.*" CAMBI, Eduardo. *Neoconstitucionalismo e Neoprocessualismo*. 2 ed, São Paulo: Revista dos Tribunais, 2010. p. 63.

29 See CANOTILHO, José Joaquim Gomes. *Direito Constitucional.* 6 ed, Coimbra: Almedina Editora, 1993. p. 18.

that mediation should not only be incorporated to the jurisdictional environment, it also should be mandatory[30].

Yet, in reality, won't we see those same mistakes from recent decades, in which access to the Judiciary Branch was promoted, with no regard for its limits? Is it rational forcibly submitting the parties[31] to mediation? Might overvaluing mediation, in the long run, transform it into another ineffective method for solving conflicts, just as adjudication is today regarded by society? Do force the parties to participate in a process of mediation make them less liable to implement the settlement reached? Still, can mediation be worthwhile when it is mandatory?

It is important reinforce that mediation is an out-of-court procedure. It takes place before searching for state adjudication. However, there is nothing to stop the parties, having begun a lawsuit, deciding to go back on their positions and try, once more, the route of conciliation, either of their own free will or on the recommendation of a judge.

However, transforming it into an mandatory phase, either prior to the proceeding or incidentally, has the aim of serving merely statistical purposes, which are far from meeting the needs of the citizen. Mediation is not limited to silencing the other party, or that makes that the conflict "goes away". This does not allow the return to the status quo before the start of the conflict. The reason for mediation turns around the end of the controversy, the pacification rather than peace, setting aside the relational logic that is fundamental to it.

We have reached a point where mediation emerges from a paradoxical prospect: the unbridled search for institutionalization of mediation inserts its practice in Courts, brings rules to be followed by mediators, judges and other interested parties, and on top of this, imposes a timeframe for its terminating, predetermines the cases in which it must be used, and obliges the litigants to submit to the practice of mediation in certain cases.

All of this for remedying state inefficiency in the management of conflicts and the inevitable threat to the guarantee of access to justice. Nonetheless mediation acts as a weak remedy, almost a placebo, since in the early, the feeling of relief at the Judiciary is obvious, since mandatory mediation expresses a veritable barrier to stop litigants from

30 "Citizens of all counties accept regulations if they believe that as a result of that regulation "Society" will be better off. For instance in some countries bans on tobacco advertising are accepted because research has "proved" that smoking is bad for health. We pay for seatbelts in our cars (even though the government tells us we must) because research proves that seatbelts save lives." Mandatory Mediation. LC Paper N. CB (2)1574/01-02(01). Available at: <http://www.legco.gov.hk >. Access on: Feb. 10 2012.

31 MONTELEONE, Girolamo. La mediazione "forzata". In: *Judicium*, p. 01-02. 2010. Available at the website: < http://www.judicium.it.> Access on: Nov. 20 2011.

reaching the Judiciary.

It might seem that there is some benefit in obliging the parties to meet and discuss their dispute. The optimal result might be a solution mutually satisfactory and voluntarily agreed upon; the worst result, on the other hand, would be the failure in achieving a settlement and the pursue dispute to the Court, taking the form of discontent, additional costs and unnecessary delays, or further reaching any settlement as a result of ignorance of the process and of their own conflict.

Mediation is not a process suited to all cases, regardless of circumstance. It seeks to strengthen those who are less powerful through a balancing of power, more attentive listening, engendering options, the creation of awareness of the dispute, negotiation of solutions, removing the mask of demon or victim created by the other, allowing each side to choose the best alternative for a negotiated solution, reaching at the end, the consensus.

This entire voluntary process has as its essence the respect for the autonomy of will of the parties in participating on the process[32], even admitting that mediation may be suggested by a judge. Thus any attempt to make it mandatory, prior or incidental to the lawsuit or with a term to end is quite unfitted.

The defenders of mandatory mediation may ask: how could anyone not wish to reach a mutually-beneficial settlement? It so happens that not everybody may be interested, or it may be that mediation is not really the best method to apply in the attempt to resolve that conflict.

Treating mediation like a *magic potion*[33], believing that by making it mandatory, inserting it in the procedure codes and even placing it under the Judiciary's eyes will resolve the crisis of access to justice, reflects a distorted view of this guarantee and totally mistaken of the mechanism which, repeating, is essentially voluntary. The principle of autonomy of will, the first ground of mediation, relies on parties' freedom to be able to decide if and when mediation will be established,

32 We must always be alert to the fact that mediation will only be successful when in the option for mediation, the parties wish it, along with circumstances favorable to the mediation process, as well pointed out by Warren Winkler: "in certain cases the parties simply want a judicial determination of their rights, win or lose, not a mediated resolution. In that event, they are entitled to a trial and ought not to feel pressured in a settlement meeting to accept a compromise they are not interested in. ADR is not meant to subvert the conventional litigation process. Parties are entitled to have their rights decided in a court with appropriate procedural safeguards". WINKLER, K. Warren. *Accès à la Justice: la mediation judiciaire*. Canadian Arbitration and Mediation Journal. n. 16, p. 9-12. 2007.

33 PINHO, Humberto Dalla Bernadina de; PAUMGARTTEN, Michele. L'esperienza italo-brasiliana nell'uso della mediazione in risposta alla crisi del monopolio statale di soluzione di conflitti e la garanzia di accesso alla giustizia. *Revista de Direitos e Garantias Fundamentais* FDV, n. 11, Aug. 2012, pp. 171-201.

according to their interests and accord of wills.

The objections leveled against ADRs by Owen Fiss in "Against Settlement" arouse interest[34]. His arguments were centered on quality in the consent to reach a settlement based especially on the imbalance of forces (economic, business skills) between the participants in the process. For Fiss, a party's consent to an agreement, at disadvantage, would be the result of coercion. Updating the concern of the great jurist, his statements may be used perfectly as a warning as to the fragility, not of the outcome that may be obtained in a mediation, but of obliging the parties to take part in this process. It is the mandatory nature, in fact, that expresses an imbalance of forces and which may contaminate the outcome obtained in the mediation[35].

The contemporary world requires the search for access to justice as a value, a justice thought through, not in the Christian manner whereby doing good or evil to the other is doing good or evil to oneself, but rather a justice that considers the counterpoise of more-or-less equal forces is the aim of ADR.

What is expected is not one more justice marked by rubbing out the distances and differences as if they had never existed; the new justice must have balance in its cellular nucleus. Being capable of balance, in fact, is already a manifestation of strength. The weak and the oppressed are incapable of raising themselves up to the one counterpoised against them. Acknowledgement of the other proves to be a noble and potent virtue, thus maintaining each one in his sphere of power[36].

The aim ought be the dismantling of the traditional conception

34 FISS, O.M. Against Settlement, 93 *Yale Law Journal* 1073-90, May 1984.

35 Bret Walker and Andrew S. Bell underline the negative arguments against mandatory mediation "Such a forced process of mediation also has the potential to erode respect for the rule of law, especially if the power to order compulsory mediation is exercised frequently. It is not difficult to suppose that the power will be exercised frequently in times of pressure on courts institutionally to 'up their productivity', whatever this is meant to mean, and on judges individually, to deliver judgments expeditiously". WALKER, Bret; BELL, Andrews S.. Justice according to compulsory mediation. Bar News – *The journal of NSW Bar Association*. Spring. 2000, p. 7-8. And also: "The current regime recognizes the desirability of mediation as a means of dispute resolution without forcing parties down that route. There are, moreover, institutional mechanisms in place which encourage progress down that route. For example, it is now part of a barrister's duty to advise his or her clients at an early stage about the scope for means of dispute resolution in the alternative to litigation. Further, it is well known that many judges informally encourage litigants of the desirability of exploring dispute resolution by way of mediation. All of this is salutary and to be supported. The changes to be introduced by the Bill, however, are significant not just in practical terms but are radical and, in our opinion, most undesirable as a matter of principle." WALKER, Bret; BELL, Bell, *op.cit.*

36 PAUMGARTTEN, Michele. O processo interativo de construção de soluções como via de reabilitação do sistema vindicativo. *Revista Eletrônica de Direito Processual Civil.* vol IX. 2012. http://www.redp.com.br.

of justice based more in the defense against a possible about-face of the winner than a concern with the conflict resolution, for a justice based on perception of the intents of others, relinquishing judgment, placing the individuals consciously in the game and committed with the negotiation. This conceals the sloth of those who are satisfied with the decision imposed, encompassed within a tradition of security, avoiding the mood of facing the consequences of the settlement.

It is about this security and resignation that we must avoid in the search for the real balance of forces. Therefore it will be in the agreement, once signed, which will give birth to the expression of truth, of peace, of opposition to anger, the wish for vengeance and punishment, inherent to mankind.

Along this line, and in the wake of the Green Book on Mediation[37], in 2004 the European Parliament developed a project for a Directive concerning mediation, culminating in its publication in 2008[38]. In light of the Directive, the European member-states would be at liberty, at the time of transfer to their legal systems, to address the methods to be adopted in the installation of programs of mediation.

The following section will analyze the institutionalization of mediation by the European Union as well as the French, Spanish and

37 "In 2002, the European Commission issued a Green Paper on ADR ["Green Paper"] in civil and commercial law that specifically identified cross-border commercial disputes as an area in need of regulation. The purpose of the paper was to encourage the use of out-of -court dispute resolution as more appropriate in many cases than dispute resolution by judges or arbitrators. The Green Paper described ADR as a "political priority" for all EU institutions and launched a broad consultation process on how this goal could be achieved, although, it acknowledged that many member states had already passed legislation encouraging the use of ADR. As part of its consultation process, the Green Paper raised twenty-one questions about critical ADR issues including: confidentiality, consent, enforcement, mediator training, mediator accreditation and liability and the problem of prescription periods" NOLAN-HALEY. Jacqueline M. *Evolving Paths to Justice: Assessing the EU Directive on Mediation*. Proceedings of the sixth annual conference on international arbitration and mediation. Martinus Nijhof Publishers. 2011, p. 1-17

38 "The Directive's foundations can be traced to a series of projects beginning with the Vienna Action Plan of 1998 which established mediation as a priority "particularly for family conflicts." Its foundations were further advanced at the Tampere European Council in 1999 that called for better access to justice, and for the creation of "alternative extrajudicial procedures" to be created by Member States. From 1998 through 2002 the Committee of Ministers of the Council of Europe adopted recommendations to promote mediation in family disputes, penal matters, and disputes with administrative authorities, and a Working Group was established to monitor the progress of these recommendations. A significant aspect of the Working Group's guidelines was its concern with the role of lawyers, judges, and legal educators in promoting ADR awareness. Several ADR programs were established to promote consumer access to justice, and the European Commission recommended that institutions involved in the consensual resolution of consumer disputes be influenced by the principles of impartiality, transparency, effectiveness and fairness". *Ibidem*

German laws, published upon expiry of the deadline for transferring the Directive. This includes the Italian legislative decree, the first law to be published in the wake of the Directive, which besides opting for mandatory mediation, created procedural mechanisms whose constitutionality is questioned. The section will also examine the institutionalization of mediation by Brazil, and lastly, a reflection on the option for mandatory mediation made by some American states to resolve conflicts thrown up by the mortgage crisis.

IV. THE PRESENT DAY SCENARIO FOR MEDIATION IN EUROPE, BRAZIL AND IN U.S.A.

A powerful wave of reforms has been promoted by various countries seeking to attach the ADR concept to the movement for access to justice, or, as defined by the European Parliament, access to suitable processes of resolution of individual and business disputes.

A. THE WATCHWORD OF THE EUROPEAN DIRECTIVE: ENCOURAGE

The movement for mediation in Europe got under way in the late 1990's. This came in the aftermath of the new era that emerged in the U.S.A. after the Pound Conference of 1976 which saw the birth of *concepts* such as the "multi-door courthouse." These ideas spread to Australia, Canada and New Zealand as far back as the 1980's[39]. The appeal for mediation was strong, as it was a process that brought in more advantages than disadvantages, such as lower costs compared to a judicial or arbitration proceeding, informality, flexibility and autonomy to reach a consensus.

Different models were developed in Europe. Some countries regulated mediation[40] and it became common to find programs of mediation to resolve conflicts involving consumer rights[41]. This was

39 ALEXANDER, Nadja. *Op. cit.*

40 Poland, for example, was the first country in Eastern Europe to enact legislation on mediation in civil and commercial cases. Poland's law was much broader than the Directive which is limited to cross-border commercial disputes. See: PIECKOWSKI, Sylwester. *How the New Polish Civil Mediation Law Compares with the Proposed EU Directive on Mediation,* 61 DISP. RES. J. 67, 2006.

41 In the private sector, several provider organizations in continental Europe have encouraged mediation since the 1990s, while traditional arbitration providers added mediation to their list of services. In 1996 the U.S. based CPR Institute for Dispute Resolution published the Model European Mediation Procedures, and in 2001 the International Chamber of Commerce, a leading provider of arbitration services, issued ADR Rules making mediation the default choice of a dispute resolution process. See: NOLAN-HALEY, Jacqueline. op.cit., 2012. See

until May 21 2008 when Directive 52, which arose from the fundamental recommendation launched in 1998 (98/257/CE) and in 2001 (2001/310/CE), was published by the European Parliament. This triggered a policy that prioritized the consensual solution of conflicts that became a definitive part of the agenda for the European Judicial Area and obliged each member-state to reflect, insert or create legal texts contemplating mechanisms for the amicable settlement of conflicts. This generated a series of significant changes to the national systems of many member-states.

Even though the Directive had a scope more restricted than that recommended by the Green Book on Mediation and even the 2004 Project for the Directive, it is undeniable that the objective of this intervention was to encourage countries, especially those countries with no tradition in the use of ADRs, to enshrine mediation in civil and commercial cases[42] as an important step towards access to justice and towards the simpler and speedier resolution of conflict. Consequently, this tried to resolve the grave crisis of institutional justice looming over the greater part of the member-states.

Even though the rule, given its community-wide scope, had as its immediate focus the regulation of transnational conflicts, the European Parliament and the European Union understood that the adoption of mediation, even on the countries' internal scenario, would have numerous benefits. Among these were: greater agility in the solution of controversies, a lower outlay on costs, a greater willingness by the parties involved for spontaneous compliance, and preservation of the amicable relationship between the interested parties.

The Directive defines mediation as a voluntary process in which a third party assists two or more parties in dispute to reach a resolution for their difference; a functional definition that focuses on agreement as the end sought by mediation. The European Parliament opted for a general regulation when drafting the Directive. This was done specifically to respond to the complexity caused by the different languages and cultures within the EU, although it would appear to have been insufficient to promote a consensus among the member-states in

also: "French experience: Les Médiateurs de la Paix" MARTINS, NadiaI Beviláqua. *ADR in the age of contemporaneity*. Curitiba: Juruá, 2010, p. 271; Int'l Chamber of Commerce. *ADR Rules of the Int'l Chamber of Commerce*. Preamble and Article 5, available at http://www.iccwbo.org/court/adr/id4452/index.html.

42 The objective of the Directive is clear: "The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings" EUROPEAN UNION. *Directive 2008/52/CE,* of May 21 2008. Official Gazette of the European Union, European Parliament and the Council, Brussels, May 24 2008. p 3-8.

the transfer of the rule of the Directive to their internal systems as the existence of different visions of the subject is something inevitable.

1. FRENCH LAW

Prior to the Directive in France, by means of Decree 96-652 of 1996, the Code of Civil Procedure already provided for holding the total or partial mediation of a dispute in court and outlined some procedures integrated to the procedural rule. However, the European Directive calls for a broader approach to mechanisms for the amicable solution of conflicts, which has led to significant changes to the legal systems of the member-states, as mentioned above.

In compliance with the Directive, Decree 66 of 2012[43] was published in France, which, while still representing timid progress in the handling of ADRs in the country, did establish the search for an amicable solution through mediation (which may be done by a natural person or legal entity), conciliation, or a participative process. However, it does not impose on the parties any procedural or pre-procedural phase.

The innovation introduced by the Decree is the participative proceeding. It was inspired by the Collaborative Law, which was common in countries such as the U.S.A., Canada, Australia and the United Kingdom. Pursuant to the Collaborative Law, parties seek an agreement to bring the conflict to a close according to the terms and conditions established in a contract signed with the participation of their attorneys, together. Communication is done through lawyers in an agreed upon form rather than with the aid of a neutral third party, though an expert may also provide assistance.

It is expected that conventional mediation or conciliation, as established in law, plus the new tool revealed by the participative proceeding, may drive the parties and French professionals even further towards resorting to these mechanisms as alternative means to jurisdiction, as proposed by the community Directive.

2. SPANISH LAW

In Spain, even though mediation showed a certain degree of development within the Autonomous Communities, Law 15/2005 (which regulated mediation prior to the Directive) was criticized for normative insufficiency, as it recommended that the Government should draft a bill on mediation based on the directives set forth by the European Union.

The Spanish Code of Civil Procedure integrated the practice of

43 Text available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte> Access on: Feb. 25 2012.

mediation into family matters by means of Law 15/2005, allowing the parties to request suspension of a case by mutual agreement which was allowed by the procedural law for a maximum of sixty days, a very tight schedule for mediating.

On March 05, 2012, after being subjected to stiff criticism for the delay in transferring the Directive to its internal system, the Spanish government published Decree No. 5/2012[44], which regulates mediation in civil and business issues, excluding from its scope mediation within the public administration, in labor issues and consumer relations. Concerned with highlighting the potential for mediation, it encourages mediation as an alternative to jurisdiction or arbitration, putting it forward as an effective tool for the self-solution of conflicts and respecting the autonomy of will of the parties, demonstrated in titles II and IV of the Decree which establish the free decision of the parties in adhering to the procedure and the choice of mediator. It states objectively and clearly that mediation is voluntary, and even after beginning mediation, no-one is obliged to neither remain in the procedure nor conclude an agreement.

The Spanish law of civil procedure was also amended to allow suspension of the proceeding if the parties wish to mediate in the course of a lawsuit (stressing that in this case, the suspension will last as long as the mediation). It also, depending on the subject of the dispute, allowed the Court to invite the parties to participate in a mediation procedure with a prior informative session.

Besides highlighting the equality between the parties, the impartiality of the mediators, neutrality, and confidentiality, the Spanish lawmaker refrained from setting any deadline for holding the mediation, going no further than stating that the procedure shall be as brief as possible. The decree is quite right in not setting a deadline for concluding the procedure which we know cannot be foreseen as it depends on the emotional involvement of the parties with the case and the subject of the dispute, among other factors. This is left open, and however much brevity is demanded, it is certain that mediation will last as long as necessary to resolve the conflict.

The settlement reached by the parties may address all or part of the issues submitted to mediation, and may be formalized by a public deed to have the force of execution, or, if carried out in the course of a judicial proceeding, may be submitted for court ratification, with the consequent abandonment of the case.

The institutionalization of mediation in Spain operates at a reasonable level of legal transition, protecting the autonomy of will of the parties involved in a dispute without ruling out the possibility of the Court suggesting mediation to them, should it be considered suited

44 Text avsailable at *Boletín Oficial del Estado*: < http://www.boe.es/boe/dias/2012/03/06/pdfs/BOE-A-2012-3152.pdf > Access on Mar. 07 2012.

to the case. It states the technique of mediation coherently, respecting the nature of the mechanism, without adopting authoritarian procedural measures[45].

3. ENGLISH LAW

The British experience is interesting, and also warrants analysis. In fact, the Civil Procedure Rules addresses the use of alternative means with Rule 1.4[46] stating that the Court has the duty to actively manage cases, which includes, among other measures: "*(e) encouraging the parties to use an alternative dispute resolution*".

From this standpoint, the effectiveness of the jurisdictional measure means intervening (by means of a sentence of imposition), when necessary, as *ultima ratio*[47], not least because failing to consider the use of "alternative means" may mean a waste, insofar as they not

45 As well stressed by item II of the exposition of motives of Law 5/2012: : "*La mediación, como fórmula de autocomposición, es un instrumento eficaz para la resolución de controversias cuando el conflicto jurídico afecta a derechos subjetivos de carácter disponible. Como institución ordenada a la paz jurídica, contribuye concebir a los tribunales de justicia en este sector del ordenamiento jurídico como un último remedio, en caso de que no sea posible componer la situación por la mera voluntad de las partes y puede ser un hábil coadyuvante para la reducción de la carga de trabajo de aquéllos, reduciendo su intervención a aquellos casos en que las partes enfrentadas no hayan sido capaces de poner fin, desde el acuerdo, a la situación de controversia.*".

46 "Civil Procedure Rules. Part One. Overriding Objective. (...) 1.4 Court's duty to manage cases (1) The court must further the overriding objective by actively managing cases. (2) Active case management includes: (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently" Text available for consultation at: http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/menus/rules.htm, access on Dec. 28 2012.

47 "The CPRs state that the courts have observed more and more that legal proceedings must be the last option, and that suits must not be brought prematurely, when an agreement is still possible. Therefore, the parties must consider whether the alternative forms of dispute resolution are more suitable than litigation and, if such is the case, must make an effort to reach an agreement on which of the forms should be adopted." ANDREWS, Neil. (translation: Teresa Alvim Arruda Wambier). *O Moderno Processo Civil: formas judiciais e alternativas de resolução de conflitos na Inglaterra*, São Paulo: Revista dos Tribunais, 2009, p. 271.

only ease access to justice, but also complement and enormously assist the procedural system, if properly employed[48].

Along this line, as informed by Fernanda Pantoja[49], despite precedents at the *High Court* restricting the possibilities of the parties' refusing the recommendation for mediation and going so far as to determine its being held, even when one of the parties had previously rejected this alternative[50], the *English Court of Appeal,* in a May 2004 decision, limited the power of the *High Court* to impose an attempt at mediation on the litigants, arguing that obliging parties who do not wish to mediate amounts to a veritable obstruction of the right of access to justice. In the decision mentioned, the court stated that a compulsory system of mediation offends article 6 of the European Convention on Human Rights, which protects the universal right to a fair trial, in reasonable time, by an independent and impartial court[51].

Thus, even without imposing mediation, there has been a significant reduction in the number of lawsuits, as we are informed by Chiara Besso[52], plus a considerable increase in the number of mediations[53].

48 "To express this interaction between the public and private forms of civil justice, the author has elsewhere suggested (…) that a helpful metaphor might be `Civil Justice's strand—consisting of ADR, including arbitration and mediation—and the other strand—the court process—are complementary and entwined. Together the two strands of the public court process and the alternative forms of private dispute resolution have considerable strength". ANDREWS, Neil. *Mediation in England: organic growth and stately progress*. Text not yet published and kindly ceded by the author at the time of his visit to the UERJ Law School in December 2011, p. 19/20.

49 PANTOJA, Fernanda Medina. Mediação Judicial, in: PINHO, Humberto Dalla Bernardina de (orga¬ni¬zer). *Teoria Geral da Mediação à luz do Projeto de Lei e do Direito Comparado*. Rio de Janeiro: Lumen Juris, 2008, p. 192.

50 "For example, in Hurst v. Leeming [2002] EWHC 1051 (Ch), the High Court stated that mediation should be refused only in exceptional circumstances. In Shirayama Shokusan Co. Ltd. v. Danova Ltd. [2003] EWHC 3006 (Ch), the High Court went so far as to order mediation over the objection of one of the parties" KIRMAYER, Kathryn e WESSEL, Jane. An offer one can't refuse: mediate. In *The National Law Journal*, Oct/2004, p. 1.

51 Halsey v. Milton Keynes General NHS Trust Steel v. (1) Joy & (2) Halliday [2004] EWCA (Civ) 576. KIRMAYER, Kathryn e WESSEL, Jane. An offer one can't refuse: mediate. In *The National Law Journal*, Oct/2004, p. 1.

52 BESSO, Chiara (org). *La Mediazione Civile e Commerciale*, Torino: Giappichelli, 2010, p. 14.

53 *"I.9. In the author's opinion, the most significant change is the recognition of mediation's potential as a means of reaching an agreement. Three new trends can be noticed here: I.10. First, the private market for dispute resolution in England has resorted to mediations in civil and commercial cases. The high cost of a lawsuit, caused mainly by the high fees of the attorneys has been one of the significant factors. (...) I.11. The second major change is that the English courts have shown great interest in holding mediations. (...). I.12. In third place, it has been recognized that agreements can be reached on different occasions, and result of different procedural stimuli or factors"*. ANDREWS, Neil. (translation Teresa Alvim Arruda

4. GERMAN LAW

In Germany, meanwhile, with publication of the *Gesetz zur Förderung der Mediation und anderer Verfahren de außergerichtlichen Konfliktbeilegung* on July 25, 2012[54], mediation did not become clearly mandatory, although it is required that upon filing suit, the party must state if there has been any prior attempt at conciliation.

Once the lawsuit has begun, the judge may propose alternative forms of resolving the conflict, in accordance with the case. He may send the parties to a private mediator or a conciliating judge (*Güterichter*), that is, a judge from the Court itself, who will receive special training to carry out the mediation, and who obviously cannot be involved with judgment of the case.

In the case of a settlement, court costs are reduced. The statute of limitations is suspended upon starting the process of mediation and the novelty concerns the qualification of the mediator. Prior to this law, mediators did not need to have specific qualification, and anyone could call himself a mediator. This situation has been partially modified, and though anyone can still call himself a mediator, to say that he is a "certified mediator" he must have attended an intensive 120-hour course. The aim is to ensure a minimum level of quality, as there were many problems with the services rendered by German mediators.

B. THE WATCHWORD OF ITALIAN LEGISLATIVE DECREE NO. 28: OBLIGE

The institutionalization of mediation by various EU countries follows a very similar formula. General lines are laid down and it is sought to attract mediation to the environment of the Court. Other member-states[55], such as Bulgaria[56] and Romania[57], and even Germany recently, have sought to adopt, among other measures of encouragement, financial incentives if the parties are able to resolve by mediation a

Wambier). *O Moderno Processo Civil: formas judiciais e alternativas de resolução de conflitos na Inglaterra*, São Paulo: Revista dos Tribunais, 2009, p. 30.

54 Bundesgesetzblatt Jahrgang 2012 Teil I nr. 35, aausgegeben zu bonn am 25. July 2012. Available at: <http://www.bundesgesetzblatt.de>. Access on July 26 2012.

55 Greek law does not require consent for enforcement of the agreement. The Northern Ireland Access to Justice Review Report recommends that it be a condition of receiving legal aid in particular categories of cases that ADR options be considered and reasons given when they are rejected. NOLAN-HALEY, Jacqueline. *op.cit*., 2012.

56 See: Bulgarian Mediation Act/2004.

57 See: Romanian Mediation Act (n° 192/2006).

dispute that would have been transformed into a lawsuit. However, Italy merits a special analysis, since in transferring the Directive, the country made use of procedural mechanisms that go beyond the idea of *encouragement* of the use of ADRs contained in the community-wide basic norm.

The Italian Parliament enacted Law No. 69 of June 18 2009, following the command of article 12 of Directive 2008/52/CE, which, besides addressing matters related to economic development and amendments to the Code of Civil Procedure, contained a provision on mediation delegating to the Government, and within a maximum of six months from the law coming into effect, publication of a legislative decree destined to standardize it in the civil and commercial sphere. Accordingly, on March 04 2010, Legislative Decree No. 28 was issued, which disciplines three types of mediation: *mediazione facoltativa, mediazione concordata and mediazione obbligatoria*[58].

The regime of mediation adopted by Italy has extended far beyond the provisions of the Directive, and, as may be imagined, the most significant core which is causing the greatest impact is the *obbligatoria* modality, raised to the status of a condition for admissibility of the legal proceeding for a wide range of civil and commercial issues. If the parties go to court without following the mandatory procedure, the judge may send the parties to mediation, suspending the proceeding for four months, at the end of which the parties must have reached an agreement. If an agreement is being difficult to reach and if the mediator considers it appropriate, he may outline a proposal for a settlement.

Although the parties are theoretically free to reach the agreement, in the Italian decree, their freedom is somewhat mitigated, since if the suit filed is judged according to the terms of the agreement not settled, the Court may impose sanctions on the party who refused to accept the agreement, indirectly obliging the parties to reach an agreement to avoid suffering sanctions. Besides the breach of secrecy, setting a timeframe for the mediation and dressing up the mediator in the guise of a conciliator, penalizing a party who refuses to reach an agreement if the content is revealed in the grounds of the court sentence seems to us an excess of authoritarianism inserted into the Italian law that institutionalized mediation.

Faced with this, some professional associations have taken legal action against the Ministry of Justice and Ministry of Economic Development before the Lazio TAR, which decided in 2011[59] that the doubts raised concerning certain provisions of D. Leg. No. 28/2010

58 DITTRICH, Lotario. Il procedimento di mediazione nel d. lgs. n. 28, del 4 marzo 2010 in <http://www.judicium.it>. Access on October 20 2011.

59 The full text of the Decision is available at http://www.ilcaso.it. Consulted on September 15 2011.

was not unfounded. These doubts were in regard to the excessive delegation stated in article 5, and the fact that mediation still at the pre-judgment phase, expressing a condition for the admissibility of the case, effectively impedes access to justice[60].

Besides the Lazio TAR, other courts such as the Court of Genova[61] and the Justice of Peace at Parma and Catanzaro[62] have in recent decisions reinforced even further the unconstitutional profile of the law before the Italian Constitutional Court[63].

While awaiting the statement from the Constitutional Court on the validity of some provisions of the decree, associations of Italian lawyers have been asking the courts not to apply the mechanism[64], arguing that the judge, at the request of either one of the parties may admit the request, refusing to apply article 5 of the Decree, given its incompatibility with the European Charter of the Rights of Man[65].

It is also important to stress the opinion issued by the European Commission in a response to the EU Court of Justice[66]. The remarks

60 VIGORITI, Vincenzo. Europa e mediazione. Problemi e soluzioni. *Revista de Processo*. n. 197. 2011, p. 248.

61 Tribunale di Genova. Sezione III Civile. N 4574/2011. Available at: <http://tribunale.genova.it>. Access on Mar 01 2012.

62 N. 2 Ordinanza del del 1 settembre 2011emessa dal Giudice di Pace di Catanzaro. Available at: <http://www. gazzetaufficale.it.> Access on Mar 01 2012.

63 The hearing is set for October 23 2012, to be held at the Constitutional Court to analyze the mandatory nature of mandatory mediation, as informed in the Gazzetta Ufficiale No. 54, dated Dec. 28 2011.

64 It has also been quite common to request an obtain setting aside mandatory mediation in cases of *in rem* rights, especially adverse possession. News available at: < http://www.lider-lab.sssup.it/lider/it/mediazione/news>.

65 See the text published by the Organismo Unitario dell' Avvocatura Italiana, entitled: "Disappicazione dell'obbligatorietà della media conciliazione per contrasto della Corte dei Diritti Fondamentali dell'Unione Europea". Available at: < http://www.oua.it/Dottrina/Civile/Civile.asp> Access on: Jan. 20 2012.

66 With regard for penalizing a party who refuses to close the agreement along the lines proposed by the conciliator: *"non osta ad una normativa nazionale come quella oggetto della presente causa che prevede che la parte che ingiustificatamente non partecipa al procedimento di mediazione sia sanzionata con la possibilità per il giudice successivamente investito della controversia di desumere argomenti di prova dalla mancata partecipazione e con la condanna al pagamento di una somma corrispondente al contributo unificato dovuto per il giudizio. Tali sanzioni, non risultano tali da ostacolare o rendere particolarmente difficile l'accesso al giudice". However, is pondered, that in case of mandatory mediation: "osta ad una normativa nazionale quale quella oggetto della presente causa che assortisce il procedimento di mediazione di tipo obbligatorio di sanzioni economiche in grado di incidere sulla libertà delle parti di porre fine al procedimento di mediazione in qualsiasi momento e pertanto di limitare, in maniera sproporzionata, l'esercizio del diritto d'accesso al giudice". And recognizes that this measure goes beyond the policy of the Directive: "un sistema di mediazione quale quello istituito dal D.lgs. 28/2010, il quale prevede che il mediatore possa e a volte debba, senza*

of the Commission are particularly centralized on the mechanisms of sanctions[67] stated in articles 11 and 13 of D. Leg. 28/2010.

Italy wants the unbridled adoption of mediation to alleviate the heavy volume of cases under way in its Courts[68] and this would appear to be the paramount objective of the reform: to (ab)use mediation

che le parti possano opporvisi, formulare una proposta di conciliazione che le parti sono indotte ad accettare per evitare di incorrere in determinate sanzioni economiche, non é in grado di consentire alle parti di esercitare il diritto di decidere liberamente quando chiudere il procedimento di mediazione e pertanto non appare in linea con la ricerca consensuale dell'accordo di mediazione. Effettivamente tale meccanismo appare in grado di produrre un forte condizionamento delle scelte delle parti che sono spinte ad acconsentire alla mediazione (mettersi d'accordo amichevolmente o accettare la proposta del mediatore) e di conseguenza sono scoraggiate dall'introduzione del processo in sede giudiziaria. Tuttavia, nel caso in cui tale meccanismo opera nell'ambito della mediazione di tipo facoltativo, il condizionamento da esso prodotto non appare tale da incidere sull'esercizio del diritto d'accesso al giudice. Nelle ipotesi di mediazione facoltativa, infatti, sussiste sempre la possibilità per le parti di adire direttamente il giudice". Parere quello formulato dalla Commissione europea nella memoria consegnata alla Corte di Giustizia sul caso di media-conciliazione obbligatoria rinviato dal giudice di pace di Mercato San Severino alla Corte di Giustizia europea in vista della pronuncia pregiudiziale circa la compatibilità del D.Lgs. 28/2010 con la normativa europea. Full decision available at: http://www.mondoadr.it/cms/wp-content/uploads/commissione-Ue-sanzioni-conciliazione.pdf.

67 This makes more flexible the limitation imposed as a deadline for duration of the mediation: "*non osta, in linea di principio, ad una normativa nazionale come quella oggetto della presente causa che prevede per l'esperimento della mediazione obbligatoria un termine di quattro mesi che in determinate circostanze sia destinato ad aumentare. Questa misura non appare tale da comportare un ritardo nell'introduzione e nella definizione di un successivo giudizio che possa essere tale da risultare manifestamente sproporzionato rispetto all'obiettivo di garantire una composizione più rapida delle controversie. Spetta, tuttavia, al giudice nazionale stabilire caso per caso se il ritardo che l'esperimento della mediazione obbligatoria comporta rispetto al diritto ad una tutela giurisdizionale effettiva non sia tale da comportare una compressione dì questo diritto suscettibile di ledere la sostanza stessa del diritto". Regarding to the costs of the mediation, the European Commission concluded that: "osta, in linea di principio, ad una normativa nazionale come quella oggetto della presente causa che prevede una mediazione obbligatoria onerosa. Tuttavia, spetta al giudice nazionale stabilire caso per caso se i costi di una mediazione obbligatoria sono tali da rendere la misura sproporzionata rispetto all'obiettivo di una composizione più economica delle controversie". Idem*.

68 Close to 9 million cases in 2007, some 5.4 million cases under way before the civil courts and another 3.3 million before the criminal courts. Of these 3.3 million, 1/3 are initial proceedings while the rest are appeals. Compared to other European countries, the number of cases handled by the Italian civil court amounts to three times more than the quantity of cases before the French court, six times more than the load of the German court and five times more than the Spanish court. The number of lawsuits awaiting the first judgment (1.2 million) corresponded to twice the number of cases awaiting judgment in Germany, Spain and England together. O'CONNEL, Vanessa. Mandatory Mediation in Italy? Mamma Mia! T*he Wall Street Journal*, March, 14, 2011. Available at: http:// wsj.com/law/2011/03/14/mandatory-mediation-in-italy-not-if-the-lawyers-have-any-say/.

to overcome a serious crisis in the civil courts, making it a tool for reducing the workload of the judges and cutting down the number of cases, not to mention the countless criticisms the country has received for failing to observe the guarantee of reasonable duration of cases, laid down in art. 6 of the European Human Rights Convention[69].

C. THE MEDIATION IN THE PROJECT OF THE NEW BRAZILIAN CIVIL PROCEDURE CODE

In Brazil, mediation began to take legislative shape in 1998, but it was not until November of 2010 when the National Council of Justice issued Resolution No. 125[70], that the activities of judicial conciliation and mediation were regulated[71]. Art. 1 of the Resolution institutes the National Judiciary Policy for handling conflicts of interest with the aim of assuring all of the rights to the solution of conflicts by appropriate means, making it clear that it behooves the Judiciary Branch to, besides providing a solution adjudicated by sentence, offer other mechanisms for resolving controversies, in particular the so-called consensual means, such as mediation and conciliation, as well as affording service and guidance to the citizen. To achieve these targets, the Courts are to set up as Permanent Center of Consensual Methods for Conflict Resolution

69 SCHENK, Leonardo. Breve relato histórico das reformas processuais na Itália. Um problema constante: a lentidão dos processos cíveis. *Revista Eletrônica de Direito Processual*, Rio de Janeiro, v. 2, p. 181-202, 2008. Available at: http://www.redp.com.br/edicao_02.htm. Access on: Sep. 12 2010.

70 Available at http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/323-resolucoes/12243-resolucao-no-125-de-29-de-novembro-de-2010

71 "a) the right of access to justice, provided for in art. 5, XXXV, of the Federal Constitution, besides the formal version before the judiciary bodies, implies access to a fair legal system; b) at this point, it behooves the Judiciary to establish a public policy for the proper handling of legal problems and conflicts of interests, which occur on a wide and growing scale in society, so as to organize on a nationwide level not only the services rendered in legal proceedings, but also those that may be provided through other mechanisms for conflict resolution, in particular those of consensus, such as mediation and conciliation; c) the need to consolidate a permanent public policy of encouraging and enhancing the consensual mechanisms of conflict resolution; d) conciliation and mediation are effective tools of social peacemaking, solution and prevention of disputes, and their appropriate discipline in programs already implemented in the country has reduced the excessive institutionalization of conflicts of interests, the quantity of appeals and the enforcement of sentences; e) it is indispensable to stimulate, support and spread the systematization and enhancement of the practices already adopted by the courts; f) the importance and need to organize and standardize the services of mediation, conciliation and other consensual methods of conflict solution, to avoid disparities of orientation and practices, while also ensuring the proper execution of public policy, respecting the specific aspects of each segment of Justice." PINHO, Humberto Dalla Bernandina de. Mediação e o CPC Projetado. *Revista de Processo*. v. 207, p. 219, 2012.

and install Judiciary Centers for Conflict Resolution and Citizenship.

With National Counsel of Justice Resolution No. 125 now in force, given the prospects of setting rules for judicial mediation in the Project of the New Code of Civil Procedure now taking shape, and also, faced with the heed to address issues concerning the integration between adjudication and forms of self-resolution, an Ante-project of a Law of Civil Mediation has been drafted. Following examination at the Consultancy of the Federal Senate in August 2011, a Senate Legislative Bill was presented, receiving the number 517[72], working with concepts that are more up-to-date and better suited to Brazilian reality[73].

However, the most relevant point, as we see it, lays in the clear option by the Commission of Jurists for the facultative and non-mandatory form of using mediation. It is important to stress this issue, as in the past there has been much controversy on this point, due to one of the most polemical aspects of the legislative proposal of 1998: the obligation to carry out this procedure in all fact-finding proceedings, save a few exceptions dictated by the project.

While the idea of imposing incidental mediation in certain cases is highly seductive, we do not believe it is the best solution, and the

72 The text may be consulted at the website of the Federal Senate, at http://www.senado.gov.br.

73 "Thus, for example, art. 2 states that: "mediation is a decision-making process conducted by an impartial third party, seeking to assist the parties to identify or develop consensual solutions". As to the modalities, art. 5 admits prior and judicial mediation, which in both cases may, chronologically, be prior, incidental or even subsequent to the procedural relationship. We quite often find references to prior and incidental, although we seldom find the regulation of subsequent mediation, although this is becoming more and more common (obviously, there must be an appraisal of possible impacts on the thing judged, which will not be analyzed in this work). Another innovation may be seen in the criterion used to conceptualize judicial and out-of-court mediation. The option was for separating the classification from the site of holding the act, taking as a parameter the initiative of the choice. Thus, according to art. 6, "mediation will be judicial when the mediators are appointed by the Judiciary Branch, and out-of-court when the parties choose a private mediator or mediation institution". No objective restrictions were set as to the fitness of mediation. Suffice for the parties to wish it, by mutual agreement, and for the plea to be considered reasonable by the judge (art. 7). Mediation can never be imposed, nor can a refusal to take part in the procedure entail any sanction for either of the parties (2nd paragraph), while it falls to the judge, if the procedure is accepted by all, to decide on a possible suspension of the proceeding (4th paragraph), for a period no greater than 90 days (5th paragraph), unless agreed on by the parties with express court authorization. Also according to the text of the Project, the judge must "recommend judicial mediation, preferably, in conflicts in which it is necessary to preserve or recompose an interpersonal or social relation, or when the decisions of the parties entail material consequences for third parties" (art. 8). On the other hand, if mediation proves to be unsuited for settling that conflict, the act may be converted to a hearing of conciliation, if agreed upon by everyone (art. 13). So, without going into the specific issues of the Project, it is important to highlight the intent to standardize and make compatible the provisions of the New CPC and CNJ Resolution No 125, regulating the points that lacked legal handling" PINHO, Humberto Dalla Bernadina de, *op.cit.* 2012, p. 220.

project of the new Code of Civil Procedure was quite right in resisting the siren's song of such a practice. In the wording currently available in the Project of the new CPC, we can identify the Commission's concern with the mechanisms of conciliation and mediation, specifically in articles 144 to 153. The Project focuses, specifically, on mediation done within the structure of the Judiciary Branch. However, this does not rule out prior mediation or even the possibility of using other means for resolving conflicts (art. 153).

However, the institutionalization of mediation now entering Brazilian procedural law warrants a few brief remarks, due to certain peculiarities.

Brazilian experience in the area of conflict resolution has been gradually transformed, although the lawsuit-focused culture is a feature that leads to the judiciary being much sought-after, making it ever-more dysfunctional, slow, inaccessible to the excluded, ridden with red tape, inefficient and unpredictable[74]. Moreover, on the pretext of *presenting* other means for the solution of conflicts beyond the adjudicated solution, the Judiciary Branch takes upon itself the performance of mediation, impregnating it with the weight of state intervention, deepening the anachronism vis-à-vis the contemporary concept of ADR.

The spread of the use of this form is really the easiest and most comfortable way, when the ideal would be to have the methods for dispute resolution outside of jurisdiction presented in the universities to those who operate the Law, and made public generally in society, especially through the schools of basic qualification.

Educating society to resolve its own conflicts or to choose the best method for resolving them is an arduous task. This is especially true considering, however frustrating and inoperative the judicial services may be, it is difficult to break down a system which is comfortable because it is known and familiar even despite it being oppressive. Only education guides in relation to the rules of conduct and the values that will orient the option chosen; training and equipping individuals to distinguish between correct and incorrect reasons for preference and inclination in following the former and avoiding the latter, and leading individuals to internalize rules that will henceforth guide their practice[75].

D. MANDATORY MEDIATION AND THE U.S. MORTGAGE CRISIS

The popularity of ADRs in common law countries is well-known. The advent of Court-connected programs and the birth of

74 NALINI, José Renato. Os três eixos da Reforma do Judiciário. *Revista do Advogado (AASP)*, n. 75, apr. 2004, p. 67.

75 BAUMAN, Zygmunt. *Em busca da política.* Rio de Janeiro: Jorge Zahar editor, 2000.

the concept of the multi-door courthouse coined by Frank Sander at the 1976 Pound Conference was to be a watershed in the history of ADRs[76] in the United States and the harbinger of a new era in the area of conflict resolution. As a consequence, Court-Connected Programs and laws have been implemented at the federal and local level with the aim of stimulating the use of ADRs[77], simultaneously triggering concern with the *privatization* of conflict resolution, as the public nature of the judgment and court decisions is a guarantee of protection of the individual's rights[78].

The obligation to mediate[79] has been debated now for many years by American scholars, and the thesis held is that the requirement is limited to submission by the parties to a process of mediation and not to reaching an agreement. Moreover, coercion into the use of mediation would serve to *present* the method to those unaware of the procedure, but who would be potential users of the practice. The arguments are always highly similar.

The Law and Public Policy Committee of the Society of Professionals in Dispute Resolution published a report in 1990 affirming that mandatory participation in a dispute-resolution procedure would, in certain situations, be appropriate. Federal legislation[80] has followed the

76 See: STONE, Katherine V.W., *Alternative Dispute Resolution.* Encyclopedia of Legal History, Stan Katz, ed., Oxford University Press., 2004.

77 In 1983, Rule 16 of the Federal Rules of Civil Procedure was amended to exhort courts to consider the "possibility of settlement" or "the use of extrajudicial procedures to resolve the dispute" at pre-trial conferences. The Civil Justice Reform Act of 1990 also required every federal district court to consider court-sponsored ADR. In addition, the ADR Act of 1998 gave district courts the mandate to establish ADR programs and listed mediation as an appropriate ADR process. QUEK, Dorcas. Mandatory Mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program. *Cardozo Journal of conflict resolution*. vol. 11:479. 2010, p. 479-509

78 "Similarly, some critics urge that treating disputes as matters of individual, rather than public, concern eliminates important public accountability. Others argue that dispute resolution fails to serve an important educational function when it is privatized. Another common criticism is that the establishment of dispute resolution processes weakens the position of less powerful members of society". STERNILIGHT, Jean R., Is Alternative Dispute Resolution Consistent With the Rule of Law? *De Paul Law Review,* Vol. 56, , 2006, p. 569

79 See: SANDER, Frank E. A. Another View of Mandatory Mediation. *DISP. RESOL. MAG*., Winter 2007.

80 On this point it is worth taking a look at the "Alternative Dispute Resolution" Act, of 1988, in force in the United States. The main excerpts of the Act follow: "(…)(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, mini-trials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; (…) (b) AUTHORITY- Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance

same understanding, and, as a consequence, the Civil Justice Reform Act inserted mandatory mediation as part of the scenario of ADRs. The Courts have confirmed its legitimacy[81].

The attachment to reasons such as efficiency and economy that similarly surround the U.S. programs of mandatory mediation has come in for stiff criticism. Studies show that the quantity of cases taken to court to challenge the validity and quality of the agreements obtained in mediation[82] overcomes the logic of efficiency[83], and that the cure for the inefficiency of access to justice has, in actual fact, become a barrier besides being anti-democratic[84]. It is important to stress that at no time are the benefits of mediation called into question; rather only the fact of its being imposed as a pseudo-facilitator of access to justice.

The central ideology of U.S. mediation is its voluntary nature[85] based on self-determination[86]. However, programs of mandatory

with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district. (…) SEC. 4. JURISDICTION. Section 652 of title 28, United States Code, is amended to read as follows: Sec. 652. Jurisdiction (a) CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION IN APPROPRIATE CASES- Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration. (…)". Source: http://www.pubklaw.com/hi/105-315.html.

81 "After mediation was implemented as a cure for the inefficiencies of the justice system, mandatory mediation programs were adopted in numerous contexts, particularly for custody and divorce disputes". NOLAN-HALEY, Jacqueline M. *op.cit*., 2012.

82 THOMPSON, N. Peter; COBEN, James R. Disputing Irony: A systematic look at litigation about mediation. 11 *Harvard Negotiation Law Review*. 43. 2006, pp. 73-89.

83 "Confidentiality may also be compromised, particularly when rules requiring good faith bargaining allow the mediator to report on what happened during mediation. Good faith bargaining requirements also can pressure parties to settle.Some parties who are referred to mediation may fear that if they do not settle, there will not be a favorable outcome from the judge". *Ibidem*

84 See: WELSH, Nancy A. The place of Court-Connected Mediation in a Democratic Justice System, 5 *Cardozo Journal of Conflict Resolution* 117, 2004.

85 See: NOLAN-HALEY, Jacqueline M. Mediation Exceptionality. *Fordham Law Review,* vol. 78, n. 101, Nov. 2009.

86 "The Model Standards of Conduct for Mediators emphasize the importance of informed consent—'each party makes free and informed choices as to process and outcome.'" *Ibidem*.

mediation[87] have spread, adopting various models, from coercion in the guise of a court suggestion to submission to sessions of mediation and the institutionalized obligation as a condition precedent for judgment of the case.

The American explanation is that there is a difference between *coercion into* and *coercion within mediation*[88]. The Courts may require participation in sessions of mediation (front-end), yet they could not demand reaching an agreement or acceptance of a particular proposal (back-end), and thus mandatory mediation becomes an acceptable institution on the U.S. legal scene.

In recent years, the theme of mediation has taken a front seat for facing up to the conflicts arising from the grave mortgage crisis that has beleaguered the United States since 2008[89]. Although the laws to stimulate mediation are normally implemented at local level, in this case, given the magnitude of the problem, the Federal Government assumed a more proactive role, providing the States with funds to set up programs to promote negotiation between banks and borrowers, to prevent these coming before the Courts. The local governments and courts are in fact those best-suited to manage such programs of mediation, as they are more familiar with the social and economic nuances of their surroundings.

More than fifteen American States offer some type of mediation, while some of them[90] have decided to force borrowers who face foreclosure to take part in sessions of mediation prior to the legal proceeding. Borrowers and creditors are informed of the need to attend a session of mediation. If the borrower fails to attend, he suffers no penalty, while the creditors may face sanctions.

As far back as 2008, at the start of the crisis, Connecticut[91] became

87 Nonetheless, some U.S. jurisdictions have apparently acted in good faith in introducing programs of mandatory mediation, due to the poor indices of adhesion to voluntary mediation: "U.S. courts and legislatures have had little problem in requiring parties to participate in the "voluntary" process of mediation, and in some jurisdictions they must do so in good faith" *Ibidem*

88 QUEK, Dorcas. *op.cit.*

89 "More than 25 foreclosure mediation programs have been created in at least 14 states. Although many programs are still finding their footing, outcomes from several established programs are impressive, with some boasting 70-75 percent settlement rates with approximately 60 percent of homeowners reaching settlements that allow them to remain in their homes" Available at: <http://www. http://portal.hud.gov>

90 The States of Connecticut, California, New York, Florida, Pennsylvania, Philadelphia e Rhode Island have adopted mandatory mediation. States and cities such as Delaware, Hawaii, Illinois, Indiana, Kentucky, Maryland, Maine, Michigan, Nevada, New Jersey, New Hampshire, New Mexico, Ohio, Oregon, Minnesota, Wisconsin have adopted voluntary programs. *The Wall Street Journal.* Dec 2010.

91 "Mediation in Connecticut is available for any qualifying mortgage, which includes both

one of the first States to approve a law requiring mediation between borrowers in difficulties and creditors, followed by Philadelphia (2008), New York (2008), Florida (2009), California (2009), Rhode Island (2009) and Pennsylvania (2010).

Borrowers always complained of difficulties in negotiating a modification of the amounts due on the loans, an almost always frustrating experience, as they would often receive contradictory information from the representatives of the banks. The work of the mediator in these cases is to balance the forces in conflict, humanizing what is already a most painful process; many homeowners at the risk of losing their homes are managing through mediation to construct solutions for the problem, preventing seizures and reducing the costs of foreclosure. The results are still coming in, yet some figures require attention[92].

The programs of mediation in New York and Connecticut are indicated as references of success. In Connecticut around 70% of debtors have entered the mediation program and some 60% have managed to reduce the monthly payment on their mortgages, whereas in Nevada and New Jersey, where attendance at sessions of mediation is voluntary, 11% and 20% of debtors, respectively, have contacted the program. However, what is surprising is that in Nevada, debtors have managed to reach agreements to reduce installments in 74% of the

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first and second liens on any one-to-four family owner-occupied property. Eligible defaulted mortgages are not limited to mortgages taken out for the purchase of the property and can be loans for "personal, family or household purposes", such as refinancing, second mortgages, and home equity lines of credit. Connecticut is a judicial foreclosure state, so homeowners receive notice with service of the complaint on a form titled, 'Notice to Homeowner: Availability of Foreclosure Mediation.' The form lists the eligibility criteria and explains that "Mediation is a process by which a neutral mediator assists parties in trying to reach a voluntary negotiated settlement to resolve their dispute." The form also notes that a homeowner must fill out to participate. The notice ends with a statement in bold that there is no fee for applying to the program. The court must schedule mediation within 10 business days of the homeowner's response. Mediation must conclude within 60 days, though parties or the mediator can apply for a 10-day extension upon a showing of good cause. Bill number 619 would give the court 15 days to schedule mediation and provide for an extension of 30 days. The homeowner and servicer's counsel must appear in person; servicer's counsel must have authority to enter into a settlement, and the servicer's representative must be available by telephone or electronic means. Within two days after the first mediation, the mediator must decide whether a further mediation would be fruitful and send the court and parties a report to that effect; otherwise the mediator may cancel any subsequent sessions and permit foreclosure to proceed. The foreclosure proceedings are not stayed during mediation, so a homeowner must file an answer and participate in the litigation as needed. However, no judgment can be entered until the mediation period has ended." Available at: <http://www.americanprogress.org>. Acces on: Aug 10 2012

92 See: http://www.mediate.com

cases and in New Jersey 65%.

We note that the index of results favorable to the debtors is greater when participation in mediation is voluntary. And why does the choice of the program have a low index? Lack of knowledge by the debtors about the existence of the programs and the belief that the method is ineffective are convincing reasons.

The complexity and sensitivity required by conflicts thrown up by the mortgage crisis was determinant for the highlight given to them in this article.

Many Americans went through the agony of the risk of losing their homes, and on top of this, the cost that foreclosures represented, not only for the victims, but also for the Government, was expressive. Encouraging the setting-up of programs of mediation and participation by debtors and creditors is a step forward. Extensive publicity for the benefits of mediation would avoid the imposition and the time that the parties have taken to reach an agreement in places where it is mandatory.

Even through the paramount objective of the plan was calling the banks for a settlement, rather than the debtors, since the former would be in a far better position to withstand lengthy lawsuits, even so, it is expected that at least the imposition of mediation is done temporarily, and not installed definitively to the detriment of clarification and education towards reaching an agreement with security and quality.

V. CLOSING REMARKS

Mediation, imbued with the social function required of legal mechanisms, has impregnated the contemporary movement for access to justice, and has been occupying a prominent place in the legal systems. It is a process that has undisputed benefits including its voluntary and consensual nature, plus the self-determination of the party, but has been promoted and delivered unequally in both civil law and common law jurisdictions.

It is quite true that we must not allow the Judiciary to be used, abused or manipulated at the whim of the litigants who quite simply want to fight[93] or take the conflict to new frontiers. We believe that all those who operate the law have already come across a case in which this was clear and, quite often, the judge becomes a hostage to the whim of one or both the parties by virtue of the *non liquet* Principle.

93 "what people bring to court is the refuse of our national and community life. Mendacity, greed, brutality, sloth, and neglect are the materials with which we work". Paul D Carrington, 'Teaching Civil Procedure: A Retrospective View' (1999) 49 Jo of Leg Educ 311, at 328, apud ANDREWS, Neil. Mediation in England: organic growth and stately progress. Text not yet published and kindly ceded by the author at the time of his visit to the UERJ Law School in December 2011, p. 17.

The mediation programs have been widely incorporated into the courts; their procedures are regulated by laws, and the participation in the sessions is compulsory in certain subjects. However, the institutionalization and mandatory participation in sessions of mediation, although they may seem to be speedy and efficient solutions, are in actual fact, schemes that compromise the very essence of the mechanism, even on the argument that it is a form of educating the people[94] and implementing a new form of public policy, and lend themselves to resolve the crisis in access to justice only in the short term.

Leaving mediation in the shadow of a Court or punishing parties who resist the invitation to mediate wounds its identity by bringing it closer to adjudication (proceduralization) or confusing it with conciliation (materialization). In both cases the end result falls short of the expectations.

It is not rational to transform mediation into a remedy to cure the inefficiency of the public administration, making it a measure that restricts access to the court on the legitimizing grounds of ensuring a swifter settlement of disputes. This paradoxical idea has enjoyed priority in many countries.

The EU advances with application of the Directive and the member-states run up against the challenges of establishing programs of mediation, such as the concern with ethics, which becomes stricter in countries that decide to adopt mandatory mediation. Brazil, with no tradition in the use of ADRs, recognizes their importance on the contemporary scene and institutionalizes them in the project for its new Code of Civil Procedure, making them part of the legal landscape. In the U.S.A., where ADRs enjoy greater popularity, it has not been possible to escape the trend heading towards institutionalization and mandatory imposition.

However, we must be cautious about the expectations of

94 "Potential litigants have become aware that mediation can secure various economic gains, social benefits, and even psychological advantages, when compared to the other two main `paths of justice', namely court proceedings and arbitration. 5 The following points will be uppermost in the minds of disputants when they peer down the barrel of court proceedings: (1) the perception (and nearly always the reality) that court litigation is unpredictable; (2) the judicial process (including extensive preparation for the final hearing) involves a heavy-handed fight for justice, which is a source of expense, delay, and anxiety; (3) court litigation offers little scope for direct participation by the parties, as distinct from legal representatives; (4) final judgment normally awards victory to only one winner; (5) trial is open-air justice, visible to mankind in general; (6) litigation is private war—even if judges pretend that it is governed by elaborate rules and conciliatory conventions designed to take the sting out of the contest". ANDREWS, Neil. (translation. Teresa Alvim Arruda Wambier). *O Moderno Processo Civil: formas judiciais e alternativas de resolução de conflitos na Inglaterra*, São Paulo: Revista dos Tribunais, 2009, p. 273.

mediation as a panacea for the shortcomings of the systems of justice. The Judiciary Branch, in its turn, must be allied to the programs of mediation and do not absorb them. If access to justice includes access to systems of ADR, it is fundamental to bear in mind the values that made mediation, in particular, so attractive.

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OIL&GAS INDUSTRY IN BRAZIL: *A BRIEF HISTORY AND LEGAL FRAMEWORK*

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Abstract: The recently announced discovery of potential large-scale reserves in the Brazilian so called pre-salt layer has resulted in a new legal framework for the country. In this new architecture, old and new regulation share the legal arena. Exploring this context, this paper provides an overview of the emergence and evolution of the oil and gas market in Brazil, and discusses the new legal configuration where the prevailing Concession System co-exists with the Production Sharing System and the Onerous Assignment. The conclusion pinpoints the challenges that the country faces in dealing with two energy sources –oil and gas— that will play an increasing role in Brazil's future. It also indicates that the introduction of competition also has brought new features and improvements to oil and gas industry in Brazil. Structuring a robust legal framework that will foster the necessary investments is not only a challenge for the Brazilian economy, but also one that has to be tackled by many emergent economies with newly hydrocarbon discoveries.

Keywords: Oil&Gas - Brazilian Regulation - Pre-salt.

INTRODUCTION

Oil and gas continue to be an important source of energy all over the world. Although many investments have been made in new technologies to aid in developing new energy sources, including renewable ones, the world will still depend on oil and gas for many years (IEA, 2012).

Several factors have caused changes in many Latin American markets, especially economic and political factors; among the most important are a rise in the international price of fossil fuels, including oil

and gas, and the importance of energy security (BRAGA and CAMPOS, 2012). In Brazil, the recently announced discovery of potential large-scale reserves has trigged intense debate and resulted in a new legal framework (IBP, 2013).

In 2012, the Brazilian Congress passed three new laws concerning Oil and Gas: (i) Law 12,276/2010 (Onerous Assignment); (ii) Law 12,304/2010 (PPSA –Pré-sal Petróleo S.A. [Pre-Salt Petroleum Co.]); and (iii) Law 12,351/2010 (Production Sharing system). In addition, the Petroleum law —Law 9,478/1997, from 1997, which regulates the Concession system— is still existing discovery of potential large-scale reserves in the Brazilian so called pre-salt layer revenue sharing scheme for Brazilian oil and gas.

This paper aims to provide an overview of the emergence and evolution of the oil market in Brazil, focusing on how oil and gas regulation has been organized in the country. It also analyses the role of International Oil Companies in the Brazilian recent oil and gas history. The so-called Regulatory Mixed Regime as well as some relevant facts which were controversial during some bidding rounds will also be explained within the scope of the Concession Model, established by Law 9,478/1997. This review is based mainly on a regulatory and legal approach of the oil and gas framework released by Brazilian regulatory authority, from 1997 to 2012, and the latest version of the country's Constitution of 1988 and its amendments.

This paper aims to provide an overview of the emergence and evolution of the oil market in Brazil. It also focuses on the role of International Oil Companies as well as the Brazilian oil and gas history. The so-called mixed regime will be explained, as will the importance of the Concession Model, established by Law 9,478/1997. Some relevant facts which were controversial during some Bidding Rounds will also be explained.

This paper is divided in five parts. The first part will describe the establishment of Petrobras, Brazilian National Oil Company and the legal history of oil and gas monopoly in the country, including a consideration of the relevant legal and constitutional provisions.

Part two briefly analyzes the legal framework, focusing on the Petroleum Law, which established the ANP –Agência Nacional de Petróleo, Gás Natural e Biocombustíveis [National Regulatory Agency of Petroleum, Natural Gas and Biofuel]— and instituted the Concession regime.

In sequence, the three laws that enacted the mixed regime, in 2010, will be addressed. Part three discusses the Production Sharing System and the Unitization in Brazil, both regulated by Law 12,351/201.

Legal aspects and contractual features of the Onerous Assignment, Law 12,276/2010, are treated in the fourth part of this

paper. This Assignment allowed Brazilian Government to keep its position as a main shareholder in the world largest capitalization, when Petrobras raised R$120.2 billion (proximately 60.1 billion dollars) (Petrobras, 2010).

Finally, part five discusses the current Brazilian scenario, developed under Concession Model, with some aspects of its Bidding Rounds explained in detail. Some information about production, Operators, Government Takes and the oil and gas market in Brazil will also be considered .

The paper concludes by summarizing with the challenges that the country faces in the important field of oil and gas industry.

1. PETROBRAS ESTABLISHMENT AND THE OIL MONOPOLY

Petrobras –Petróleo Brasileiro S.A. [Brazilian Petroleum Co.]– was established by the Law 2,004/1953 as the Brazilian state-controlled oil and gas company. Under this law, Petrobras was given a monopoly on oil and gas exploration and production activities (BRAZIL, 1953).

But, as ROSADO, apud BRAGA and CAMPOS (2012), stated, in the 1970's, Petrobras was allowed to enter into risk services contracts with private international oil companies – IOCs, showing a small market opening.

After the oil crisis in 1973, Brazilian President, Mr. Geisel, authorized Petrobras to enter into risk contracts with International Oil Companies—IOCs. At the same time, the President noted that such permission did not mean that the monopoly was no longer enforceable, nor did it mean that the monopoly no longer existed (Estado de São Paulo, 1975).

The fact is that, prior to the Constitution of 1988, Brazil's oil and gas industry was formed not only by Petrobras, but also by other international oil companies that had begun oil exploration in Brazil. Many companies operated in Brazil during this time, including Shell, Exxon, Texaco, BP, ELF, Total, Marathon, Conoco, Hispanoil, Pecten, and Pennzoil. Some National enterprises also participated in these activities: Paulipetro, Azevedo Travassos, and Camargo Corrêa, among others (LUCCHESI, 1998).

On the other hand, in 1972, Petrobras also established an affiliate –Petrobras Internacional S.A. (Braspetro) [Petrobras International Co.]— to act in other countries, at a time when many IOCs were moving toward global integration. During this period, Braspetro discovered oil in a huge field in Iraq (PEDROSO, JR. 2009).

Since the passage of the Constitution of 1967, the oil monopoly has had constitutional status. However, the 1967 Constitution did not mention how this monopoly should be exercised, but set forth the sole

requirement that it must be done so pursuant to the law. Only in 1988 did the Constitution include more restrictive provisions. In its original version, the Constitution of 1988 had established not only the monopoly, but also the prohibition on contracting with other companies (BRAZIL, 1998).

The Brazilian Constitution considers oil and gas, whether under production or not, property of Federal Union, even though it grants the land owner a participation in production. Article 176 of the Constitution designs the oil and gas treatment, as follows:

> *"Article. 176. The oilfields whether in production or not, and other mineral resources and potential hydropower constitute distinct property of the soil, for the purpose of exploration or exploitation, and belong to the Union, with a guarantee to the concessionaire of title to the production. §1- The exploration and mining of mineral resources and the utilization of the potentials referred to by the "caput" of this article may only be performed upon authorization or concession of the Union, in the national interest, by Brazilians or Brazil's national capital, in the form of the law, which shall establish the specific conditions when these activities develop in border strip or indigenous lands. §2- The owner of the land is ensured participation in the mining proceeds in the form and value as established by law. §3- The authorization for exploration will always be for a fixed period, and the authorizations and concessions provided for in this article may not be assigned or transferred, in whole or in part, without prior consent of the licensor. §4- The use of the potential of renewable energy of reduced capacity will not depend on the authorization."*[1]

1 Art. 176. As jazidas, em lavra ou não, e demais recursos minerais e os potenciais de energia hidráulica constituem propriedade distinta da do solo, para efeito de exploração ou aproveitamento, e pertencem à União, garantida ao concessionário a propriedade do produto da lavra. § 1º A pesquisa e a lavra de recursos minerais e o aproveitamento dos potenciais a que se refere o "caput" deste artigo somente poderão ser efetuados mediante autorização ou concessão da União, no interesse nacional, por brasileiros ou empresa constituída sob as leis brasileiras e que tenha sua sede e administração no País, na forma da lei, que estabelecerá as condições específicas quando essas atividades se desenvolverem em faixa de fronteira ou terras indígenas. § 2º É assegurada participação ao proprietário do solo nos resultados da lavra, na forma e no valor que dispuser a lei. § 3º - A autorização de pesquisa será sempre por prazo determinado, e as autorizações e concessões previstas neste artigo não poderão ser cedidas

Further, in Article 177, 1988's Constitution included the exploration of oil, gas, and other hydrocarbons fluids under the Union's monopoly; prohibiting International Oil Companies to act in Brazil (BRAZIL, 1988).

These provisions were amended to maintain the Union's monopoly over oil and gas, but, at the same time, to allow International Oil Companies to act in Brazil. According to the Constitutional Amendment 9, from 1995, the Federal Union may contract the exploration and mining of oil and natural gas and other hydrocarbon fluids (BRAZIL, 1995). The table below shows the 1988version of Constitution and the text adopted since 1995[2].

Original Version	**After Amendment 9 of 1995**
Article. 177. The Union's monopoly: I- The exploration and mining of deposits of oil and natural gas and other hydrocarbon fluids; . . . §1 The monopoly referred to in this article includes the risks and results arising from the activities mentioned therein, being forbidden the Union transferring or granting any kind of participation, in kind or in value, the exploitation of oil or natural gas deposits, except as provided in art. 20, § 1.	Article. 177. The Union's monopoly: I- The exploration and mining of deposits of oil and natural gas and other hydrocarbon fluids; . . . § 1 The Union may contract with State-owned enterprises or private, carrying out activities referred to in sections I to IV of this article and complying with the conditions established by law. § 2 The law referred to in § 1 shall be provided on: I- the security of supply of petroleum products throughout the national territory; II- the recruitment conditions;III- the structure and tasks of the Union's monopoly regulator ;

The stated purpose of the Constitutional Amendment was to delegate to Congress the authority to enact laws governing the oil and gas industry (Congresso Brasileiro [Brazilian Congress], 1995).

2. THE PETROLEUM LAW (LAW 9,478/1997) AND THE ANP

Two years after the Constitutional Amendment, the Government published the Law 9,478/1997 (BRAZIL, 1997), known as the Petroleum Law. This law created the ANP –Agência Nacional de Petróleo, Gás Natural e Biocombustíveis [National Regulatory Agency of Petroleum,

ou transferidas, total ou parcialmente, sem prévia anuência do poder concedente. § 4º - Não dependerá de autorização ou concessão o aproveitamento do potencial de energia renovável de capacidade reduzida.

Natural Gas and Biofuel] — and established the concession system for the research and production of Brazilian oil, gas and other fluid hydrocarbons.

As with every regulatory agency in Brazil, the ANP is an independent agency and was inspired by the United States model (BINENBOJM, 2005).

In the U.S., "[s]ome federal agencies within the Executive Branch are called 'independent agencies' because—unlike others—their leaders cannot be fired by the President once they have been confirmed for a term of specific years."(MCALLIN, et. al, 2005). Pursuant to the Law 9,478/1997, the ANP may have five Directors on its Board of Directors, each designated by the President, and approved by the Federal Senate. Each Director is then confirmed for a mandate of four years.

The objective of the ANP are, among others, to promote the regulation of the petroleum industry and to contract, and supervise the economic activities of the petroleum industry, pursuant to Article 8 of the Law.

> *"To achieve its purposes, the Concessions Law establishes that ANP shall administrate the rights related to the exploration and production activities, including contracting with private or state-owned companies, pursuant to Article 21 of the Law. ANP shall also award Concession Contracts for the exploration, development and production of oil and gas, issue authorizations related to these activities, supervise the enforcement of the contracts, as well as implement the public policy defined for the energy sector." (ZACOUR, at. al. 2012)*

2 Original Version: "Art. 177. Constituem monopólio da União: I - a pesquisa e a lavra das jazidas de petróleo e gás natural e outros hidrocarbonetos fluidos; § 1º O monopólio previsto neste artigo inclui os riscos e resultados decorrentes das atividades nele mencionadas, sendo vedado à União ceder ou conceder qualquer tipo de participação, em espécie ou em valor, na exploração de jazidas de petróleo ou gás natural, ressalvado o disposto no art. 20, § 1º. " After Amendment 9 of 1995: "Art. 177. Constituem monopólio da União: I - a pesquisa e a lavra das jazidas de petróleo e gás natural e outros hidrocarbonetos fluidos; § 1º A União poderá contratar com empresas estatais ou privadas a realização das atividades previstas nos incisos I a IV deste artigo observadas as condições estabelecidas em lei. § 2º A lei a que se refere o § 1º disporá sobre: (Incluído pela Emenda Constitucional nº 9, de 1995) (Vide Emenda Constitucional nº 9, de 1995) I - a garantia do fornecimento dos derivados de petróleo em todo o território nacional; (Incluído pela Emenda Constitucional nº 9, de 1995) II - as condições de contratação; III - a estrutura e atribuições do órgão regulador do monopólio da União;"

In 2010, a new petroleum regulatory framework arose in Brazil. Three new laws were published: (i) Law 12,276/2010; (ii) Law 12,304/2010 and (iii) Law 12,351/2010. Those laws, along with Law 9.478/1997, were called a mixed regulatory regime by the ANP (ANP, 2012, c).

These new laws and the mixed regulatory regime will be explained below. The Concession Model and some aspects of its Bidding Rounds will then be explained in detail. Some information about current production, Operators, and the oil and gas market in Brazil will also be discussed.

3. PRODUCTION SHARING CONTRACTS AND THE NEW UNITIZATION LEGAL FRAMEWORK

The Pre-salt region —a large-scale oil and gas discovery in Campos Basin—put Brazil among the top ten oil producers in the world:

> *Estimates of Brazilian pre-salt reserves indicate a potential for 70 to 100 billion barrels of oil equivalent - boe (sum of oil and natural gas), but the exploration process for this wealth of resources is still in its early stages. (BRAZIL, 2013, a)*

> *According to a study prepared by Ernst & Young in partnership with FGV Projetos, the deposits discovered in the pre-salt sedimentary basins of Campos and Santos offshore São Paulo and Rio de Janeiro (in the Southeast region), should provide the country with an income of US$ 28 billion from oil exports in 2020. According to the study, export volumes of 600 thousand barrels per day are expected by the end of this decade. If these figures are confirmed, this will be an increase of 73% in relation to 2010, equivalent to US$ 16.1 billion. (BRAZIL, 2013, b)*

When the discovery of the Pre-salt area was announced, it ignited many debates in the Congress and among Brazilian society (SERRA, 2013). As is widely known, the main point of contention was whether the Sovereign Government should leave the nation's wealth in the hands of International Oil Companies or its state company, Petrobras. On the other hand, some wondered whether it would be economically and structurally feasible for Petrobras to explore and develop all fields in the area. Issues related to international policy and constitutional

matters also arose.

After more than a year of debates, and many proposed laws, Law 12,351/2010 –the Production Sharing Agreement Law (PSA Law)— was enacted (BRAZIL, 2010, a). This law introduced a new regime to the Brazilian oil and gas industry, the main features of which are described by ZACOUR at. al. (2012).

> *Usually, under the production sharing system, the host State (owner of deposits), typically through its state-owned company 100% public (National Oil Company-NOC), enters into a contract with an oil company investor (International Oil Company – IOC), also called by the industry as "Contractor." These activities are performed at IOC's account and own risk. Once held a commercial discovery, the IOC is entitled to recover its investments through a portion of the production, known as "cost oil." After deducting the costs of production according to specific methodology established in the Contract, the "profit oil" is shared between the host State and the IOC. The model introduced by the PSA Law also follows this basic structure. (ZACOUR, 2012)*

The Pre-salt area is known as "*a grande picanha azul,*" which translates to "the big blue steak," a reference to the area's similarity to a Brazilian prime cut of steak and its reputation as the premier oil and gas region in Brazil; its shape is similar to the Pre-salt polygon.

The production of oil and gas in the geographical area defined under the law will be controlled through Production Sharing Agreements. The map below shows in pink the "Pre-salt" area (BRAZIL, 2012, d), subject to this regime.

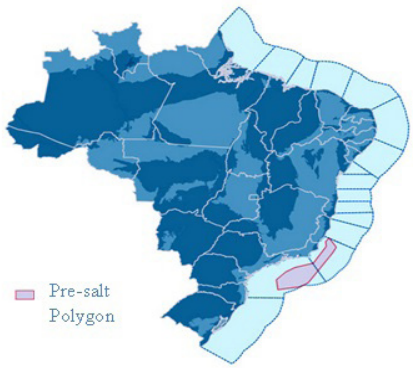


Figure 1: Brazilian offshore zone detaching Pre-salt Polygon.Source: ANP, 2012, c.Mapa Brasil Almada.jpg

Production Sharing Agreements, in Brazil, however, are going to be unique in one aspect: Besides the regulatory agency, ANP, and Petrobras, another state company will sign this contract: Pré-sal Petróleo S.A. –PPSA [Pre-Salt Petroleum Co.] (BRAZIL, 2010, d).

The PPSA, accordingly SILVA (2012), will be mainly responsible for:

a) conducting the management, audit, and inspecting and supervising of petroleum activities performed under PSCs;
b) authorizing the bidding processes related to the exploration and production of pre-salt areas;
c) representing the Government, through the operational committees, in
consortiums incorporated for the execution of PSCs; and
d) representing the Government in case of unitization in the pre-salt and strategic areas

PPSA is a new player in oil and gas industry in Brazil, and to it was given a great deal of power by Law 12,304/2010 (BRAZIL, 2010, d). Despite its privileged position in the operational committee, PPSA bears no risks in the exploration and production of hydrocarbon, pursuant the article 8º, §2º of Law 12,351/2010. All the risks and costs will be borne by Petrobras and the IOCs, if they are partners in the venture.

Pursuant to the PSA Law, the Pre-salt area must be developed under a Production Sharing Agreement – PSA. In addition, any other area recognized as a "strategic area" by an Executive Decree must also be developed under the PSA model (BRAZIL, 2010, a).

This rule was strongly criticized, for many reasons. First, Brazil is known as a politically stable country for international oil and gas investments because of its legal and political consistency (ERNEST & YOUNG, 2011). The law ignited a storm of controversial issues and created an atmosphere of uncertainty for international investors.

Some commentators have argued that the President now has too much power. They argue that although the law provides some parameters, in theory, any area in Brazil can now be declared a "strategic area" for oil and gas exploration purposes, once it has been recognized as strategic area simply as a result of a Presidential Decree.

Why is this so relevant for international investors? Because under the PSA regime, Petrobras will be the only operator of all fields, holding a minimum of 30% of participating interests (BRAZIL, 2010, a).

Importantly, the remaining 70% of participating interests may be offered in a public bidding procedure, or they may not. In the first instance, the Union, through the Ministry of Mines and Energy, will

enter into production sharing contracts directly with Petrobras. In the second instance, a public bidding procedure—through which Petrobras can improve its participating interests—will determine who will be the partner (ZACOUR, et. al, 2012).

As a matter of fact, the Federal Union had never entered into any Production Sharing Agreements as of February 2013. In December 2012, a new law was enacted by the Congress that established royalty rates at 15%. The Brazilian PSAs have not only "profit oil," as usually set forth in this kind of contract, but also will have two additional Government Takes: bonus and royalty (BRAZIL, 2012)[3].

Once there is a determination of the royalties to be paid under the PSA model, the Agreement can be signed. It is expected that the first bidding round will occur in the second half of 2013, after the Eleventh Concession Round, although no official announcement has been made (FOLHA DE SÃO PAULO, 2013).

Local content regulation is under review by ANP. Because of the Regulatory Mixed Regime, ANP included the Onerous Assignment area within the LC regulation. Petrobras, during notes and comments period, argued the Production Sharing Regime (PSR) should also be included in the same rule, and the concept of goods should be reviewed to include expenditures not related to exploration and development to satisfy other required investments under the PSR.

Given Petrobras' request, the final proposal will likely be amended to include the PSR under the same regulation, absent some contrary action by the Government. Keeping the same rules for the PSR demonstrates that the LC rules are of great importance to the Brazilian Government because the rules may increase Petrobras' costs, thus reducing the government's profit-oil lift .

To date, ANP has not announced any Public Hearing about the contract model to be adopted by Brazil for development of oil and gas reservoirs under the Production Sharing Agreement regime (ANP, 2013, c).

Meanwhile, some issues remain unsolved. First, the law did not address the issue if a company makes an uneconomical offer, which Petrobras do not want to be obliged with. There is no clear answer, but, in other public actions, the Government may refuse to sign a contract the it believe is unfeasible and the law that deals with public actions in Brazil is usually applied alternatively.

3 The term "Government Take" was also used in the Law 9,478/1997 and in the Law 12,351/10. In Brazil, the term has a different meaning than it generally has in the rest of the world. In this country, "Government Take" only refers to: assignment bonus, royalty, special participation and payment for the retention and occupation of the area (Law 9,478/1997, Article, 45 and Law 12,351/10, article 42), unlike other countries which consider also taxes and fees. (BRAZIL, 1997 e 2010, a)

Moreover, is it going to be feasible for Petrobras to performance as an operator in all PSA? It will probably depends on if the company growth will be in the same pace as the improvement of exploration and production, which will be designated by the Brazilian Government. Finally, theses questions are not constitutional ones, so further legislation may address this issues and any other adaption it may be need, respecting all vested rights, which are constitutionally protected.

3.1. The new Unitization framework

Professor SMITH, et al., (2010) defines Unitization as "the cooperative exploitation of a reservoir by all interest owners so that the reservoir is developed as if it were owned and controlled by a single entity."

Law 12,351/2010 not only introduced the Production Sharing Agreement to the Brazilian Legal System, but also enacted a new legal framework for Unitization in Brazil. This Act also revoked article 27 of Law 9,478/1997, which was the sole law regulating Unitization at that moment (BRAZIL, 2010, a).

Under the Law 9,478/1997, article 27, there had been celebrated four Unitization Agreements (in Portuguese: "Acordos de Individualização da Produção") .The first one was approved in 2007 and involved Albacora e Albacora Leste fields. In the next year, ANP approved the Agreement to Mangangá e Nautilus fields. Then, in 2009, two more Agreements were approved, the first for the fields of Camarupim and Camarupim Norte; and a second for the Campos de Lorena and Pardal fields (BRAGA and SZKLO, 2012).

It is important to emphasize that the new Act revoked the previous provision determining that only different interest owners may be subject an Unitization. The reference to different interest owners –expressed in Law 9,478/1997– was withdrawn by the new Act. Thus, in the Brazilian legal system, it is possible that a single company may submit and receive approval for a Unitization Agreement, even if the single company is the interest owner and the operator of the two areas (BRAGA and SZKLO, 2012).

This possibility was contemplated by the new law considering that the reservoir may underline areas under different legal regimes –consequently, under different royalties rates, taxes regimes and obligations. Analyzing the contracts, it is possible to say that even under the revoked law this issue might have arisen, given, for example, the different contractual obligations for Local Content.

Since 2010, all Unitization Agreements, under all oil and gas contracts celebrated in Brazil –including Concession Contracts, have been regulated according to Law 12,351/2010, as follows (BRAZIL,

2012, a):

> *Art. 33. The unitization of production activities of oil, natural gas and other hydrocarbons shall be set up whenever the field should extend beyond the block granted or contracted under the production sharing model.*
>
> *§ 1 The concessionaire or contractor under the production sharing model shall inform the ANP that the field shall be subject to an unitization of production agreement.*
>
> *§ 2 The ANP shall set forth the deadline for the parties to celebrate the unitization of production agreement, in observance of the guidelines issued by the CNPE.*
>
> *Art. 34. The ANP shall regulate the procedures and guidelines used to prepare the unitization of production agreement, which shall define:*
>
> *I – the participation of each of the parties in the unitized field, as well as the hypotheses and criteria for its revision;*
>
> *II – the development plan pertaining to the area subject to unitization of production; and*
>
> *III – conflict resolving devices*
>
> *Art. 35. The unitization of production agreement shall appoint the respective field operator.*
>
> *Art. 36. The Federal Government, represented by the public company referred to in § 1 of art. 8, and based on surveys carried out by the ANP, shall celebrate an unitization of production agreement with the parties in cases where fields belonging to the pre-salt area and other strategic areas should extend beyond areas not being shared or assigned. The future concessionaire or contractor under the production sharing model shall be obliged by the terms and provisions of such unitization of*

production agreement.

§ 1 The ANP shall provide the public company referred to in § 1 of art. 8 with all information required to celebrate the unitization of production agreement.

§ 2 The exploration and production model to be adopted in the areas dealt with in the head is independent of the model being used in adjoining areas.

Art. 37. The Federal Government, represented by the ANP, shall celebrate an unitization of production agreement with the interested parties after the respective evaluations of fields not located within the pre-salt areas or other strategic areas and extending beyond non-assigned areas. The future concessionaire shall be obliged by the terms and conditions of such agreement.

Art. 38. The ANP may enter into contract directly with Petrobras in order to carry out the field evaluation activities provided in arts. 36 and 37.

Art. 39. The unitization of production agreements shall be submitted to previous approval by the ANP.

Art. 40. Once the term set forth in § 2 of art. 33 will have elapsed, and no agreement is reached between the parties, the ANP shall determine, in up to 120 (one hundred and twenty) days, and based on a technical opinion, the form by which rights and obligations over the field shall be appropriated and shall notify the parties to sign the respective unitization of production agreement.

§ sole paragraph:: The refusal to sign the Unitization Agreement will imply the termination of concession or production sharing agreement.[4]

4 Art. 33. O procedimento de individualização da produção de petróleo, de gás natural e de outros hidrocarbonetos fluidos deverá ser instaurado quando se identificar que a jazida se estende além do bloco concedido ou contratado sob o regime de partilha de produção. § 1o O concessionário ou o contratado sob o regime de partilha de produção deverá informar à ANP

Analyzing Article 40, BRAGA and SZKLO (2012) concluded that the effects when the involved parties decline to sign the agreement are not sufficiently clear. They note that the law did not distinguish between a situation when both parties refuse to sign and a situation in which only one party refuses to sign; in this last situation, the signing party might continue to develop and produce. They also call attention to the fact that the Unification Agreement may involve only part of an area in the block under concession or PSA, and yet the termination would apply to the entire contract.

This scenario might occur if the ANP interprets the law literally. However, the article may also be constructed as authorizing the partial termination of a contract. Although this interpretation might be controversial, it seems more aligned to the public interest, given that the development and production of oil and gas is economically, socially, and politically important to the country.

On the other hand, an operator placed in jeopardy of the

que a jazida será objeto de acordo de individualização da produção. § 2o A ANP determinará o prazo para que os interessados celebrem o acordo de individualização da produção, observadas as diretrizes do CNPE. Art. 34. A ANP regulará os procedimentos e as diretrizes para elaboração do acordo de individualização da produção, o qual estipulará: I - a participação de cada uma das partes na jazida individualizada, bem como as hipóteses e os critérios de sua revisão; II - o plano de desenvolvimento da área objeto de individualização da produção; e III - os mecanismos de solução de controvérsias. Parágrafo único. A ANP acompanhará a negociação entre os interessados sobre os termos do acordo de individualização da produção. Art. 35. O acordo de individualização da produção indicará o operador da respectiva jazida. Art. 36. A União, representada pela empresa pública referida no § 1o do art. 8o e com base nas avaliações realizadas pela ANP, celebrará com os interessados, nos casos em que as jazidas da área do pré-sal e das áreas estratégicas se estendam por áreas não concedidas ou não partilhadas, acordo de individualização da produção, cujos termos e condições obrigarão o futuro concessionário ou contratado sob regime de partilha de produção. § 1o A ANP deverá fornecer à empresa pública referida no § 1o do art. 8o todas as informações necessárias para o acordo de individualização da produção. § 2o O regime de exploração e produção a ser adotado nas áreas de que trata o caput independe do regime vigente nas áreas adjacentes. Art. 37. A União, representada pela ANP, celebrará com os interessados, após as devidas avaliações, nos casos em que a jazida não se localize na área do pré-sal ou em áreas estratégicas e se estenda por áreas não concedidas, acordo de individualização da produção, cujos termos e condições obrigarão o futuro concessionário. Art. 38. A ANP poderá contratar diretamente a Petrobras para realizar as atividades de avaliação das jazidas previstas nos arts. 36 e 37. Art. 39. Os acordos de individualização da produção serão submetidos à prévia aprovação da ANP. Parágrafo único. A ANP deverá se manifestar em até 60 (sessenta) dias, contados do recebimento da proposta de acordo. Art. 40. Transcorrido o prazo de que trata o § 2o do art. 33 e não havendo acordo entre as partes, caberá à ANP determinar, em até 120 (cento e vinte) dias e com base em laudo técnico, a forma como serão apropriados os direitos e as obrigações sobre a jazida e notificar as partes para que firmem o respectivo acordo de individualização da produção. Parágrafo único. A recusa de uma das partes em firmar o acordo de individualização da produção implicará resolução dos contratos de concessão ou de partilha de produção.

termination of a contract might attempt to avoid the termination by farming out that area[5] to the other common reservoir operator or relinquishing the area corresponding to the reservoir that overlaps the block, if the operator cannot reach an agreement.

4. THE ONEROUS ASSIGNMENT CONTRACT (LAW 12,276/10)

In conjunction with the enactment of the Production Sharing Agreement Law, Brazil enacted the Law 12,276/2010. The objective of this law was to allow Petrobras to attract new investors and to keep the Federal Union as the main shareholder, holding at least 50% of the voting shares (SOUZA, 2011). In 2012, the Federal Union had 50,3% of the voting shares and 28,7% of the total shares. (PETROBRAS, 2012).

The law authorized the Federal Union to sign the Onerous Assignment with Petrobras, giving the company the right to explore and to produce up to five billion barrels equivalent of crude oil. Also, under this law, the payment was made by Petrobras in federal debt securities.

At the same time, the law provides that the Federal Union might subscribe and pay Petrobras´ shares with federal debt securities. Souza notes that according to Brazilian Corporation Law, the Government could not instead pay shares with oil and gas in place, because the value of the asset could not be reviewed in that situation (SOUZA, 2011). At the end of the day, the Brazilian Government increased its participation in Petrobras stocks through its national oil and gas proved reserves contracted with Petrobras in the Onerous Assignment.

The table below shows the areas, or reservoirs, subject to the Onerous Assignment (Área do Contrato), the volume of each area (Volume da Cessão Onerosa) and also the oil price per barrel considered (valor do barril) in the contract. Peroba area was nominated as a backup area, in case the production in other areas did not achieve the volume foreseen.

Table 1 - Volumes and Values under Onerous Assignment

Area	Volumes under Onerous Assignment (millions of barrels of oil equivalent)	Price per barrel (USD/bbl)	Onerous Assignment Values (USD billions)
Florim	467	9.81	4,287
Franco	3,058	9.04	27,644
Sul de Guará	319	7.94	2,534
Entorno de Iara	688	5.82	3,489
Sul de Tupi	128	7.85	1,885
Nordeste de Tupi	428	8.54	3,653
Peroba		8.53	
TOTAL	5,088	8.51	42,533

Source: SOUZA, 2011.

5 Only in the Sixth Round, the Concession Contract expressly establish rules to assign only some areas of the block under concession (ANP, 2004). On the other hand, Fifth Round Contract, for example, establishes the power of assignment, totally or partially, although partially is not contractually defined (ANP, 2003).

ANP contracted with Gaffney, Cline and Associates (GCA) for an audit and "valuation" of the resource (ANP, 2011,d). The report --*Review and evaluation of ten Selected discoveries and prospects In the pre-salt play of the deepwater Santos basin, Brazil* –supported the contract signed by the Brazilian Government and Petrobras to development of the above-mentioned areas (BRAZIL, 2011, d).

ZACOUR, et. al, (2012) explain, in short, the main characteristics of the onerous assignment contract:

> *[T]he parties of this Contract, signed in September 2010, are: the Union, represented by the Minister of Mines and Energy, the Minister of Finance and the General Attorney of the National Treasury, and Petrobras. The ANP has integrated the Contract as a regulator and controller.*
>
> *The purpose of the Contract is the execution of activities of exploration and production of oil and natural gas in certain areas, as specified in the annex to the Contract. Operational risk is all of the Assignee (Petrobras).*
>
> *With respect to geological risk, it is possible to say that there is no exploratory risk to the Assignee (Petrobras), considering that the Contract establishes mechanisms to ensure that Petrobras will have the right to produce the total amount of 5 billion barrels of boe.*
>
> *The term of the Contract is 40 (forty) years as from the date of its execution (clause 5.2). This period may be extended by the Assignor by a maximum of 5 (five) years, upon request of Assignee (Petrobras) (clause 5.3). . . .*
>
> *Petrobras cannot transfer any of its rights under the Onerous Assignment Contract (art. 1, §6, of Law 12,276/2010). The consideration to be paid by Petrobras is composed of: (a) the price paid by the Assignee (Petrobras) to explore and produce oil and natural gas to the limit of 5 (five) billions of barrels of oil equivalent of oil, in areas of pre-salt (art. 1º, § 3, Law 12,276/2010); and (b) the royalties (art. 5 of the Law), which will be paid, monthly, in an amount*

> *corresponding to 10% (ten percent) of production of oil or natural gas . . .*
>
> *The property of oil extracted, up to the limit of 5 (five) billion of barrels of oil equivalent of petroleum, as well as the costs of operations, will be – in its entirety - of the Assignee (Petrobras) (art. 1º, § 1, and art. 4º of Law 12,276/2010).*
>
> *Finally, the control of the operations to be performed by Petrobras will be up to the National Agency of Petroleum, Natural Gas and Biofuels – ANP (art. 7 of Law 12,276/2010).*

As prescribed in Article 5, Special Participation (explained below) is not required for the production of this amount of oil. The State of Rio de Janeiro —the main beneficiary of this Government Take— argued the unconstitutionality (STF, 2012, a) of this article in the Supreme Court in November 2011. As of February 2013, no in limine or final decision had been reached.

5. The Concession Regime and the exploration and production in Brazil

When the Petroleum Law was enacted, Petrobras had already been operating and producing in Brazil. As a transition, the law allowed Petrobras to carry on the operations in areas where it had already been working. The law also determined that Petrobras should sign Concession Contracts in each of these areas. These contracts came to be known as "Round Zero" (ANP, 2011, b, f). As determined in Article 33 of Law 9,478/1997, 397 contracts were signed with Petrobras in 1998.

Since then, ANP has promoted ten annual Bidding Round of Blocks for Exploration and Production of Oil & Natural Gas. This is a mandatory procedure, accordingly the Law 9,478/1997, Article 23:

> *Art. 23. Oil and gas exploration, development and production activities shall be exercised by means of concession agreements preceded by public bids, as set forth herein, or by the production sharing model in the pre-salt and strategic areas, as per the specific laws thereto.*

Prior to August 2012, there were seventy seven different economic groups performing exploration and production activities in

Brazil, including International Oil Companies and Brazilian independent producers. Among them, thirty eight are foreign (ANP, 2012, f).

A summary of each Round can be found on the ANP website (ANP, 2013, h). BRAGA and CAMPOS give a good overall view of the Bid's procedure:

> *ANP launched the bid notice and the draft of the concession agreement and discusses its terms in a public hearing. As soon as the bid notice is launched, begins the process of bidder's qualification by the CEL [Comissão Especial de Licitação [Bidding Special Committee]]. The documentation required in Brazilian bidder's qualification process is divided into three categories: i) technical, ii) economic and financial; iii) legal and fiscal. In Brazil, companies are classified in non-operator and operator. The operator classification is still divided, according to the area of operation, in: A (onshore, shallow and deep water), B (onshore and shallow water) and C (onshore). The ANP allows individual companies without experience to participate of the Bidding Round, since they were qualified as operators B or C, through detailed assessment of the technical staff member's resumes, confirming relevant experience in petroleum exploration and exploitation. The Brazilian qualification process is linked to Bidding Rounds. (BRAGA and FERREIRA, 2008).*
>
> *After being qualified by the CEL, companies must pay a participation fee and submit financial guarantees in order to be allowed to present offers on the public section, previously scheduled by ANP (BRAZIL ROUNDS, 2008).*
>
> *The offer should consist of three components: i) signing bonus, which has [a]weight [of] 4 in the bid evaluation, ii) Minimum Exploration Program - PEM, also with [a] weight [of] 4, and iii) local content, weighing 2, divided into 0.5 for the exploratory phase and 1.5 to development and production phase. Each block offered in the bid has a minimum signature bonus, and companies can only offer amounts equal to or greater than this. The PEM is expressed in work units (UT) and must be*

> *[greater than] [] zero, following the parameters of equivalence with exploratory activities. Regarding local content, there is a spreadsheet with the minimum percentages required for each item of the subsystems (geology and geophysics, drilling, completion and evaluation, operational support, system production and collection of plant).*
>
> *ANP has its own system of bid evaluation, developed specifically for the offers processing in order to provide transparency and speed in the process. The bid evaluation's result is show[n] to the participants of public section almost immediately after the announcement of the final offer. In the event of a tie, tied companies must submit a new offer. All the criteria must be offered with equal or greater values than the first offer. Petrobras has the preference, if one of tied companies (BRAGA and FERREIRA, 2008).*
>
> *On completion of public section and disclosure of the Bidding Round results, companies must submit the required documents for the signing of the concession agreement, in accordance the provisions of Bid Notice. (page 13)*

It is important to note that the Eighth Round was suspended, under judicial order (ANP, 2013, f). The Ninth Round had forty one blocks, which were withdrawn as determined by Resolution 06/2007 CNPE – Conselho Nacional de Política Energética [National Council for Energy Policy], after Petrobras announced its discovery of potential large-scale reserves in the Brazilian pre-salt layer. For many years, the situation continued unresolved, but in 2012, ANP Board Resolution nº 593/2012 (ANP, 2013, a) was enacted and the following notice was posted on its website:

> *The ANP began the process of refunding the Participation Fees and Bid Bond relating to areas of the Eighth Round.*
>
> *The companies that have paid the Participation Fee for the sectors that have been removed from the Eighth Round, by means of a Resolution of Board of Directors, will have their Participation Fees*

> *refunded, as well as the Bid Bond not associated with a valid proposal. (ANP, 2012, b)*

Unfortunately, the last Round had taken place in 2008, shortly before the debates about the Pre-salt area began. At that time, the Tenth Round only "[o]ffer[ed] 130 blocks, all located in onshore basins, this Bidding Round has attained its goal of attracting small and medium-sized companies, alongside with major oil companies." (ANP, 2013, e)

After a hiatus of almost four years, the Federal Government announced the next Bidding Round of Blocks for Exploration and Production of Oil & Natural Gas:

> *President Dilma Rousseff authorized today (9/18/2012) the 11th Brazil Round for concession of exploratory blocks for petroleum, that will take place on May 2013, on a date to be set by ANP. The blocks to be offered will be disclosed by the Agency in the next few days.*
>
> *The promotion of the 11th bidding round is conditioned to the approval of the royalties' law by the Brazilian Congress. (ANP, 2012, e)*

In December, 18, 2012, The National Council for Energy Policy authorized ANP, on 01/11/2013, to hold the Eleventh Bidding Round (ANP, 2013, g), which will offer blocks in seventeen sectors, totaling 121.2 thousand km² in basins of new borders and mature basins. The area being offered covers nine sedimentary basins and forms 172 blocks, on shore and offshore (ANP, 2013, b).

The exploratory blocks on shore are: Espírito Santo Basin, Parnaíba Basin, Potiguar Basin, Recôncavo Basin, Sergipe-Alagoas Basin. The Offshore Sectors, located on shallow waters, are: Barreirinhas Basin, Foz do Amazonas Basin. These areas can be seen on Appendix I (ANP, 2013, d).

The Eleventh Bidding Round will be governed by Resolution nº 27/2012, which approves the Regulations dealing with procedures for bidding on the acquisition of blocks intended for the hiring of exploration and production activities of oil and natural gas under the concession regime. An unofficial version in English can be found at ANP website (ANP, 2013, a). Also, information about areas offered in the Eleventh Round, qualification to participate, and data package area available in English (ANP, 2013, c).

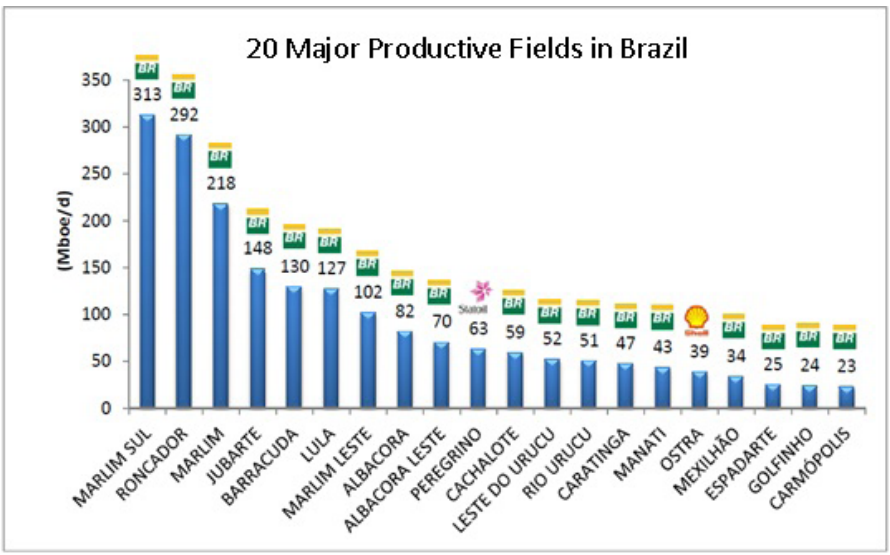
5.1. Production and Government Takes under Concession Regime

According to Petroleum Law, the companies that operate in Brazil must be established under Brazilian law. "Foreign companies are allowed to participate in Brazil Round []. In the event of success, the winner company must provide performance guarantees to a Brazilian affiliate who will sign the Concession Agreement." (ANP, 2007).

Many international companies have both a Brazilian affiliate and a successful business in Brazil, although Petrobras is still responsible for more than 90% of all oil and gas produced in Brazil (ANP, 2012, a).

Besides Petrobras, the main producers in Brazil and their countries of origin are: (1) Statoil Brasil (Norway); (2) Shell Brasil (Anglo–Dutch); (3) BG Brasil (United Kingdom); (4) Sinochem Petróleo (China); (5) Manati (Brazil); (6) Petrogal Brasil (Portugal); (7) OGX (Brazil); (8) BP Energy (United Kingdom); (9) Repsol (Spain); (10) ONGC Campos (India) (ANP, 2012, a). It is important to remember that, according to Brazilian law, all these companies are Brazilian (BRAZIL 1997), although they are affiliated of foreign companies.

The table below shows the most productive fields in Brazil, including the Statoil and Shell fields (ANP, 2012, a). Actually, Chevron, operating the Frade field, was usually figured as one of these major producers before its first oil spill, which occurred on November, 2011 (Chevron, 2012). In January, 2011, Frade was the Ninth Field in total production (ANP, 2011, c).



Source: ANP, 2011, c.

Among these fields, only Leste Urucu, Rio Urucu and Carmópolis are onshore. The Brazilian oil and gas industry is remarkable for its offshore production. Roughly, 90% of oil production is offshore and about 75% of gas production is offshore. This difference can be attributed to Urucu Field (*Leste Urucu, Rio Urucu and Sudoeste do Urucu*), a major non-associated gas productor, located in *Solimões* Basin, Amazonas (ANP, 2012, a).

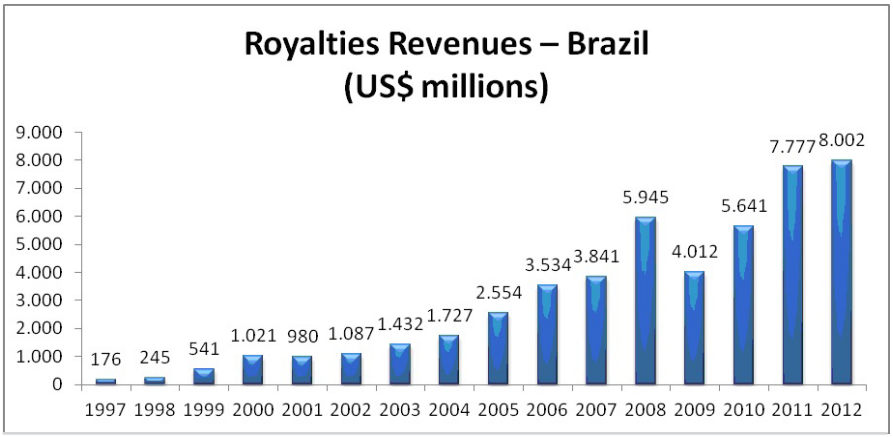
The average of API Gravity from Brazilian oil–defined for The American Petroleum Institute–is about 24º. The production is represented for: 9% of light oil (>= 31º API), 57% of medium oil(>=22°API e <31°API) e 34% of heavy oil, (<22°API), accordingly to the ANP's classification (ANP, 2012, a).

Under the Concession System, the Operator acquires the ownership of the hydrocarbons once produced. At the same time, there emerges a duty to pay royalties.

Royalties, under the Concession regime, are ten percent, but can be reduced to as little as five percent. In deciding to reduce royalties, ANP will consider the geological risks, the production expectations, and other relevant factors. The majority of the fields pay royalties of ten percent (SERRA, 2013).

Royalties are due on the last workday of the month subsequent to the production. In the Concession system, royalties are not paid in kind. To determine the price of the oil, ANP considers physio-chemical composition, TBP (True Boiling Point) curve, API gravity and sulfur content. This data is compared to Brent Oil and other crude oil benchmarks (ANP, 2009).

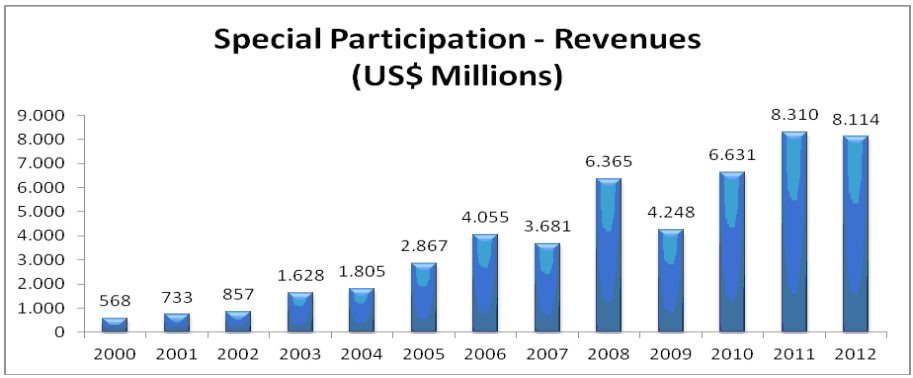
The graph below shows the amount of royalties paid, per year, since ANP was established.



Source: Authors.

Before ANP was established, royalties were five percent of the production. These royalties were calculated and paid directly by Petrobras for the beneficiaries, according to Law 2,004/1953 and Law 7.990/1989 (BRAZIL, 1953 e 1989).

Another important Government Take paid in Brazil is the "Participação Especial - PE" [Special Participation]. Although only fields with great production volumes pay Special Participation, this Government Take collects more money than does Royalty. Below, it is possible to verify the amount of Special Participation and compare it with Royalties payments above.



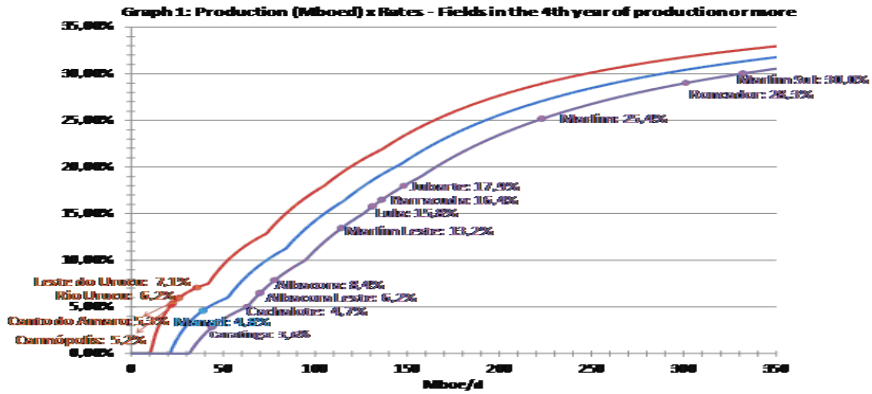
Source: Authors.

In 2009, sixteen fields paid Special Participation; this number increased to nineteen in 2012. Without exception, like every other field in Brazil, theses fields also pay royalties.

In contrast to royalties–that is, a fixed percentage of production–the calculation of Special Participation is complex. The tax basis considers not only the profits, but also some of the costs, which can be deduced according to some of ANP's rules (Portaria ANP 10/99 and Portaria ANP 58/2001).

On the other hand, rates are fixed in the Decree 2,705/1998 and will vary, depending on: (1) production volume; (2) field location: onshore, offshore and offshore deeper than 400 meters (about 1,300 feet) under the sea; and (3) years of production, which stabilizes in the fourth year.

This decree provides twelve tables, with all the possible rates. The table below presents some examples of applicable rates to fields with more than four years of production. Each line in the graphic represents the three possible locations, and the rates increase as production increases.



Source: Authors.

All the "Government Takes" are distributed according to the shares provided by Petroleum Law. The beneficiaries are the: (1) Federal Union; (2) Ministry of Science and Technology; (3) Navy; (4) Productive States; (5) Productive municipalities; and (6) States Fund[6].

The Government Takes shares are a complex subject, and beyond the scope of this article. However, it is important to note that, beginning in December 2012, the revenues shares from the Concession Contracts are under legislative review. The Bill 2,565/2011 (PL nº 2,565/2011), approved as Law 12,734/2012, had its article 3 vetoed by the President, Ms. Rouseff. Article three aimed to establish a new share for the revenues of Concession Contracts already signed.

The effect of the veto is to maintain the rules of Petroleum Law. The Constitution, however, establishes a mechanism whereby a two-thirds majority vote allows the Congress to override a Presidential veto of legislation, similar to the veto override provisions found in the U.S. Constitution (Constitution of The United States, Article I, Section 7, (2)). During its December, 12, 2012, session, the Congress approved an "urgent regime" for the veto voting. This would mean that this veto would be appreciated first, disregarding other more than 3,000 ones that are waiting to be analyzed by Congress.

Against this decision, two writs [Mandados de Segurança] were presented to the Supreme Court. The plaintiffs sustained that: (i) the "urgent regime" violates the due process of law, once it was not designed to veto; (ii) the due process of law was also violated because the Congress's procedures rules were not followed; and (iii) the "regime" violates the precedence order and the principle of reasonableness (STF, 2012, b).

In the first writ, Justice Luiz Fux decided, *in limine*, to suspend the legislative process, stating that chronological order must be observed

6 This is a small share that is shared with all States, independent of whether there is production in their territory, or not.

in appreciating the veto (STF, 2013). As of February, 2013, there is no final decision. In the second one, no opinion was delivered.

6. CONCLUSION

The oil and gas industry in Brazil has changed a great deal since the Constitutional Amendment of 1995. Although Petrobras is still the major player in this market, the mere fact that competition, introduced by the Concession Regime, has brought some new features and improvements to oil and gas industry in Brazil, resulting in significant volumes of production.

At the same time, Brazil has gained the status of being considered a stable country for International Oil Companies. Fortunately, some misleading events involving the Eighth Round and the Ninth Round, which were suspended, have been overcame, putting an end in any inconsistency that may have arose.

Additionally, the Eleventh Round recovers the attention to Brazilian oil and gas industry and has been appointed as a way to recover new investments and create opportunities in the country. It is expected that the first Production Sharing Agreement auction will occur still in 2013, although there is no official announcement yet. Notwithstanding, IOCs have great expectations about the model of Production Sharing Agreement to be adopted by Brazil.

In the meantime, oil and gas revenue sharing remains to be decided. From the investors' point of view, there should not be any concern. The amounts to be paid, under Concession Regime and under PSA, are already defined and not under debate in Congress. However, this is of great concern to the Government.

The Brazilian Government will also have to gauge the international reaction to the new regime after it goes into effect. Pré-sal Petróleo S.A.—PPSA remains unfamiliar even to Brazilian investors. On the other hand, the state owned company, Petrobras, is a consolidated and respected company worldwide, even when facing the ups and downs due to the domestic economic policy, holding back fuel prices to compromise with inflation target. Moreover, Brazilian Government has always shown consistency in oil and gas agreements and had never breached any contract, fostering a safe environment for long run investments.

The lessons learned from this experience show that structuring a robust legal framework to foster the necessary investments is not only a challenge for the Brazilian economy, but also one that has to be tackled by many emergent economies with newly hydrocarbon discoveries.

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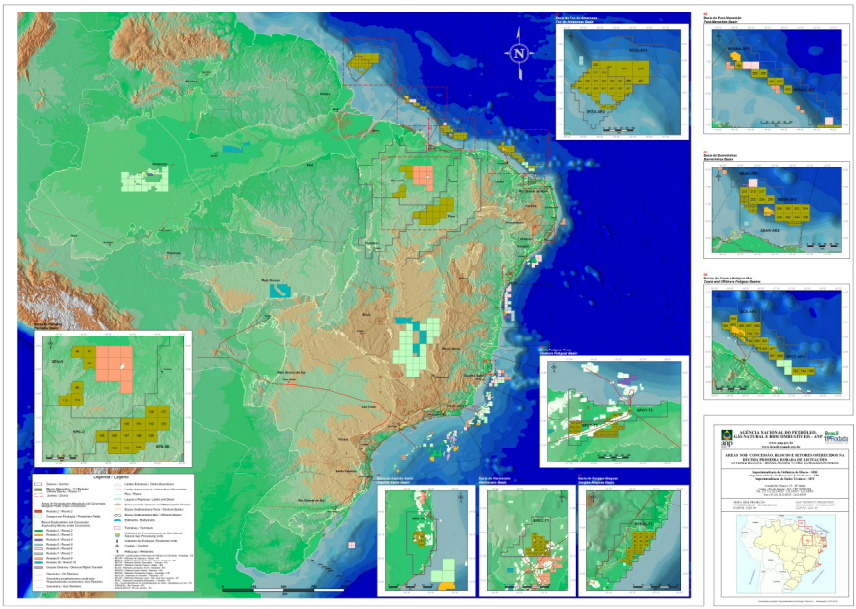
SUPPLEMENTARY MAP



THE DECRIMINALIZATION OF THE ABORTION OF ANENCEPHALIC FETUSES: *RELEVANT DISCUSSIONS*

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Abstract: After eight years of endless discussions about the decriminalization of the abortion of anencephalic fetus, on April 24, 2012, the claims contained on the Allegation of Disobedience of Fundamental Precepts n. 54/2004 were finally deemed relevant by the Brazilian Supreme Court, and the long-awaited therapeutic discontinuation of such pregnancies was no longer punished under the Brazilian Penal Code. This decision was upheld as a victory of those who believe that the right to life has no absolute character, nor is etiologically superior to other fundamental rights, like the mother's freedom to reproductive autonomy, and the legalization of these specific cases of abortion is based on an obedience to the constitutional precept known as the Dignity of the Human Person, ideally achieved by allowing an attenuation to the immeasurable physical, moral and psychological suffering experienced by those pregnant women. The present article will analyze the civil, criminal and constitutional questions relevant to the debate, aiming to promote reflections about the pertinence of the Supreme Court's decision inside a global context in which the valorization of a subset of human rights, especially those that concern women's reproductive health, is being vigorously understood as of great importance.

Keywords: Decriminalization - Abortion - Anencephalic Fetus.

1. INTRODUCTION

In most developed countries, abortion is considered a permitted and rightful way to save the life of the mother or to preserve their mental and physical health. It's also allowed in cases of fetal anomaly, economic or social reasons, and even at the request of the mother, if it's performed inside a law-imposed and legally limited period. In Latin America and Caribbean countries, the lawmakers rulings points otherwise, and most of them ban abortion completely, as happens in

Chile and Dominican Republic[1].

Brazilian law is among the strictest ones in Latin America, concerning abortion-specific rulings. The Penal Code of 1940 criminalizes abortion completely, establishing that it can be legally carried out by a physician, and thus exempted from punishment, only in two specific cases: when there is no other way of saving the life of the mother, or when the pregnancies result of rape. Despite the severe restrictive laws, even the abortions that are included in the above-mentioned circumstances face many obstacles, leading to dire consequences. Because of the law prohibitions and obstacles the legal abortion faces in the public health system, almost all of the pregnancy interruptions are performed in illegal abortion clinics, and the risks they present to the mothers' health and lives contributes to the country being within the ones with the highest maternal mortality rate[2].

These questions aside, the article will handle the polemic question that concerns the (now allowed) possibility of abortion on cases of pregnancies in which the unborn carries a serious defect known as anencephaly, briefly defined as a set of several malformations of the cerebrum and cerebellum, which ultimately leads to fetal loss, stillbirth or neonatal death.

On July 1, 2004, the National Confederation of the Health Providers of Brazil ("CNTS") filled a lawsuit at the Supreme Court in favor of making these abortions legal. As the case dealt with "fundamental precepts" related to the Brazilian Constitution of 1988 and the Civil Code of 2002, the pleas were made in the form of a Allegation of Disobedience of Fundamental Precepts ("Arguição de Descumprimento de Preceitos Fundamentais"), known as the ADPF 54.

After many years of debate, the ADPF 54 has returned to the Supreme Court ("Supremo Tribunal Federal") docket this year and on April 24, 2012, it's been finally voted 8-2 in favor of allowance of the abortions. As of this ruling handed down by the Brazilian Supreme Court in favor of the applicants, this third case of legal abortion has been amended to Brazil's current abortion law, to exclude punishment also in cases where the fetus has been diagnosed with anencephaly.

The legal reasons that regard the signing of this positioning by the Supreme Court will be the present paper objective of analysis, as to confirm that it truly was the right and wisest decision to be made in

1 CENTER FOR REPRODUCTIVE RIGHTS. *The World's Abortion Laws*. Available in: < http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf> Access in: 20 October 2012

2 DUARTE, Graciana Alves; OSIS, Maria José Duarte; FAÚNDES, Aníbal; SOUSA, Maria Helena de. *Brazilian abortion law: the opinion of judges and prosecutors.* Rev. Saúde Pública. Vol. 44 no. 3 São Paulo. Available in: < http://www.scielo.br/scielo.php?pid=S0034-89102010000300004&script=sci_arttext&tlng=en> Access in: 22 November 2012

such a controversial humanitarian question.

In a first moment, we'll present and discuss the major theories concerning the adoption by our legal system, in the Brazilian Civil Code of 2002, article 2°, of provisions that safeguard unborn child's rights, but also contained a lot of ambiguity: "The person's civil personality starts with the living birth, but the law provides for the rights of the unborn child since its conception". But when is a conception made? When does life begin for the unborn child? What is the "unborn child"? Those will be the first questions addressed by the work.

Then, we'll analyze the criminal questions concerning abortion general aspects, the penalties for those who commit the crime, and the exclusions of liability given to the mothers and to the physicians that help them in the legal abortion situations.

In a third moment, we'll analyze the constitutional grounds related to those used by the Supreme Court Rapporteur minister selected to handle ADPF 54, Marco Aurelio Mello, to issue eight years ago an injunction that authorized the interruption of gestations in the event of anencephalic fetus. As the injunction statements were followed by seven other ministers in the ADPF 54 final judgment this year, we'll highlight the fact that the allowance of this type of abortion is, according to the Constitutional Law adopted by Brazilian's Constitution of 1988, the right call.

As of the conclusion terms, we'll seek to put the Supreme Court ruling as an important landmark in today's global context, where several sectors of society pressures for changes to the laws, and in a dynamic scenario of changes which is marked by the feminist groups' global struggle to redefine the traditional concept of the Human Rights, renowned in the 1948 Universal Declaration of the Human Rights, so it can demonstrate the universality and plurality of the human differences, ideally culminating in what some call the "new generation of human rights", ultimately achieved by the incorporation of a gender perspective approach to the discussions, such as those relative to the reproductive rights in statutes.

2. ABORTION AND CIVIL LAW: CONSIDERATIONS

The development of Medicine and the arrival of new biotechnologies of reproduction, like prenatal diagnosis and assisted reproduction techniques, have brought fresh impetus to the studies aimed at establishing in what moment human life begins or ends. As regards to the development of the prenatal diagnosis, its importance in the civil and social discussion lies in the possibility of early detection of anomalies that could jeopardize extra uterine fetal viability, like anencephaly. These questions concern the motherland's legal system in

the fact that, it will be in the moment when a human being is considered "alive" it will also be considered legally existent as "a person of rights and duties", and thus the law provisions will protect it. There is currently no consensus in science, philosophy and religion about in what moment life really begins.

That said, the Civil Code, in its article 1o provides: "Every person is capable of rights and duties in the civil order".

As so, the question that is brought upon us is: in what moment will the human being be considered a "civil person", so it has the option to exercise the rights that belong to all citizens (subjective rights) and is assured protection of them by the State? Is it with the mere fertilization, or is it with the living birth? What are the legal provisions that define this?

On the subject, we have two conflicting major positions in Brazilian doctrine we will refer to: the Concepcionists theory and the Natalists theory, which main ideas will be briefly explained in the next topics.

2.1 The Concepcionists Theory

This theory is distinctly influenced by the French Law, and preconizes the provision of civil rights to the unborn since conception, regardless of any other condition.

The word used for unborn in the Civil Code original language is "nascituro", which originates from latin *nasciturum*, which could be roughly understood as "an already conceived human being, whose birth is expected as a future and certain fact"[3].

The theorists that are adepts of this line of thinking, like the eminent Brazilian authors Teixeira de Freitas and Clovis Beviláqua, defend the existence of a full abstracted personality in the pregnant woman's womb, which theoretically speaking would be carrying the unborn full potential of developing their personal individuality[4].

Based on this, it can be said that human life would be conceived in an instantaneous process that starts in the occurrence of the fertilization of the ovum by the spermatozoid, which will lead afterwards to the formation of an autonomous genetic reality, the zygote. As previously quoted, the main argument of this theory is the potential capacity that the zygote has of realizing its human destiny. In the words of Minahim[5]:

3 FERREIRA, Aurélio Buarque de Holanda. *Novo Aurélio século XXI* – dicionário eletrônico. Rio de Janeiro: Editora Nova Fronteira, 1999. CD ROM.

4 AMARAL, Francisco. *Direito Civil: introdução*. 6. ed, rev., atual. e aum. Rio de Janeiro: Renovar, 2006.

5 MINAHIM, Maria Auxiliadora. *Direito Penal e Biotecnologia.* São Paulo: Editora Revista dos Tribunais, 2005.

> *It's not the similarity to an adult form, or whether or not the organs and functions have been completely installed that must prevail over the decision about the humanity of an individual, but the verification of its capacity of producing itself.*

This theoretical framework, however, is prone to criticism. The only thing that the genetic code argument holds is the capacity of the embryo to become a future person. But, aside from the fact that the embryo's development is not based in an isolate process, but on the interaction of its genes and environmental factors, it has been proved that human reproduction is also extraordinarily wasteful. Scientific studies about the embryonic development shows that about 50% of the fertilized eggs (defined as zygotes or oocytes) are aborted spontaneously ("miscarried") before the fetus reach a viable gestational age, thus not resulting in live births[6].

That said, to state that the simple union of the gametes resides in the fact of the potentiality of them becoming a new being, is to ignore that a large proportion of the zygotes is bound to fail in its destiny. There is no scientific way to assure that conception will be effective in the moment of fertilization, as the embryonic development is highly selective, as spontaneous abortion happens to most of the oocytes carrying severe cromossomic and congenital pathologies.

Adopting this theory would lead us to assure that both life and personality would start in the moment of conception, so a fetus, even if anencephalic, would have his life and personality protected by the law since then. As so, abortion would be considered an attack to its personality rights.

2.2 The Natalists Theory

The Natalist Theory is the one adopted by the Brazilian Civil Code provisions in article 2°, and also is widely accepted by the majority of the Civil Law doctrine, like Pontes de Miranda, Silvio Rodrigues, Caio Mário. This theory is based in the fact that personality is incorporated to the human being right after the living birth.

The living birth is understood as the genesis of the individual personality, and is defined by the Resolution n. 1/88 of the National Council of Health ("Conselho Nacional de Saúde") as the: "Expulsion or complete extraction of the product of conception when, after the separation, it breathes and has heart beats, whether or not the umbilical

6 REGAN, L, RAI, R. *Epidemiology and the medical causes of miscarriage.* Baillieres Best Pract Res Clin Obstet Gynaecol. Londres. Vol. 14, n.5. 2000. Available at: <http:// www.pubmed.com> Access in: 20 October 2012.

cord was cut, and whether or not the placental separation have occurred". The medical examination responsible to verify the breathing condition is called galenic hydrostatic pulmonary docimasy.

In this moment, as the life element becomes present, the offspring no longer depends on the maternal organism directly to live. As such, life is considered present with living birth. In this respect, Fernando Simas Filho specifies[7]:

> *It's not enough the simple fact of birth; it's necessary that the newborn presents the signs of life, like their own movements, breathing, cries. [...] Law states that, so civil personality can be given and it becomes a subject of rights, the child must show unequivocal signs of life, even in event of death shortly thereafter. If the child is stillborn, it does not acquire personality, and therefore does not receive or transfer rights.*

In conclusion, to the theory supporters, the Article 2o *in fine* of the Civil Code reveals that the unborn is considered only a biological life that carries a person expectancy that will be fulfilled with the living birth. As so, it cannot be considered a complete human being mainly due to the link of dependence it has with the maternal innards, responsible for its nutrition and survival until birth. As the anencephalic fetus is not considered viable in extra uterine conditions, and certainly will be stillborn, it will be not considered a person to the Brazilian Civil Law. But, as the unborn essentially carries an expectancy of rights, it is important to the natalists that the law provides it with protective measures to what some call their "formal personality rights", as is the right to life[8].

Also, about the subject of the anencephaly, this idea is ratified by Francisco Peixoto, who assured, based in broad medical literature that "anencephaly is a fatal defect for the fetus" and that "from an obstetrician's point of view, there is no possibility of extra uterine survival for the anencephalic fetus[9].

About this, Diniz states that "anencephaly is a fetal malformation incompatible with life, about which there is a consensus in international

7 SIMAS FILHO, Fernando. *A Prova na Investigação de Paternidade*. Curitiba: Editora Juruá, 1998.

8 Diniz, Maria Helena. Código Civil Comentado. São Paulo: Saraiva, 2008.

9 PEIXOTO, Francisco Davi Fernandes. Direito, Anencefalia e Antecipação Terapêutica do Parto: uma análise da realidade brasileira. Fortaleza: XIX Encontro Nacional do CONPEDI, 2010. Available in <http://www.conpedi.org.br/manaus/arquivos/anais/fortaleza/4003.pdf. Access in: 21 October 2012

medical literature concerning the diagnosis of fetal unviability."[10]

2.3 The Solution Adopted by the Brazilian Civil Code of 2002

The Brazilian Civil Code, in its article 2° provides: "The person's civil personality starts with the living birth, but the law provides for the rights of the unborn child since its conception".

It is clear the adoption of the natalists theory in regards to the beginning of the natural personality and legal capacity ("the generic aptitude to securitize rights and incur in obligations")[11] and as it provides some protective measures to the unborn, such as the right to physical integrity and to life. While both theories differ in terms of civil personality (which consequences will be important in the law of successions and other patrimonial questions), they converge at the need of protecting these fetal rights. And the most effective way of protecting both life and physical integrity is the criminalization of the acts that are offensive to them. The protective measures will be found on the provisions of the Penal Code of 1940 and the Child and Adolescent Statute, as will be seen in the next topic.

After the presentation of these theories and the Civil Code dispositions, we conclude that the Brazilian Civil Law will concede civil personality only to an already born child, but despite the theory adopted, the legal system safeguards the unborn's life and well-being, by provisioning protective measures to ensure them the best chance of reaching living birth. The Criminal Code is the most effective protection mechanism in this regard, and as such its provisions concerning abortion will be analyzed in the next topic.

3. COERCIVE DISPOSITIONS ABOUT ABORTION

3.1 The Law of Penal Violations Dispositions Related to Abortion

As aforementioned, the article 20 of the Law of Penal Violations of 1941 ("Lei das Contravenções Penais"), punishes the advertising of abortive ways, that is, the conduct of advertising processes, substances or objects aimed at causing abortion. The last part of the article 20, which also punished who advertised processes, substances or objects aimed at preventing pregnancy, was derogated by the law 6.374/1979.

The eminent author Nucci states that this figure (as most of the

10 DINIZ, Débora. *Aborto e inviabilidad fetal: El debate brasileño*. In: Cadernos de Saúde Pública. Rio de Janeiro: V.21, N.2, p. 634-639. MAR/APR., 2005, p. 637.

11 DINIZ, Maria Helena. *Curso de Direito Civil Brasileiro – Teoria Geral do Direito Civil*. 27. ed. São Paulo: Saraiva, 2010.

criminal offences this law criminalizes) has no practical use, for if one actually practices the conduct, he is automatically instigating the illegal abortion, and thus is to penalized under the Penal Code's article 286, which is far more sanctioning than this one (penalty of 3 to 6 years of prison and financial sanction).

3.2 Statute of Child and Adolescent of 1990 Abortion-related Dispositions

The article 227 of the Federal Constitution of 1988 brings us the principle of the absolute priority, which commanded the Public Administration to give primacy to the child and adolescent's rights and wellbeing, as it has been granted a special constitutional character.

The Statute of Child and Adolescent ("Estatuto da Criança e do Adolescente – ECA") also protects the unborn wellbeing both directly and indirectly, as it carries the potential of human development. As to our paper objective, it is important to refer to its article 8, which ensures "to the pregnant woman, through the Unique Health System ("Sistema Único de Saúde – SUS"), the prenatal and perinatal assistance". And its §3o requires that "is a task of the State authority the offering of food support to the needed pregnant women and nursing mothers".

3.3 The Penal Code of 1940 Protective Measures to the Unborn

The Penal Code dispositions that criminalize abortion are supported by the Civil Code provision about the need of protective measures to the unborn. It becomes necessary to define beforehand that the protection given to the intrauterine human life is substantially lower than the one given to the life of an already born person. There is no need to go further than presenting an example to prove that affirmative. Let's compare the crime of murder, as defined in article 121 and the crime of abortion, as defined in art. 124:

(*Nomen Juris*: Murder) Art. 121: Killing someone. Penalty: Imprisonment, 6(six) to 20(twenty) years..

(*Nomen Juris*: Abortion caused by the mother herself or by another with her consent) Art. 124: Cause abortion on herself or consent to another to cause it. Penalty: Detention, 1(one) to 3(three) years.

It is an obvious statement that the handling of the offenses against the person is very different than the one concerning the unborn. This makes it clear that the Brazilian legal system does not put the embryo's life and the human life at the same level, and therefore the life of the mother would deserve better than the unborn's, which will be discussed in a subsequent moment, inside the constitutional discussion.

The Brazilian Penal Doctrine suggests that there is human life,

and as such, the incidence of penal protection, right from conception. This is the thinking of the notable jurist Nelson Hungria, also shared by the likes of Aníbal Bruno, Cezar Roberto Bitencourt and José Henrique Pierangeli among other prominent penal jurists. Hungria synthetizes the question assuring[12]:

> *The Code, when it criminalizes abortion, does not distinguish between fertilized ovum, embryo or fetus: interrupting pregnancy, before its normal end, is crime of abortion. Wherever is the stage of gestation (from the conception to the beginning of birth, that is, until the breaking of the amniotic membrane), to cause its interruption voluntarily is to commit abortion.*

Indeed, this idea is clear when we analyze that the present Penal Code typifies the figures of murder (art. 121, killing someone), infanticide (art. 123, when a mother kills her newborn under the influence of puerperal condition, as a kind of privileged homicide) and abortion (killing a unborn child), protecting life from the beginning of its biological existence, as is the conception.

The different kinds of abortion that are punished are: auto-abortion or consented abortion (art. 124); abortion caused by another without the mother's consent (art. 125, penalty of imprisonment, 3 [three] to 10 [ten] years.). It also separately typifies the conduct of the stranger that causes the abortion consented by the mother in the terms of the art. 124, by provisioning in the article 126 they will be punished by imprisonment, 1 [one] to 4 [four] years. However, if she consents to abort being under 14 years old, suffering from mental conditions (dissent is presumed), or if the consent is obtained under menace, violence or fraud, the penalty given ranges from 3 [three] to 10 [ten] years of imprisonment. The article 127 deal with the qualified abortion causes, in which the abortion caused by another and the consented abortion penalties can be heightened by one third if, by consequence of the means adopted to cause it, the woman suffers bodily injury of mild nature, and doubled in cases of mother's supervening death, by the same reasons.

The Article 128 is the most important to our study about the possibility of legal interruption of the anencephalic fetus pregnancy. This article concerns the legal abortion, which is not against the law when performed by a physician, in the cases of therapeutic abortion (when there is no other option to save the mother's life), as well as

12 HUNGRIA apud FRANCO. *Anencefalia – breves considerações médicas, bioéticas, jurídicas e jurídico-penais*. RT 833. São Paulo: Revista dos Tribunais, 2005.

the case of sentimental abortion, which is also not a crime, legally performed when the pregnancy results of rape.

These were the two only exceptions. Aside those, any other form of abortion would be illegal, and thus punished by the Penal Code articles 124 to 127, according to the case. But the anencephalic fetus discussion was brought upon the courts and lawmakers by the society in face of the Constitution of 1988, which was largely different than the one in which the Penal Code of 1940 was put into force, and the ordinary legislation needed to be reviewed. In the Draft of the new Penal Code ("Anteprojeto do Novo Código Penal") which is still in discussion at the National Congress ("Congresso Nacional") as an example, aside from the already legal possibilities of therapeutic and sentimental abortion, it establishes that there is no crime of abortion when it is performed by a physician in situations of "clear probability, certified by two doctors, of the unborn having serious and irreversible mental and physical anomalies", necessarily "preceded by the consent of the mother or, when she's legally incapacitated, by its legal representative, or when married, by the spouse".

These discussions were put to an end by the decision of the Supreme Court this present year that established the legal abortion of the anencephalic fetus as a right of the mothers.

And because of the legalization in these cases, the decision also brought upon our legal system the judicial and constitutional figure named *abolitio criminis*, and its effects.

According to the dispositions of the article 2, *caput*, of the Brazilian Penal Code of 1940, no one can be punished by a conduct (fact) that is repealed by a later law, ceasing in virtue of this later law the execution and the effects of the condemning judgment. As so, all the court proceedings initiated that had relation to the crime of abortion in the cases of anencephalic fetuses were put to an end by the new and more beneficial law (the aspect) of a novatio legis in mellius, and all of those that were punished in basis of the previous understanding (of this kind of abortion being illegal), were released from serving the sentence, for their conduct was no longer a crime, and so the serving was no longer reasonable. As of situations like this, the Federal Constitution of 1988 also provides in its article 5, XL of the concrete possibility of the retroaction of a penal law, if its character is most beneficial. The other way around (a more detrimental law) is expressly not allowed. Other constitutional discussions will be carried around in due time on the next topic of the present paper.

4. CONSTITUTIONAL ASPECTS OF THE DISCUSSION

4.1. A Brief Summary about the Origins of the ADPF 54

The origins of the controversy that was generated by the bringing of the ADPF 54 to the courts can be found in the case of a Brazilian woman named Gabriela Alves Cordeiro. As of November 2003, the eighteen years old girl filled a lawsuit, represented by the Rio de Janeiro's Office of Public Defenders ('Defensoria Pública do Rio de Janeiro'), aiming to be authorized to interrupt her pregnancy because the fetus she was carrying was anencephalic.

The District Judge of Teresópolis (Rio de Janeiro) dismissed the process without further analysis, based on the fact that the request wasn't legal, because this specific case of pregnancy interruption was not among the legally permitted ones, as the Penal Code has not included it on the article 128 dispositions. The Office of Public Defenders appealed against this decision, and the Justice Court of Rio de Janeiro ('Tribunal de Justiça do Rio de Janeiro') decided that she could do the abortion, issuing an injunction by the hands of the court judge ('desembargadora') Gizelda Leitão Teixeira. This decision was then reexamined by the Superior Court of Justice ('Superior Tribunal de Justiça'), which concluded against the possibility of abortion.

The question then reached the Brazilian Supreme Court ('Supremo Tribunal Federal'), when ANIS ('Instituto de Bioética, Direitos Humanos e Gênero') proposed the Habeas Corpus no 84.025-6 against the Superior Court of Justice decision, to ensure the woman's right to interrupt the abortion. Because of the processing delays of the Brazilian justice system, although the Habeas Corpus was conceded by the Supreme Court Minister Joaquim Barbosa in March 2004, the decision was ultimately impaired, as Gabriela's child was already born in 27 February of the same year.

Those were the reasons that later resulted in the proposal of the ADPF 54, by the National Confederation of the Health Providers of Brazil ("CNTS"), presented by the lawyer Luís Roberto Barroso, based on the article 103 of the Brazilian Federal Constitution ('Constituição Federal'), combined with the article 1o, head, of the law n. 9.882/1999, and aimed to solve this controversy about the interruption of these kind of pregnancies being legal or illegal. This ADPF was later laid down upon the hands of the Rapporteur Minister Marco Aurélio de Mello, in 2004, who issued an injunction that was lately not endorsed by the rest of the Supreme Court's Plenary, leaving the final ruling to be issued in an undefined date. In the following years, heated discussions were raised.

As of the later winning side, the Rapporteur Minister Marco Aurélio maintained that the ADPF 54 was not around decriminalizing abortion (which was deemed by some as of eugenic), by the fact that there was a clear difference between this and the anticipation of "birth" in the case of anencephalic fetus. As of his words:

> *Abortion is a crime against life. It protects the potential life. In the case of anencephalic, I repeat, there is no possible life[...] The anencephalic will never become a person. To sum up, it concerns not a potential life, but a certain death.*

Marco Aurelio also referred to the fact that in the decades of 1930-40, when the current Penal Code was enacted, Medicine was nowhere near its current state of the art, and at that time, had no necessary technical resources to identify previously this kind of fetal anomaly, and its inability of extra-uterine survival. The opposite is truth nowadays, and it seems logical to adapt the provision, in the way that the anencephalic fetus has no possible life, and thus the crime of abortion has no meaning in face of those cases, as it protects society from the ones that commit crimes against life.

The Minister Rosa Weber, followed by the Ministers Joaquim Barbosa and Cármen Lúcia in her understandings, also maintained by the exclusion of interruption or anticipation of the "birth" of anencephalic fetus from the list of criminal acts against life. Under her point of view, the discussion was not about the anencephalic fetus right to life, for it could never develop a life of its own, as is certain, safe and guaranteed by the current state of development of scientifical and medical researches. The pivotal point in debate was the right of the mother to choose her own fate in those cases. As of the Minister's words:

> *The pregnant women should be free to opt about the future of the pregnancy of anencephalic fetus. [...] All ways, as of my judgment, lead to the preservation of the autonomy of the mother to choose about the interruption of the pregnancy of anencephalic fetuses. [...] The opposite position, as of my judgment, is not sustainable, under none of those perspectives and in the light of the greater principles of Law, as is the dignity of the human person, laid down by our Carta Magna, in its article 1o, III.*

Gilmar Mendes, who considered the interruption of the anencephalic fetus pregnancy as abortion, also believes that it should be among the unlawful exceptions, and that it should be allowed, in respect to the pregnant mothers' free will:

> *"It is up to each mother, in possession of her fetal anencephaly diagnosis, to decide which way to take".*

To the Minister Luis Fux, who also voted in favor of the possibility of interrupting the anencephalic fetus, brought upon an interesting fact in his words, that could be deemed as too harsh by some, as he equated the prohibition to torture:

> *To prevent the interruption of pregnancy under the threat of criminal liability is effectively equivalent to a torture, which is prohibited by the Constitution. […] Why punish this woman that already suffers from a human tragedy? […] This, in my point of view, would be punishing by punishing without reason, like the Penal Law was the panacea of all social problems.*

In the same line, the Minister Ayres Britto stated:

> *To take to the extreme this martyrdom against the women's will corresponds to torture, to cruel treatment. No one can impose martyrdom on another.*

Finally, it is important is to duplicate the Minister Celso de Mello synthetic statement concerning all the discussion in favor of the anticipation:

> *STF (Supreme Court), in the current state of this trial, is recognizing that women, based in reasons funded in their reproductive rights and protected by the undeniable effectiveness of the constitutional principles of dignity of the human person, freedom, self-determination and intimacy, has the irrepressible right to opt for the therapeutic anticipation of birth in cases of proven anencephalic fetal abnormality; or to, according to reasons that stem from her private autonomy, the right to express her individual freedom, the natural continuation of*

the physiological process of pregnancy.

On the other hand, the Minister Ricardo Lewandowski had an opposite point of view, voting against the permitting of the anencephalic fetus pregnancies interruption or anticipation.

In his vote, he followed two lines of reasoning. First, he maintained that it was an usurpation of power to decide this question, for the members of the Judicial Power were not democratically legitimized to discuss these questions by popular vote, under the fact that the National Congress, if it wished to, could have altered the law to include the anencephalic case among those in that abortion is not criminalized.

Second, he emphasized that a decision allowing this kind of pregnancy interruption could create a dangerous precedent that could be extended to allowing the interruption of pregnancy of embryos with another kinds of pathologies that result in little or nonexistent perspective of extra uterine life, like Spinal Muscular Atrophy, *Acardia*, Renal Agenesis, Pulmonary Hypoplasia, to name a few.

To briefly summarize, the existence of provisions safeguarding unborn rights and the usurpation of power would prevent the Supreme Court to rule in favor of the permission. Only the Lawmakers could, preceded by broad public discussion, issue a law around the matter.

Lewandowski's opposite line of thinking was ultimately followed by the Minister Cesar Peluso, who maintained that allowing those abortions was similar to promoting discrimination against diversity, as the fetus was "treated like trash", and stated that:

> *The anencephalic die, and it can only die if it is alive. […] This conduct is bluntly prohibited by the legal system." […] "We have no legitimacy to create, judicially, this legal hypothesis. The ADPF cannot be turned into a panacea that gives the STF the prerogative to solve all the crucial questions of national life.*

As of this year, as previously stated, despite Lewandowski's and Peluzo's objections, the decision was favorable to the claims of the CNTS 8 to 2, and the therapeutic abortion is now legal in cases of pregnancy of anencephalic fetus[13].

Our analysis of this main question in study, as to reassure the importance of the above mentioned decision, will be based upon two extremely important juridical and social foundations: the neoconstitutionalism and the so-called "new human rights".

13 SAVARESE, Maurício. Uol. *Ministro é contra a interrupção de gravidez de anencéfalos; cinco já foram favoráveis*- Available in: http://migre.me/8Dybc. Access in: 11 November 2012.

4.2.1 The Neoconstitutionalist Order

First and foremost, it's important to put in context the main characteristics of the constitutional order in which we are socially inserted.

The prestigious jurist Luís Roberto Barroso, whose ideas follow the major constitutionalist doctrine, states that Brazil embraced the ideals of the "New Contitutional Law" in its Federal Constitution of 1988, and the Brazilian legal system became a "neoconstitutionalist" order. Abiding to the doctrinal ideas of Barroso, we can say that the neoconstitutionalism is based upon three main defining milestones[14].

First, we have the historical milestone, which relates to the post-Second War constitutionalism with great influence of the 1949 Fundamental Law of Bonn (Germany) and the Italian Constitution of 1947, alongside the end of extreme-right Iberian dictatorships, which redefined the Constitution's place in the legal systems, turning it into their most important and central standard, and its influence among the nowadays juridical institutions, with its dispositions irradiating to modify the way the public and private laws were construed by the courts.

Second, we have the philosophical milestone, which was the post-positivism, which in a brief definition, was influenced by the jusnaturalist ideas of the XVIII century, and aimed to promote a total rethinking of the juridical philosophy, by going further than the strict observance of the law provisions are they were written, to make a more moral and socially adequate realization of the rights.

Third, and which is the most important to our present study, is the theoretical milestone, which is based upon the fact of the Constitution being not merely a political charter anymore, but now provided with normative power, its rules being mandatory to the ruler. Also, it affirms the court's role in the true effectiveness of the human rights, also bringing the important idea of the need of Supreme Courts to fully optimize the fulfillment of those rights and the concrete protection of the Constitutional dispositions. The new constitutional interpretation, based upon the post-positivists ideas, also brought upon the courts the existence of open principles and concepts, like the dignity of the human person, which is considered both a principle and a foundation of the Federative Republic of Brazil. Because of that, there was now a great need of thoroughly motivated legal arguments and a new technique to solve the conflicts and collisions between those constitutional principles

14 BARROSO, Luís Roberto. *Interpretação e Aplicação da Constituição*. 3.ed. São Paulo: Editora Saraiva,1999.

and the fundamental rights, to weight the conflicting interests and bring peace to the social relations, ultimately achieving justice. There was the thought of the importance of the Proportionality Principle, which will be discussed and highlighted in a later moment as essential to the solution of the conflict between the woman's rights to freedom, intimacy, private autonomy and physical and psychological integrity (based upon the dignity of the human person principle) versus the unborn's right to life, albeit it's slight.

4.3. The "New" Human Rights

Every passing day, the importance of the debates concerning the traditional definition of the Human Rights, as stated by the Universal Declaration of the Human Rights, become more necessary aiming to adapt it to the social-economic context of the present days, increasingly marked by diversity and exclusion. Concerning this discussion, Graciela Rodriguez defends the need of a reconstruction of the human rights under a gender and minorities perspective.

By her line of thinking, the text of the Universal Declaration of 1948 was based of a concept of human rights that was built and influenced around a white occidental man paradigm, thus being necessary nowadays a reinterpretation process as to conclude that the classic international instruments and mechanisms of the protection of Human Rights are no longer sufficient and adequate to protect the needs of many, especially the poor and women's rights. The traditional paradigm no longer reflects the plurality of the society, the increasingly ascension of women to the role of house holding, the universality of the human differences which cannot be helped by thinking of Human rights as the rights of a few, in a Eurocentric point of view.

As so, under a feminist proposition, she states that the "women's human rights" need special attention of the international organisms in four areas: the right to live free of violence (which is mostly inflicted in the home environment ,by their partners), the right to work (about the uneven salary paid to man and women in equivalent jobs), the right to political involvement (to take part in the public domain of policymaking) and the right to health, which is the most important to our work, as it concerns the idea of reproductive rights, criticizing the traditional liberal speech of the individualist societies and defending a vision that privileges the autonomy of the women around the destiny of her own health and fate; a right to choose what is best for her, which is the way that reflects better her life condition and her wishes, and not to choose what is best for the society and its politicized context, becoming

relegated to the private domain and out of the decision centers[15].

About this, the Latin-American Committee for the Defense of the Woman's Rights ('CLADEM') brings us a particularly important question, as it stated:

> *It is justified, in this way, the need of redefining the concept of human rights under a gender perspective, from a social point of view that brings up the question of the complexity of the relationship between men and women, revealing the causes and effects of the distinct forms in which stereotypes and discriminations are carried out[16].*

This point of view corroborates our idea that allowing the mother the choice of not enduring the physical pain and mental suffering of many months of pregnancy of a dead "child", as happens in anencephalic pregnancies, is the best way to respect to her freedom and her reproductive rights.

4.4. The Actual Conflict Between the Mother and the Unborn Rights

Although it is not explicitly provided in the constitutional text, by the logic coherence of the protection it receives from the ordinary legislation, as evidenced in the previous discussions, the unborn being is protected by the Constitution, and thus its life. The problem around this fact arises when the continuity of an unwanted pregnancy violates woman's rights, and in this moment a conflict begins between the mother's autonomy rights and the fetus right to live.

The constitutional protection given to the human life in formation, however, does not necessarily imply that an equal legal treatment will be given to both it and the mother's life. It is not incompatible with the Constitution to grant the unborn's life a smaller value, as the Penal Code dispositions show, even though the constitutional text guarantees everyone the right to life. About this, the illustrious Reale Jr. enlightens us about the pregnant woman social importance:

> *The life of the mother has more value than the fetus', because it's of social interest her survival. Under the existential aspect the problem becomes unarguable. The pregnant has autonomy, is a being that self-*

15 RODRIGUEZ, Graciela S. *Os Direitos Humanos das Mulheres* Available in <http://www.equit.org.br/docs/artigos/direitoshumanos.pdf> Access in: 25 October 2012

16 CLADEM. "*As mulheres e a construção dos Direitos Humanos*". Comitê Latino-americano para a Defesa dos direitos da Mulher. São Paulo. Nov. de 1993.

> *affirmed in the world, establishing relations with others that make her a part of the community. She is an autonomous being that affirmed herself both personally and socially, acting over the world in an independent way. She is a "one" that imposed herself over other's consciousness, establishing intersubjective relations, being an object of other person's knowledge, and at the same time as she makes others object of her own conscience*[17].

Disserting about the fetus, the author makes the difference of "value" clear as he states:

> *It hasn't affirmed itself upon the world, does not possess autonomy, has no personal character, has neither elevated itself upon other people consciences, nor determined its own situation, nor achieved freedom, the distinctive element of man. We can, as Boaventura Santos, conclude that under an existential aspect, the fetus life does not constitute a personal existence as the mother's, and because of that it is of lesser social importance*[18].

That said, in cases of conflict between fundamental rights (in the present study, the freedom of the pregnant versus the life of the unborn), it is required that the court applies the principle of proportionality, which was brought as an innovation by the neoconstitutionalism. The collisions have to be analyzed under the three basic requirements of this principle, defined by Barroso as:

> *adequacy, which requires that the measures adopted by the Government are deemed able to achieve the intended goals; the necessity or enforceability, which requires verification of no less drastic means for achieving the purposes sought; and the proportionality in the narrow sense, which is the balance between the burden imposed and the benefit brought, as to see if the interference in the sphere of the citizen's rights is justifiable*[19].

17 REALE JR. Miguel. *Teoria do Delito.* 2. Ed. São Paulo: Editora Revista dos Tribunais, 2000.
18 REALE JR. Miguel. *Teoria do Delito* 2. Ed. São Paulo: Editora Revista dos Tribunais, 2000
19 BARROSO, Luís Roberto. *Interpretação e Aplicação da Constituição*.3.ed. São Paulo:Editora Saraiva,1999

As of the present case, based on the theories mentioned herein, it is clear that allowing the abortion is totally proportional, as it is at the same time the only and most effective way to allow the mother to enjoy her right to freedom, and it also reduces the severe damage caused to both women and Government by the illegal abortions which were carried out in hazardous ways in illegal clinics and mostly led to damage to the mother's health, from now on legal to be carried out in the public or private health systems.

As said by Débora Diniz, the "suffering, remorse or grief are all expressions of the chance that is human existence, but is up to each person, of the tranquility of their moral beliefs, to decide the direction they will follow in their life."[20]

5. CONCLUSION TERMS

Concluding our study, we can conclude that the bringing of the ADPF 54 upon the courts allowed this relevant discussion to be brought upon the whole population and to enforce the need of a reinterpretation of the human rights, especially those that concern women. As of the final terms, we can summarize the work grounds as:

1) The Civil Law, while adopting the natalist theory and thus not giving the unborn personality as its given to the born person, provides the safeguard of the unborn since conception, concluding that the right to life will always be protected, even if an expectancy or potentiality of life.

2) Nonetheless, as we can state from the Penal Law protective measures and penalties, the unborn has a much smaller protection (abortion) in comparison to an already living being (murder), and at this point, it can also be said that the anencephalic fetus, scientific proved as incompatible to life, could have its protection relativized in favor of the woman reproductive rights, and as such the therapeutic discontinuation of the pregnancy would be possible along the other permitted ways of abortion.

3) From a constitutional point of view, taking into account the need to consider and weight the principles in conflict, it was affirmed that the unborn right to a minimal life, if it comes to be born alive, was not superior to the mother's right to freedom, and as the analysis of the conflict under the principle of proportionality requirements, it becomes clear that allowing the mother to choose what is best to her is completely constitutional, as the fetal unviability brings physical

20 DINIZ, Débora APUD GUIMARÃES, Lucrécia Cristina. *Mulher ou Estado: quem decide sobre o aborto do feto anencéfalo?*. Goiânia: Revista do Ministério Público do Estado de Goiás, ano XII,n.17,2009. Available in: <http://www.mp.go.gov.br/portalweb/hp/10/docs/revista_do_mp_n_17.pdf#page=64>. Access in: 26 November 2012

and mental suffering, sometimes similar to a torture, that will not be in any way compensated by the birth of a healthy baby. As so, it was the right decision to allow the therapeutic interruption of the anencephalic pregnancies.

4) The Supreme Court played its role as to correctly weigh the value of the principles in a situation that was not among the lawmaker's prescriptions, nevertheless giving immediate effectiveness to the fundamental rights of pregnant women, following the general principles of the Constitutional text, like the Dignity of the Human Person, and adapting them to the new social circumstances.

We hope to have made it clear the importance of the discussion brought with the issuing of the ADPF 54 and with the decision laid down by the Supreme Court in the juridical and socio-political context of the present days, and that with this decision, the State will also act in the regulation of the practices and create social policies to assist the women that choose to undergo the legal abortion in these cases.

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LE DROIT PRIVÉ BRÉSILIEN : *STRUCTURE, PRINCIPES CARDINAUX ET VOIES JURIDICTIONNELLES D'APPLICATION*[1]

BRAZILIAN PRIVATE LAW: STRUCTURE, CARDINAL PRINCIPLES AND JUDICIAL WAYS OF APPLICATION

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Résumé : Cette étude vise à présenter le cadre général du droit privé brésilien, privilégiant les droits des obligations et des contrats. Aussi, des incursions dans d'autres domaines, tels que le droit des biens et celui de la famille, permettront d'illustrer également certains de nos développements. L'approche retenue s'inscrit dans un courant qui considère que l'essentiel d'un droit se trouve dans les cadres stables au sein desquels les règles de droit évoluent. C'est pourquoi, sans négliger ces dernières, nous nous intéresserons à cette superstructure. Dans cette perspective, nous vérifierons la manière dont le droit privé brésilien est structuré et mettrons en relief ses principes cardinaux ainsi que les voies juridictionnelles permettant sa mise en œuvre. La réalisation de cette étude est fondée sur la conviction de l'importance des éléments de droit positif jugés fondamentaux pour la compréhension de la structure et du fonctionnement des ordres juridiques susceptibles d'être mis en comparaison. La connaissance de tels éléments permet au comparatiste d'avancer avec moins de risque sur le terrain toujours mouvant qu'est le système juridique d'autrui.

Mots-clefs: droit privé brésilien – pluralisme juridique - codification - méthodes de codification – codification civile – codification commerciale – protection du consommateur (codification) – droit international

1 Cet article est une version remaniée de l'étude comparative intitulée « Données fondamentales pour la comparaison en droit privé français et brésilien », que nous avons publiée dans l'ouvrage : *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien– Études de droit comparé*, sous la direction de Storck (M.), Vieira da Costa Cerqueira (G.), Morais da Costa (T.), Paris, L'Harmattan, 2010, p. 67-149.

privé (absence de codification) – unification des obligations civiles et commerciales – droit de l'entreprise : dépassement de la notion de droit commercial – micro-systématisation de la protection des consommateurs - intégration des systèmes de droit privé (articulation entre les codes) - principes cardinaux du droit privé brésilien – principes à portée structurante – paradigmes de la codification civile - lignes directrices du droit des contrats (vers une justice contractuelle) - phénomènes de modulation du droit privé – constitutionnalisation du droit privé - incidence de l'ordre international sur le droit privé - prééminence des droits de l'Homme - impact de l'intégration régionale sur le droit privé - voies juridictionnelles d'application du droit privé - voie judiciaire (voie traditionnelle) - unicité judiciaire brésilienne - autorité des décisions des cours supérieures – arbitrage (voie en expansion).

Abstract: This paper aims to present a general framework of private law in Brazil, with a special regard on contract law. Incursions in the domain of property and family law will also provide an illustration for some of these achieved developments. The chosen approach belongs to a current which considers that what is essential in a legal system is the framework from which legal rules evolve rather than the rules themselves. That is why, without neglecting the latters, we focus on the superstructure of Brazilian private law. In this perspective, the paper shows how private law is structured in Brazilian legal order and highlights its cardinal principles as well as the judicial ways for its application. The knowledge provided of the basic elements of a legal system allows the comparatist to progress with less risk on the ever-changing foreign legal system field.

Keywords: Brazilian private law - Legal pluralism - codification – methods of codification - civil codification - commercial codification - consumer protection (codification) - Private International Law - unification of civil and commercial obligations – direito da empresa : moving beyond the concept of commercial law - consumer protection as a micro-system of private law- integration of private law systems - Brazilian cardinal principles of private law - guidelines of contract law (towards a new philosophy of contractual justice) – constitutionalization of private law - pre-eminence of human rights - the impact of regional integration on private law - judicial ways of application of private law - Brazilian judicial unity - authority of supreme courts decisions - arbitration (a form of ADR in constant expansion).

Lorsqu'il entame sa recherche, le comparatiste est confronté au besoin de connaître les éléments fondamentaux des systèmes juridiques qu'il étudie. Outre la difficulté de déterminer ces éléments fondamentaux que l'on peut aisément qualifier de « données fondamentales »2, ce sont des questions d'ordre méthodologique qui se posent. Sous quelle perspective mener l'étude : diachronique et dynamique ou synchronique et structurale ? Est-il convenable de n'envisager que certaines branches du droit ? Enfin, quelle définition de droit privé retenir quand chaque ordre juridique en a une définition particulière résultant de sa propre histoire ? Les réponses dépendront, bien entendu, de l'objectif de l'analyse. Ainsi, le choix même des données préalables à toute analyse comparative est déjà une source de réflexion.

Loin de prétendre offrir un panorama exhaustif du droit privé brésilien, notre propos n'aspire qu'à être une introduction à ce dernier3. Ce travail se limitera à présenter un cadre général, privilégiant les droits des obligations et des contrats dans la mesure où ils constituent le noyau du droit privé et le tronc commun des droits civil et commercial et, plus récemment, du droit de la consommation. Aussi, des incursions dans d'autres domaines, tels que le droit des biens et celui de la famille, ainsi que dans d'autres systèmes juridiques, nous permettront, ici et là, d'illustrer également certains de nos développements.

Notre travail souhaite s'inscrire dans la démarche de René David4, qui considère que l'essentiel d'un droit se trouve dans les cadres stables au sein desquels les règles de droit évoluent, conformément aux mœurs. En effet, comme l'explique Mme Jauffret-Spinosi5, le droit d'un État est plus qu'un ensemble de règles existantes à un moment

2 Comme l'a relevé D. Païva de Almeida, l'un des efforts les plus remarquables tendant à identifier explicitement les critères d'analyse qui seraient « substantiels » pour la comparaison et la classification des différents droits nationaux à l'échelle mondiale est celui du professeur J.-L. Constantinesco, dans son *Traité de droit comparé* - Tome III : La science des droits comparés (Paris, LGDJ, 1983). Cf. PAÏVA DE ALMEIDA (D.), « Données fondamentales pour la comparaison en droit public français et brésilien », in *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien*, op. cit., p. 41-66, p. 41, *ad notam* 1.

3 Une vaste bibliographie francophone sur le droit brésilien, préparée par l'auteur de ces linges en collaboration avec Thales Morais da Costa, se trouve dans l'ouvrage collectif : *Droit français et droit brésilien* : perspectives nationales et comparées, Actes du colloque de Porto Alegre du 25 à 29 mai 2009, sous la direction de Fromont (M.), Frison-Roche (M.-A.), Morais da Costa (T.), Vieira da Costa Cerqueira (G.), Graeff (B.), Vilarino (T.), Bruxelles, Bruylant, 2012, p. 1051-1086. Par ailleurs, nous avons privilégié, tant que faire s'est pu, les références bibliographiques en langue étrangère afin d'indiquer aux juristes non-lusophones des sources qu'ils pourront consulter plus aisément.

4 Cité par C. JAUFFRET-SPINOSI, « La structure du droit français », in *La structure des systèmes juridiques, sous la direction de Moréteau* (O.) et Vanderlinden (J.), Bruxelles, Bruylant, 2003, p. 259.

5 JAUFFRET-SPINOSI (C.), *Ibid*.

donné et leur connaissance ne permet pas de pleinement l'appréhender. C'est pourquoi, sans négliger ces dernières, nous nous intéresserons aux cadres stables du droit privé brésilien.

Dans cette perspective, nous vérifierons la manière dont le droit privé brésilien est structuré (I), avant de mettre en relief ses principes cardinaux (II) ainsi que les voies juridictionnelles permettant sa mise en œuvre (III).

Il convient en prolégomènes de préciser deux points. En premier lieu, le Brésil est un État fédéral où le droit privé relève de la compétence législative de l'Union, conformément à l'art. 22, I, de la Constitution fédérale de 1988. Aussi, la législation en matière de droit privé est essentiellement uniforme sur l'ensemble du territoire brésilien. Ensuite, la loi n'est pas la seule source du droit privé. En effet, l'art. 4 de la *Loi d'introduction aux normes du droit brésilien* de 1942 dispose que, dans les cas non prévus par la loi, « le juge décidera en appliquant l'analogie, les coutumes et les principes généraux du droit »[6]. En second lieu, si les doctrines et les droits étrangers (portugais, espagnol, français, allemand, italien, suisse, anglo-américain) ont eu une forte influence sur le droit brésilien, nous ne pourrons qu'exceptionnellement la mettre en lumière dans cette étude[7].

I. LA STRUCTURE DU DROIT PRIVE BRESILIEN

Si la notion de structure d'un droit n'est pas univoque[8], celle du droit privé semble encore plus délicate à cerner. Elle suppose en effet une incursion dans l'histoire du droit de chacun des pays. Cela afin d'observer leurs évolutions législative, jurisprudentielle et doctrinale, et ainsi comprendre la circonscription du droit privé. Sans approfondir cette question, nous pouvons néanmoins affirmer que cette délimitation se fait tant en fonction des principes permettant d'identifier et de circonscrire le champ d'application d'un certain nombre de règles et d'institutions juridiques, qu'en fonction des intérêts - publics ou privés - en jeux, qui induisent une distinction presque naturelle face au droit public[9].

Structurellement, le droit privé brésilien est un droit codifié (A). Dans la mesure où elle ne relève pas d'une seule méthode, il est

6 Sur les sources du droit brésilien, v. LANNI (S.), *Brasile*, Estratto da Digesto delle Discipline Privatistiche – Sezione Civile, UTET Giuridica, 2012, p. 125-157, p. 127-134.

7 La bibliographie mentionnée à la note 2, *supra,* rend compte des principaux travaux déjà réalisées sur les influences qui ont marqué la construction et l'évolution du droit privé brésilien.

8 JAUFFRET-SPINOSI (C.), « La structure du droit français », art. préc., p. 259.

9 Sur la problématique générale de la distinction entre le droit public et le droit privé, v. dans les *Archives de philosophie du droit* : La distinction du droit privé et du droit public et l'entreprise publique, tome I, 1952, et, Le privé et le public, tome 41, 1997.

opportun de s'intéresser aux modalités de codification au Brésil (B). Enfin, il faut comprendre la manière dont ce système codifié s'intègre (C).

A. Organisation codifiée du droit privé

La structure essentiellement codifiée du droit privé brésilien relève d'un processus historique commun à d'autres pays d'affirmation de leurs droits nationaux (1). Cette construction, essentielle pour affirmer l'État nouveau, passe par une systématisation de l'ordre juridique qu'opère la codification (2) et dont résulte une constellation de codes (3).

1. Le pluralisme juridique précédant la codification moderne: le Brésil colonial et le Brésil à l'aube de son indépendance

La codification du droit privé brésilien s'inscrit dans le mouvement de codification des droits de tradition civiliste. Pour cette raison, une approche comparatiste s'impose pour comprendre l'importance de cette méthode dans l'organisation actuelle du droit du privé au Brésil.

Les nations de l'ancienne Europe ont été marquées par une diversité juridique, corrélative d'un morcellement politique à partir duquel le Vieux Continent s'est organisé à la chute de l'Empire romain d'Occident au Ve siècle. Il en résulte que les droits en vigueur au début du XVIIIe siècle étaient fidèles à des traditions juridiques ancestrales [10]à travers différentes catégories de sources communes à l'ensemble des États européens. La première de ces sources est le droit romain à travers l'interprétation des compilations de Justinien, « redécouvertes » en Italie à la fin du XIe siècle[11]. Ce droit romain redécouvert se distingue du droit romain originel par l'interprétation qu'en a fait la doctrine médiévale, notamment en le faisant dialoguer avec le droit canonique[12].

10 HALPERIN (J.-L.), *Histoire des droits en Europe de 1750 à nos jours,* Paris, Flammarion, 2004, p. 18.

11 Il convient de citer l'ouvrage-phare permettant de comprendre l'importance du droit romain dans la construction du droit et des discours juridique et politique en Occident après la « découverte » de l'œuvre de Justinien à la fin du XIe siècle : SCHIAVONE (A.), Ius – *L'invenzione del diritto in Occidente*, Turino : Giulio Einaudi editore, 2005.

12 Si jusqu'à Gratien le droit romain et le droit canonique ne sont pas comparables, ils s'ouvrent l'un à l'autre à partir de la moitié du XIIe siècle. En effet, ils utilisent les même méthodes (glose, commentaire, *disputatio*, etc) et ont longtemps la même capitale : Bologne. Ces deux droits finissent par avoir une dénomination commune: *l'utrumque jus* (« l'un et l'autre droit »). Ces deux droits se distinguent par leurs domaines mais sont « liés ensemble comme l'âme et le corps ». Ainsi, si canonistes et civilistes s'opposent politiquement, « leurs disciplines

À partir du Moyen Âge, le droit romain est considéré comme le *jus commune*, le droit commun, de l'Europe qui s'applique subsidiairement aux *jura propria*, aux droits locaux. Ces derniers sont les coutumes locales, provinciales et régionales, ainsi que les statuts octroyés aux différents corps – villes, corporations, universités, etc. –, mais aussi le droit d'origine royal ou impérial à travers les ordonnances applicables à l'ensemble d'un royaume[13].

Il en allait ainsi pour le droit portugais, qui s'est appliqué au Brésil pendant toute la *période coloniale*, et même après l'*indépendance* de celui-ci le 7 septembre 1822. À cette époque, le droit portugais était essentiellement compilé dans les Ordonnances Philippines de 1603 et composé de quelques lois complémentaires, toutes assez lacunaires. Subsidiairement, mais assez largement, on appliquait les règles romaines fixées à la Renaissance ainsi que le droit canonique[14]. La coutume y jouait un rôle considérable au XVIe siècle où elle était d'application principale face au droit romain et aux lois générales, contenues dans les Ordonnances du royaume. Ces dernières constituaient un droit commun aux deux pays et sont restées en vigueur jusqu'en 1867 au Portugal et jusqu'en 1916 au Brésil, dates respectives d'adoption de son premier code civil par chacun des deux pays[15].

Parallèlement, une législation spéciale faite au Portugal pour le Brésil enrichie le corpus normatif en vigueur pendant la période coloniale. Cette législation propre au Brésil pouvait revêtir en la forme les aspects les plus variés (*Alvarás, Cartas Régias, Regimentos, Forais,*

s'entremêlent [voire] se complètent » - particulièrement après le milieu du XIII^{e} siècle où les auteurs puisent « à toutes les sources ». Dès lors « à la fois distincts et complémentaires, droit civil et droit canonique finissent par constituer un double *jus commune* : le droit commun de l'Europe » (J.-M. CARBASSE, *Manuel d'introduction historique au droit*, 2^{e} éd., Paris, PUF, 2002, p. 142-146).

13 CARBASSE (J.-M.), *op. cit*., p. 85.

14 BRAGA DA CRUZ (G.), « Formação Histórica do Moderno Direito Privado Português e Brasileiro », *Scientia Iuridica*, IV (1954-1955), p. 32-77, esp. 34-38 (56).

15 René David nous apprend que dans la période des capitaineries héréditaires (1532-1548), les chartes de donation octroyées aux capitaines héréditaires déclaraient applicables, comme règle générale, les Ordonnances du royaume et les lois générales et les coutumes du Portugal. Postérieurement, en 1751, lorsqu'est créée la *Relação do Rio de Janeiro*, « on impose à cette nouvelle juridiction d'appel de se procurer les Ordonnances du royaume avec leurs répertoires, en même temps qu'une collection des lois postérieures et aussi la glose d'Accurse, un Bartolo dans sa dernière édition, et une collection de canons, tous documents indispensables pour connaître, à cette époque, le droit de la métropole. Certains actes, du reste, précisent formellement que leur domaine d'application est non seulement le Portugal, mais aussi les possessions portugaises d'outre-mer : l'application des canons du Concile de Trente est ainsi prescrite e tant dans le royaume que dans ses colonies par un Décret de 1569 » (René DAVID, « Le droit brésilien jusqu'en 1950 », in Wald (A.); Jauffret-Spinosi (C.) (dir.), *Le droit brésilien : hier, aujourd'hui et demain*, Paris, SLC, 2005, p. 25-182, p. 50).

Instruções) et toucher aux questions les plus hétérogènes intéressant la colonie (organisation administrative et judiciaire, protection des Indiens, organisation de l'exploitation économique du territoire : les mines, les eaux, l'industrie et le commerce, les exploitations agricoles et les travaux publics)[16]. À côté de cette législation portugaise faite à l'usage du Brésil, coexistaient des textes adoptés, dans la Colonie, par les autorités locales en vertu du pouvoir réglementaire qui leur était conféré par les différents actes qui les instituaient, souvent conçus dans les termes les plus vastes[17]. Il s'agit plus particulièrement, dans un premier moment, des dispositions prises par les capitaines-majeures (*Capitão-môr*) et, puis, des édits des gouverneurs, ceux des municipalités et, enfin, ceux des autorités ecclésiastiques, notamment ceux de l'archevêque de Bahia[18]. Toute cette législation spéciale dérogeait au droit commun portugais pour les aspects qu'elle couvrait.

Dans le même temps, une autre source d'origine brésilienne s'associait à cette législation spéciale dérogeant au droit commun portugais : la coutume. C'est en conformité avec le droit portugais lui-même[19] que la coutume a joué un rôle de premier plan au Brésil colonial. Comme l'a enseigné René David, les conditions de vie y étant très différentes de celles de la métropole, la situation était propice à la naissance de coutumes locales dérogatoires des dispositions des Ordonnances Philippines[20]. De surcroît, le défaut de publication appropriée au Brésil de certains textes législatifs édictés au Portugal, ainsi que le manque de documents et de juristes provoquait des situations d'incertitude ou d'impossibilité pratique d'appliquer le droit et la législation portugaise[21]. Dès lors, pendant toute l'époque coloniale, l'existence du droit privé brésilien « *était restée toute théorique, la vie réelle du pays étant commandée par une structure géographique et sociale qui laissait bien peu de place à l'application des règles théoriquement en vigueur* »[22].

En tout état de cause, la variété de sources ne permettait pas de circonscrire le contenu du droit privé brésilien ni pendant la période coloniale ni pendant celle qui suit immédiatement l'indépendance du pays.

Il faut dire que le phénomène n'était absolument pas isolé. En

16 DAVID (R.), « Le droit brésilien jusqu'en 1950 », art. préc., p. 51-52.

17 DAVID (R.), « Le droit brésilien jusqu'en 1950 », art. préc., p. 52-53.

18 DAVID (R.), « Le droit brésilien jusqu'en 1950 », art. préc., p. 51-52.

19 Cf. note 15, *supra*.

20 Pour quelques exemples, v. DAVID (R.). « Le droit brésilien jusqu'en 1950 », art. préc., p. 53-54.

21 DAVID (R.), « Le droit brésilien jusqu'en 1950 », art. préc., p. 53.

22 DAVID (R.), « Structure et idéologie du droit brésilien », *Cahiers de législation et de bibliographie juridique de l'Amérique Latine*, nº 17-18, Janvier-Juin 1954, p. 5-20, p. 6.

effet, un manque de clarté et de cohérence prévalait à l'intérieur de tous les ordres juridiques nationaux alors en formation d'autant que, correspondant plus ou moins à « des périodes de synthèse » ou de « stagnation juridique », certains ensembles législatifs avaient pour objectif principal d'organiser des inventaires actualisés du droit en vigueur, sans grand souci quant à leur structure interne[23]. La méthode de « consolidation » juridique engendrait des compilations globalisantes réunissant plusieurs domaines juridiques et l'autonomie du droit privé n'était que relative compte tenu des tensions suscitées par la réception du droit romain face à l'essor des particularismes nationaux, qui parfois s'y opposaient. La distinction épineuse entre droit public et droit privé[24], liée aux questions des compétences et des fonctions des juridictions qui se posaient au sein des États européens jusqu'au moins le XVIIIe siècle, a fortement contribué à la difficulté d'appréhender les frontières du droit privé. En outre, le caractère mixte de certaines institutions, à la fois civiles et religieuses, à l'instar du mariage, fut un élément non moins important de complication.

Nonobstant leurs problèmes de clarté et de cohérence, le droit des pays européens et le droit privé brésilien - dont le droit portugais fut le « porte-parole » jusqu'en 1916[25] - étaient largement considérés comme un ensemble de règles relativement « universelles ». En effet, ces droits étaient les fruits d'un héritage commun : le droit romano-canonique qui s'était développé à travers une unité intellectuelle entre les juristes européens. Ainsi, malgré les disparités parfois non négligeables entre les différents ordres juridiques occidentaux en phase de nationalisation, cette tradition commune formait une unité au sein de laquelle pouvait s'exprimer une diversité[26].

Toutefois, ce socle que constituait le droit commun n'excluait pas des tensions entre lui et les *jura propria* dans la portion continentale de l'Europe. Prenons le Portugal et la France comme repère. D'une part, alors que le Saint Empire recevait le droit romain en vertu d'une décision impériale, les rois de France, s'inscrivant dans un processus d'affirmation de leur indépendance (cf. Lettres patentes de Philippe IV le Bel de 1312), ne l'acceptèrent que du fait de l'impérieux besoin de la raison, et non eu égard à l'Empire. Rappelons, par ailleurs, que dans le nord de la France, le droit romain n'avait qu'une valeur

23 ALMEIDA COSTA (M. J.), *História do direito português*, 3ª ed., Coimbra, Almedina, 2007, p. 420-421.

24 Pour un exemple bien illustratif en droit français, système juridique de référence à ce stade de la formation des droits nationaux de tradition civiliste, v. BIGOT (G.), « La difficile distinction droit public/droit privé dans l'ancien droit : l'exemple du droit administratif », *Droits*, 38, 2003, p. 97-111.

25 V. *infra*, I.A.2.

26 GERKENS (J.-F.), *Droit privé comparé*, Bruxelles, Larcier, 2007, p. 16.

supplétive, s'appliquant là où la coutume faisait défaut[27]. De même, les Ordonnances portugaises en vigueur au Brésil colonial plaçaient le *jus commune* comme source subsidiaire, dont l'application était conditionnée à l'autorisation du monarque. Tout comme en France, la publication des Ordonnances au Portugal s'inscrivait dans une logique d'affirmation de la souveraineté royale. D'autre part, le droit romain réglait de nombreuses questions de droit privé, sans rencontrer d'obstacles importants de la part des droits territoriaux. Tel était le cas en matière d'obligations et de contrats, terrain de prédilection du *jus commune*[28]. Face à un droit coutumier et à des ordonnances royales peu développés ou insuffisants – si l'on excepte *Las Siete Partidas* de 1265[29], c'est donc le droit romain, beaucoup plus sophistiqué, qui s'imposa comme *ratio scripta*[30], à un moment où l'activité économique et le niveau d'instruction progressaient[31].

Au sein de ces structures assez semblables, le droit privé se présente aussi comme un droit résultant de l'autorité accordée au passé et qui échappe, dans une certaine mesure, à l'intervention législative de pouvoir royaux en pleine affirmation de leur autorité depuis le XIIe siècle, comme l'attestent les exemples portugais[32] et français[33]. Dans le même temps, la diversité des sources du droit ne correspondait plus

27 En 1789, la France connaissait encore 65 coutumes générales et 300 variations coutumières locales dans le nord du royaume, tandis que le Midi obéissait au droit romain en tant que *ratio scripta*, dont l'interprétation variait néanmoins au gré des ressorts parlementaires. Cf. BOUINEAU (J.) et ROUX (J.), *200 ans de Code civil*, Paris, ADPF, p. 35 ; v. aussi, ZENATI-CASTAING (F.), « Le Code civil et la coutume », *Mélanges en l'honneur de Philippe Jestaz*, Paris, Dalloz, 2006, p. 607 *sq*.

28 HALPERIN (J.-L), *Histoire des droits en Europe de 1750 à nos jours*, *op. cit*., p. 19-21.

29 Les règles sur les contrats contenues dans la 5e Partida sont elles-mêmes d'origine romaine. Cf. la préface de L. Moreau Lislet et d'Henry Carleton à la traduction des Sietes Partidas vers l'anglais, faite par les auteurs: *The laws of Las siete partidas: which are still in force in the state of Louisiana*, Volume 1, New Orleans, James M'Karaher, 1820, p. viii. La cinquième Partida se trouve dans le volume II de la même édition.

30 J. KRYNEN, « Le droit romain : droit commun de la France », *Droits*, 38, 2003, p. 21-35, rappelle l'attachement des glossateurs à la supériorité du *jus commune* de vocation à fournir principes, définitions, règles et techniques valant universellement (non exclusivement, ni uniformément).

31 GERKENS (J.-F.), *Droit privé comparé*, *op. cit*., p. 74.

32 V. ALMEIDA COSTA (M. J.), *op. cit*., p. 173 *sq*, qui souligne néanmoins la difficulté, au plan méthodologique, d'opérer une division chronologique adéquate à l'histoire du droit politique et du droit privé (p.173).

33 « Si les ordonnances [royales en France] concernent la réformation du royaume, la politique, l'administration ou la police, jamais le roi n'intervient dans le domaine du droit privé » (P. OURLIAC et J.-L. GAZZANIGA, *Histoire du droit privé français de l'An mil au Code Civil*, Albin Michel, coll. « L'évolution de l'humanité, 1985, p. 142). Pour plus de développement sur la circonscription du pouvoir législatif de roi par son rôle de gardien des bonnes coutumes : v. CARBASSE (J.M.), *op. cit*. p. 191-209.

à l'esprit d'un temps qui marchait vers l'affirmation du rationalisme moderne au XVIIIe siècle, dont les premiers fondements ont été posés au XIVe siècle par la scolastique tardive, notamment avec le philosophe Guillaume d'Occam (v. 1285 - v. 1349)[34]. Après avoir cherché à unifier le droit pour marquer l'unité de leurs royaumes sous un pouvoir unique, les monarques européens vont uniformiser le droit en le soumettant à une loi unique, « clef de voûte » de tout le système moderne[35]. Les ordres juridiques européens sont alors en phase d'évolution vers une nationalisation complète, dont les codifications modernes en ont témoigné de manière exacerbée en se projetant comme un moyen rationnel d'organisation du droit interne. Le Brésil a suivi ce mouvement.

2. La codification moderne: moyen rationnel d'organisation du droit

On peut affirmer que la codification moderne du droit privé des pays de tradition civiliste est l'aboutissement d'un mouvement tendant à l'unification initiée au XVe siècle. Lors de la « découverte » du Brésil, le Portugal venait d'entamer ce même mouvement : en 1446 sont publiées les Ordonnances Alphonsines, considérées comme un des plus anciens codes de l'Europe moderne. En 1521, elles ont été remplacées par les Ordonnances Manuélines qui sont restées en vigueur jusqu'en 1603, date de la parution des Ordonnances Philippines[36]. D'ailleurs, on ne connaîtra en Europe un texte comparable aux Ordonnances Alphonsines que huit ans plus tard en France, avec l'Ordonnance de Montils-lès-Tours d'avril 1454, de Charles VII[37].

34 Sur l'apport de la philosophie nominaliste du *franciscain* Guillaume d'Occam à la perception future et moderne du droit, en opposition au aristotélisme du *dominicain* de Saint Thomas d'Aquin, v. CARBASSE (J.-M.), *op. cit.*, p. 241 *sq*.

35 BOUINEAU (J.) et ROUX (J.), *op. cit*., p. 35.

36 Sur leur différentes sources, v. ALMEIDA COSTA (M. J.), *op. cit.*, p. 276-277.

37 L'Ordonnance de Montils-lès-Tours d'avril 1454 prise par Charles VII sur « le fait de la justice » marque, en France, le commencement de l'unification du droit (cf. J.-L. GAZZANIGA, « Rédaction des coutumes et codification », *Droits*, n° 26 (1998), p. 71-80 ; A. WIJFFELS, *Introduction historique au droit – France, Allemagne, Angleterre,* Paris, PUF, 2010, p. 100-105). En effet, ce texte, qui consacre le pluralisme juridique, ordonne la rédaction de toutes les coutumes du Royaume. Cependant cette ordonnance, elle est sans effet. Il faut attendre le règne de Louis XII pour que le mouvement de rédaction débute. Mais cela n'arrive que dans le Nord puisque le Sud argue de ne pas avoir de coutume mais seulement le droit romain (v. note 27, *supra*). Ces coutumes rédigées sont avalisées par les états-provinciaux et sont l'objet d'éditions imprimées qui assurent leur diffusion. De cette dernière naît une comparaison entre les coutumes et avec le droit romain (on appelle cela la "conférence des coutumes"). Ces comparaisons vont générer des critiques qui susciteront un désir d'amélioration duquel découlera un second mouvement de rédaction. L'objectif de ces nouvelles rédactions de réformation, dans la seconde moitié du XVIe siècle, est de chercher une convergence entre

Le processus de codification moderne du droit est ainsi la conséquence d'une politique d'édification et d'affirmation des États nationaux de l'Europe continentale[38]. D'une part, la codification devait mettre fin à la multiplicité des sources de droit ; d'autre part, elle envisageait de mettre sur pied un système qui couvrirait la totalité du droit privé, en excluant les sources juridiques « rivales », notamment le *jus commune* romano-canonique[39]. Elle marquait, en même temps, le passage d'une culture fondée sur la prééminence et la diversité de la coutume à un régime fondé sur et par la loi. Modernisatrice et progressive, la codification envisageait le renouvellement par rapport à la pratique de la compilation : à la place d'une simple synthèse globale du droit ancien, il fallait faire une œuvre prospective et de classification rationnelle des règles de droit.

Dans cette logique, la codification française est considérée comme le premier grand travail de réforme, d'uniformisation et de systématisation moderne du droit privé (civile en 1804 et commerciale en 1807), ayant à cet égard servi de modèle à un très grand nombre de codifications nationales[40].

Le Brésil a suivi ce mouvement suite à son indépendance en 1822. Tout en maintenant l'application des lois portugaises en vigueur au Portugal au 25 avril 1821, l'Alvará du 20 octobre 1823, promulgué par l'*Assembleia Constituinte Legislativa* de l'Empire brésilien (1822-1889), ordonnait l'élaboration d'un code civil et d'un code de commerce. Cette démarche du législateur brésilien est bien l'héritage de la tradition juridique portugaise, marquée par un droit formaliste, individualiste et codifié[41].

À la différence de la France et de l'Allemagne, mais à l'instar du Portugal, le Brésil s'est d'abord doté d'un code de commerce en 1850, puis d'un code civil en 1916. Cela n'est pas anodin pour le comparatiste.

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les coutumes. C'est ainsi qu'émerge la notion de droit commun coutumier ; cette notion vient des juristes coutumiers parisiens, notamment Charles du Dumoulin, qui considèrent ce droit commun coutumier comme le droit commun français, par opposition au droit commun romain. Cette affirmation d'un droit commun national marque la naissance de l'idée de droit français, idée que Louis XIV consacrera par l'érection de ce droit propre en matière universitaire (édit de Saint-Germain-en-Laye, art. 14, 1679). Là est l'origine du droit unique mise en œuvre dans le Code civil de 1804 (J.-M. CARBASSE, *op. cit*. p. 210 *sq* ; v. également, C. LOVISI, *Introduction historique du droit*, 3e ed., Paris, Dalloz, 2007, n° 351-356).

38 L'essor du mouvement de codification consécutif aux développements de l'École du droit naturel moderne est illustré par les codifications prussienne de 1794, française de 1804 et autrichienne de 1811.

39 GERKENS (J.-F.), *op. cit*., p. 18.

40 V. *La circulation du modèle juridique français*, Trav. de l'Assoc. Henri Capitant, vol. XV, Paris: Litec, 1994.

41 COUTO E SILVA (C. V.), « O Direito civil em perspectiva histórica e visão de futuro », *Revista de Informação Legislativa*, n° 97 (I-1988), p. 163 *sq*, p.167.

Ce décalage temporel explique que le Code de commerce brésilien ait réglementé les obligations et les contrats commerciaux, lorsque le Code de commerce français de 1807, pourtant modèle pour le législateur brésilien[42], ne contenait qu'une seule disposition en la matière – elle était relative à la preuve (ancien art. 109).

La configuration dichotomique du droit privé par la codification civile et commerciale restera immuable, au sein de ces structures assez semblables, jusqu'à la seconde moitié du XXe siècle. En effet, à partir des années 1970 surgit la figure du consommateur, dont la protection est devenue une exigence d'ordre public. Comme en France[43] ou en Italie[44], elle s'organise, au Brésil, au sein d'un code spécifique qu'est le Code de protection des consommateurs, adopté en 1990. La promulgation au Brésil d'un nouveau Code civil en 2002, malgré la prétention qu'était la sienne d'unifier les obligations civiles et commerciales, n'a pas abrogé le Code de protection des consommateurs[45].

Au sens large, la codification du droit privé brésilien se présente comme moyen permettant un certain degré d'unification du droit. Elle cherche également à réformer le droit en dépassant la simple compilation[46]. Elle converge ainsi tout naturellement avec les systèmes de droit continental, où le code constitue, comme l'a affirmé Frédéric Zenati[47], « un mythe fondateur et acquiert une dimension transcendantale, au sens de donnée a priori, de l'expérience juridique ».

Au sens strict, toutefois, le droit privé brésilien n'a pas été unifié par la codification du début du XXe siècle. Celle-ci a obéi à la dichotomie alors régnante entre le droit civil et le droit commercial. Il n'a pas été unifié non plus par la nouvelle codification civile de 2002, qui n'a absorbé qu'une partie des règles fondamentales applicables aux rapports privés. On ne parle plus alors de codification, mais de *codifications* du droit privé brésilien.

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42 V. AGUILAR VIEIRA (I.) et VIEIRA DA COSTA CERQUEIRA (G.), « L'influence du Code de commerce français au Brésil (Quelques remarques sur la commémoration du bicentenaire du Code français de 1807) », RIDC, 2007-1, p. 27-78 ; DE MELO VALENÇA FILHO (C.) « Le Code de commerce: un point de vue brésilien », in *Bicentenaire du Code de commerce: 1807-2007* – Les actes des colloques, Paris, Dalloz, 2008, p. 265-270.

43 Le 26 juillet 1993 est publiée la loi n° 93-949, relative au Code de la consommation (partie législative). Le décret n° 97-298 du 27 mars 1997 a codifié la partie réglementaire.

44 Decreto legislativo 06.09.2005, n. 206 (S.O. n. 162 alla Gazzetta Ufficiale 8 ottobre 2005, n. 235).

45 V. *infra*, I.B.2.c ; I.B.3.c.

46 GOLAB (S.), « Théorie et technique de la codification », *Studi filosofico-giuridici dedicati a Giorgio Del Vecchio*, vol. I, Modena, Societa Tipografica Modenese, 1930, p. 296.

47 ZENATI (F.), « Les notions de code et de codifications », *Mélanges Mouly,* Paris, Litec, 1998, p. 217-253, p. 217.

3. Les *codifications* du droit privé brésilien

Le droit brésilien possède un droit privé fondé sur un groupe de codes. Jusqu'à l'avènement du nouveau Code civil brésilien en 2002[48], la constellation de codes avait par ailleurs la même configuration que celle de certains ordres juridiques de l'Europe continentale[49]: un code civil, un code de commerce et un code de la consommation[50]. Dans cette configuration, le Code civil constitue l'élément central du droit privé (a), tandis que le Code de commerce représentait un élément d'importance, révélateur d'une dichotomie persistante (b). La codification des rapports consuméristes en 1990 a introduit un nouvel élément dans la constellation. En ce qui concerne le droit international privé, l'absence de codification nationale diverge du traitement législatif accordé aux règles matérielles qui en forment le socle (d).

a. La codification civile: projection d'un texte central du droit privé

Comme dans les autres systèmes de tradition civiliste, le Code civil se tient au cœur du droit privé brésilien. Il est la réglementation principale des rapports interpersonnels et se fonde sur l'égalité et la liberté. Il constitue ainsi la source première du droit civil, unanimement considéré comme le droit privé commun en raison de sa vocation universelle[51].

La codification bésilienne civile de 1916 a été précédée d'une compilation des lois en vigueur, qui pour l'essentiel reprenaient le droit portugais dans ses grandes lignes - la très grande influence de ce dernier

48 Loi n° 10.406, du 10 janvier 2002 (en vigueur depuis le 11 janvier 2003). V. *Code Civil brésilien*, Édition bilingue Brésilien/Français, traduit sous la direction d'A. Wald, Paris, SLC, 2009.

49 A l'instar de l'Allemagne, du Portugal, de la Belgique ou de la France.

50 La similitude la plus remarquable est avec l'ordre juridique français, dont le droit privé est structuré par un code civil, un code de commerce et un code de la consommation. L'Italie, qui a unifié les droits civil et commercial en 1942, a néanmoins adopté en septembre 2005 un code de la consommation (*Codice del consumo*) qui rassemble tous les textes jusqu'alors en vigueur dans le pays, dont la plupart avait une origine communautaire. Au Portugal, l'initiative, toujours en cours, de codifier le droit de la consommation fut entamée en 1996, avec la mise en place d'une commission en charge d'élaborer un avant-projet de code de la consommation. En mars 2007, un avant-projet de code du consommateur fut publié par le Ministère de l'économie et de l'innovation. Cf. CRISTAS (A.), « O Código civil no contexto do direito privado », in Verträge der *Deutsch-Lusitanischen Juristenvereinigung,* S. Grundmann et alii (dir.), Baden-Baden, Nomos Verlag, 2012, p. 29-40.

51 Cf. CRISTAS (A.), « O Código civil no contexto do direito privado », art. préc., p. 31.

sur la formation du droit brésilien est, pour cette raison, indéniable[52]. C'est ainsi qu'en 1857 Teixeira de Freitas présente *La Consolidation des lois civiles* à l'Empereur, don Pierre II, qui l'approuve le 22 décembre 1858[53]. Cette compilation se substituait aux textes dont elle reproduisait les solutions et jouissait d'une telle autorité, qu'elle a été maintes fois utilisée par les juristes comme source du droit[54]. Teixeira de Freitas a été également responsable de l'élaboration du projet de Code civil et songea, alors qu'il finissait l'élaboration de son « ébauche » (Esboço), à la rédaction d'un code de droit privé, contenant les matières civiles et commerciales unifiées. Pour le *Jurisconsulte* de l'Empire, ce même code de droit privé devrait être précédé d'un code général, *« dominant toute la législation, et nécessaire à la compréhension de celle-ci »*[55]. Outre le retard dans l'accomplissement de sa tâche, les nouvelles conceptions de systématisation du droit privé qu'il prônait, hautement inspirées de la pandectiste allemande, ont largement contribué à l'échec des travaux de Teixeira de Freitas. Après quelques tentatives postérieures de codification (1872, 1882, 1889, sous l'Empire ; et 1890, sous la République), la codification civile fut finalement achevée sous la plume de Clóvis Beviláqua, en 1899. Une longue période de discussion s'en est suivie, en particulier sur les aspects linguistiques et sur le style du projet. Le premier code civil brésilien a été promulgué le 1er janvier 1916 et est entré en vigueur le 1er janvier 1917[56]. Il est resté en usage pendant 85 ans.

À la différence du Code civil français ou du *Bürgeliches Gesetzbuch* allemand (BGB), la codification civile brésilienne de 1916 n'avait pas une tâche première d'unification, nonobstant la confusion

52 PONTES DE MIRANDA (F. C.), *Fontes e evoluções do direito civil brasileiro*, Col. Econômica e jurídica, vol. CCXIV, Rio de Janeiro, 1928, p. 50-51.

53 Un commentaire de la Consolidation fait par *l'Annuaire de Législation Étrangère de 1877*, publié par la Société de Législation Étrangère en 1878, se trouve dans WALD (A.), « Le droit brésilien et le Code civil de 2002 », in *Code Civil brésilien*, *op. cit*., p. 15-28, p. 18-19, *ad notam* 6.

54 Avant la *Consolidation de lois civiles* préparée par Teixeira de Freitas, le Brésil avait connu, pendant l'époque coloniale, une « compilation » des lois portugaises spécialement adoptées pour le pays. En effet, pour remédier le manque de publication de la législation faite au Portugal pour le Brésil, le roi don José I ordonna, en 1754, au magistrat Ignácio Barbosa Machado de réunir en une collection toutes les lois, les règlements et les résolutions expédiées jusque là au Brésil (à l'année d'avant, le même ordre avait concerné les possessions portugaises d'outre-mer). Seul le British Museum possède la collection prescrite par le roi don José I, qui comporte 30 volumes et va jusqu'à l'année 1757, selon les informations recueillies par DAVID (R.), « Le droit brésilien jusqu'en 1950 », *op. cit*., p. 52

55 *Apud* DAVID (R.), « Le droit brésilien jusqu'en 1950 », *op. cit*., p. 76.

56 Pour une version française du Code : GOULE (P.) et alii, *Code civil des États-Unis du Brésil loi nº 3071 du 1er janvier 1916, avec les modifications résultant de la loi nº 3725 du 15 janvier 1919*, Paris, Imprimerie Nationale, 1928.

résultant de la multiplicité des sources du droit portugais en vigueur au Brésil jusqu'alors. À ce propos, le fait que le droit brésilien ne prenne aucune racine dans les coutumes des populations indigènes est illustratif. En outre, la population noire, très importante au Brésil, n'a pas davantage contribué, par un apport de coutumes africaines, à la formation du droit privé brésilien. Les projets de Teixeira de Freitas (1860) et de Clóvis Beviláqua (1899) sont partis d'une perspective plutôt cosmopolite (conservatrice sans être nationaliste), en se basant sur les Ordonnances Philippines de 1603 et la tradition juridique portugaise, la pandectiste allemande, les droits italien et suisse, la littérature brésilienne, les lois en vigueur au Brésil et, à certains égards, le Code civil français[57].

La codification civile brésilienne de 1916, suivant l'esprit libéral qui animait les codifications du XIXe siècle, s'est également fondée sur la famille, la propriété et le contrat. Mais, à la différence des codifications européennes, elle n'a pas totalement libéré la société brésilienne de son passé féodal. En effet, le Code civil de 1916 (CC/16) en prévoyait un modèle contractuel affirmant avec force l'autonomie individuelle d'une part, et en maintenait un système fortement conservateur de relations sociales et familiales d'autre part. Il illustrait ainsi la contradiction du tissu social d'après l'indépendance, composé d'une bourgeoisie mercantile et urbaine en ascension et d'une population rurale majoritaire (de l'ordre de 80 %), où les rapports de production s'approchaient du modèle féodal et duquel les indigènes[58] et les noirs libres[59] restaient pratiquement en marge.

En 2002, le Brésil s'est doté d'un nouveau Code civil[60]. La commission nommée en 1969 pour la révision du Code de 1916 a constaté la difficulté de réaliser une simple révision de ce dernier. Un certain décalage avec la société contemporaine et les changements significatifs de la science du droit justifiaient l'édition d'un nouveau code, plus en phase avec son temps et porteur de certaines valeurs considérées comme essentielles.

Ces principes fondamentaux, auxquels on reviendra ultérieurement plus amplement, sont les valeurs éthiques, la sociabilité

57 F. C. PONTES DE MIRANDA (*Fontes e evoluções do direito civil brasileiro*, op. cit., p. 93) a relevé que 172 des 1807 articles du Code de 1916 trouvaient leur origine dans le Code civil français (plus de sa formulation moderne de règles romaines que du Code lui-même).

58 Sur le droit du peuple indigène au Brésil, v. LANNI (S.), *Brasile*, préc, p. 151 sq.

59 L'esclavage au Brésil a été officiellement aboli le 13 mai 1888.

60 A propos, v. WITZ (Cl.), «Regards d'un juriste européen sur le nouveau Code civil brésilien», in Wald (A.) (dir.), *Le code civil brésilien*, *op. cit*., p. 29-45.

et l' « opérationnalité » (efficacité[61])[62]. Un certain degré d'unification sera par conséquent atteint avec la nouvelle codification, comme corollaire des principes fondamentaux l'inspirant.

Comme le Code de 1916, le nouveau Code civil de 2002 (CC/02) est appelé à jouer un rôle central au sein du droit privé brésilien, notamment en raison de l'unification des obligations civiles et commerciales qu'il réalise et de la réglementation nouvelle du droit de l'entreprise qu'il comporte[63].

b. La codification commerciale : révélatrice d'une dichotomie persistante

Ce que l'on comprend sous le nom de droit commercial – ou sous ses variations les plus répandues aujourd'hui: *droit de l'entreprise* ou le *droit des affaires* – n'était à l'origine que des institutions forgées par la pratique coutumière des commerçants italiens d'avant le douzième siècle. À partir du douzième siècle, on a vu s'établir avec force en Italie des coutumes dont le caractère spécial est d'avoir été adoptées, dans le reste de l'Europe, « par tous les commerçans, à quelque peuple qu'ils appartinssent, à quelques lois qu'ils fussent d'ailleurs soumis ; en sorte que tous les commerçans de l'Europe, considérés en cette qualité, formaient vraiment un peuple qui se régissait par ses propres lois »[64]. Fondamentalement, la lex mercatoria, dont les premières manifestations seraient le *contrat de change* et la *juridiction consulaire*, constituait à l'origine, et pendant plusieurs siècles, le droit commun commercial[65].

Ce droit commun des marchants, librement élaboré au fils des siècles, ne résistera cependant pas au mouvement d'organisation rationnelle du droit qu'ont connu les pays de tradition civiliste à partir du XVIIIe siècle. La codification du droit commercial, malgré les critiques qu'elle a suscitées[66], ira, par conséquent, largement contribuer

61 Selon la traduction proposée par un auteur : Vera J. de FRADERA, « La culture Juridique et l'acculturation du droit – Rapport national brésilien », in *La culture Juridique et l'acculturation du droit, Revue Juridique de l'ISaidat*, (2011), volume 1 Special Issue 1, Article 4, 11p., p. 7, *ad notem* 8.

62 REALE (M.), « Visão Geral do novo Código Civil », in *Novo Código Civil brasileiro, estudo comparativo com o Código de 1916, Constitutição Federal, legislação comparada e extravagante*, 2ª ed., São Paulo, RT, 2002, p. IX-XIX.

63 LIMA MARQUES (C.), « Das neue brasilianische Zivilgesetzbuch vom 2002 : Bemerkung zum neuen Unternehmensrecht und der Quellendialog mit dem Verbraucherschutzbuch von 1990 », in Jayme (E.) et Schindler (Ch.) (dir.), *Portugiesisch – Weltsprache des Rechts*, Aachen : Shaker, 2004, p. 127-153, p. 138. Cf. *infra*, I.B.2.

64 FREMERY (A.), *Études de droit commercial ou le droit fondé sur la coutume universelle des commerçants*, Paris, Alex-Gobelet, 1833, p. 12-13.

65 *Ibid,* p. 13.

66 Suite aux premières codifications nationales, A. FREMERY, *Études de droit commercial*

à la structuration du droit privé de ces pays[67].

Au Brésil, la codification commerciale de 1850 intervient dans le contexte d'affirmation du nouvel Empire brésilien[68]. Le besoin même d'élaborer un Code de commerce résulterait du contexte précédant l'indépendance du pays, notamment l'installation de la famille impériale portugaise au Brésil le 24 janvier 1808 et l'ouverture des ports brésiliens aux Nations amies le 28 janvier 1808. Avant l'avènement du code en 1850, la législation commerciale applicable au Brésil était principalement étrangère : le législateur brésilien allait puiser dans le Code de commerce français de 1807, le Code de commerce espagnol de 1829 et le Code de commerce portugais de 1833[69]. L'application de ces

ou le droit fondé sur la coutume universelle des commerçants, *op.cit.*, p 19, s'exprimait : « depuis deux cents ans, le véritable droit commercial, œuvre lente et successive de l'unanimité des commerçants et dont les sources se retrouvent dans les monuments épars de leur coutume, a été divisé et mis en lambeaux par les législateurs de nations diverses et au lieu d'un droit commercial simple, grand, universel comme le commerce qui l'avait produit, on a eu le droit commercial français, le droit commercial anglais, le droit commercial espagnol. Puis sont venus les commentateurs qui, par principe, n'admettant pas d'autres sources du droit que le texte de la loi, ont cherché, chacun en son pays, dans des textes mal rédigés, confus, incohérents, la solution de toutes ces questions que multiplient et compliquent les paroles du prolixe législateur ».

67 Cf. VIEIRA DA COSTA CERQUEIRA (G.) et RIBEIRO OERTEL (R.), « O direito comercial », in Morais da Costa (Th.), *Introdução ao direito francês*, vol. II, Curitiba: Juruá, 2009, p. 313-392. Si l'on se tient à l'exemple français, la codification de 1807 a été la première codification *stricto sensu* de la matière et a exercé une influence universelle (cf. A. SAINT-JOSEPH, *Concordances entre les Codes étrangers et le Code de commerce français*, 2e éd., Paris, Videcoq, 1851, p. XI-XVII). En France, jusqu'alors on se trouvait devant de simples tentatives de coordonner et de compiler les règles régulatrices des rapports commerciaux, y compris le commerce maritime, à l'instar des Ordonnances de Louis XIV de 1673 (« code de Savary ») et 1681 (sur le commerce maritime, dont une traduction portugaise est disponible dans l'ouvrage de J. SILVA LISBOA, *Princípios de direito mercantil e lei de marinha*, vol. II, Rio de Janeiro, Cândido Mendes, 1874). Ces ordonnances ont à la fois réformé le droit commercial statutaire d'alors (institué par l'édit de Charles IX en 1563) et lui ont offert un cadre juridique plus scientifique et systématique en unifiant le droit commercial, le droit maritime et la procédure (cf. E. RICHARD, « Les sources et l'encadrement du droit des affaires », in É. Richard (dir.), *Droit des affaires – Questions actuelles et perspectives historiques*, Rennes, PUR, 2005, p. 102). Le Code de 1807 était ainsi l'aboutissement d'une longue, complète et universelle période de préparation de la codification commerciale en France. Le fait que la France disposait d'un droit commercial écrit et national précédant la codification explique, d'un point de vue historique, les différences de forme, de contenu et d'esprit entre la codification civile et commerciale, ainsi que le « démembrement du droit privé » (expression empruntée à F. TERRE, citée par L. LEVENEUR, « Code Civil, Code de commerce et Code de la Consommation », in *Le Code de Commerce 1807-2007*. Livre du Bicentenaire, Paris, Dalloz, 2007, p. 81-93, p. 82).

68 FERREIRA (W.), *Tratado de direito comercial*, vol. I, São Paulo, Saraiva, 1960, p. 86-87.

69 CARVALHO DE MENDONÇA (J. X.), *Tratado de direito comercial brasileiro*, vol. I, 2ª ed., Rio de Janeiro, Freitas Bastos, 1933, p. 79-80 ; BENTO DE FARIA, *Direito comercial*, t. I – Do comércio em geral, Parte Primeira, Rio de Janeiro, Coelho Franco Filho, 1947, p. 34.

derniers avait été rendue possible grâce à la *Lei da boa razão* (Loi de la saine raison) du 18 août 1769[70], loi portugaise demeurée en vigueur au Brésil même après son indépendance. En effet, cette loi autorisait l'application subsidiaire, pour les affaires politiques, économiques, commerciales et maritimes, des lois des nations chrétiennes, éclairées et cultivées[71]. Cette loi portugaise permettait ainsi indirectement aux juges brésiliens d'utiliser les droits étrangers pour justifier leurs décisions ; et ainsi assurait l'influence de la conception européenne[72] commune du droit dans la formation du droit brésilien. En matière commerciale, les tribunaux de commerce du Brésil, durant leur courte existence, statuaient *ex æquo et bono* dans la plupart des affaires. Ils avaient pour sources juridiques les lois générales et parfois les dispositions spéciales énonçant les principes adoptés par les nations plus civilisées, mais ils se référaient surtout aux dispositions du Code français de 1807[73].

Deux idées phares ont guidé les travaux d'élaboration du projet du Code de commerce brésilien. D'une part, le code devait être *« rédigé sur la base des principes adoptés par toutes les nations commerçantes, en harmonie avec les usages et les coutumes du commerce qui réunissent sous un même drapeau les peuples du nouveau et du vieux Monde »*[74]. D'autre part, il devait être *« aménagé selon les circonstances spéciales*

70 BENTO DE FARIA, Direito comercial, *op. cit*., p. 34.

71 La *Lei da boa razão* rendait le droit canonique sans valeur légale devant les tribunaux laïques (V. *Code civil portugais du 1er juillet 1867 : Ministère de la justice* / traduit et annoté par G. Laneyrie, Joseph Dubois, Paris, Impr. Nationale/ Société de législation comparée (Paris). 1896, p. XXIX). Elle disposait que les gloses et les opinions de Accurse et Bartolo ne pouvaient plus être invoquées en justice ni suivies par la pratique. En sus, cette loi stipulait que le droit romain ne s'appliquerait que subsidiairement aux lois du Royaume, de façon complémentaire et seulement si en accord avec la *recta ratio*, celle-ci étant fondée sur le droit naturel et les usus *modernus pandectarum* que le droit des gens avait unanimement établis pour diriger et gouverner toutes les nations civilisées. La doctrine aurait même soutenu que la *Lei da Boa Razão* permettrait d'exclure, dans bien des cas, l'application du droit portugais en faveur de solutions, conformes à la raison, admises par les législations les plus modernes des nations civilisées. Des exemples peuvent être trouvés dans SANTOS JUSTO (A.), « Direito Brasileiro: raízes históricas », *Revista Brasileira de Direito Comparado*, n.º 2, p. 1-14, p. 5 ; et BRAGA DA CRUZ (G.), « Formação Histórica do Moderno Direito Privado Português e Brasileiro », art. préc., p. 60-64.

72 Pour R. DAVID (« Structure et idéologie du droit brésilien », art. préc., p. 8), « *cette référence, dans le monde du dix-neuvième siècle, constituait en fait une référence au droit français, lequel avec la codification napoléonienne, avait été le premier (...) à fonder sa structure et ses solutions nouvelles sur les exigences de la raison* ». Pourtant, très critique à cet égard : BENTO DE FARIA, *Direito comercial*, *op. cit*., p. 34.

73 SAINT-JOSEPH (A.), *Concordances entre les Codes étrangers… op. cit*., p. 171 (notice fournie par Pinheiro-Ferreira à l'auteur).

74 Exposé des motifs du Projet *apud* W. FERREIRA, *Tratado de direito comercial,* vol. I, *op. cit.,* p. 93.

du peuple pour lequel il est fait »[75]. Parler d'un aspect réformateur de cette codification s'avère cependant difficile, d'autant plus que les circonstances spéciales du pays pour lequel le Code de 1850 a été conçu étaient celles d'une monarchie constitutionnelle, fondée sur une structure économique essentiellement agraire et esclavagiste. À cela s'ajoute le fait qu'il y eût un décalage du code avec les transformations de son temps : comme la plupart des codes de commerce adoptés au XIX^{e} siècle et aux débuts du XX^{e} siècle en Europe et en Amérique latine, le Code de commerce brésilien n'a pas résisté à la fracture entre ses règles et le bouleversement de l'économie que connut le XIX^{e} siècle. Mais, après sa promulgation en 1850, le législateur a en effet renoncé à enrichir le Code de commerce de nouvelles dispositions, préférant satisfaire les besoins nouveaux du commerce en dehors de ce cadre normatif[76].

Si le Code de 1850 demeure aujourd'hui toujours en vigueur, il n'a qu'une place très marginale au sein du droit privé brésilien. En effet, l'émancipation du droit de la faillite depuis 1890, l'unification du droit des procédures civiles et commerciales depuis 1939, l'émancipation du droit des sociétés anonymes depuis 1940 et l'unification des obligations civiles et commerciales et la réglementation du droit de l'entreprise par le nouveau Code civil de 2002[77], ont considérément réduit son rôle.

Une telle configuration pourrait toutefois connaître des évolutions importantes dans l'avenir. En effet, une proposition d'un nouveau code de commerce est actuellement en débat au Congrès national[78]. Ce projet, inspiré de l'ébauche élaboré par le professeur Fábio de Ulhoa Coelho[79], vise à redonner une autonomie systématique et méthodologique au droit de commercial, aujourd'hui absorbé par le Code civil de 2002. L'éventuel aboutissement de ce projet renforcera la dichotomie persistante, mais aujourd'hui anéantie, du droit privé brésilien, également marqué par la codification du droit de la protection du consommateur.

c. La codification du droit de la protection du consommateur: origine d'un nouvel élément de la constellation

Dans les pays qui l'ont expérimentée, la codification de la

75 *Ibid.*

76 RUSSELL (A.), « O direito comercial e sua codificação », in *Livro do centenário dos cursos jurídicos (1827-1927)*, vol. I, Rio de Janeiro, Imprensa Nacional, 1928, p. 125-156, p. 131.

77 L'art. 2.045 du nouveau Code civil brésilien a abrogé la partie première du Code de commerce.

78 Projet de loi n ° 1572, de juin 2011, disponible à l'adresse : http://participacao.mj.gov.br/codcom/

79 ULHOA COELHO (F.), *O futuro do direito comercial*, São Paulo, Saraiva, 2011.

consommation connaît un décalage temporel de plus d'un siècle et demi par rapport aux codifications civiles et commerciales. Elle est le résultat d'une politique de protection d'une partie au contrat présumée en position d'inégalité et de faiblesse[80].

Au Brésil, un Code de protection du consommateur (*Código de Defesa do Consumidor* - CDC) a été adopté par la Loi n° 8.078, du 11 septembre 1990. Ce code traite de manière unitaire et systématique de la protection du consommateur. Celle-ci est constitutionnellement assurée par l'art. 5, XXXI de la Constitution fédérale du 5 octobre 1988 (CF) – qui inscrit la protection du consommateur, devoir de l'État, dans la liste des droits et des garanties fondamentales – et par l'article 170, V – qui, reconnaissant le consommateur comme un acteur économique vulnérable au sein du marché, inscrit sa protection comme l'un des principes de l'ordre économique national. En outre, il était prévu à l'art. 48 des Actes et des dispositions constitutionnelles transitoires, l'obligation attribuée au Congrès national d'élaborer un Code de protection du consommateur dans les 120 jours suivant la promulgation de la Constitution. Le CDC était ainsi spécialement conçu pour régir les rapports entre le consommateur et les professionnels[81]. À cet égard, les rédacteurs de ce Code se sont largement inspirés du projet de code de la consommation français, du professeur J. Callais-Auloy[82], dont

80 Sur la définition de consommateur, v. GRAEFF (B.), « L'interdiction des clauses abusives dans les contrats de consommation en France et au Brésil », in *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien*, *op. cit*., p. 321-337, p. 323-326. La codification des règles de protection du consommateur, voire des règles régissant la consommation, n'est point la conséquence d'un impératif épistémologique imposant la délimitation des frontières au sein du droit privé, notamment du droit des contrats. Ainsi MAZEAUD (D.), « Droit commun du contrat et droit de la consommation », *Liber amicorum Jean Calais-Auloy*, Paris, Dalloz, 2004, p. 297-724.

81 À propos, v. LIMA MARQUES (C.), « L'expérience de la codification et de la réforme du droit de la consommation au Brésil », in *Pour une réforme du droit de la consommation au Québec*, Cowansville : Yvon Blais, 2006, p. 74-91 ; TEPEDINO (G.), « Les contrats de consommation au Brésil », in *Le droit brésilien, op.cit.*, p. 433-443. Plus récemment, LIMA MARQUES (C.), « Rapport national : droit brésilien », in Fernández Arroyo (D. P.) (dir), *La protection des consommateurs dans les relations internationales*, Asunción : CEDEP/ASADIP/ Brasilcon, 2010, p. 47-95 ; GALINDO DA FONSECA (P.), « Le dynamisme du droit brésilien de la protection du consommateur », *Revue québécoise de droit international*, 23.1 (2010), p. 115-155.

82 En France, les initiatives officielles de codification remontent à 1982, quand une commission de refonte du droit de la consommation, présidée par le professeur Jean Calais-Auloy, a été installée. Cette commission a publié, en 1985, un rapport intitulé *Propositions pour un nouveau droit de la consommation* (La documentation française, 1985), où figure un projet de code contenant 326 articles. Ce rapport a été mis à jour par M. Calais-Auloy au sein de la Commission supérieure de codification, créée en 1989, et remis au secrétaire d'État chargé de la consommation, en avril 1990, sous l'intitulé «Propositions pour un code de la consommation»

l'influence était majeure parmi les sources étrangères consultées lors des travaux préparatoires[83].

Nonobstant son origine constitutionnelle, il est à noter avec M. Claude Witz que le Code de protection du consommateur a aussi pu résulter d'un manque d'alternative législative.

> *« Il est aisément compréhensible que les vieux codes ou les codes plus récents conçus à une époque où le droit de la consommation n'existait pas encore ou n'en était qu'aux balbutiements, ne laissent au législateur d'autre choix que l'adoption de textes successifs de protection des consommateurs, appelés le cas échéant à former plus tard un code-compilation ou à voir leur contenu intégré dans un authentique code de la consommation. La voie suivie par le Brésil, doté à la fois d'un Code civil et d'un Code de protection des consommateurs, s'éclaire d'autant mieux que le Nouveau Code civil repose, rappelons-le, sur un projet achevé en 1974. Ainsi, l'expérience brésilienne converge avec celle de la plupart des pays européens, dont les codes civils antérieurs au mouvement de protection des consommateurs n'incluent pas les textes*

(*Propositions pour un code de la consommation*, La documentation française, 1990). Après une validation du périmètre de ce code et d'un premier projet de plan par le CSC en août 1990, la loi n° 92-60 du 18 janvier 1992 renforçant la protection des consommateurs a entériné le principe d'une codification « à droit constant » du droit de la consommation. Le 26 juillet 1993 est publiée la loi n° 93-949 relative au Code de la consommation (partie législative). Le décret n° 97-298 du 27 mars 1997 a codifié la partie réglementaire. Le Code de la consommation de 1993 n'est donc pas l'aboutissement du Projet Calais-Auloy, jugé trop ambitieux, mais la consolidation d'une série de lois élaborées progressivement depuis les années 1970. Ces textes couvrent de nombreux secteurs, dont la publicité trompeuse, les actions en justice des associations de consommateurs, le démarchage à domicile, le crédit, les clauses abusives, la sécurité des produits et des services. Alors que l'on s'était déjà interrogé sur le bien fondé d'une telle codification (D. FENOUILLET et F. LABARTHE (dir.), *Faut-il recodifier le droit de la consommation* ?, Economica, 2002), une refonte du Code de 1993 est prévue par la loi n° 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs, qui habilite le Gouvernement à procéder, par ordonnance, à l'adaptation de la partie législative du Code de la consommation, « afin d'y inclure les dispositions de nature législative qui n'ont pas été codifiées et d'aménager le plan du code » (art. 35, I, 1°). Les lois postérieures à 1993 ont été, pour la plupart, introduites dans ce Code par la méthode de la codification « à droit constant ». Sur cette dernière méthode, v. note 111, *infra*.

83 PELLEGRINNI GRINOVER (A.) et alii, *Código Brasileiro de Defesa do Consumidor* – comentado pelos autores do anteprojeto, 9ª éd., Rio de Janeiro, Forense, 2007, p. 9-10.

consuméristes. […]»[84].

Avec la codification du droit de la protection des consommateurs, l'ensemble des règles matérielles les plus fondamentales applicables aux rapports privés se trouvent codifiées au sein de l'ordre juridique brésilien. Toute autre chose se vérifie avec le droit international : à l'absence d'une codification nationale, s'ajoute une pluralité de sources.

d. L'absence de codification nationale et la pluralité de sources du droit international privé

Le droit international privé brésilien (DIPr) se voit attribuer un domaine moins vaste que celui qu'il connaît dans certains pays, comme la France, où il englobe à la fois les conflits de lois, les conflits de juridictions, la condition des étrangers et la nationalité. Au Brésil, le DIPr ne concerne traditionnellement que le conflit de lois, certains auteurs y associant néanmoins de nos jours les conflits de juridictions[85], voire la condition des étrangers et la nationalité[86].

Actuellement, la Loi d'introduction aux normes du droit brésilien de 1942[87] en est la principale source[88]. Elle ne lui dédie cependant

84 WITZ (Cl.), « Regards d'un juriste européen sur le nouveau Code civil brésilien », art. préc. p. 33.

85 ARAUJO (N.), *Direito internacional privado*, 4ª ed., Rio de Janeiro, Renovar, 2008.

86 TIBURCIO (C.), «*La diversité des sources du droit international privé* – Rapport brésilien», in Droit français et droit brésilien: perspectives nationales et comparées, op. cit., p. 171-185.

87 Version en français disponible dans le *Code Civil brésilien*, *op. cit*., p. 47-55. Cette loi est venue remplacer l'« *Introduction au Code civil des États-Unis du Brésil* » de 1916. Jusqu'alors, les règles portugaises s'appliquaient au Brésil, sauf en matière commerciale pour laquelle le législateur impérial avait prévu des règles de conflit de lois et de conflit de juridictions, à l'instar de l'art. 30 du Code de commerce de 1850 (sur la loi applicable aux actes de commerce réalisés au Brésil par des étrangers y ayant leur résidence) ou des arts. 3, 4, 5 (sur la loi applicable au statut personnel, à la forme et au fond du contrat commercial, respectivement) et de l'art. 14, § 3 (sur la compétence de la justice commerciale) du *Regulamento* n° 737 de 1850. À l'image de l'*Introduction* abrogée, la loi de 1942, alors adoptée sous la dénomination Loi d'*introduction au Code civil*, contient des dispositions sur l'application des normes juridiques en général dans le temps et dans l'espace, ainsi que des critères d'herméneutique et des dispositions concernant aussi bien le droit public que le droit privé. Le fait que l'essentiel des règles conflit de lois se retrouvent à l'intérieur d'un ensemble de dispositions ayant trait aux aspects généraux de l'application et de l'interprétation de la loi atteste par ailleurs une démarche qui met en exergue le rôle premier de la règle de conflit, à savoir celui de délimitation du champ d'application des règles matérielles (à propos, cf. VIEIRA DA COSTA CERQUEIRA (G.), *L'indivisibilité des règles de conflit et des règles matérielles*, Mémoire, DEA, Université Robert Schuman, 2003).

88 A propos des sources du DIPr brésilien, v. essentiellement DOLINGER (J.), *Private International Law in Brazil*, Kluwer Law International, 2012 ; TIBURCIO (C.), « La diversité des sources du droit international privé – Rapport brésilien », rap. préc., p. 171-185 ; et VIEIRA DA COSTA CERQUEIRA (G.), « La diversité des sources du droit international privé :

que quelques règles consacrant des solutions classiques. On y trouve ainsi des règles concernant le statut personnel, le mariage, le régime matrimonial et le divorce (art. 7), les biens (art. 8), les obligations (art. 9), les successions (art. 10), les personnes morales (art. 11), la compétence internationale (art. 12), la preuve (art. 13), l'application de la loi étrangère (art. 14), la reconnaissance et l'exécution de décisions étrangères (art. 15), le rejet du renvoi (art. 16), les moyens d'évincement de la loi, des actes et des décisions étrangers (art. 17) et la compétence des autorités consulaires brésiliennes pour la réalisation de certains actes d'état civil ainsi que sur la validité de ces derniers (arts. 18 et 19).

Il convient de souligner que la Loi de 1942 a apporté deux innovations importantes par rapport à l'ancienne l'*« Introduction au Code civil des États-Unis du Brésil »* de 1916 qu'elle a remplacée. D'abord, le critère de la nationalité a été remplacé par celui du domicile en matière de statut personnel (art.7, *caput*)[89]. Ce changement a permis au Brésil de s'affranchir du modèle nationaliste français ayant inspiré le législateur de 1916 et de créer les conditions d'une meilleure assimilation des étrangers aux origines multiples venus s'installer au pays à partir du XIXe siècle[90]. Ensuite, contrairement à l'*Introduction* de 1916, dont art. 13 stipulait que les obligations, quant à leur substance et leurs effets, étaient régies, *sauf disposition contraire*, par la loi du lieu où elles avaient été formées[91], la loi de 1942 a gardé, dans son art. 9, un étrange silence sur le principe de l'autonomie en matière d'obligations[92]. Si les raisons d'un tel silence sont difficiles à cerner[93], la question n'en a pas

commentaires à la table-ronde », in *Droit français et droit brésilien: perspectives nationales et comparées, op. cit*., p. 207 *sq*.

89 Art. 7 : *« La loi du pays où la personne est domiciliée régit le début et la fin de la personnalité, le nom, la capacité et les droits de famille »*.

90 L'idée de pleine égalité entre nationaux et étrangers et le rejet du principe de réciprocité dans la réglementation de la condition des étrangers étaient, par ailleurs, présents déjà dans l'œuvre de Teixeira de Freitas et a fortement marqué l'évolution du DIPr brésilien.

91 Néanmoins, le paragraphe unique de l'art. 13 de *l'Introduction au Code civil brésilien de 1916* disposait que seraient toujours régis par la loi brésilienne : *I - Les contrats conclus en pays étrangers, lorsqu'ils doivent être exécutés au Brésil. II - Les obligations conclues entre brésiliens, en pays étranger. III - Les actes concernant les immeubles situés au Brésil. IV - Les actes relatifs au régime brésilien de l'hypothèque*. Autant d'exceptions en faveur de la loi brésilienne qui rendait presqu'anodin tout choix d'une loi étrangère.

92 Art. 9 : *« Pour qualifier et régir les obligations, la loi du pays où elles ont été constituées est applicable. § 1 – Au cas où l'obligation doit être accomplie au Brésil et dépende de forme essentielle, celle-ci sera observée, es spécificités de la loi étrangère étant admises en ce qui concerne les conditions extrinsèques de l'acte. § 2 – L'obligation résultant du contrat est réputée constituée au lieu de résidence du proposant »*.

93 Cependant, en consultant les travaux de Mme Vieira-Munschy, l'on apprend d'une part qu'au cours du XIXe et de la première moitié du XXe siècle, une partie expressive de la doctrine brésilienne était réticente à l'application du principe de l'autonomie de la volonté, ce

moins fait l'objet de vifs débats en doctrine[94]. Alors que la majorité des auteurs semblent être en faveur de l'acceptation du principe de l'autonomie par le DIPr brésilien[95], notamment par une lecture dudit art. 9 à la lumière de la Constitution de 1988[96] - qui énonce que « nul ne peut être contraint à faire ou empêché de faire quoi que ce soit si ce n'est en vertu de la loi » (art. 5 II) -, certains ont vu dans le silence dudit article un refus du principe par le législateur de 1942[97]. Quoi qu'il en

qui aurait pu contribuer à la suppression de l'expression « sauf stipulation contraire » présente dans l'art. 13 de l'*Introduction* au Code civil de 1916, et, d'autre part que, comme l'observait le Professeur H. Valladão, la Loi d'Introduction de 1942 est le fruit d'un décret présidentiel édicté à une époque dictatoriale où la volonté des individus n'était pas entièrement respectée du fait du non-fonctionnement du Congrès National. L'environnement culturel juridique et politique n'était donc pas favorable à l'épanouissement de la volonté des individus en droit. Cf. VIEIRA DA COSTA CERQUEIRA (F.), *Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur*, Thèse, Strasbourg, 2010, p. 113 sq et bibliographie citée par l'auteur. Dans les travaux de Mme Posenato, nous pouvons également lire que H. Valladão et J. Dolinger ont jugé, dans leurs écrits, que le silence de la nouvelle loi sur la possibilité de choix par les parties de la loi applicable à leur contrat (ainsi que le silence sur le choix du for dans le Code de procédure de 1939/1940) était plutôt dû au souci des auteurs du nouveau texte d'éviter, dans un contexte dictatorial (Estado Novo-1937/1945), toute référence à l'autonomie de la volonté que véritablement d'en anéantir le principe. Cf. POSENATO (N.), *Autonomia della volontà e scelta della legge applicable ai contratti nei sistemi giuridici latino-americani,* Milano, Cedam, 2010, p. 403. Cf. également, GRANDINO RODAS (J.), « Elementos de conexão do direito internacional privado brasileiro relativamente às obrigações contratuais », in *Contratos internacionais, Contratos Internacionais*, Grandino Rodas (J.) (dir), 3ª ed. São Paulo, Revista dos Tribunais, 2002, p. 19-65, p. 57; STRENGER (I.). *Autonomia da vontade em Direito Internacional Privado*, São Paulo, RT, 1968, p. 212.

94 Sur ce débat : VIEIRA DA COSTA CERQUEIRA (F.), *Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur,* thèse citée, p. 113 *sq*. ; POSENATO (N.), *Autonomia della volontà e scelta della legge applicable ai contratti nei sistemi giuridici latino-americani*, *op. cit*., p. 403-405 ; GRANDINO RODAS (J.), « Elementos de conexão do direito internacional privado brasileiro relativamente às obrigações contratuais », art. préc., p. 50-58 ; STRENGER (I.). *Autonomia da vontade em Direito Internacional Privado*, *op. cit.*, p. 192-206.

95 Ainsi : BAPTISTA (L. O.), *Dos Contratos Internacionais*, São Paulo, Saraiva, 1994, p. 49 ; DOLINGER (J.), *A Evolução da ordem pública no Direito Internacional Privado*, Rio de Janeiro, 1979, p. 205; A. CASTRO, Direito Internacional Privado, 1a ed. Rev. e atual. por Jacob Dolinger, Rio de Janeiro, Freitas Bastos, 1976, vol. II, p. 177.

96 GAMA ET SOUZA JR. (L.), « Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro : Uma leitura constitucional do art. 9° da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável », in *O Direito internacional contemporâneo. Estudos em Homenagem ao Professor Jacob Dolinger*, Tiburcio (C.) et Barroso (L. R.), Rio de Janeiro, 2006, p. 611 *sq*, spéc. p. 619 *sq*.

97 A l'instar de GRANDINO RODAS (J.), « Elementos de conexão do direito internacional privado brasileiro relativamente às obrigações contratuais », in *Contratos internacionais, Contratos Internacionais*, Grandino Rodas (J.) (dir), 3ª ed. São Paulo, Revista dos Tribunais,

soit, la validité du choix de la loi applicable aux contrats internationaux est reconnue par certaines cours d'appel[98], le *Tribunal Superior do Trabalho* (TST) l'admettant dans les contrats individuels de travail[99]. En revanche, le *Superior Tribunal de Justiça* (STJ) ne s'est pas encore manifesté sur la validité d'un tel choix. Les critiques formulées par la doctrine au texte de l'art. 9[100] et les quelques tentatives de réforme en vue d'adapter la Loi de 1942 aux évolutions les plus récentes en droit comparé sont jusqu'à présent restées lettres mortes ou ont échoué par manque de volonté politique[101] .

D'autres textes nationaux contiennent encore des dispositions intéressant le DIPr. Ainsi, la Constitution fédérale de 1988 régit certains aspects liés à la nationalité (art. 12), aux droits fondamentaux des étrangers (art. 5, *caput*) et à la loi applicable à leur succession (art. 5, XXXI). La Constitution fixe la compétence du STJ pour la reconnaissance (« homologação ») des décisions étrangères et l'octroi de l'*exequatur* aux documents commis par un juge étranger (« cartas rogatórias ») (art. 105, I, i)[102]. Il en va de même pour la compétence de la Justiça Federal en matière de différends relatifs aux traités internationaux et aux contrats signés entre l'Union et un État étranger ou une organisation internationale (art. 109, II) et pour l'exécution des

2002, p. 19-65, p. 59 (qui propose de substituer à la loi en vigueur une plus apte à régir les contrats); FRANCESCHINI (J. I.), « A lei e o foro de eleição em tema de contratos internacionais », in *Contratos Internacionais*, op. cit., p. 66-121, spéc. p. 80-81 et 114; BASSO (M.), « A autonomia da vontade nos contratos internacionais do comércio », *Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul*, vol. 12, 1996, Porto Alegre, 1996, p. 198-211, spéc. 199; ARAÚJO (N.), *Direito internacional privado*, 3ª ed., Rio de Janeiro, Renovar, 2003, p. 316; MEYER RUSSOMANO (G. M. C.), *Direito internacional Privado do Trabalho*, p. 180 *sq*.

98 Cf. les décisions citées par VIEIRA DA COSTA CERQUEIRA (F.), *Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur*, Thèse préc., p. 124 *sq*.

99 *Ibidem*, p. 128-130.

100 V. notamment, GRANDINO RODAS (J.), « Substituenda est lex introdutoria », *Revista dos Tribunais*, vol. 630, 1988, p. 243-245.

101 Cf. pour les obligations contractuelles, le projet de *Lei Geral de Aplicação das Normas Jurídicas* (art. 50) – Anteprojeto oficial – Décrets n° 5.055 de 1961 et n° 1.490 de 1962 – Projet présenté par H. Valladão ; l'avant-projet de loi nº. 4905/1995 (art. 11) ou encore le Projet de loi n° 269/2004 (art. 12). Sur l'ensemble des projets de réforme de la loi de 1942 présentés depuis 1964, v. GRANDINO RODAS (J.), « Elementos de conexão do direito internacional privado brasileiro relativamente às obrigações contratuais », art. préc., p. 19-65 et POSENATO (N.), *Autonomia della volontà e scelta della legge applicable ai contratti nei sistemi giuridici latino-americani, op. cit*., p. 418-428.

102 Question régis par la Résolution 9 du STJ, du 4 mai 2005. A propos, v. ARAÚJO (N.) (coord.), *Cooperação jurídica internacional no Superior Tribunal de Justiça* – Comentários à Res. 9 do STJ, Rio de Janeiro, Renovar, 2010.

décisions étrangères et des documents commis par un juge étranger, ainsi que pour les questions concernant la nationalité (art. 109, X).

La Constitution indique aussi la place occupée par les traités dans l'ordre juridique brésilien, dont le contrôle de constitutionnalité revient, en dernière instance, au Supremo Tribunal Federal (STF) (art. 102, II, b), ce qui n'est pas anodin, vu le nombre des conventions internationales en la matière auxquelles le Brésil est partie. En effet, si une valeur constitutionnelle est reconnue aux traités portant sur les droits de l'Homme (art. 5°, § 3° CF)[103], les autres traités demeurent équivalant à la loi ordinaire et peuvent, à ce titre, voir certaines de ses dispositions être déclarées non-conformes à la constitution ou dérogées, expressément ou tacitement, par une loi postérieure, sauf quand la spécialité commande leur application en cas d'antinomie.

On trouvera également certaines dispositions assez restrictives dans le nouveau Code civil sur le fonctionnement des sociétés étrangères au Brésil (arts. 1134 à 1141). La condition juridique de l'étranger est quant à elle réglementée par la loi n° 6.815 du 19 août 1980. Enfin, le Code de procédure civile comporte certaines règles de compétence internationale (arts. 88 et 90) et des précisions sur les exigences de forme et sur l'exécution de documents commis par un juge étranger (arts. 204 à 212)[104].

En ce qui concerne la jurisprudence, celle-ci a toujours joué un rôle secondaire dans le comblement des vides législatifs et dans l'évolution de la matière. D'une manière générale, les décisions sont assez conservatrices et, jusqu'à une époque récente, assez méfiantes du droit étranger, ce qui contraste par ailleurs avec l'esprit universaliste, comparatiste et pluraliste de la culture juridique brésilienne. Des changements se font cependant sentir, notamment en matière d'obligations contractuelles. Ceci est le résultat d'une réinsertion du pays dans l'économie globalisée après une longue période de dictature militaire et de ralliement à la politique externe nord-américaine, en soi-même très nationaliste.

Certains changements législatifs récents et ponctuels ne sont par ailleurs pas sans importance pour l'évolution de la pratique du DIPr brésilien, à l'instar de l'Amendement constitutionnel n° 45 du 30 décembre 2004, qui, outre avoir élevé au rang constitutionnel les traités

103 V, *infra*, II.C.2.a.

104 Le projet de nouveau Code de procédure civile (Projet de loi 8046/2010), actuellement discuté dans le Congrès national, comporte également des règles de conflit de juridictions et sur la coopération juridictionnelle dans les articles 21 à 41, à l'intérieur du titre II, intitulé *Limites de la juridiction brésilienne et coopération internationale*, du Livre I – Partie générale. Pour une critique aux aspects de droit international privé de ce projet, v. ARAUJO (N.), GAMA JR. (L.) et VARGAS (D.), « *Temas de direito international privado no Projeto de novo Código de Processo Civil* », RArb 28 (2007), p. 147 *sq*.

portant sur les droits de l'Homme, a fait glisser la compétence pour la reconnaissance et l'exécution de décisions étrangères du STF au STJ (art. 105, I, i CF/88). De surcroît, l'avènement de la loi d'arbitrage du 23 septembre 1996 rend la voie arbitrale plus favorable au principe de l'autonomie en matière contractuelle (art. 2) que la voie judiciaire[105], où le juge se voit restreint à appliquer la loi du lieu de conclusion du contrat ou, sous certaines conditions, celle du lieu d'exécution du contrat, les seuls rattachements prévus à l'art. 9 de Loi de 1942.

En termes de sources internationales, le Brésil a ratifié la *Convention sur le droit international privé*[106], adoptée par la sixième conférence panaméricaine de La Havane le 20 février 1928[107]. Connue comme le *Code Bustamante*, cette convention, qui ne lie, en principe, que les États contractants (art. 1°)[108], est composée de 4 l Livres et comporte 437 articles ayant trait respectivement au droit civil international, au droit commercial international, au droit de la procédure internationale et au droit pénal international. Nonobstant son vaste contenu et son esprit de système, le *Code Bustamante* ne représente pas une codification du droit international privé brésilien pour plusieurs raisons : en premier lieu, le Brésil a émis quelques réserves importantes lors de la ratification de ce Code (en matière de divorce) ; en second lieu, après l'entrée en vigueur du *Code Bustamante*, le législateur brésilien a adopté une nouvelle loi d'introduction au Code civil (1942), deux nouveaux codes de procédure civile (1939/1975) et non moins de cinq Constitutions contenant des dispositions en la matière – la contrariété des maintes de ses dispositions avec les nouveaux textes nationaux a conduit à son «

105 AGUILAR VIEIRA (I.), « L'arbitrage au Brésil », *Bulletin du CEDIDAC*, n° 52, décembre 2009, p. 1-7.

106 Promulgué par le Décret 5.647, du 8 janvier 1929 et publié par le Décret 18.956, du 22 octobre 1929. Le Code fut adopté dans son ensemble, exception faite des seuls arts. 52 et 54 (sur le divorce) qui avaient fait l'objet de réserves.

107 SDN, *Recueil des Traités*, vol. 86, p. 113.

108 Une décision du STF l'a néanmoins appliquée à une situation concernant un ressortissant d'un État non-contractant sur le fondement qu'« un Code, quelles que soient son origine et la loi du pays qui l'a promulgué, régit le droit qu'il réglemente indépendamment de la nationalité des personnes qui l'invoquent » (STF, SE n° 933, Rio de Janeiro, 17 julho de 1940, *Revista do Tribunais*, vol. 136, 1942, p. 824-828). Cette décision confortait les auteurs qui considéraient que le Code s'applique également dans les relations avec les États non contractants ne serait-ce qu'en tant que source doctrinale (E. ESPINOLA, E. ESPINOLA FILHO, *A Lei de Introdução ao Código Civil Brasileiro*, vol. II, 2ª ed. atualizada por Silva Pacheco, Rio de Janeiro, Renovar, 1995, Vol. II, p. 370). D'autres soutiennent le contraire (C'est la position notamment du juriste brésilien Amílcar de Castro (A. CASTRO, *Direito Internacional Privado*, 4ª ed., Rio de Janeiro, Forense, 1987, p. 300-303; G. A. L. Droz, « L'harmonisation des règles de conflit de lois et de juridictions dans les groupes régionaux d'États », *Rapport général* au VIème Congrès International de Droit Comparé (Hambourg, 1962), Bruxelles, 1964, p. 393-433).

abandon » par la jurisprudence[109]; et, en troisième lieu, le Brésil a ratifié d'autres textes internationaux de droit international privé, à l'instar de certaines conventions interaméricaines, des certaines conventions de La Haye et des Protocoles du Mercosur, dont les solutions tendent à primer en cas de conflit insurmontable[110].

Suite à ce bref tour d'horizon des sources du droit international privé brésilien, revenons au droit matériel et plus particulièrement à la méthode de codification du droit privé brésilien.

B. Méthodologies de codification

Au Brésil, la systématisation du droit privé par la codification présente des spécificités liées à la façon dont les matières ont été codifiées (1), ainsi qu'à l'étendue (2), à l'architecture (3) et au style des principaux codes (4).

1. La compilation et la codification « à droit constant » : une exception au Brésil

À la différence de certaines pratiques codificatrices des systèmes juridiques de référence, comme le français, le législateur brésilien n'a recouru à la technique de la consolidation ou de la codification « à droit constant »[111] que dans de très rares occasions. Il en était ainsi

109 STRENGER (I). *Autonomia da vontade em Direito Internacional Privado, op. cit.*, p. 206-207.

110 Sur les « dialogues » possibles entre les instruments d'uniformisation du DIP en Amérique latine et, en spécial au sein du Mercosur, afin de résoudre les conflits entre eux, v. LIMA MARQUES (C.), « Procédure civile internationale et Mercosur: pour un dialogue des règles universelles et régionales », *Revue de droit uniforme*, 2003-1/2, p. 465-484 ; VIEIRA DA COSTA CERQUEIRA (G.), « A Conferência da Haia de Direito Internacional Privado como fonte de direito uniforme para os processos regionais de integração econômica », in : Protección de los consumidores em América, Los trabajos de la CIDIP (OEA), sous la coordination de Fernández Arroyo (D. P.) et Moreno Rodríguez (J. A.). Asunción : *Revista Jurídica La Ley*, 2007, p. 303-346.

111 Le législateur français ne se prive pas d'une codification « à droit constant » pour rajeunir les ensembles législatifs. Il en est ainsi pour les principaux codes, la codification civile de 1804 restant néanmoins relativement épargnée (J.-L. SOURIOUX, « Codification et autres formes de systématisation du droit à l'époque actuelle. Le droit français », in Journées de la Société de Législation comparé – Année 1988, RIDC, n° spécial, vol. 10, 145-158). Cette méthode implique de codifier sans conduire au changement de la loi. Elle vise « la mise en ordre du droit positif existant » (Ph. MALAURIE, « L'utopie et le bicentenaire du Code civil », in 1804-2004 : Le Code civil, un passé, un présent, un avenir, Dalloz, 2004, p. 1-8, p. 3), des modifications aux textes regroupés ne pouvant intervenir que « pour assurer le respect de la hiérarchie des normes et la cohérence rédactionnelle des textes ainsi rassemblés, harmoniser l'état du droit, remédier aux éventuelles erreurs ou insuffisances de codification et abroger les dispositions, codifiées

de l'ancienne *Consolidation de lois civiles de 1857*, tout comme de l'actuelle *Consolidation des Lois du Travail* de 1943, qui comporte également des dispositions spéciales sur la procédure auprès de la justice prud'homale. En ce qui concerne la codification civile de 2002, le fait que le législateur ait maintenu les règles qui ne devaient pas nécessairement être changées n'induit pas un recours à la technique de compilation : il s'agissait plutôt de conserver les traditions avec un minimum de rupture et de ne pas modifier la terminologie juridique elle-même.

On observe ainsi deux façons de codifier, fort différentes l'une de l'autre : l'une, important une véritable systématisation, rationalisation et innovation de contenu, fortement privilégié par le législateur brésilien, l'autre, plutôt organisatrice, basée sur la technique de la codification «

ou non, devenues sans objet » (Art. 35, I, 1° de la loi du 3 janv. 2008 pour le développement de la concurrence au service des consommateurs). Par conséquent, « L'abrogation d'une loi à la suite de sa codification à droit constant ne modifie ni la teneur des dispositions transférées, ni leur portée. En outre, les arrêtés ou règlements légalement pris par l'autorité compétente revêtent un caractère de permanence qui les fait survivre aux lois dont ils procèdent, tant qu'ils n'ont pas été rapportés ou qu'ils ne sont pas devenus inconciliables avec les règles fixées par une législation postérieure » (Cass. crim., 4 mai 1995, BID n° 5/1996). C'est la méthode qui a prévalu lors de la recodification de la matière commerciale, dont les illusions et les effets négatifs ont été largement mis en évidence par la doctrine (F.-X. LICARI et J. BAUERREIS, « Das neue französische Handelsgesetzbuch. Ein kritischer Beitrag zur Methode der codification à droit constant », *ZEuP*, 1/2004, p. 132-152 ; J. MONEGER, « De l'Ordonnance de Colbert de 1673 sur le commerce au code de commerce français de septembre 2000 : réflexion sur l'aptitude du droit économique et commercial à la codification », *RIDE* 2004, p. 171-196 ; D. BUREAU et N. MOLFESSIS, « Le nouveau code de commerce : une mystification », *D*. 2001, chr., p. 366 *sq* ; C. A. ARRIGHI DE CASANOVA et O. DOUVRELEUR, « La codification par ordonnances. À propos du Code de commerce », *JCP* G, n° 2, *10 janvier 2001, I, p. 285, spéc. p. 286 sq ; G. RIPERT et R. ROBLOT*, Traité de droit commercial, t. 1, v. 1, par L. Vogel, 18e éd., LGDJ, 2001, n° 32 . V. aussi, H. MOYSAN, « La codification à droit constant ne résiste pas à l'épreuve de la consolidation », JCP G 2002, p. 1231 ; Ph. REIGNE et T. DELORME, « Une codification à droit trop constant. À propos du code de commerce », *JCP* E 2001, act. n° 1, p. 2 ; N. MOLFESSIS, « Les illusions de la codification à droit constant et la sécurité juridique », RTD Civ. 2000, p. 186 *sq* ; T. LE BARS, « Nouvelles observations sur la codification " à droit constant " du code de commerce », *JCP* E 2000, p. 2164 ; GB, « Le code de commerce nouveau est arrivé ! («Arrêter de recoder !») », *Bull. Joly* 2000, p. 883.). La même méthode a également conduit à la codification française de la consommation issue de la loi du 26 juillet 1993. D'une part, la codification « à droit constant » a permis au code de s'adapter plus constamment à la fois aux situations purement nationales, à l'instar de la réglementation du surendettement, et aux prescriptions européennes. D'autre part, elle a conduit, sous l'effet d'un empilement des textes, au manque de clarté et de cohérence du code. En cette matière, des hésitations persistent cependant : bien des dispositions renforçant la protection du consommateur ont été adoptées depuis sans être codifiées, contrariant l'art. 8 de la loi du 26 juillet 1993 (cf. G. VIEIRA DA COSTA CERQUEIRA, « Données fondamentales pour la comparaison en droit privé français et brésilien », art. préc., p. 87-88).

à droit constant », peu utilisé au Brésil car la lisibilité qu'elle cherche initialement à donner aux textes rassemblés ne résout pas la complexité engendrée au fil du temps.

2. L'étendue des principales codifications

À l'ancienne dichotomie absolue du droit privé s'oppose l'unification partielle du droit privé brésilien de nos jours (a). Par conséquent, un certain dépassement de la notion de droit commercial peut être relevé (b). Parallèlement, la codification brésilienne du droit de la protection du consommateur, marquée par une certaine transversalité, forme un microsystème au sein du droit privé brésilien (c).

a. L'unification partielle du droit privé brésilien

Bien que la dichotomie du droit privé ait marqué l'évolution du droit brésilien, un pas considérable vers l'unification de la matière civile et commerciale a été franchi avec la nouvelle codification civile de 2002.

En effet, le nouveau Code civil brésilien de 2002 unifie le droit des obligations civiles et commerciales[112] et réglemente le droit de l'entreprise.

Cette unification n'est pas sans conséquences sur le droit commercial. Tout d'abord, les modifications introduites par le législateur de 2002 dépassent le simple aspect formel de présentation du droit civil et du droit commercial. Désormais incluses dans le nouveau Code civil, ces matières sont soumises aux lignes directrices du code (*sociabilité, opérationnalité, « éthicité »*) et aux principes en découlant - dont la fonction économique et sociale du contrat et de la propriété et la protection de l'adhérent dans les contrats d'adhésion. Ces nouveaux principes encadrent les relations entre les particuliers, qu'elles soient ou non des rapports d'affaires.

Ensuite, malgré l'existence antérieure d'une relative « commercialisation du droit civil » de même qu'« une civilisation du droit

112 Malgré l'échec de la proposition d'unification par Teixeira de Freitas au XIXe siècle, l'idée d'unification, du moins des obligations, demeurait vivante chez les juristes brésiliens. Ils ont envisagé dans le courant du XXe siècle un Code unique des obligations, tout en conservant pour les matières spécifiques au commerce une série de lois distinctes, sans les réunir dans le cadre d'un code. Ainsi le Projet de Code de droit privé, proposé par Herculano Marcos Inglez de Souza en substitution au projet d'un nouveau Code de commerce, dont il a été chargé de l'élaboration par le gouvernement brésilien en 1911 ; le Projet de Code des obligations de 1940, proposé par Hahnemann Guimarães, Philadelpho Azevedo et Orozimbo Nonato ; le Projet de Code des obligations de 1962/1965, de Caio Mário da Silva Pereira *et alii*.

commercial »[113], l'unification a permis de dépasser certains clivages qui existaient dans l'ordre juridique brésilien[114]. En effet, la distinction traditionnelle entre les obligations civiles et commerciales avait déjà perdu sa raison d'être lors de l'unification des compétences civile et commerciale au sein d'une seule et même justice. Les distinctions de base qui existaient entre certains biens, comme les meubles et les immeubles, avait également perdu une partie de leur importance avec la titrisation des crédits immobiliers, la commercialisation de l'hypothèque, l'émission de lettres de change immobilières, la création de fonds d'investissements immobiliers dans le marché financier et l'adoption (optionnelle) de la forme anonyme pour les sociétés de construction d'immeubles[115].

En conséquence de l'unification des obligations, la nouvelle codification brésilienne régit certains contrats commerciaux, dont la vente. On regrette toutefois que certains aspects majeurs restent dépourvus d'une réglementation précise. En effet, toute une série de dispositions propres à la vente commerciale et à d'autres obligations typiquement commerciales n'a pas été reprise par le nouveau Code civil[116] qui a dérogé à la partie générale du Code de commerce de 1850. En outre, les obligations du vendeur et de l'acheteur continuent d'obéir au système élaboré selon les modèles classiques du droit romain, aujourd'hui insuffisants pour garantir le bon déroulement de l'exécution des obligations contractuelles de plus en plus complexes[117].

Cette complexité se reflète notamment dans les effets de

113 L'art. 121 du Code de commerce de 1850 autorisait le recours aux règles du droit civil des contrats, tandis que le Code civil de 1916 autorisait le recours au droit commercial, lorsqu'il s'agissait d'appliquer subsidiairement aux sociétés civiles les règles relatives aux sociétés anonymes, à condition que celles-ci ne rentraient pas en conflit avec la loi civile (art. 1364).

114 WALD (A.), « Le droit de l'entreprise au XXIe et le Code civil brésilien », in *Le droit brésilien* :…, *op. cit.*, p. 249-273, p. 263.

115 WALD (A.), « L'entreprise et le Code civil brésilien », art. préc., p. 263.

116 Dans le Code de commerce de 1850, les règles générales sur les contrats étaient complétées par des dispositions, supplétives certes, mais indicatives des obligations subsidiaires et accessoires à la prestation principale ou caractéristique de l'affaire, plus en accord avec la pratique commerciale. Le nouveau Code est silencieux par exemple quant au délai, à la forme et à qui doit être livrée la chose achetée. Le Code civil de 1916 était également silencieux quant à toutes ces questions, mais le Code de commerce, bien que légèrement et timidement, stipulait que la marchandise devait être livrée dès le contrat conclu, dans le délai et selon la manière déterminés dans celui-ci (art. 197), et au lieu où elle se trouvait au moment de la vente, si les parties n'en avaient pas décidé autrement (art. 199).

117 La tendance de la vente moderne est celle du pluralisme d'obligations, de plus en plus étendues et complexes soit en raison du contrat, soit en raison du droit (loi, jurisprudence, usages): à l'obligation de livraison d'un bien conforme s'ajoutent les obligations de remise de documents, d'information, de collaboration, de conseil, de sécurité (avertissement des risques) ; certaines obligations subsistent même après le transfert de la propriété et des risques.

l'inexécution, comme l'atteste la notion unitaire de *conformité de la prestation*, traitée comme obligation principale par les principaux instruments d'uniformisation du droit des contrats et par certains codes nationaux régissant la matière[118]. Sous l'empire du Code civil de 1916, la jurisprudence[119] et la doctrine[120] ont pu dégager cette notion de la formule générale de l'ancien art. 1.056[121], alors que ce Code, à l'instar du Code de commerce de 1850, avait gardé les règles classiques propres aux vices cachés (art. 210, C. com. 1850 ; art. 1101, CC/16), à la mise en demeure (art. 202, C. com. 1850 ; art. 955 CC/16) ; et l'éviction (arts. 214 et 216, C. com. 1850 ; art. 1107, CC/16). Le nouveau Code civil a conservé les garanties légales antérieurement prévues et a consacré un seul dispositif aux garanties contractuelles (art. 456), mais il est resté silencieux aussi bien à propos de la formule générale de l'ancien art. 1.056 du Code civil de 1916 (actuel art. 389[122]) que des obligations subsidiaires ou accessoires à l'obligation principale. On attend toujours de voir comment la jurisprudence réagira à cet égard[123].

118 Comme prévu dans la Convention de Vienne de 1980 sur la vente internationale de marchandises (art 35); dans la directive européenne 44/1999 sur certains aspects de la vente aux consommateurs (art. 2) ; dans la notion *d'exécution défectueuse* des Principes d'UNIDROIT 2010 (art. 7.1.1) ; ou encore, dans le droit comparé, sous la notion de *breach of contract* du droit anglais ou de *Pflichtverletzung* (§ 280 du BGB après la réforme de 2002). Il convient de noter qu'en droit interne de la vente français la notion de *conformité* n'a pas la même portée : ce droit distingue les défauts de la chose selon leur caractère apparent (*non-conformité* attachée à l'obligation de délivrance) ou caché (effet de l'obligation de délivrance). En revanche, pour les contrats de vente conclus par les consommateurs (art. L. 211-4 C. consom.) ou pour les contrats de vente internationale soumis à la Convention de Vienne de 1980 (art. 35), la notion de conformité présente, en droit français, un caractère unitaire, recouvrant les notions traditionnelles de vice caché et de non-conformité. Au Brésil, la notion unitaire de conformité est adoptée spécifiquement par l'art. 18 du CDC.

119 STJ: Resp. n.º 52075/ES, Industrial Malvina S.A. v. Coopersanto Industrial S.A., DJ 21.11.1994, p. 34352; Resp. n.º 72482/SP, Condomínio Edifício Orion v. Estrutura Incorporadora e Construtora Ltda, DJ 08.04.96, p. 10474; RESP 406590/PR, Cerâmica Porto Ferreira Ltda v. Casagrande Pisos Cerâmicos Ltda, DJ 16.09.2002, p. 00194.

120 AGUIAR JR. (R. R.), *Extinção dos contratos por incumprimento do devedor*, Rio de Janeiro, Aide, 1991. A propos, v. notre étude : « Defective performance in contracts for the international sale of goods. A comparative analysis between the Brazilian Law and the 1980 United Nations Convention on Contracts for the International Sales of Goods », in *Review of the Convention on Contracts for the International Sale of Goods* (CISG)/ Pace International Law Review, 2005-2006, p. 23-84.

121 Art. 1056: *« Le débiteur sera condamné au paiement de dommages-intérêts lorsqu'il n'exécute pas l'obligation ou lorsqu'il ne l'exécute pas de la manière et dans le délai prévus ».*

122 Art. 389 : *« Si l'obligation n'est pas exécutée, le débiteur répond des dommages et intérêts, outre les intérêts et l'indexation, selon les taux officiels régulièrement établis, et les honoraires de l'avocat ».*

123 Certes, outre les nouveaux principes qui régissent la matière, le juge se servira également des règles générales applicables aux obligations de donner, notamment celles concernant

À ces critiques, peut être associée la remarque d'un juriste européen avisé[124] pour qui même si le Code civil de 2002 apporte une modernisation au droit privé par rapport au Code de 1916 auquel il se substitue, il n'est pas pour autant un code du XXIe siècle naissant. Selon M. Claude Witz, outre l'ancienneté du projet sur lequel l'essentiel du Code repose,

> *«Il en résulte, par exemple l'absence de retombées de la révolution numérique, notamment en droit des contrats et dans le domaine de la preuve. De même, le Code n'a pas pu tirer profit des divers instruments d'uniformisation du droit des contrats, d'apparition plus récente, sous le prisme desquels tout droit national des contrats tend aujourd'hui à être apprécié, pas plus que de l'intense bouillonnement intellectuel ayant précédé ou suivi leur adoption»*[125].

Enfin, il est à noter que, durant les travaux législatifs, l'unification du droit des obligations a suscité la méfiance, voire l'opposition, d'une partie de la doctrine. D'une part, on y voyait le danger que la réglementation de certains types de contrats pourrait susciter, d'autre part, on craignait la mise en cause de l'autonomie du droit commercial et, par là même, sa disparition. Malgré l'unification, celui-ci n'a cependant pas disparu. Il semble même avoir conservé son autonomie, cette fois-ci sous une nouvelle dénomination : le droit de l'entreprise.

b. Le dépassement de la notion de droit commercial : l'affirmation du droit de l'entreprise

L'unification réalisée par le législateur en 2002 a contribué au dépassement de la notion de droit commercial. Désormais, sous la rubrique Droit de l'entreprise (*Direito da empresa*)[126], le Livre II de la

l'exécution et l'extinction des obligations (art. 304 s. CC/02). L'arbitrage pourra également apporter quelques contributions en ce domaine dans un futur proche. V. VIEIRA DA COSTA CERQUEIRA (G.), « Garantias e exclusão da responsabilidade no novo direito brasileiro da compra e venda », in: Grundmann (S.) et dos Santos (M.) (dir.), *Direito contratual entre liberdade e protecção dos interesses e outros artigos alemães-lusitanos*, Coimbra, Almedina, 2008, p. 89-153.

124 WITZ (Cl.), « Regards d'un juriste européen sur le nouveau Code civil brésilien », art. préc. p. 29.

125 *Ibid*.

126 Conversion déjà pressentie par Waldemar Ferreira lors du centenaire du Code de 1950. Cf. FERREIRA (W.), « O código comercial no século », *Rev. de direito mercantil,* vol. 1 (1951), p. 7-20, p. 20.

Partie spéciale du Code civil de 2002 (arts. 966 à 1.195)[127] réglemente le *droit de l'entrepreneur* (*direito do empresário*), le *droit des sociétés*, le *droit d'établissement* et quelques *institutions complémentaires du commerce*.

Sous l'égide de la notion d'entreprise, qui n'est d'ailleurs pas définie dans le nouveau Code civil[128], la figure du *commerçant* a été remplacée par celle de *l'entrepreneur*. Il semblerait néanmoins que le nouveau Code conserve dans une large mesure le critère subjectif[129] adopté jadis par le Code de commerce de 1850, dans la mesure où l'empresário demeure au centre de l'activité entrepreneuriale, tel que l'était le commerçant vis-à-vis de la loi commerciale abrogée[130]. La définition actuelle d'*empresário* (art. 966)[131], comme étant *celui qui exerce une activité économique organisée en vue de la production ou de l'échange des biens et des services*, n'est d'ailleurs pas suivie d'une spécification quelconque des actes qui caractérisent objectivement une telle activité économique[132]. Tout comme auparavant, l'*empresário* doit être inscrit dans le *Registro público de empresas mercantis* avant de démarrer ses activités (art. 967)[133]. La même logique se présente

127 D'autres dispositions du nouveau Code civil sont également applicables en la matière, à l'instar des arts. 45, 48, 50, 51 (dispositions générales concernant les personnes morales); des arts. 83, III, 89, 90, 91 (sur les biens); des arts. 927, § unique, 932, III, 933 (sur la responsabilité civile); et des arts. 2.031, 2.033, 2.035, 2.037 et 2.045 (concernant les dispositions transitoires).

128 Concept que la doctrine brésilienne formule d'une façon double, l'entreprise se présentant à la fois comme objet et comme sujet de droit. Cette tendance de la doctrine a été mise en lumière par C. V. COUTO E SILVA, « O conceito de empresa no direito brasileiro », *Revista da Ajuris*, n° 37, 1986, p.42-59.

129 R. REQUIÃO parle d'un *concept subjectif moderne* (*Curso de direito comercial*, op. cit., p. 14). V. AGUILAR VIEIRA (I.) et VIEIRA DA COSTA CERQUEIRA (G.), « L'influence du Code de commerce français au Brésil », art. préc., p. 68 *sq*.

130 Un auteur a même parlé d'un retour au critère subjectif à travers la théorie de l'entreprise : GOMES DA SILVA (S. A. R.), « Teoria da empresa – um retorno ao critério subjetivo », *Revista dos Tribunais*, vol. 783, 2001, p. 16 *sq*.

131 Inspirée *ipsis litteris* de l'art. 2082 du *Codice civile italien*. Par ailleurs, le nouveau Code se préoccupe, d'une part de ne pas qualifier d'empresário celui qui exerce une profession intellectuelle, de nature scientifique, littéraire ou artistique, même avec la concurrence d'assistants ou de collaborateurs, sauf si l'exercice de la profession constitue un élément de l'entreprise (art. 966, §1), ainsi que la société dite simple (art. 982); et, d'autre part, de prêter cette qualification à l'entrepreneur, dont l'activité agricole constitue sa profession principale (art 971).

132 Selon A. WALD (« L'entreprise et le Code civil brésilien », art. préc., p. 265), ce texte ne se limiterait pas au seul domaine de la circulation, mais comprendrait aussi l'industrie, sous toutes ses formes.

133 La définition actuelle de la notion d'entrepreneur se base sur l'ancienne définition d'activité commerciale (art. 4 du Code de 1850, combiné avec l'art. 19 Regulamento n° 737 de 1850), dans la mesure où elle distingue les activités entrepreneuriales et celles qui ne le sont pas (art. 966 et 1044, p. ex.), en qualifiant les premières d'activités économiques exercées de façon

d'ailleurs pour l'*entreprise* (société, non plus *commerciale* mais *entrepreneuriale*), car la définition de celle-ci se base sur celle de l'empresário et son inscription a lieu auprès du même registre prévu pour l'inscription de celui-ci (art. 982).

La réglementation de l'entreprise au sein du Code civil a créé une nouvelle configuration de la matière. L'entreprise surgit comme un élément unificateur[134]. Elle semble apporter au concept de société une nouvelle portée qui, sans en modifier la structure, lui ouvre un champ d'application nouveau. En ce sens, l'*entreprise* est désormais soumise au *principe fondamental de la sociabilité*, étant à la fois attachée à la *fonction sociale du contrat* et à la *fonction sociale de la propriété*. On ne distingue plus les sociétés civiles et commerciales, mais désormais les *sociétés simples* et les *sociétés entrepreneuriales*. On a également introduit dans le nouveau Code civil une réglementation ferme sur la responsabilité du chef d'entreprise ainsi que la théorie de la levée du voile social (art. 50), déjà admise en matière de protection du consommateur (art. 28 CDC) et reconnue par la jurisprudence en matière de protection du travailleur[135]. En outre, le nouveau Code règle désormais la phase précédant l'acquisition de la personnalité morale de la société sous la dénomination de société en commun, à côté de la société en participation, faisant en sorte que les sociétés créées de fait quittent le cadre du droit commun[136]. La nouvelle loi couvre également le groupe, la liquidation, la transformation, l'incorporation, la fusion et la scission des sociétés, ainsi que, de façon originale, l'autorisation, la nationalité et la liberté d'établissement liée à la société étrangère (arts. 1097 à 1141)[137].

professionnelle. Les définitions sont tellement proches que le nouveau Code civil détermine dans son article 2.037 que « sauf disposition contraire, s'appliquent aux entrepreneurs et aux sociétés entrepreneuriales les dispositions de loi non abrogées par ce code qui s'appliquent aux commerçant, aux sociétés commerciales et aux activités commerciales ». En ce sens, v. AGUILAR VIEIRA (I.) et VIEIRA DA COSTA CERQUEIRA (G.), « L'influence du Code de commerce français au Brésil », art. préc., p. 70, *ad notam* 230.

134 Dans ce sens, v. COUTO E SILVA (C. V.), « O conceito de empresa no direito brasileiro », art. préc., p.42-59. V. aussi LIPPERT (M. M.), *A empresa no Código Civil, elemento de unificação no direito privado*, São Paulo, RT, 2003.

135 A propos, VIEIRA DA COSTA CERQUEIRA (G.), « Lever le voile social. Regards croisés en droit des sociétés français et brésilien », in : *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien. Études de droit comparé, op. cit*., p 339-382 ; « A desconsideração da personalidade jurídica no direito brasileiro. Entre subsunção e concreção, uma teoria em prol da pessoa jurídica», in : Verträge der Deutsch-Lusitanischen Juristenvereinigung, *op. cit*., p. 91-128.

136 CARUSO MAC-DONALD (N. C.), « O Projeto de Código civil e o direito comercial », *Revista da Faculdade de Direito da UFRGS*, vol. 16 (1999), p. 139-160, p. 154.

137 A propos, v. LIMA MARQUES (C.), « Das neue brasilianische Zivilgesetzbuch vom 2002: … », art. préc., p. 138-142.

Le nouveau Code civil brésilien régit également l'établissement (arts. 1142 à 1149) et quelques institutions complémentaires du commerce (arts. 1150 à 1195). Défini comme « tout complexe de biens organisés, pour l'exercice de l'entreprise, par l'entrepreneur, ou par la société entrepreneuriale » (art. 1142), l'établissement intègre le concept même d'entreprise[138] et surgit comme une nouvelle manière de voir le fonds de commerce, sous une dimension objective. Les institutions complémentaires régies par le Code civil, non sans faire appel aux lois spéciales, sont le registre (arts. 1150 à 1154), le nom entrepreneurial (arts. 1155 à 1168), les préposés (arts. 1169 à 1178) et les livres (arts. 1179 à 1195).

L'incorporation dans le Code civil brésilien du droit de l'entreprise a suscité la critique d'une certaine doctrine pour qui un tel droit est comme un « corps étranger », sans aucune relation interne impérative avec les autres parties du code[139]. Le droit de l'entreprise aurait dû faire l'objet d'une réglementation spécifique, propre à ce domaine particulier du droit[140]. Par ailleurs, les lacunes ne sauraient être négligées, comme en matière de responsabilité de l'entrepreneur individuel ou encore, jusqu'en juillet 2011, sur la possibilité de constitution d'une société unipersonnelle à responsabilité limitée, à l'image du droit italien, dont le code s'inspire[141]. L'absence de normes générales en matière de droit de la concurrence, de la propriété intellectuelle, d'entreprises en difficultés, ainsi qu'en droit maritime ou du transport aérien, constitue davantage un autre facteur de critique du nouveau Code[142].

En effet, nonobstant l'unification des obligations civiles et commerciales et la codification du droit de l'entreprise, la tendance en droit privé brésilien est celle de conserver un large arsenal législatif non codifié. Ainsi, alors que certains nouveaux types de contrats commerciaux ne font pas l'objet de réglementation, ce qui compromet l'unité et la systématisation qu'on attend d'un code[143], une grande partie des matières que l'on peut ranger dans le domaine du droit de

138 LIPPERT (M. M.), *A empresa no Código Civil, elemento de unificação no direito privado*, *op. cit*., p. 122

139 COMPARATO (F. K.), *Atualidades*, p. 177.

140 BULGARELLI (W.), *Tratado de direito empresarial*, São Paulo, Atlas, 2000, p. 191.

141 Sous la dénomination d'« entreprise individuelle à responsabilité limitée », fut récemment introduite la notion de société unipersonnelle en droit brésilien par la Loi n° 12.441 du 9 juillet 2011 (*DOU* de 12.7.2011.). La seule forme de société unipersonnelle jusqu'alors admise était la société subsidiaire intégrale d'une société anonyme, prévue à l'art. 251 n° 6.404, du 15 décembre 1976 sur les sociétés par actions.

142 JAEGER Jr. (A.), "*Das neue brasilianische Bürgerliche Gesetzbuch und das Unternehmensrecht*", in Jayme (E.) et Schindler (Ch) (dir), Portugiesich – Weltsprache des Rechts, op. cit., p. 217-235, p. 223.

143 KONDER COMPARATO (F.), « Projeto de Código civil », *RDM* n° 17 (1975), p. 173-175.

l'entreprise demeure réglementée en dehors du Code civil, à l'instar de la Loi n° 6.404, du 15 décembre 1976 sur les sociétés par actions et de la Loi n° 11.101, du 9 février 2005 sur les entreprises en difficultés[144].

Une telle configuration de la matière codifiée qui, selon ses détracteurs, compromet l'unité et la systématisation qu'on attend d'un code[145], pourrait toutefois connaître des évolutions importantes en cas d'avènement du nouveau code de commerce, dont le projet est actuellement en débat au Congrès national[146]. Avec l'objectif de redonner une autonomie systématique et méthodologique au droit de l'entreprise, ce projet réglemente la matière de manière plus large que l'actuel Code civil. Outre l'entreprise, les sociétés entrepreneuriales et les obligations et contrats entrepreneuriaux, le projet dédie un quatrième livre aux dispositions matérielles du traitement des entreprises en difficulté[147], renouant ainsi avec la tradition française (codes de 1807 et de 2000), de laquelle l'ancien code de commerce de 1850 faisait déjà écho[148].

Il faut ainsi reconnaître qu'au Brésil le nouveau Code civil s'exprime, non sans quelques difficultés, dans le langage propre au droit commercial, désormais identifié comme droit de l'entreprise. L'étendue du champ d'application du nouveau Code civil reste néanmoins délimitée par la micro-systématisation de la protection du consommateur.

c. La micro-systématisation de la protection des consommateurs

Le Code de protection des consommateurs de 1990 s'est voulu plus protecteur qu'un véritable code de la « consommation » pour un agent économique considéré plus faible: le consommateur. Malgré une certaine transversalité (vu qu'il traite des questions liées à la procédure ou aux infractions pénales et à l'organisation du système national de protection du consommateur), ce Code ne vise toutefois pas le marché de la consommation dans toutes ses composantes, à commencer par la concurrence et les situations de surendettement[149]. Par conséquent,

144 Une liste des principales normes de droit privé en vigueur se trouvent dans WALD (A.), « Le droit brésilien pendant la deuxième moitié du XXe Siècle », art. préc., p. 183-198, p. 197 sq.

145 KONDER COMPARATO (F.), « Projeto de Código civil », *art. préc*., p. 173-175.

146 V. *supra*, I.A.3.b.

147 Le projet d'une Code de commerce brésilien est ainsi composé de cinq livres, destinés à règlementer, successivement, l'entreprise, les sociétés entrepreneuriales, les obligations des entrepreneurs, la crise de l'entreprise et les dispositions finales et transitoires. Les aspects procéduraux du régime applicable aux sociétés en difficultés demeureraient régis par la Loi nº 11.101 de 2005.

148 AGUILAR VIEIRA (I.) et VIEIRA DA COSTA CERQUEIRA (G.), « L'influence du Code de commerce français au Brésil », art. préc., p. 27-77.

149 LIMA MARQUES (C.), « L'expérience de la codification et de la réforme du droit de la

le CDC tend à former une sorte de microsystème au sein du droit privé brésilien[150], dont les règles ont vocation à régir tous les rapports juridiques entre un consommateur et un professionnel (*fornecedor*), que leur origine soit contractuelle, précontractuelle ou extracontractuelle, ou encore de nature interne ou international[151], auquel cas la jurisprudence l'applique en tant que loi d'application immédiate[152].

Ce Code aboutit à une protection maximale du consommateur aussi bien matérielle (notamment les articles 6 à 54, couvrant les droits fondamentaux des consommateurs ; la protection à la santé et la sécurité des produits ; la responsabilité du fait du produit et du service ; la responsabilité par défaut de conformité ; la déchéance et la prescription ; la mise à l'écart de la personnalité juridique ; les pratiques commerciales ; la protection contractuelle, dont celle contre les clauses abusives et les contrats d'adhésion) que procédurale (notamment les articles 81 à 104, couvrant les conditions, les modalités et les règles procédurales des actions individuelles et collectives visant la protection du consommateur, ainsi que sur la chose jugée) et aussi bien interne qu'internationale (cf. art. 1er).

Une révision du Code de 1990 est néanmoins en cours afin d'en étendre le périmetre. Une commission des juristes instituée par la présidence du Sénat le 10 décembre 2010 et présidée par un Conseiller du STJ, le professeur A. Herman Benjamin, a présenté, le 14 mars 2012, trois avant-projets de loi. Ces derniers visent à adapter les règles de protection des consommateurs aux nouvelles technologies, notamment au commerce électronique, mais aussi à mettre en place des mécanismes de prévention et de traitement du surendettement du consommateur individuel, et enfin à perfectionner les mécanismes d'accès à la justice,

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consommation au Brésil », art. préc., p. 74-91. A propos, v. DANILEVICZ BERTONCELLO (K. R.), « Surendettement et droit de la consommation - Rapport brésilien », in *Droit français et droit brésilien: perspectives nationales et comparées, op. cit*., p. 1007-1035 ; et GRAEFF (B.) et PEREIRA (W.), « commentaires », ouvrage précité, p. 1036 *sq.*

150 V. TEPEDINO (G.), « Les contrats de consommation au Brésil », *op.cit.*, p. 433-435 ; VASCONCELLOS BENJAMIN (A. H.) ; LIMA MARQUES (C.); ROSCOE BESSA (L.), Manual de Direito do Consumidor, 3e ed. São Paulo, RT, 2010.

151 Cf. VIEIRA DA COSTA CERQUEIRA (F.), « Le régime de détermination de la loi applicable aux contrats conclus par les consommateurs en droit français et en droit brésilien », in Les frontières entre liberté et interventionnisme en droit français et en droit brésilien– Études de droit comparé, *op. cit.*, p. 399-424; LIMA MARQUES (C.), « Rapport national : droit brésilien », rap. préc., p. 47-95 ; ZANCHET (M.), « A proteção dos consumidores no Direito Internacional privado brasileiro», Revista de Direito do Consumidor, vol. 62 (2007), p. 172-219; DEL'OLMO (F.), « Direito do consumidor e direito internacional privado », *Revista de Direito do Consumidor*, vol. 68 (2008), p. 108-116.

152 FRIEDRICH (T. S.), *Normas Imperativas de Direito Internacional Privado – Lois de Police*, Belo Horizonte : Forum, 2007, p. 199 *sq*.

notamment par le biais des actions collectives[153]. Par ailleurs, des règles de conflit de lois et de conflit de juridictions, fortement inspirées du projet de convention interaméricaine en la matière et des règlements européens actuellement en vigueur, complètent le cadre de cette réforme.

En y introduisant des règles de conflit de lois et de juridictions, des règles sur le contrat électronique[154] et sur la protection des données, sur le traitement du crédit, sur l'endettement et les moyens procéduraux de défense du consommateur, la révision entamée en 2010 tend à étendre le champ d'application matériel du Code de protection des consommateurs dans une démarche transversale propre au droit de la consommation[155].

3. L'architecture des principaux codes de droit privé

Voyons brièvement comment le législateur brésilien a entendu organiser les matières à l'intérieur des principaux codes de droit privé, en commençant toujours par le(s) Code(s) civil(s) (a), ensuite par le Code de commerce (c) et, enfin, par le Code de protection des consommateurs (c).

a. Les Codes civils de 1916 et de 2002

153 Projets disponibles à l'adresse : http://www.senado.gov.br/senado/codconsumidor/pdf/Anteprojetos_finais_14_mar.pdf. Le rapport général préparé par Madame le Professeur C. Lima Marques se trouve disponible à l'adresse : http://www.senado.gov.br/senado/codconsumidor/pdf/extrato_relatorio_final.pdf.

154 Il convient de mentionner que le 15 mars 2013 fut adopté, par la présidente de la République, le Décret n° 7962 portant sur le commerce électronique. Ce décret, destiné à réglementer le CDC en ce qui concerne le contrat conclu par un consommateur par voie électronique ou similiaire, reprend l'essentiel de l'avant-projet de loi sur la question, présenté par la Commission des juristes en 2012 (v. *supra*, note 153). Le nouveau décret réglemente le droit d'information du consommateur sur le site, les produits et services y commercialisés, les modalités de contractation et de traitement des opérations de paiement en ligne, ainsi que le droit de rétractation . Les solutions relatives au *spam*, au système de sanctions et aux conflits de lois et de juridictions préconisés par l'avant-projet de 2012 en la matière n'ont cependant pas été reprises par le nouveau décret. Cela se comprend aisément : les sanctions, notamment pénales, et les règles de conflit de lois et de juridictions doivent être introduites par la loi et ne peuvent pas faire l'objet d'un décret réglementaire émanant de l'exécutif.

155 Il convient de noter que, comme l'ont affirmé J. Calais-Auloy et F. Steinmetz, une définition du droit de la consommation « n'est ni possible, ni utile », dans la mesure où les disciplines juridiques « n'ont jamais de frontières tracées au cordeau ». Si le droit de la consommation peut être plus étendu qu'un Code de la consommation, il n'en demeure pas moins que c'est celui-ci qui en contient les règles les plus importantes. Cf. CALAIS-AULOY (J.) et STEINMETZ (F.), *Droit de la consommation*, 7e éd., Dalloz, 2006, n° 17. Les auteurs remarquent tout de même l'utilité de définir le professionnel et le consommateur, car ces notions délimitent le domaine d'application des principales règles du droit de la consommation (*Ibid*., n° 17, p. 18, *ad notam*1).

Le Code civil brésilien de 2002, ainsi que celui de 1916, n'a pas suivi le modèle français, dont le plan s'inspirait des Institutes de Gaius et de Justinien – personnes, biens, actions[156] – et qui était le modèle le plus répandu en matière de codification civile[157]. En effet, le code brésilien présente une structure binaire, comprenant une Partie générale et une Partie spéciale[158]. La première contient des dispositions dominant l'ensemble du droit civil et dont l'application est prévue par la Partie spéciale. Comme dans le Code de 1916, la Partie générale du Code de 2012 contient trois livres : Livre I – « Des personnes » ; Livre II – « Des Biens » et Livre III – « Des faits juridiques ». La Partie spéciale comporte cinq livres, dont quatre existants auparavant : Livre I – « Du droit des obligations » ; Livre II – « Du droit de l'entreprise » ; Livre III – « Du droit des Choses » ; Livre IV – « Du droit de la famille » ; Livre V – « Du droit des successions »[159]. Un livre complémentaire contient les dispositions finales et transitoires. Le nouveau Code compte 2.046 articles[160].

L'architecture des codes civils brésiliens suit la division pensée et mise en œuvre par Teixeira de Freitas lors de l'élaboration de la Consolidation des lois civiles de 1857 et, plus tard, dans son Esboço de Código Civil de 1860 (Première partie). Ce juriste avait proposé une division particulière aux deux textes qui n'était ni celle des Institutes, ni celle des Ordonnances Philippines, ni celle du Code Napoléon ou d'autres codes qu'il avait à sa disposition, ni celle enfin des auteurs portugais qu'il connaissait[161]. En effet, il s'était inspiré de

156 « Le plan tripartite [du Code civil] est celui des Institutes, remanié au XVIIe siècle par le juriste et philosophe allemand Leibniz et les jurisconsultes de l'Ecole du droit naturel » (J.-L. THIREAU, *Introduction historique au droit*, 3e éd., Paris, Flammarion, coll. « Champs Université », 2009, p. 307).

157 « La plupart des États qui, au cours du XIXe siècle, se dotèrent de Codes prirent exemples sur les codes napoléoniens, empruntèrent leur plan et nombre de leurs règles de fond, tout en les adaptant aux conditions et aux traditions locales » (J.-L. THIREAU, *op. cit*., p. 318). Cette influence « s'est [maintenue] jusqu'à la fin du XIXe siècle, où le modèle allemand est venu quelque peu l'éclipser » (J.-M. CARBASSE, *op. cit*., n° 210).

158 V. JACOB DE FRADERA (V. M.), « La partie générale du Code civil », in *Le droit brésilien : hier, aujourd'hui et demain*, *op. cit.*, p. 203-221.

159 L'ordre de la Partie spéciale du code de 1916 était le suivant : Livre I – « Du droit de la famille » ; Livre II – « Du droit des Choses »; Livre III – « Du droit des obligations » ; Livre IV – « Du droit des successions ».

160 Le Code de 1916 en comptait 1 807.

161 Le plan de la Consolidation fut établi en fonction de la distinction entre droits réels et absolus, et droits personnels et relatifs. Son architecture était ainsi conçue : une partie générale et une partie spéciale. Cette dernière comportait un Livre I, dans lequel étaient réglementés les droit personnels, soit dans les relations de famille (mariage, puissance paternelle, relations de parenté, tutelle et curatelle), soit dans les relations dites civiles (causes génératrices de droits, contrats et délits, causes d'extinction des droits). Un seconde livre était consacré aux droits réels

la pandectiste allemande[162,] fondatrice de l'idée d'une partie générale regroupant l'ensemble des institutions et des concepts applicables au droit privé[163]. Si nous laissons de côté le projet de Code civil pour la Sache de 1852, duquel Teixeira de Freitas n'avait vraisemblablement pas eu connaissance, la Consolidation de lois civiles fut la première solution législative à avoir adopté le plan bipartite[164].

Nonobstant une « étroite parenté » unissant les deux Codes civils brésiliens au *Bürgerliches Gesetzbuch*, ce qui a suggéré leur classement dans le « système des cinq livres »[165], le professeur Claude Witz[166] a justement remarqué que « le plan du Code de 2002, tout comme celui de 1916, s'opposent sous un angle formel au plan du BGB, qui s'articule en cinq Livres, les Livres 2 à 5 formant par leur contenu une réglementation particulière par rapport au livre Ier (Partie générale) ». L'auteur en conclut finement qu'« en érigeant la réglementation du droit des obligations, du droit de l'entreprise, du droit des choses, du droit de la famille et du droit des successions en 'partie spéciale', la codification brésilienne rejoint paradoxalement l'ordonnancement en deux parties, cher à la tradition d'exposition de la doctrine française »[167] .

Le plan bipartite se répandra ultérieurement sur quelques codes et lois brésiliennes de dimension importante, à l'instar du Code pénal et de l'actuel projet de Code de procédure civile de 2010, la codification commerciale de 1850 n'ayant toutefois pas suivi ce modèle.

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comme la propriété, les servitudes, les successions, les hypothèques et l'usucapion. La partie générale précédant ces deux livres spéciaux contenait des dispositions concernant les personnes et d'autres concernant les choses. Il est à noter que si Teixeira de Freitas était un internationaliste, il n'a pas doté la *Consolidation de lois civiles* des règles de conflit, contrairement au législateur français de 1804. Cela est très compréhensible, car, d'une part, le Code français ne l'inspirait pas tellement et, d'autre part, conformément à la doctrine dominante à l'époque, les questions de DIPr relevaient des rapports entre nations et du droit de gens, et non du droit privé. À propos, v. R. DAVID, « Le droit brésilien jusqu'en 1950 », art. préc., p. 67-70.

162 SCHMIDT (J. P.), *Zivilrechtskodifikation in Brasilien*, Tübingen, Mohr Siebeck, 2009, p. 331 sq ; VALLADÃO (H.), *Einfluss des deutschen Rechts auf das brasilianische Zivilgesetzbuch* (1857-1922), Rio de Janeiro, s.n., 1973 ; LIMA MARQUES (C.), « Das BGB und das brasilianische Zivilgesetzbuch von 1916 », in Jayme (E.) et Mansel (H.-P.) (Hrsg.), *Auf dem Weg zu einem gemeineuropäischen Privatrecht - 100 Jahre BGB und die lusophonen Länder* Baden-Baden: Nomos, 1997, p. 73-97.

163 Ainsi les règles relatives aux personnes, aux choses, aux actes d'affaire, à la prescription et à la déchéance.

164 Ansi, SCHMIDT (J. P.), *Zivilrechtskodifikation in Brasilien, op. cit*., p. 337.

165 Cf. EICHLER (H.), « Codificação do direito civil e teoria dos sistemas de direito », trad. R. Limongi França, *Revista de direito civil*, 1977, vol. 2, p. 43-58, p. 45.

166 WITZ (Cl.), « Regards d'un juriste européen sur le nouveau Code civil brésilien », art. préc., p. 33.

167 *Idem, ibidem*.

b. Le Code de commerce de 1850

Le Code de commerce brésilien de 1850 comporte trois parties, à savoir : « Du commerce en général » (arts. 1er à 456), « Du commerce maritime » (arts. 457 à 796), « Des faillites » (arts. 797 à 913). Il contenait en plus un « Titre unique » portant sur l'« administration de la justice dans les affaires et causes commerciales ». Ainsi, ce Code n'a pas adopté un plan binaire. Il a également évité une division trop détaillée et « hiérarchisée » des matières, ce qui a rendu difficile une meilleure appréhension et une rapide circonscription de leur réglementation.

À la différence de la codification civile, le Code de 1850 se présentait à l'image du Code français de 1807. Seule la réglementation de la juridiction commerciale[168] manquait pour que le code de commerce brésilien lui soit équivalent au plan formel. En revanche, il semble l'avoir particulièrement suivi dans la composition de sa première partie, également intitulée « Du commerce en général ». À l'image du premier livre du Code français de 1807, la première partie du Code de commerce brésilien régissait, dans ses 456 articles, les commerçants, les livres de commerce et la comptabilité, les auxiliaires du commerce, les banquiers, les obligations et les divers contrats commerciaux, la lettre de change et le billet à ordre, les sociétés commerciales, entre autres. Comme pour le code français, l'intitulé de la première partie suggérait que le reste du Code serait consacré au commerce en particulier, ce qui n'a pas été le cas. La similitude de forme du premier livre des deux codes ne révélait cependant pas les différences existant dans leurs contenus respectifs. À cet égard, alors que la réglementation des obligations et des contrats commerciaux est pratiquement inexistante dans le Code français de 1807, elle tenait une place prépondérante dans le Code brésilien de 1850, faute d'une réglementation civile de la matière la précédant comme en France. Enfin, à l'époque de sa promulgation, le code brésilien présentait plus de dispositions normatives (913 articles) que le Code de commerce français (648 articles).

c. Le Code de protection du consommateur de 1990

Pluridisciplinaire, le Code de protection du consommateur présente une structure reflétant la politique que l'État brésilien établit

168 Alors réglementée par le *Regulamento* n° 738, du 25 nov. 1850, et abrogée par le Décret-loi n° 1608, du 18 sept. 1939, instituant le précédant Code de procédure civile.

pour la protection du consommateur[169].

Le CDC contient 119 articles distribués dans cinq titres. Le Titre I, intitulé « Des droits des consommateurs », abrite les dispositions générales, celles destinées à la politique nationale des rapports de consommation, aux droits fondamentaux des consommateurs, à la qualité des produits et des services, à la prévention et à la réparation des dommages, aux pratiques commerciales, à la protection contractuelle ainsi qu'aux sanctions administratives. Le Titre II est dédié aux infractions pénales, alors que le Titre III apporte des règles et des mécanismes spécifiques à la protection individuelle et collective du consommateur dans le cadre de la procédure. Un quatrième titre s'occupe plus particulièrement du système national de protection du consommateur et un cinquième titre réglemente la convention collective de consommation, suivi de quelques dispositions transitoires.

La révision en cours de ce Code devra aboutir à des modifications à l'intérieur de Titres afin d'accueillir des nouveaux chapitres et des nouvelles sections contenant la réglementation de nouvelles matières mentionnées auparavant[170].

4. Le style des principaux codes

Ce qui caractérise le style législatif « c'est tout à la fois le degré de généralité des normes ou le recours à une réglementation tatillonne, la propension à l'abstraction ou aux situations concrètes, la précision ou la souplesse des normes, l'emploi de concept-cadres, ou encore l'élégance de la formulation »[171]. La fonction structurante du langage juridique et le discours porté par elle seront tributaires de la manière dont non seulement la langue est maniée mais aussi dont la discipline juridique est charpentée.

La tradition d'une partie générale extrêmement didactique est un trait caractéristique de la codification civile et de celles que ce modèle a influencées. Par là, on peut se rendre compte de l'importance du style pour le législateur brésilien. La longue durée de discussion et d'approbation du Projet de Code civil de 1916 l'illustre parfaitement : elle est due en grande partie à la vive controverse sur le langage et le style du Projet, engagée entre le Sénateur Ruy Barbosa et Clóvis Beviláqua, auteur du Projet de 1899. À ce débat formel du texte ont pris part des nombreux grammairiens et philosophes brésiliens, qui furent à l'origine d'une vaste littérature sur ce sujet. Outre leur importance pour

169 LANNI (S.), *Brasile*, art. préc., p. 147 sq.

170 Cf. *supra*, I.B.2.c.

171 WITZ (Cl.), « Regards d'un juriste européen sur le nouveau Code civil brésilien », art. préc. p. 33.

la fixation au Brésil de la langue écrite[172], ces ouvrages, ainsi que les débats au sein du Congrès, ont contribué à ce que le Code de 1916 ait un style amélioré et un langage plus simple et plus vigoureux[173].

La codification de 2002 n'a également pas échappé au souci de présentation des nouvelles règles. Mais elle a été marquée cette fois-ci moins par les préciosités grammaticales que par la nécessité d'établir un ensemble cohérent et accessible. Ainsi, en raison du décalage entre le Code de 1916 et la société brésilienne actuelle, la commission mise sur pied pour élaborer le projet de nouveau Code civil avait la mission de présenter un texte plus opérationnel. Cette exigence visait à : éliminer les doutes liés à certaines incertitudes et controverses[174]; supprimer des synonymes pouvant être source de confusion ; et établir des clauses générales, afin d'adapter le mieux possible le droit aux circonstances[175]. Une modernisation terminologique était par ailleurs jugée nécessaire par la doctrine. Cette dernière a relevé que dès 1950 il y avait un droit civil propre au Code civil de 1916 et un droit civil résultant des lois postérieures et de la jurisprudence qui allaient « au-delà du Code »[176]. Tout en la modernisant, le nouveau Code n'aura cependant pas rompu avec la technique de rédaction de la législation antérieure[177].

172 F. C. PONTES DE MIRANDA, *Fontes e evoluções do direito civil brasileiro, op. cit*., p. 84-85.

173 DAVID (R.), « Le droit brésilien jusqu'en 1950 », art. préc., p. 85-86.

174 C'est notamment le cas des nullités. Avant l'entrée en vigueur du Code de 1916, les nullités étaient traitées par le *Regulamento* n° 737 du 25 novembre 1850 (Règlement instituant les actes de commerce et la justice consulaire) qui adoptait la division consacrée par la doctrine française entre « nullités absolues » et « nullités relatives ». Le Code de 1916 n'a cependant pas suivi cette division, en instituant les notions d'« actes nulles » et d' « actes annulables » (arts. 145 à 158). Le nouveau Code civil de 2002 a retenu cette classification, tout en y apportant des précisions techniques par rapport aux dispositions du Code abrogé. Désormais la matière est traitée dans les articles 166 à 184, du chapitre V, intitulé « *Da invalidade do negócio jurídico* » (« De l'invalidité de l'acte juridique »), qui appartient au Titre I, (« *Do negócio jurídico* »), du Livre III (« *Dos fatos juríricos* ») de la Partie générale du nouveau Code. Du fait de cette classification « dualiste » on relève également deux régimes juridiques en la matière : soit on est en face des hypothèses d'« actes juridiques nuls » (arts. 166 à 170), soit des hypothèses d'« actes juridiques annulables » (arts. 171 à 184). La déclaration de la nullité de l'acte, qu'il s'agisse d'un acte nul ou d'un acte annulable, requiert toujours l'intervention du juge. Un autre exemple marquant est la réglementation distincte de la prescription (arts. 189 à 206) et de la déchéance (arts. 207 à 211), alors inexistante sous l'empire du Code de 1916.

175 A l'instar de l'art. 113, selon lequel les actes juridiques doivent être interprétés selon la bonne foi et les usages du lieu de leur réalisation ; de l'art. 422, selon lequel les contractants sont tenus d'agir en bonne foi tant dans la conclusion que lors de l'exécution du contrat; ou de l'art. 187, sur l'abus de droit, selon lequel « le titulaire d'un droit qui, en l'exerçant excède manifestement les limites imposées par sa fin économique ou sociale, par la bonne foi ou par les bonnes mœurs, commet ainsi un acte illicite ».

176 WALD (A.), « *Le droit brésilien et le Code civil de 2002* », art. préc., p. 23.

177 *Ibid.*, p. 22. Gustavo Tepedino et Anderson Schreiber proposent pourtant une autre lecture

Il est à noter avec M. Claude Witz[178] que « les normes s'articulent en phrases courtes, dont le sens est généralement compréhensible dès la première lecture », mais la légèreté de la réglementation confine parfois à l'imprécision, à l'instar de la nullité de clauses au sein des contrats d'adhésion (art. 424), remarque l'auteur, et sur laquelle nous avons eu déjà l'occasion de mener une analyse plus spécifique[179].

Toujours selon M. Witz[180], le nouveau Code civil brésilien rejoint le Code civil français dans la mesure où tous deux s'en tiennent aux lignes directrices de la codification. En effet, Portalis estimait que « *l'office de la loi est de fixer, par de grandes vues, les maximes générales du droit : d'établir des principes féconds en conséquence, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière* »[181]. De la même manière au Brésil, Miguel Reale énonça l'opérationnalité[182] comme un principe guidant la formulation de nombreuses règles ; le réel contenu de ces dernières devant être dégagé, *a posteriori*, de manière concrète par la pratique, notamment jurisprudentielle, plutôt que, *a priori*, par un traitement législatif exhaustif ou trop détaillé de la matière.

Quant à la codification commerciale, il est à noter que, par manque de choix, le législateur brésilien a suivi la manière dont sont présentés encore de nos jours les articles dans les codes français, tant dans la façon de les rédiger que dans celle de les numéroter. En ce sens, les articles du Code de 1850 ne comportaient aucun intitulé ni mention

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de la technique législative du Code de 2002 : « l'innovation la plus valorisée du Code Civil de 2002 se trouve dans le changement de la technique législative employée dans le traitement des relations privées. Inspiré des exemples fournis par les statuts plus récents, "le législateur emploie les clauses générales, abdiquant la technique règlementaire qui, sous l'égide de la codification, définit les types juridiques et les effets qui en découlent. Il revient à l'interprète de faire ressortir des clauses générales les incidentes fonctions qui se reflètent sur d'innombrables situations futures, dont quelques-unes n'ont même pas été prises en compte par le législateur, mais qui sont cependant soumises au traitement législatif prétendu, du fait qu'elles s'insèrent dans certaines situations-standards: la typification formelle donne lieu à des clauses générales, globales et ouvertes" ». (G. TEPEDINO et A. SCHEREIBER, « *Culture et droit civil* : rapport brésilien », in Travaux de l'Association Henri Capitant, Tome LVIII – *Droit et culture* : journées louisianaises (19-23 mai 2008), Bruxelles, Bruylant, 2010, p. 87-98.

178 WITZ (Cl.), « Regards d'un juriste européen sur le nouveau Code civil brésilien », art. préc., p. 33-34.

179 Cf. VIEIRA DA COSTA CERQUEIRA (G.), « *Garantias e exclusão da responsabilidade no novo direito brasileiro da compra e venda* », art. préc., p. 132-139.

180 Ainsi, WITZ (Cl.), « *Regards d'un juriste européen sur le nouveau Code civil brésilien* », art. préc., p. 34.

181 Portalis (J.-M.-E.), « *Discours préliminaire sur le projet de Code civil* », in Portalis (J.-M.-E.), Discours et rapports sur le Code civil, Caen, PUC, 2010, p. 66 (p. 8 du *Discours*).

182 V. *infra*, II.A.2.

marginale indiquant leur contenu[183]. Ils étaient parfois très longs et leurs alinéas comportaient plusieurs phrases sans numérotations. Ils possédaient parfois un langage imprécis et polysémique, à l'exemple de l'art. 121 qui établissait que les règles civiles applicables aux contrats en général s'appliquaient également aux contrats commerciaux. Dans cette disposition, comme l'avait observé J. X. Carvalho de Mendonça[184], le mot « contrats » devait être compris comme « obligations », car à l'occasion le législateur brésilien avait repris l'expression employée par l'art. 1101 du Code civil français tout en voulant se référer à l'« obligation », dont le contrat n'est qu'une des sources. À ces critiques, W. Ferreira a néanmoins répondu que :

> *« Celui qui se propose de justifier l'ancienneté du code commercial brésilien n'a pas à chercher en lui l'autorité classique de la langue, qui évidemment lui manque. Manifeste est son langage. Limpide sa phrase. Clairs leurs dispositifs, écrits par des opérateurs et par des juristes qui se sont efforcés pour que la grande loi du commerce fût à la portée de tous ceux qui se consacraient à l'activité professionnelle, médiateur entre l'offre et la demande de marchandises, aussi bien dans les marchés internes comme dans les marchés internationaux »*[185].

Le Code de protection des consommateurs, à son tour, contient, à côté des dispositions impératives, quelques dispositions « narratives », à l'instar de l'art. 4, dont l'importance systémique a été mise en valeur par le professeur Cláudia Lima Marques[186]. Aux termes de cet article, la *politique nationale de rapports de consommation* a pour objectif de satisfaire les nécessités des consommateurs, d'assurer le respect à leur dignité, à leur santé et sécurité, de promouvoir la protection de leurs intérêts économiques, de contribuer à l'amélioration de leur qualité de vie, ainsi que d'assurer la transparence et l'harmonie des rapports de consommation selon un certain nombre des principes comme celui de la reconnaissance de la vulnérabilité du consommateur au sein du marché, de l'obligation pour l'Etat de protéger le consommateur, de l'harmonisation des intérêts en jeu (protection du consommateur et développement économique et technologique) sur la base de la bonne

183 DAVID (R.), « *Le droit brésilien jusqu'en 1950* », art. préc., p. 99-100.

184 DAVID (R.), « *Le droit brésilien jusqu'en 1950* », art. préc., p. 99-100.

185 FERREIRA (W.), « *O código comercial no século* », art. préc., p. 9. [Nous avons traduit].

186 VASCONCELLOS BENJAMIN (A. H.) ; LIMA MARQUES (C.); ROSCOE BESSA (L.), *Manual de Direito do Consumidor, op. cit.* (chapitre II).

foi et de l'équilibre contractuel, de l'éducation et de l'information des professionnels et des consommateurs quant à leurs droits respectifs, et celui de la répression à l'abus au sein du marché, dont la concurrence déloyale.

Il convient encore de souligner l'accessibilité des codes brésiliens aux juristes d'autres systèmes de droit privé qui s'expriment dans des langues néo-romaines. En effet, une grande partie du vocabulaire juridique brésilien, notamment en droit privé, tend à une correspondance terminologique et conceptuelle considérable avec ceux de ces systèmes du fait de leur racine commune, le droit romain, et des influences réciproques. Une telle convergence révèle néanmoins l'existence de « faux amis » ainsi que de nuances non négligeables entre les institutions juridiques de ces différents systèmes. Deux exemples suffiront à les illustrer. Le premier, plus simple, tient à la confusion qui peut exister avec la terminologie juridique française. Ainsi, la *decadência* du droit brésilien qui ne doit pas être traduit par « décadence », mais par « déchéance »[187]. Le second exemple tient à la terminologie espagnole. Nonobstant la proximité des langues espagnole et portugaise et de leurs terminologies juridiques respectives, il existe une différence de sens des termes « filiale » et « succursale » en droit brésilien et dans les droits argentin, uruguayen, paraguayen et vénézuélien. En effet, les droits des sociétés des pays membres du Mercosur attribuent au mot « filial » des significations différentes. Les pays hispanophones emploient le terme « filial » pour désigner toute personne morale dont le capital est contrôlé par une société mère. L'acception argentine, paraguayenne, uruguayenne et vénézuélienne se rapproche ainsi de l'acception française du terme « filiale ». Pour le droit brésilien, une telle personne morale est désignée par le terme « subsidiária », suivant en cela la terminologie anglo-saxonne : « subsidiary ». Par le terme « filial », le droit brésilien désigne plutôt les entités qui, dotée d'un capital propre, opèrent de manière régulière et habituelle au Brésil, sans pour autant être considérées comme des personnes morales autonomes de la société mère, dont le siège se trouve souvent à l'étranger. Les pays hispanophones retiendront, à leur tour, justement les termes succursales ou agence pour désigner telles entités dépourvues de personnalité morale[188].

187 L'une des acceptions juridiques du terme déchéance en français e qui correspond à celle incarnée par le terme *decadência* en droit brésilien est justement celle de la « perte du droit d'agir (ou du bénéfice d'un acte) qui frappe celui qui ne fait pas les diligences nécessaires dans le délai requis (on parle aussi de forclusion), n'observe pas les formes exigées, ou celui auquel est imputable une négligence caractérisée. (…) » (G. CORNU (dir.), Vocabulaire juridique, 6e éd., coll. « Quadrige », Paris, Puf, 2004, v° « Déchéance », acception 2).

188 Cf. DE AGUINIS (A. M.), « Regimes societários no Mercosul », in Baptista (L. O.) (Coord.), Mercosul: a estratégia legal dos negócios, São Paulo, Maltese, 1994, 140p., p. 27-71,

Nonobstant les spécificités terminologiques des systèmes de droit privé qui s'expriment dans des langues néo-romaines[189], le comparatiste originaire de ces cultures juridiques les cernera avec plus d'aisance que s'il n'était en face des institutions sans correspondant dans son système d'origine, à l'instar de notions comme la *fondamental breach of contrat*, l'*estoppel* ou le *trust* de *Common law*, ou la *Generalklausel* et le *Rechtsgeschäft* allemands, ces deux dernières étant étrangères à certains droits romanistes, comme le droit français, mais pas au droit brésilien.

C. Intégration des systèmes de droit privé : l'articulation entre les codes

Dans un système de droit privé compartimenté au plan des sources, le juriste est confronté à un problème de cohérence dans le traitement des matières par les différents codes. Le renouveau de l'autonomie du droit commercial et le plaidoyer pour un nouveau code de commerce pour le Brésil sont très illustratifs à cet égard[190]. On peut ainsi lire dans l'exposé des motifs de l'avant-projet de Code de commerce préparé par le professeur F. Ulhoa Coelho : « ignorant les spécificités du droit commercial, et de leurs propres principes, l'unification législative [de 2002] a fini non seulement par mettre en lambeaux les valeurs de la discipline, mais a également privé l'ordre juridique national d'une réglementation appropriée au stade actuel de l'évolution de notre économie, fortement intégrée dans le processus de mondialisation. La législation unification était une erreur. Il faut la corriger dès que possible ». D'où la nécessité, conclut l'auteur, d'adopter un nouveau code de commerce qui soustrairait au Code civil les disciplines dont celui-ci s'est approprié.

Sans entrer dans le débat sur la pertinence d'une nouvelle codification commerciale, ce qu'il convient de souligner est que dans l'état actuel du droit positif, les difficultés majeures surgissent au *stade d'application des différents codes*, notamment en matière d'obligations. En cause, la définition du champ d'application des dispositions codifiées.

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p. 30. D'autres exemples en droit privé sont encore donnés par FRADERA (V. M. J.) « Langue et droit au Mercosur - Brésil », in *Langue et droit,* XV Congrès international du droit comparé, Bristol, 1998 : collection des rapports, Erik Jayme (éd.), Bruxells, Briuylant, 2000, p. 123-140. p. 132-133. En comparant les droits argentin et brésilien, ce dernier auteur défend l'existence de définitions différentes tenant aux notions d' « acte juridique » (l'*Acto Jurídico* argentin et l'*Ato Jurídico* brésilien), de contrat et de bonne-foi.

189 Un riche glossaire juridique français-portugais/portugais-français peut être consulté dans ouvrage collectif : MORAIS DA COSTA (T.) (dir.), *Introdução ao direito francês, op. cit.*, p. 623-642 (vol. I) et p. 627-647 (vol. II).

190 Cf. ULHOA COELHO (F.), *O futuro do direito comercial,* art. préc., p. 8 sq.

Au Brésil, une articulation entre les principaux codes est nécessaire, car l'avènement du nouveau Code civil n'a pas dérogé aux dispositions spéciales du Code de protection des consommateurs. Or ces dispositions peuvent concurrencer celles du nouveau Code civil, tant *ratione materiae* que *ratione personae*[191]. Dans la perspective d'un « dialogue » entre le Code civil et le CDC, le professeur Cláudia Lima Marques a suggéré trois articulations, notamment en matière d'obligations et de contrats[192]. La première articulation possible est l'*articulation systématique de cohérence*, par laquelle le Code civil peut servir de base conceptuelle pour les lois spéciales, apportant, si nécessaire, des définitions légales. Ensuite, une *articulation de complémentarité*[193] et de *subsidiarité* pourrait avoir lieu, les règles spéciales s'appliquant en premier. Enfin, en raison des influences réciproques, une *articulation de coordination* ou d'*adaptation systématique* est proposée[194]. Notons, toutefois, que ces influences provoqueraient deux types de résultat: en partant des lois spéciales vers le Code Civil, les influences seraient peu concrètes, en raison du nombre réduit d'interprétation et de concrétisation dont les dispositions spéciales ont fait l'objet. À l'inverse, surgit une indéfinition, car les délimitations résultant de l'application des dispositions du Code civil pourraient contribuer à une réduction

191 Un bon exemple du besoin d'articulation est l'application de la règle autorisant la mise à l'écart du voile de la personnalité juridique des personnes morales, prévue dans les deux codes sous des conditions fort différentes. A propos, v. VIEIRA DA COSTA CERQUEIRA (G.), « Lever le voile social. Regards croisés en droit des sociétés français et brésilien », art. préc., p 339-382 ; « A desconsideração da personalidade jurídica no direito brasileiro. Entre subsunção e concreção, uma teoria em prol da pessoa jurídica», art. préc., p. 91-128.

192 LIMA MARQUES (C.), « Três diálogos entre o Código de Defesa do Consumidor e o Código Civil de 2002: superação das antinimias pelo 'diálogo das fontes' », in: Pfeiffer (R. A. C.) et Pasqualotto (A.) (org.), *Código de Defesa do Consumidor e o Código Civil* de 2002, São Paulo, RT, 2005, p. 11-82. V. aussi, LIMA MARQUES (C.), *Diálogo das fontes – Do conflito à coordenação de Normas do Direito Brasileiro*, São Paulo, RT, 2012.

193 Les rapport entre égaux sont ainsi exclus du champ d'application du CDC et de la *Consolidation des lois du travail*. L'énoncé n° 9 de la première Journée de droit commercial propose que « lorsque l'on l'applique aux rapports juridique entrepreneurials, l'art. 50 du Code civil ne peut pas être interprété par analogie à l'art. 28, 5° CDC ou à l'art. 2 § 2° CLT » Sur la signification et la portée des « énoncés » adoptés dans le cadre des Journées de droit commercial et des Journées de droit civil, auxquels nous feront un certain nombre de références au long de ce travail, v. *infra*, III.A.2.

194 Une telle influence a fait l'objet de l'énoncé 167, adopté dans de le cadre de la IIIe Journée de droit civil. Cet énoncé, concernant les articles 421 à 424 du Code civil brésilien de 2002, est ainsi libellé : « avec l'avènement du Code civil, il y a eu une forte approximation, au plan des principes, entre ce Code et le Code de protection des consommateurs en ce qui concerne la régulation contractuelle étant donné que les deux texte incorporent une nouvelle théorie générale des contrats ». Les articles 421 à 424 du Code civil ont comme objet des principes importants du droit des obligations contractuelles – celui de la bonne foi ; de la fonction sociale du contrat et de l'interprétation *pro-adhérent*, lorsqu'il s'agit des contrats d'adhésion.

considérable du champ d'application du CDC, à l'instar de l'application aux relations de consommation de l'art. 50 CC/02, qui autorise le juge à percer le voile de la personnalité juridique afin d'engager la responsabilité des dirigeants et des associés, ou de l'art. 424 CC/02 sur la nullité des clauses de contrats d'adhésion, beaucoup plus restrictives quant aux conditions d'application que celles prévues par le CDC.

Des telles difficultés renforcent la nécessité d'articulation entre les codes et révèlent la valeur des différents dialogues proposés par le professeur Cláudia Lima Marques qui, associés aux autres techniques d'herméneutique, devront conduire à une solution appropriée de composition entre les différents textes régissant une même institution. Une solution appropriée serait l'utilisation d'un dialogue d'application simultanée dans le cadre d'une *articulation de coordination ou d'adaptation systématique* pour distinguer les champs respectifs d'application des dispositions civiles et spéciales[195]. Dans ce cas, comme le suggère l'auteur, les différentes dispositions composant le régime juridique d'une institution, comme celles sur les clauses abusives, seraient utilisées comme argument pour révéler que, en l'espèce, il s'agit d'un cas différent, pour être alors ensuite écartées au bénéfice d'une seule règle[196]. À notre avis, si cette articulation a pour effet de réserver pour une même institution un régime juridique pluriel, elle contribue néanmoins à une harmonie fonctionnelle du système en surmontant les divergences et le manque de cohérence pouvant résulter de la pluralité des sources[197].

Quoi qu'il en soit, nonobstant le caractère codifié du droit privé brésilien, toute une autre réalité normative subsiste. Comme bien d'autres ordres juridiques, le droit privé brésilien est marqué par une multitude de sources internes et externes. Plus que jamais, l'éclatement de sources « non-codifiées » ou « pseudo-codifiées » est dans l'air du temps, ce qui induit qu'un exercice constant de coordination entre les différents textes en vigueur s'impose quotidiennement aux juristes, magistrats et avocats.

La structure du droit privé brésilien étant ainsi esquissée,

195 *Ibid*, p. 47-48

196 En ce sens, STF, Assemblée plénière, SEC 5.847-1, affaire jugée le 01.12.1999, *Revista do direito do Consumidor*, vol. 34 (2000), p. 253-263.

197 V., par exemple, l'énoncé 190, adopté dans le cadre de la IIIe Journée de droit civil, ainsi libellé : « La règle de l'art. 931 du nouveau Code civil ne fait pas obstacle aux règles relatives à la responsabilité par le fait du produit prévue à l'art. 12 du Code de protection des consommateurs, qui demeure plus favorable au consommateur lésé » ; ou encore l'énoncé 369 (IVe Journée), qui propose que lorsque l'hypothèse de l'art. 732 du Code civil est configurée, il convient d'appliquer au contrat de transport conclu par un consommateur les dispositions du Code de protection du consommateur qui lui sont plus favorables afin d'assurer une meilleure protection de ce dernier et, par là, une « vision constitutionnelle » d'unité du système.

tournons-nous à présent vers principes cardinaux de ce droit.

II. PRINCIPES CARDINAUX DU DROIT PRIVE BRESILIEN

Il s'agit ici de s'intéresser aux principes cardinaux dans leur fonction structurante du droit privé brésilien (A) et, ensuite, de rappeler les lignes directrices du droit des contrats (B). Il convient également de mettre en évidence certains phénomènes actuels, non moins fondés sur certains principes, engendrant une modulation du droit privé brésilien (C).

A. Principes à portée structurante du droit privé

Lorsque le comparatiste prétend dépasser la structure formelle d'un droit privé pour mieux connaître ses institutions, il doit identifier au préalable les principes structurant de l'ordre juridique en question (1). Ces principes peuvent connaître des apports, dont les contours résultent d'une politique législative ou d'une codification orientée. À cet égard, le nouveau Code civil brésilien est un exemple illustratif (2).

1. La portée des principes structurants

Que doit-on entendre par principes structurants ? La réponse n'est pas évidente et tend toujours vers la notion de principes généraux du droit. Doivent-ils cependant être confondus ou assimilés ? Même si certains principes peuvent aisément cumuler les deux positions, les principes structurants ne doivent pas être confondus avec les principes généraux du droit. Nous estimons qu'un principe structurant peut jouer les rôles, d'ailleurs toujours controversé et à définir dans certains systèmes juridiques[198], d'un principe général du droit (*rôle fondamental* : comblement de lacunes d'un droit incomplet[199] ; adéquation, voire éviction des textes législatifs et/ou réglementaires ; prorogation du droit en vigueur ; *rôle instrumental* : celui de transfert des solutions d'un système de droit positif - ou d'une branche du droit - vers un autre, qui en est demandeur)[200], tandis que l'inverse nous semble moins certain.

198 Tant la nature et la fonction que la classification (Ripert, Josserand, Gény et Carbonnier et Ghestin) des principes généraux du droit privé font débat en doctrine, certains niant même leur existence (ainsi, René RODIERE, « Les principes généraux du droit privé français », *RIDC* 1990, n° spécial – vol. 2, p. 309-317).

199 En droit brésilien, c'est le rôle majeur qui leur est attribué par l'art. 4 de la Loi d'introduction aux normes du droit brésilien de 1942.

200 Selon les deux fonctions exposées par Morvan (P.), Les principes de droit privé, Paris, éditions Panthéon-Assas, 1999 ; et *Les principes généraux du droit et la technique des visas de principe dans les arrêts de la Cour de cassation, présenté dans Cycle Droit et technique de*

Les principes ayant une portée structurante sont ceux qui soutiennent l'édifice juridique et autour duquel une série d'institutions et de régimes juridiques se justifient et se développent, à l'instar du primat de la propriété dans l'ensemble des droits privés occidentaux. A titre d'exemple en droit comparé, la portée structurante reconnue au primat de la propriété au sein du Code civil français de 1804 a été ainsi mise en relief par Portalis : « *[...] le corps entier du Code civil est consacré à définir tout ce qui peut tenir à l'exercice du droit de propriété ; droit fondamental sur lequel toutes les institutions sociales reposent, et qui, pour chaque individu est aussi précieux que la vie elle-même, puisqu'il lui assure les moyens de le conserver* »[201]. C'est ainsi que le primat de la propriété, à côté de la famille, du contrat et de la responsabilité, est un principe structurant du droit privé français, autour duquel s'articule l'ensemble du droit civil[202]. Cet exemple illustre notre raisonnement pour ce qui concerne également le droit privé brésilien.

La méthode de distinction peut alors être ainsi formulée : si l'on écarte du système juridique un principe structurant, cela provoque des changements fondamentaux au sein de ce système. De la même manière, si des nouveaux contours sont apportés à un principe structurant, cela se reflétera à l'intérieur du système : ainsi, depuis 1988, l'exercice du droit de propriété en droit brésilien est soumis à l'exigence de la fonction sociale de la propriété. Cette méthode de distinction part d'une non-considération fictive d'un principe comme facteur engendrant sinon la disparition, du moins des mutations considérables d'une série d'institutions et de leurs régimes juridiques. La disparition ou la mutation d'un principe général du droit ne produirait pas forcément ce genre d'effet, ou tout au moins pas avec une telle ampleur.

D'autre part, la classification d'un principe structurant dépend (et peut varier en fonction) de son importance au sein du système juridique. Prenons l'exemple du *principe du consensualisme* en droit des contrats : il ne saurait être un principe structurant du droit privé pris dans son ensemble, car sa disparition ou sa mutation conceptuelle ne provoquerait pas la suppression du régime de formation du contrat, le droit privé demeurant structurellement inchangé par rapport à ce qu'il était auparavant. En revanche, on pourrait considérer le consensualisme

cassation 2005-2006, le 4 avril 2006, disponible à l'adresse : http://www.courdecassation.fr/IMG/File/intervention_morvan.pdf

201 Extrait du discours de Portalis, orateur du Gouvernement, lors de la présentation du Titre II (De la propriété) du Livre II du projet de Code civil dans la séance du corps législatif, du 26 Nivôse an 12, in *Code civil français- Discours et exposés des motifs* – Tome III, Bruxelles, G. Huygue, an 12, 1804, p. 42.

202 Cf. HALPERIN (J.-L.), *Histoire des droits en Europe de 1750 à nos jours, op. cit*., p. 20-25. Pour une belle étude avec une dimension comparatiste : LEMOALLE (É.), « Le droit civil », in Introduction au droit brésilien, *op. cit*., p. 271-293.

comme un principe structurant du système de droit privé dans l'une de ses composantes : les contrats. Sa disparition, ou plutôt sa substitution par le principe du formalisme, engendrerait des conséquences non négligeables à l'intérieur du microsystème des obligations et des contrats, à l'instar du régime de nullités.

En revanche, on voit mal le principe du consensualisme comme un principe général du droit, d'où l'incongruité des assimilations. On pourrait même faire de la spéculation, en attribuant à un principe une fonction structurante du droit privé pris dans son ensemble en raison du degré structurant du domaine juridique à l'intérieur duquel il joue déjà un rôle structurant… Mais limitons-nous là pour l'instant.

Il y aurait donc des principes structurants relatifs au droit privé pris dans son ensemble, ainsi que ceux restreints à certains domaines. Les principes de laïcité, d'égalité, de liberté individuelle, de responsabilité, ainsi que le primat de la propriété et des principes de la libre circulation de biens et de services et de liberté économique ont une portée structurante en droit privé brésilien pris dans son ensemble, car ils constituent l'axe autour duquel ce dernier s'est construit et s'articule, notamment depuis la proclamation de la République en 1889 et son autonomie du droit portugais en 1917[203].

Néanmoins, la valeur absolue et le contenu de ces principes ont été peu à peu relativisés ou redéfinis au sein de l'ordre juridique brésilien. L'œuvre de la jurisprudence et du législateur au fil du temps, maintes fois sous l'impulsion de la doctrine, des réformes constitutionnels et de l'adhésion du Brésil à des textes internationaux relatifs à protection des droits de l'Homme et de l'environnement, a bien fait du droit privé un terrain mouvant, où l'individualisme, le libéralisme, l'égalité formelle et le formalisme ont dû céder la place au respect de la dignité des personnes - et à l'individu, ou au groupe d'individus, dans sa dimension privée et sociale -, à l'équilibre effectif dans les rapports juridiques, à la (non) égalité matérielle des parties à un contrat, à l'égalité affirmée entre femmes et hommes au sein d'un couple - non nécessairement sacré par le mariage-, à l'égalité des enfants - adultérins, naturels et légitimes, notamment au plan successoral -, ainsi qu'à des considérations liées à l'environnement ou au comportement des parties dans leur rapport contractuel, à l'instar de la bonne foi objective ou de la confiance légitime créée chez le partenaire.

Des spécificités relatives à l'efficacité de ces principes peuvent également exister au sein de chaque ordre juridique. Pour illustrer cette affirmative, nous reprendrons la comparaison réalisée à une autre occasion entre deux principes à portée structurante communs au droit brésilien et au droit français[204].

203 Le Code civil de 1916 est entre en vigueur le 1er janvier 1917.

204 V. VIEIRA DA COSTA CERQUEIRA (G.), « Les données fondamentales pour la

Le premier exemple concerne le principe de la laïcité[205] appliqué aux conditions de validité du mariage civil. Le mariage civil - devant un officier d'état civil - est la règle en droit français et en droit brésilien (art. 165 Civ. et art. 1512 CC/02). Il peut être ou non suivi d'une cérémonie religieuse. Le mariage religieux est donc un fait privé qui, en principe, n'intéresse pas l'État. En sus, ce dernier admet la dissolubilité de l'union civile par le divorce lorsque certaines religions la refusent aux unions qu'elles sacrent. Toutefois, le droit brésilien admet que le mariage religieux produise les mêmes effets que le mariage civil, dans l'hypothèse où il respecte les mêmes exigences en matière de validité, et pourvu qu'il soit enregistré, à partir de la date de sa célébration (art. 1515 CC/02 ; art. 226, § 2 CF/88). La jurisprudence française considère, en revanche, que le mariage purement religieux célébré en France ne produit aucun effet dans ce pays[206], la cérémonie religieuse ne pouvant en aucun cas se substituer valablement à la cérémonie civile[207]. Par ailleurs, le mariage religieux doit être obligatoirement précédé par le mariage civil, sous peine d'amende ou d'emprisonnement proféré à l'encontre du ministre du culte qui contreviendrait à la règle, conformément à l'art. 433-21 du Code pénal français[208].

Le second exemple concerne le *primat de la propriété*. En France, le droit de propriété est inscrit dans la Déclaration des Droits de l'Homme et du Citoyen de 1789 comme un droit naturel et imprescriptible (art. 2) et le Code civil le reconnaît comme un droit absolu, dont les seules limitations admises doivent résulter de la loi

comparaison en droit privé », art. préc. p. 115-117.

205 Pour le Brésil, c'est le Décret nº 119-A adopté le 07 janvier 1890 à l'initiative de *Ruy Barbosa*, alors que pour la France c'est la loi adoptée le 9 décembre 1905 à l'initiative de *Aristide Briand* qui marquent définitivement la séparation des Églises et de l'État et constituent les textes fondateurs de chacune des deux Républiques laïques.

206 CA Paris, 8 déc. 1992, D. 1994, p. 272. Cette conception est héritée de la sécularisation du mariage opérée en 1792 et confirmée avec le Concordat de 1801 : « la Révolution avait lutté contre l'emprise de l'Église catholique sur la société. Le régime concordataire admettait une influence, dès lors que les pouvoirs publics la contrôlaient ou même la façonnaient. Le Code civil consacre l'existence des registres de l'état civil et d'un mariage civil. L'officier d'état civil reçoit des parties "la déclaration qu'elles veulent se prendre pour mari et femme ; il prononcera au nom de la loi qu'elles sont unies par le mariage" (art. 75). Libre à chacun de procéder ensuite aux cérémonies religieuses de son choix, mais il est interdit de faire célébrer mariage religieux non précédé d'un mariage civil. Le ministre du culte qui y procéderait est passible de sanctions pénales » (B. BASDEVANT-GAUDEMET, J. GAUDEMET, *Introduction historique au droit*, 3e éd., Paris, LGDJ, 2010, p. 397).

207 Cass. 1re civ., 09 oct. 1991, *Rev. crit. DIP*, 1992, p. 61.

208 Il est à noter toutefois que selon l'art. 171-1 du Code civil, le mariage célébré à l'étranger entre Français, ou entre un Français et un étranger, est valable en France s'il a été célébré dans les formes usitées dans le pays de célébration, ce qui comprend, notamment, le mariage purement religieux.

(art. 544). C'est particulièrement le cas lorsqu'il s'agit de mettre en œuvre des garanties constitutionnelles, comme la possibilité, pour toute personne, de disposer d'un logement décent, ou le droit de vivre dans un environnement équilibré et respectueux de la santé. Cependant, la démarche entreprise par le législateur ne doit en aucun cas avoir un caractère de gravité tel que le sens et la portée du « *droit de jouir et disposer des choses de la manière la plus absolue* » en soient dénaturés.

Au Brésil, la Constitution de 1988 inscrit également le droit de propriété comme un droit fondamental (art. 5, *caput*) en ce sens qu'il est inviolable. Dans le même temps, la Constitution impose que la propriété réalise sa « fonction sociale » (arts. 5, XXIII et 170, III). Ainsi, la fonction sociale justifie l'augmentation progressive des taxes foncières sur les propriétés urbaines en fonction de leur valeur ou une différentiation du montant de la taxe en fonction de la localisation ou de l'usage auquel l'immeuble est destiné (art. 156, § 1° CF/88), tout comme la détermination que la propriété urbaine soit en conformité avec les exigences fondamentales de la politique d'aménagement urbain (art.182, § 2 CF/88) ou la désappropriation de l'immeuble rural afin de procéder à la réforme agraire (art. 184, § 2 CF/88), ou encore l'exigence, selon les critères et conditions établis par la loi, d'utilisation rationnelle et adéquate de la propriété rurale, en respectant les ressources naturelles disponibles, l'environnement, les dispositions qui réglementent les relations du travail de sorte à favoriser le bien-être des propriétaires et des travailleurs (art. 186 CF/88). C'est également la fonction sociale qui a justifié la règle de l'art. 191 de la Constitution sur l'usucapion rural spécial. En créant une règle spéciale par rapport à la règle générale posée à l'ancien article 550 du Code de 1916[209], l'art. 191 CF/88 admet l'acquisition de la propriété d'un immeuble rural d'une surface de terrain non supérieure à 50 hectares par celui qui, sans être propriétaire d'un immeuble rural ou urbain, exerce sans opposition la possession dudit immeuble pendant *cinq ans ininterrompus*, en le mettant en valeur par son travail ou celui de sa famille et en y conservant son habitation.

Le Code civil de 2002 exige, à son tour, que la propriété soit « *exercée en conformité avec ses finalités économiques et sociales* » (art. 1228, § 1°), raison pour laquelle le législateur de 2002, à l'image du législateur constituant de 1988, a prévu des règles et des délais spécifiques pour l'usucapion d'immeuble urbain d'une certaine surface. Conformément à l'art. 1240, caput, celui qui possède, comme sienne, une surface urbaine non supérieure à 250 m2 depuis cinq ans ininterrompus et sans opposition, l'utilisant comme sa demeure ou celle de sa famille,

209 Règle qui stipulait, sans aucune distinction de la nature ou de la dimension de l'immeuble, comme étant de 20 ans de possession ininterrompus le délai pour l'acquisition de la propriété immobilière par l'usucapion.

en acquerra la propriété, dès lors qu'il n'est pas propriétaire d'un autre immeuble urbain ou rural.

Dans tous les cas, à toute propriété s'impose un exercice

> *« en conformité avec ses finalités économiques et sociales et de façon à ce que soient préservés la flore, la faune, les beautés naturelles, l'équilibre écologique et le patrimoine historique et artistique, et que soit évitée la pollution de l'air et des eaux, conformément à ce qui est établi par des lois spéciales »* (art. 1228, § 1°, *in fine*, CC/02).

À la différence du droit français, le caractère absolu de l'exercice de la propriété n'a pas été expressément consacré par la loi au Brésil. L'exercice de la propriété y est soumis aux exigences imposées par le *principe de sociabilité* qui axe désormais le droit privé brésilien. La rédaction de l'art. 1228, § 1, *in fine*, du Code civil de 2002, laisse cependant supposer que les limitations du droit de propriété visant à mettre en œuvre la fonction sociale de la propriété, y compris l'entreprise, ne peuvent résulter, cette fois-ci à l'image du droit français, que de la loi (« *conformément à ce qui est établi par des lois spéciales* »). Mais rien n'est moins certain. L'art. 1228, § 1 constitue bien une clause générale, moyen d'expression par excellence des nouvelles valeurs innervant le droit privé brésilien, lesquelles devront être matérialisées par les juristes et par les juges[210] lors de l'application desdites clauses[211], comme nous le verrons par la suite.

2. Les principes structurants et les paradigmes de la codification : l'exemple de la nouvelle codification civile brésilienne de 2002

Bien que le nouveau Code civil soit l'aboutissement d'un projet précédant l'ouverture politique du pays en 1985 et la Constitution de 1988, il s'est doté des principes fondamentaux pouvant contribuer à la réalisation des objectifs constitutionnels, notamment la construction d'une société libre, juste et solidaire (art. 3, I CF/88). Ces principes

210 V. MENKE (F.), « A interpretação das cláusulas gerais : a subsunção e a concreção dos conceitos », *Revista de Direito do consumidor*, n° 50 (2004), p. 9-35.

211 L'énoncé 507 adopté lors des Ve Journées de droit civil propose à cet égard qu' « en mettant en œuvre le principe de la fonction sociale de la propriété immobilier rurale, la clause générale de l'art. 1228 § 1 du Code civil doit être respecté conformément à la disposition de l'art. 5, inc. XXIII de la Constitution de 1988, afin de permettre de mieux objectiver la fonctionnalisation par des critères d'évaluation centrés sur la primauté du travail ».

fondamentaux sont ceux que Miguel Reale[212] appelle l'*eticidade* (les valeurs éthiques), la *sociabilidade* (sociabilité) et l'*operacionalidade* (opérationnalité), dont découleraient tous les autres[213].

L'eticidade est le principe qui a permis au législateur de 2002 de dépasser l'attachement de l'ancien Code de 1916 au formalisme juridique. Il s'agit de « *reconnaître l'indéclinable participation des valeurs éthiques dans l'ordonnancement juridique* ». L'abondant recours à des *concepts flexibles* ou à des *expressions floues*, dont certaines constituent des clauses générales, donne lieu à l'ouverture du système et son irrigation par les valeurs éthiques. Le système des clauses générales permet la création des modèles juridiques herméneutiques et par conséquent l'actualisation continue des textes légaux[214]. La *sociabilidade* s'impose face à l'individualisme excessif de l'ancien Code de 1916, édicté dans le cadre d'une société essentiellement rurale. Avec une population essentiellement urbaine aujourd'hui, il est apparu important d'insérer un critère de *sociabilité* dans les rapports juridiques, dont la fonction sociale du contrat (art. 421 CC/02) et la *fonction sociale de la propriété* (art. 1228)[215] sont les illustrations les plus fidèles du paradigme de la sociabilité. L'opérationnalité se révèle à travers l'idée d'offrir au milieu juridique un code accessible et compréhensible, dont l'interprétation et l'application devraient être rendues faciles. Pour cela, outre les clauses générales distribuées un peu partout dans le Code[216], on a conservé la structure bipartite du plan avec une partie générale extrêmement didactique et remplie de définitions légales. Enfin, l'*opérationnalité* contient également un *principe de concrétude* qui a imposé au législateur l'obligation d'édicter des règles fondées sur des circonstances sociales concrètes et non éloignées des faits sociaux composant l'environnement des justiciables[217].

Ces clauses générales sont, pour la plupart, à l'attention des juges, qui ont la latitude d'analyser les faits à la lumière des circonstances sociales et économiques actuelles et selon les dictames de justice sociale et d'économicité[218]. La marge ainsi laissée aux juges pour appliquer la

212 REALE (M.), « Visão Geral do novo Código Civil », art. préc., p. IX sq.

213 Ainsi la protection de la personne (art. 11 s.), l'unification du droit des obligations (art. 233 s.), l'édification du droit de l'entreprise (art. 966 s.), entre autres.

214 REALE (M.), « *Visão Geral do novo Código Civil* », art. préc., p. XII.

215 *Idem*, p. XIII-XIV.

216 V. le vaste catalogue elaboré par MARTINS-COSTA (J.), *Comentários ao novo Código civil*, vol. 5, Rio de Janeiro, Forense, 2005, p. 11-13.

217 REALE (M.), [chapitre 1], in A. H. Ferreira (dir.), *O novo Código Civil. Discutido por juristas brasileiros,* Campinas, Bookseller, 2003, p. 27-61, p. 36 *sq* ; SCHMIDT (J. P.), *op. cit.*, p. 337.

218 V., à titre d'exemple, le Par. Unique de l'article 404 ; l'article 413 et le Par. Unique de l'article 944, du Code civil brésilien.

justice aux cas concrets vise également à réduire des inégalités sociales et économiques, ce qui est sans précédent dans l'histoire juridique brésilienne.

De par leur importance, ces nouveaux paradigmes ou principes fondamentaux agissent sur les principes structurants du droit privé brésilien de manière à provoquer sinon une refonte de certaines institutions et de certains droits, du moins à conditionner largement leur exercice à l'observation des nouvelles exigences qu'ils établissent.

Bien que ces nouveaux paradigmes aient guidé l'élaboration du Code civil de 2002, ils concernent également la codification du droit de la protection du consommateur[219], dans la mesure où cette dernière en est l'expression en elle-même. On ne sera alors pas surpris de voir que les paradigmes de la codification civile de 2002 vont indiquer les lignes directrices du droit des contrats.

B. Nouvelles lignes directrices du droit des contrats : vers une justice contractuelle

Alors même qu'on assiste à une contractualisation renforcée du droit - « *le centre de l'organisation de la société [se déplace] de la loi vers le contrat* »[220] - un mouvement mettant l'accent sur l'intérêt social du contrat vient perturber les postulats traditionnels de la *liberté contractuelle*, de la *force obligatoire des conventions* et de *l'effet relatif du contrat* pour les adapter aux nouvelles exigences résultant de *la diminution de la part des liens prescrits au profit des liens consentis*[221]. Il y a plus particulièrement un changement de la vision du contrat, appelé à devenir plus que jamais un véritable instrument de justice économique, voire sociale. Il s'agit de dépasser le seul intérêt des parties et de leur imposer, en même temps, un devoir de coopération. Il ne s'agit pas pour autant d'aller jusqu'à faire du contrat un véritable « instrument d'efficacité économique », quoiqu'il puisse y contribuer lorsqu'on admet la détermination unilatérale du contenu du contrat[222]

219 LIMA MARQUES (C.), « A chamada crise do contrato e o modelo de direito privado brasileiro: crise de confiança ou de crescimento do contrato », art. préc., p. 17-86.

220 JAUFFRET-SPINOSI (C.). « Le contrat – Rapport de synthèse », in *Le contrat,* Travaux de l'Association Henri Capitant, Journées brésiliennes, tome LV (2005), Paris, SLC, 2008, p. 1- 22, p. 3.

221 L'expression est empruntée à JAUFFRET-SPINOSI (C.). « Le contrat – Rapport de synthèse », art. préc., p. 3.

222 En droit brésilien, l'admission de la détermination unilatérale du contenu du contrat est possible, mais sous contrôle en cas des contrats d'adhésion (art. 424 CC/02). L'art. 489 CC/02 prévoit la nullité du contrat lorsque la fixation du prix est laissée à l'appréciation exclusive d'une des parties.

ou la résolution unilatérale du contrat[223]. Ce mouvement très répandu en droit comparé se fait fortement sentir au Brésil. Nous nous limiterons ici à n'en donner qu'un bref aperçu.

Une vocation sociale et solidaire du contrat est explicitement affirmée par le législateur brésilien dans les matières civile et commerciale (1), alors qu'une relativisation des postulats contractuels classiques avait déjà été affirmée afin de protéger le consommateur (2).

1. Relativisation des postulats contractuels classiques par la codification civile de 2002

Dans les domaines intéressant le contrat, le Code civil de 2002 prévoit de nombreuses clauses générales, à l'instar des arts. 113 et 422, sur la *bonne foi*, de l'art. 421, sur la *fonction sociale du contrat*, de l'art. 478, sur *l'onérosité excessive*, de l'art. 1228, § 1°, sur *la fonction économique et sociale de la propriété*, ou encore de l'art. 187, sur l'abus de droit. Toutes ces innovations ont vocation à révolutionner les postulats classiques du droit des contrats et à imposer un traitement égalitaire des intérêts intégrant aussi bien la sphère du créancier que du débiteur[224]. Nombre de ces solutions avaient été dégagées par la jurisprudence avant la codification de 2002[225].

La *bonne foi objective* (art. 422) attribue à la *bona fides* une valeur autonome, sans rapport avec la volonté des parties[226]. Elle dépasse le dogme de l'autonomie de la volonté lorsqu'elle reconnaît des nouvelles obligations entre les contractants[227] qui s'ajoutent implicitement au

223 En droit brésilien, le contrat inexécuté est résolu de plein droit en présence d'une clause résolutoire expresse (à l'image du droit français), mais dépend d'une décision judiciaire lorsque cette clause est tacite (art. 474 CC/02).

224 MARTINS-COSTA (J.), « A boa-fé objetiva e o adimplemento das obrigações, *JB* 200, p. 3-39, p. 20-21.

225 Dans la perspective de la bonne foi : le nouveau Code civil a incorporé la règle de l'ancien art. 131, al. 1 du Code de commerce de 1850, selon laquelle le contrat doit être interprété selon la bonne foi des parties. Avant cette incorporation, la jurisprudence avait déjà comblé cette lacune existante dans le Code civil de 1916. V. les décisions du STJ: Resp. n.º 52075/ES, *Industrial Malvina S.A. v. Coopersanto Industrial S.A*., DJ du 21.11.1994, p. 34352; Resp. n.º 72482/SP, *Condomínio Edifício Orion v. Estrutura Incorporadora e Construtora Ltda,* DJ du 08.04.96, p. 10474; et RESP 406590/PR, *Cerâmica Porto Ferreira Ltda v. Casagrande Pisos Cerâmicos Ltda*, DJ du 16.09.2002, p. 00194. V. également COUTO E SILVA (C. V.), *A Obrigação como processo*, São Paulo, Bushatsky, 1976; MARTINS-COSTA (J.), *A boa-fé no direito privado*, São Paulo, RT, 1999.

226 COUTO E SILVA (C. V.), « O princípio da boa-fé no direito brasileiro e português », in Estudos de direito civil brasileiro e português (*I Jornada Luso-Brasileira de Direito Civil)*, São Paulo, RT, 1980, p. 41, p. 54.

227 AGUILAR VIEIRA (I.), « Deveres de Proteção e Contrato », *Rev. dos Tribunais*, vol. 761 (1999), p. 68 *sq*.

contrat (telles les obligations d'information, de transparence, de loyauté et de coopération)[228]. Il en va de même lorsque la bonne foi établit des limites à l'exercice des droits subjectifs, en interdisant, par exemple, l'abus de droit, dont la constatation est indépendante de la faute (art. 187)[229]. Le *principe de l'équilibre du contrat* bouleverse à son tour le principe de la force obligatoire des conventions en permettant la révision ou la résolution des contrats lors de la « disparition du fondement contractuel » (arts. 317, 478 et 479) ou en cas lésion (art. 157)[230]. Il est remarquable de noter que si le Code civil de 1916 ne traitait pas de la lésion, le Code de commerce de 1850 quant à lui interdisait tout simplement la rescision du contrat de vente conclu entre commerçants au motif d'une lésion - sauf en présence d'un vice de consentement rendant le contrat inéquitable (art. 220). Le nouveau Code civil dispose encore que la *« liberté de contracter sera exercée en raison et dans les limites de la fonction sociale du contrat »*[231]. Cette nouvelle approche sociale permet la relativisation du principe de l'effet relatif des contrats, en imposant des effets contractuels au-delà de ce qui a été convenu entre les parties. Par la fonction sociale, le respect au contrat devient opposable aux tiers[232], alors que les contractants doivent respecter les titulaires d'intérêts socialement valorisés, éventuellement touchés par le rapport contractuel[233].

La doctrine a remarqué qu'un paradoxe existe désormais entre le renouveau du contrôle étatique des contrats et de la propriété, rendu possible par le biais de ces clauses générales, et le fort caractère néolibéral qui imprègne le continent américain[234]. Ce paradoxe est d'autant plus remarquable qu'à côté de ces clauses générales intervient une règle générale d'ordre public extrêmement contraignante, selon

228 TEPEDINO (G.), « Novos princípios contratuais e teoria da confiança: a exegese da cláusula "to the best knowledge of the sellers », *Revista Forense*, vol. 377, p. 237 *sq*, sp. p. 243.

229 Ainsi, l'énoncé n° 37, approuvé lors de la I Journée de droit civil (CEJ/CJF) – v. *supra*, III.A.2.

230 A propos, v. JUNQUEIRA DE AZEVEDO (A.), « Rapport brésilien - La révision du contrat », in *Le contrat, op. cit*., p. 466-481.

231 Il est à noter que l'art. 5 de la Loi d'Introduction de 1942 établit que « lorsqu'il applique la loi, le juge tiendra compte des fins sociales auxquelles elle se destine et les exigences du bien commun ».

232 Ainsi l'énoncé n° 21, approuvé dans le cadre de la I Journée de droit civil (CEJ/CJF) - v. *supra.*

233 TEPEDINO (G.), « Novos princípios contratuais e teoria da confiança :... », art. préc., p. 242. Pour une approche comparative avec la notion de cause en droit français, v. PIGNATTA (F. A.), « *Le droit brésilien des contrats* – Quelques différences par rapport au droit français », in Les frontières entre liberté et interventionnisme en droit français et en droit brésilien Etudes de droit comparé, *op. cit.*, p. 295-306.

234 LIMA MARQUES (C.), « *Das neue brasilianische Zivilgesetzbuch* vom 2002…», art. préc., p. 129-131.

laquelle les conventions, même celles valablement constituées sous l'empire des lois abrogées, ne prévalent pas lorsqu'elles portent atteinte aux dispositions d'ordre public établies en vue d'assurer la *fonction sociale du contrat et de la propriété* (art. 2035, § unique CC/02)[235]. Érigés en normes d'ordre public et d'intérêt social, ces principes sont à appliquer d'office par le juge à tout instant du procès[236].

Il est donc permis de s'interroger sur le sort des contrats, antérieurement qualifiés de commerciaux, lorsque ceux-ci seront mis à l'épreuve des principes fondamentaux du nouveau Code, notamment celui de la *fonction sociale du contrat* et celui de la *fonction sociale de la propriété*[237]. La doctrine et les praticiens se montrent réticents à cette confrontation. Certains énoncés de la première Journée de droit commercial d'octobre 2012 en témoignent : aux termes de l'énoncé n° 21 « le dirigisme contractuel doit être nuancé à l'égard des contrats entrepreneuriaux, compte tenu de la symétrie naturelle des rapports inter-entrepreneurials » et, aux termes de l'énoncé n° 23, « dans les contrats entrepreneuriaux, il est loisible aux parties d'établir les paramètres objectifs pour l'interprétation des conditions de révision et/ou de résolution du contrat » ; aux termes de l'énoncé n° 25, « la révision du contrat pour onérosité excessive fondée sur le Code civil doit tenir compte de la nature d'objet du contrat. Dans les rapports entrepreneurials, on doit présumer la sophistication des contractants et observer les risques assumés par ceux-ci » ; aux termes de l'énoncé n° 26, « le contrat entrepreneurial accomplit sa fonction sociale lorsqu'il ne porte aucun préjudice à des droits ou intérêts diffus ou collectifs, dont est titulaire une personne étrangère au rapport contractuel » ; aux termes de l'énoncé n° 29, « la fonction sociale du contrat et la bonne fois objective (art. 421 et 422 du Code civil) s'appliquent aux négoces

235 V. l'énoncé n° 300, approuvé lors des IV Journées de droit civil (CEJ/CJF) : « La loi applicable aux effets actuels des contrats conclus avant le nouveau Code civil sera celle en vigueur au moment de leur célébration ; toutefois, en présence d'une modification législative qui met en évidence l'anachronisme de la législation abrogée, le juge équilibrera les obligations des parties contractantes, en tenant compte des intérêts traduits par les règles abrogées et celles qui leur sont substituées ainsi que de la nature et de la finalités de l'affaire ». Par ailleurs, le STF a eu l'occasion de décider qu'en matière contractuelle la Constitution de 1988 n'admet pas la rétroactivité de la loi, sous toutes ses formes, y compris sur les effets postérieurs des conventions formées antérieurement à la nouvelle loi (STF Assemblée plénière, ADI 493-DF, Rapporteur Moreira Alves, affaire jugée le 25.06.1992, DOU 04.09.1992, p. 14089). En revanche, le STJ a récemment décidé que la loi brésilienne d'arbitrage de 1996 régit les contrats contenant une clause d'arbitrage, même s'il a été signé avant son entrée en vigueur (SEC 894/UY, Rapporteur Nancy Andrigui, affaire jugée le 20/08/2008, *DJ* 09/10/2008).

236 FROMONT (M.). « L'influence de la Constitution sur le Code civil au Brésil », in *La lettre du Centre français de droit comparé*, n° 58, oct. 2009, p. 4-6, p. 5.

237 À propos, v. JUNQUEIRA DE AZEVEDO (A.), « Princípios do novo direito contratual e desregulamentação do mercado », *Revista dos Tribunais*, vol. 750, p. 113 sq.

juridiques entre entrepreneurs, en conformité avec les spécificités des contrats entrepreneuriaux ». De toute évidence, le solidarisme contractuel prôné par le législateur de 2002 et à la charge du juge ne séduit pas les commercialistes brésiliens.

Toujours est-il qu'en cas de défaillance des parties[238] ou de la loi, c'est le rôle d'intervention du juge dans le contrat qui est en jeu, car pour le rendre juste, aussi bien économiquement que moralement et aussi bien à l'égard des parties que des tiers, il faut bien pouvoir le modifier. Le nouveau Code en vient ainsi à confirmer textuellement cette tâche traditionnellement reconnue au juge et à l'arbitre, par ailleurs.

2. Relativisation pionnière des postulats contractuels classiques par le Code de protection du consommateur

Précédant la codification civile de 2002, le Code de protection du consommateur de 1990 présente des mesures réformatrices des postulats classiques du droit des contrats d'importance majeure. D'abord, il apporte, de façon pionnière, des modifications dans la structure contractuelle basée sur la liberté et l'égalité. Dans un contrat passé entre un professionnel et un consommateur, la *liberté contractuelle* n'est plus pleine et le consommateur reçoit un traitement différencié et protecteur[239], notamment contre l'abus de faiblesse (art. 39, IV CDC). En outre, du fait que la plupart des dispositions de ce code soient impératives et d'ordre public interne (art. 1er CDC), la place accordée aux règles non-contraignantes ainsi qu'à l'autonomie contractuelle reste assez résiduelle[240]. Enfin, la bonne foi innerve les rapports de consommation (art. 4, III CDC).

L'*assouplissement du principe de la force obligatoire des conventions* peut être illustré par l'exigence d'une obligation générale d'information préalable du consommateur conditionnant l'efficacité du contrat (art. 46 CDC) et par l'adoption de la faculté de rétractation (art.

238 A l'instar de l'absence d'une clause de modification ou de renégociation dans le contrat de longue durée ou même d'une telle démarche même en l'absence d'une clause contractuelle contraignante en ce sens.

239 Cf. AGUILAR VIEIRA (I.), « A autonomia da vostade no Código Civil brasileiro e no Código de Defesa do Consumidor », *Revista dos Tribunais*, vol. 791, p. 31 sq.

240 Cette caractéristique amène certains auteurs, comme Véra Maria Jacob de Fradera, à soutenir que « *le principe de la liberté contractuelle ne joue pas, dans les contrats de consommation, un rôle pareil à celui joué dans le domaine des contrats de droit civil, au contraire, c'est la loi qui détermine toutes les normes contractuelles, et ces normes sont de nature impérative. Cela est dû au fait que le plus important dans les rapports de consommation, n'est pas la volonté des parties, mais si, l'intérêt social, selon les mots de Paulo Luiz Netto Lobo* » (V. M. JACOB DE FRADERA, « *Les contrats du consommateur : rapport brésilien* », Travaux de l'Association Henri Capitant, Tome LVII – *Le consommateur : journées colombiennes* (24-28 septembre 2007), Bruxelles, Bruylant, 2010, p. 55-64, p. 60).

49 CDC). Par ailleurs, le juge peut, en cas d'excessive onérosité, réviser ou résilier le contrat conclu par le consommateur (art. 6, V CDC). En outre, l'équilibre contractuel est assuré par les moyens de lutte contre les clauses abusives (art. 51 CDC)[241].

Enfin, l'assouplissement de l'effet relatif du contrat peut être illustré par la responsabilité solidaire de tous les fournisseurs[242] d'une chaîne contractuelle à l'égard du consommateur en vertu du défaut de conformité des biens et des services (arts. 18 à 25 CDC). Comme l'a dit le professeur Véra Maria Jacob de Fradera, « le contrat ou rapport de consommation rompt avec ce principe (celui de la relativité des contrats), en introduisant l'ouverture des effets du contrat réalisé entre un commerçant et un consommateur, dans le sens que le consommateur peut demander en justice le fabricant, le producteur de ce produit, s'il présente un défaut. Dans ce sens-là, le contrat de consommation se ressemble, par rapport à cet aspect de la non-relativité de ses effets, à la convention collective de travail et au fidéicommis *inter vivos*, par exemple »[243].

À ces phénomènes d'ajustement, vers l'équilibre, des rapports de droit privé, l'on peut associer d'autres qui viennent moduler, cette fois-ci, le droit privé brésilien dans son ensemble.

C. Phénomènes actuels de modulation du droit privé

Un double phénomène module actuellement le pouvoir du législateur et des juges nationaux. D'une part, les principes et les règles constitutionnels s'imposent en droit privé pour rendre ses institutions compatibles avec un nouvel ordre socio-politico-économique (1). D'autre part, les engagements internationaux conduisent, peu à peu, à l'adaptation ou à la mise en conformité du droit privé aux impératifs qu'ils engendrent (2).

1. La « constitutionnalisation » du droit privé

L'évolution du droit privé brésilien est liée à ses Constitutions[244]. L'évolution actuelle, rattachée à la Constitution du 5 octobre 1988, est marquée par une forte connotation sociale. En effet, cette Constitution

241 À propos, v. GRAEFF (B.), « *L'interdiction des clauses abusives dans les contrats de consommation en France et au Brésil* », art. préc., p. 321-337.

242 Selon l'art. 3 CDC, le fournisseur est un professionnel (personne physique ou morale, publique ou privée, nationale ou étrangère), qui vend, produit, fabrique ou commercialise un produit ou offre un service sur le marché brésilien.

243 V. M. JACOB DE FRADERA, « Les contrats du consommateur : rapport brésilien », rap. préc, p. 55-64.

244 WALD (A.), « Le droit brésilien et le Code civil de 2002 », art. préc., p. 21.

dote l'État de mécanismes interventionnistes pour réaliser les objectifs de construction d'une société socialement juste et fraternelle. Ceci laisse des empreintes sur le droit privé[245] dans la mesure où, au-delà des règles relatives à la forme de l'État et à l'organisation des pouvoirs publics, la Constitution brésilienne prévoit des règles et des principes relevant des rapports entre particuliers. Outre les droits fondamentaux assurés par les arts. 5 à 17, l'affirmation de l'égalité entre tous les enfants et la reconnaissance de « l'union stable », sorte de union civile, entre personnes de sexe différent comme entité familiale et de l'aspect contractuel de cette union[246], la Constitution dispose que l'ordre économique[247], fondé sur la valorisation du travail humain et sur la libre entreprise, a pour but d'assurer à tous une existence digne et conforme aux exigences de la justice sociale, conformément aux principes de la propriété privée, de la fonction sociale de la propriété, de la libre concurrence, de la protection du consommateur et de la défense de l'environnement (art. 170).

Ces principes constitutionnels interviennent directement sur la force créatrice de la volonté : celle-ci doit désormais privilégier des solutions plus en accord avec une certaine idée d'éthique sociale et d'équité[248]. On parle ainsi d'une « constitutionnalisation » du droit privé brésilien[249], rendue possible notamment grâce au système de contrôle de constitutionnalité *a posteriori* exercé de manière *diffuse et concrète* par le juge du fond qui peut écarter l'application d'une loi s'il l'estime inconstitutionnelle, ou *concentrée et abstraite*, hypothèse dans laquelle le *Supremo Tribunal Federal* peut être saisi directement par différentes voies de recours directs à l'initiative de certaines autorités, des partis politiques et des syndicats de portée nationale[250].

C'est justement par le contrôle direct de constitutionnalité des

245 FROMONT (M.). « L'influence de la Constitution sur le Code civil au Brésil », art. préc., p. 4-6 ; LEMOALLE (É.), « Le droit civil », art. préc., p. 279-284.

246 V. JACOBI MICHEL (A.), « Les limites contractuelles dans les relations hors mariage en droit français et en droit brésilien », in *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien– Études de droit comparé, op. cit.*, p. 391-398.

247 Pour une analyse en droit comparé, v. FRISON-ROCHE (M.-A.) (dir.), *Le rôle des Cours suprêmes en matière économique – Dossier scientifique*, Paris, Regulatory law review/Lextenso, 2010.

248 Sur la prise en compte des valeurs sociales contenues dans la Constitution de 1988 dans le domaine du droit civil, cf. TEPEDINO (G.) et SCHREIBER (A.), « *Culture et droit civil: Rapport brésilien* », rap. préc., p. 4-6.

249 Expression d'origine doctrinale, Gustavo TEPEDINO étant l'un des ténors de cette théorie au Brésil.

250 V. MORAIS DA COSTA (T.), « Le droit constitutionnel : la protection des droits fondamentaux », dans PAÏVA DE ALMEIDA (D.), *Introduction au droit brésilien,* L'Harmattan, 2006, p. 47-87. Pour une approche comparatiste, v. FROMONT (M.), La justice constitutionnelle en France et dans le monde, Paris, Dalloz, 2013 (à paraître).

lois que le STF a jugée, le 5 mai 2011[251], que « l'union stable » entre personnes de même sexe devait être considérée comme une entité familiale au même titre que « l'union stable » entre personnes de sexes différents. En ayant déterminé une telle assimilation, la décision a privé d'effet la différence de sexe mise en exergue par l'art. 1723 du nouveau Code civil brésilien comme condition d'application du régime de l'union stable aux couples homosexuels[252].

251 STF, ADI 4277, Assemblée plénière, affaire jugée le 05.05.2011, *RTJ* 219, p. 212 ; et ADPF 132, Assemblée plénière, affaire jugée le 05.05.2011, EMENT, vol. 2607-01, p. 1. Dans ces deux affaires, il était question d'interpréter l'art. 1723 du Code civil à la lumière de la Constitution fédérale de 1988. Aux termes de cet article, « l'union stable entre un homme et une femme est reconnue comme une entité qui constitue une famille, caractérisée par la vie en commun, en publique, continue et de longue durée, et établie avec cet objectif ». Dès lors que cet article n'envisage l'union stable, forme d'entité familiale constitutionnellement reconnue (art. 226 §3), qu'entre personnes de sexe différent, la question de sa conformité à la Constitution s'est posée à la Cour suprême, dans le cadre d'une *action directe de constitutionnalité* (ADI), intentée par le procureur général de la République, et d'une *action par manquement à précepte constitutionnel* (ADPC), intentée par le gouverneur de l'État du Rio de Janeiro. En synthèse, ces deux actions avaient pour objectif voir le STF déclarer, d'une part, que l'union entre personnes du même sexe devrait être obligatoirement reconnue comme entité familiale, dès lors que les conditions exigées pour la constitution de l'union stable entre un homme et une femme sont réunies, et, d'autre part, que le même statut (droits et devoirs) reconnu et applicable aux unions stables entre hommes et femmes devrait être étendu aux unions stables entre personnes du même sexe.
252 Pour décider de la sorte, le STF va raisonner par étapes. Tout d'abord, il affirme que le sexe ne saurait être un facteur de non-égalité juridique entre les personnes. L'incise IV de l'art. 3 de la Constitution prohibe toute discrimination en ce sens car elle irait à l'encontre de l'objectif fondamental de la République de «promouvoir le bien de tous » sans préjugés d'origine, de race, de sexe, de couleur, d'âge ou toute autre forme de discrimination. Par conséquent, le STF reconnaît le droit à l'orientation sexuelle comme corollaire du principe de la « dignité humaine», ce qui implique le droit à l'auto-estime, point le plus élevé de la conscience humaine. Pour la Cour, le droit à la recherche du bonheur conduit à un « saut » normatif de l'interdiction de la discrimination à la proclamation de la liberté sexuelle, dont l'exercice effectif est protégé par la Constitution. L'autonomie de la volonté en la matière constitue donc une clausula petrea. Ensuite, la Cour reconnaît que le mot « famille » employé dans le texte constitutionnel n'enferme une quelconque signification orthodoxe ou propre à la technique juridique. Au contraire, au sens de la Constitution, la famille est une catégorie socioculturelle. Il y a donc un droit subjectif reconnu à chaque citoyen de constituer une famille de sorte que le caput de l'art. 226 de la Constitution, aux termes duquel la famille, base de la société, bénéficie d'une protection spéciale de l'État, repousse toute interprétation réductionniste. Pour la Cour, la « famille » est le principal lieu de concrétion des droits fondamentaux que la Constitution désigne par les termes « intimité et vie privée », employés à l'art. 5, X. En se référant à l'institution « famille », la Constitution n'opère aucune distinction quant à la forme ou quant au fond. D'où résulte que l'isonomie entre les couples hétérosexuels et les couples homosexuels ne peut atteindre sa plénitude que dans la mesure où ces derniers peuvent exercer le droit subjectif de constituer une famille. La famille peut donc se constituer par d'autres voies que celle du mariage civil, affirme le STF. Il s'agit d'assurer, au plan constitutionnel, « la marche vers le pluralisme comme catégorie socio-politique-culturelle », conclut la Cour. Enfin, la référence constitutionnelle à la

Cette solution de principe a été confirmée par la suite[253]. Elle a également eu un impact immédiat et non négligeable sur la jurisprudence du STJ. En effet, suite aux décisions du 5 mai 2011 du STF, le STJ a tranché, par voie d'un contrôle d'interprétation conforme des dispositions du Code civil à la Constitution, la question de l'ouverture du mariage civil aux couples homosexuels. Saisi d'un *Recurso Especial*[254], le STJ a cassé un arrêt d'appel ayant refusé la demande de délivrance d'un *certificat de capacité à mariage* (« habilitação para se casar ») faite par deux femmes vivant déjà en « union stable »[255], en décidant que les articles 1.514, 1.521, 1.523, 1.535 e 1.565 du Code civil brésilien ne s'opposent pas à ce que deux personnes du même sexe se marient civilement[256].

dualité fondamentale de l'homme-femme au § 3 de l'art. 226 n'a pour but que d'encourager les relations juridiques horizontales, sans hiérarchie, au sein des foyers. Il s'agit d'un renforcement de la réglementation dans la lutte contre la réticence des coutumes patriarcales brésiliennes. Il est donc impossible d'utiliser la lettre de la Constitution pour justifier un quelconque traitement discriminatoire. La Constitution n'interdit pas la composition d'une famille par des personnes de même sexe. Il n'y a donc pas lieu, affirme la Cour, d'interdire l'exercice de la liberté, sinon en présence d'un droit ou d'un intérêt légitime d'un tiers ou de la société à protéger, ce qui n'est pas le cas en l'espèce. La Cour constate, en effet, l'absence de règles garantissant aux hétérosexuels le droit de n'être pas assimilées juridiquement aux homosexuels. L'art. 5 §2 de la Constitution fédérale vient en renfort de sa position, en conclut la Cour, dans la mesure où « les droits et les garanties inscrits dans la présente Constitution n'en excluent pas d'autres qui découlent du régime et des principes qu'elle adopte ou des traités internationaux auxquels la République fédérative du Brésil est partie ».

253 STF, RE 477554 AgR, Rapporteur Celso de Mello, 2e Chambre (2a Turma), affaire jugée le 16/08/2011, *DJe*-164 25-08-2011, publié le 26-08-2011, *RTJ* V. 220, p. 572.

254 STJ, REsp 1183378/RS, Rapporteur Luis F. Salomão, 4e Chambre, affaire jugée le 25/10/2011, *DJe* 01/02/2012.

255 En l'espèce, deux femmes vivant en « union stable » pendant trois ans se sont présentées devant deux officiers d'état civil de la Ville de Porto Alegre afin de requérir un certificat de capacité à mariage, ce qui leur a été dénié par chacun d'eux. Le 25 mars 2009, le couple a déposé une demande de délivrance dudit certificat devant le juge de première instance de Porto Alegre, affirmant la non-existence de l'obstacle juridique au mariage entre personnes du même sexe. Le jugement a rejeté la demande, en affirmant que le mariage, tel qu'il est régi par le Code civil de 2002, n'est possible qu'entre l'homme et la femme. En appel, la décision avait été confirmée.

256 Pour décider de la sorte, le STJ affirme d'abord que, dans l'accomplissement de sa mission d'uniformiser le droit infraconstitutionnel, il ne peut pas conférer à la loi une interprétation non-conforme à la Constitution. Ensuite, le STJ s'inspire des arguments mis en avance par le STF dans ces arrêts du 5 mai 2011 qui ont conféré à l'art. 1723 du Code civil de 2002 une interprétation conforme à la Constitution pour évacuer de cette disposition toute signification empêchant la reconnaissance de l'union stable entre personnes du même sexe comme entité *familiale* (synonyme parfait de *famille*), dont la protection est constitutionnellement assurée. Les principes ayant fondé lesdites décisions du STF ont donc été étendus pour permettre la consécration jurisprudentielle du mariage civil entre personnes du même sexe. Sur l'ensemble

La « constitutionnalisation » du droit privé peut enfin également résulter du fait que le texte constitutionnel germine de véritables institutions juridiques et leur donne une valeur hautement significative et prééminente. À cet égard, le droit brésilien de la consommation est très illustratif, puisque la codification issue de la loi de 1990 découle d'un commandement constitutionnel (art. 48 des Actes et des dispositions constitutionnelles transitoires)[257].

2. L'incidence de l'ordre international sur le droit privé

Comme d'autres droits nationaux, le droit privé brésilien, notamment dans le domaine des contrats, subit l'influence grandissante des instruments et solutions approuvés au sein de différents organismes travaillant pour l'unification du droit privé.

Le Brésil a ratifié un nombre de conventions internationales sur le droit du commerce international moindre que d'autres pays européens par exemple. Un changement de position du Brésil à cet égard s'annonce néanmoins. Son adhésion à l'UNIDROIT en 1993, ainsi que son retour à la Conférence de La Haye en 2001[258] sont des initiatives à saluer. Les divers protocoles signés dans le cadre du Mercosur depuis 1991, son adhésion en 2002 à la Convention de New York de 1958 sur la reconnaissance et l'exécution de décisions arbitrales étrangères ainsi que son action au sein des *Conférences interaméricaines de droit international privé* (CIDIPs) contribuent également à renforcer cette tendance. Enfin, le recours aux Principes d'Unidroit relatifs aux contrats du commerce international pour interpréter la règle nationale sur la lésion (art. 478 CC / 02) dans des arbitrages purement internes[259], ainsi que l'utilisation des Incoterms dans les contrats de vente aussi bien nationaux qu'internationaux[260] sont de plus en plus vérifiés dans

de ces décisions, v. FROMONT (M.), *La justice constitutionnelle en France et dans le monde*, Paris, Dalloz, 2013 (à paraître).

257 COMPARATO (F. K.), « A proteção do consumidor na Constituição Brasileira de 1988 », *Revista de Direito Mercantil*, vol. 80 (1990), p. 66-75.

258 Le Brésil avait adhéré aux statuts de la Conférence en 1972 et les avait dénoncés en 1978. Cf. GRANDINO RODAS (J.) et CAMPOS MONACO (G. F.) (org.), *Conferência da Haia de Direito Internacional Privado: A Participação do Brasil*, Brasília: FUNAG, 2007; VIEIRA DA COSTA CERQUEIRA (G.), « A Conferência de Haia de direito internacional privado », *Revista da Faculdade de Direito da UFRGS*, vol. 20 (2001), p. 171-192.

259 Cf. Câmara FGV de Conciliação e Arbitragem (São Paulo, Brésil), décision nº 1/2008 du 09.02.2009, *Delta Comercializadora de Energia Ltda v. AES Infoenergy Ltda* ; et Ad hoc Arbitration (Brésil), décision du 21.12.2005. Ces décisions sont disponibles sur le site www.unilex.info. V., en dernier lieu, GAMA JR. (L.), « Prospects for the Unidroit Principles in Brazil », *Revue de droit uniforme*, 2011, p. 613 *sq*.

260 ESPLUGUES MOTA (C.) et AGUILAR VIEIRA (I.), *Compraventa internacional de Mercaderías* : Los Incoterms 2000, in C. Esplugues Mota et D. Hargain (orgs.), *Derecho del*

la pratique des affaires au Brésil. Par ailleurs, l'adhésion du Brésil à la Convention de Vienne de 1980 sur la vente internationale en 2012, devra provoquer un fort impact au droit interne de la vente[261].

Mais, au plan international, comme à l'égard des droits nationaux en Europe[262], c'est un double mouvement qui tend à provoquer les modulations les plus inattendues du droit privé brésilien: il s'agit de la prééminence des droits de l'Homme (a) et de l'intégration économique régionale (b).

a. La prééminence des droits de l'Homme

En droit brésilien, l'influence des droits de l'Homme sur le droit privé se fait plutôt sentir à travers la protection et l'effectivité des droits fondamentaux inscrits dans la Constitution de 1988[263] que par le système interaméricain de protection des droits de l'Homme. Le Mercosur quant à lui ne dispose pas d'un système de protection des droits fondamentaux à l'image du droit européen[264]. En ce qui concerne plus spécifiquement la modulation du droit privé brésilien par le système interaméricain de la protection des droits de l'Homme, il est à noter que le Brésil n'est lié à la Convention interaméricaine relative aux droits de l'Homme, signé à San José de Costa Rica le 22 novembre 1969 (Pacte de San José de Costa Rica), que depuis le 9 juillet 1992[265].

Néanmoins, suite à l'application du Pacte de San José de Costa

comercio internacional – Mercosur et Unión Europea, Madrid, Reus, 2005, p. 399-435.

261 V. notamment AGUILAR VIEIRA (I.), *L'Applicabilité et l'impact de la Convention des Nations Unies sur les contrats de vente internationale de marchandises au Brésil*, Strasbourg, PUS, 2010.

262 Comme l'a remarqué Mme Jaufret-Spinosi, « Deux sources d'inspiration viennent dépasser les droit nationaux : les droits de l'Homme et le droit communautaire ». JAUFRET –SPINOSI (C.), « A influência do direito francês sobre os direitos latino-americanos (Direito Contratual) », in Aguilar Vieira (I) (org.). *Estudos de direito comparado e de direito internacional privado*, Curitiba, Juruá, 2011, p. 35-52, spec. p. 44-50.

263 Sur cette protection, v. MORAIS DA COSTA (Th.), « Le droit constitutionnel : la protection des droits fondamentaux », in *Introduction au droit brésilien, op. cit*, p. 47-87.

264 Les deux instruments qui pourraient annoncer un tel système seraient le Protocole d'Ushuaia sur le Compromis Démocratique au Mercosur, du 24 juillet 1998, et le Protocole d'Asunción sur l'engagement avec la promotion et la protection des Droits de l'homme au Mercosur, du 19 juin 2005, où les Etats parties et associés annoncent des mesures à prendre dans le cas de graves violations des droits de l'homme et des libertés fondamentales (art. 3). Cependant, le Mercosur ne dispose pas d'un instrument contraignant et d'un organe juridictionnel compétent en matière de protection des droits de l'Homme.

265 Les droits et libertés garantis par cette Convention correspondent, dans une large mesure, à ceux protégés par les instruments européens, notamment la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, signée à Rome le 4 novembre 1950.

Rica à un rapport de consommation, le STF a considéré que l'art. 5, LXVII CF/1988, qui admet la prison civile pour le dépositaire infidèle, devait être interprété d'après ce Pacte[266] afin d'assurer le droit du consommateur de ne pas être incarcéré en tant que dépositaire infidèle, quelle que soit la modalité du dépôt[267]. Cette perspective *pro homine*[268] d'alignement du droit privé a abouti à la formulation par le STF de la « súmula vinculante » n° 25[269]. Cette décision est d'autant plus importante qu'elle a interprété une règle constitutionnelle d'après une convention de valeur infraconstitutionnelle. En effet, en ayant été ratifié avant l'avènement de l'Amendement constitutionnel n° 45 du 30 décembre 2004, le Pacte de San José da Costa Rica ne semblerait pas bénéficier, au plan formel, d'une place privilégiée dans la hiérarchie des normes que la réforme de décembre de 2004 assure aux traités portant sur les droits de l'Homme (rendus équivalents à l'amendement constitutionnel - art. 5, § 3 CF/88)[270].

Quant à la jurisprudence de la Cour interaméricaine, son impact sur le droit privé est encore à attendre. L'acceptation de la compétence de la Cour interaméricaine par le Brésil n'ayant eu lieu que le 10 décembre 1998, le contentieux devant celle-ci demeure très faible[271].

b. L'impact de l'intégration régionale sur le droit privé

266 CADH, article 7.7 : *Nul ne peut être arrêté pour motif de dette. Cette disposition ne s'applique pas aux mandats décernés par une autorité judiciaire compétente pour cause d'inexécution des obligations alimentaires.*

267 STF, HC nº 87.585 et RE nº 466.343 et 349.703, affaire jugée le 03.122008 ; et HC n° 96.772/SP, affaire jugée le 9.06.2009.

268 V. CANÇADO TRINDADE (A. A.), «International Law for Humankind : Towards a New Jus Gentium (II) », *RCADI*, 317 (2005), p. 9 sq.

269 Cf. *infra*, III.A.2.

270 Outre l'antériorité du Pacte à la réforme constitutionnelle de 2004, c'est la condition d'approbation imposée par le nouvel art. 5 § 3 CF/88 qui lui manquerait pour l'ériger en norme constitutionnelle. En effet, l'art. 5 § 3 CF/88 établit que « les traités et conventions internationales portant sur les droits de l'Homme qui ont été approuvés, dans la Chambre des députés et dans le Sénat du Congrès national, en deux tours, par 3/5 des votes de ses membres respectifs, seront équivalents aux amendements constitutionnels ». La lecture des arrêts du STF ne permet pas d'en déduire le contraire, malgré l'opinion en ce sens manifestée par les juges rapporteurs. Le STF semble donc partagé quant à la valeur constitutionnelle du Pacte de San José, certains juges l'étendant comme une règle « supra-légale », mais de valeur infra-constitutionnelle. V. PIOVESAN (F.), « Sistema Interamericano de Proteção de Direitos Humanos: Impacto, Desafios e Perspectivas à Luz da Experiência Latino-Americana» ; in On bogdandy (A.) et alii (dir.), *Direitos Humanos, Democracia e Integração Juridica na América do Sul*", Lumen Juris: Rio de Janeiro, 2010, p. 340

271 Le Brésil n'a été condamné qu'à trois reprises par la Cour de San José, dans les affaires *Ximene Lopes*, du 17 août 2006 (portant sur l'intégrité personnelle), *Escher et autres*, du 6 juillet 2009, et *Sétimo Garibaldi*, du 23 septembre 2009, les deux dernières portant sur les travailleurs sans terre.

Alors que le droit privé des pays européens connaît une évolution sans égale en raison de l'activité normative et jurisprudentielle européenne (Union européenne et Conseil de l'Europe)[272], le droit privé brésilien est moins influencé par la réglementation issue du Mercosur. Les raisons en sont multiples. Tout d'abord, les traités fondateurs du Mercosur ne contiennent pas des dispositions visant directement le droit privé et, si l'on ne prend pas en compte l'obligation générale imposée aux États membres par l'art. 1er du traité d'Asunción du 26 mars 1991 d'harmoniser leur législation dans les « domaines pertinents », il ne serait pas exagéré de dire qu'ils n'invitent pas les États membres à entreprendre une action spécifique dans les différents domaines qui s'y rattachent. Ensuite, ce sont le caractère strictement intergouvernemental des organes du Mercosur, l'absence de primauté et d'effet direct des normes qu'ils produisent et la portée encore relativement réduite des champs concernés qui pourraient rendre vaine toute tentative d'étude sur l'incidence, tout du moins mécanique, de la construction du Mercosur sur le droit privé de ses États membres, voire sur des branches particulières de leur droit privé, d'autant plus que l'on relève un fort déficit d'harmonisation législative dans ce cadre d'intégration régionale. L'impact modernisateur de l'intégration sur les droits privés nationaux reste néanmoins possible et peut être engendré tant « mécaniquement » que « par contagion »[273].

Il est ainsi à noter que la situation pourrait évoluer. Deux domaines du droit privé en sont particulièrement concernés : le droit de la consommation et les conflits de lois.

En droit de la consommation, tout d'abord. Bien qu'une proposition de règlement commun de protection du consommateur ait été rejetée par les États membres[274], une résolution portant

272 V. VIEIRA DA COSTA CERQUEIRA(G.), « Les fondamentales pour la comparaison en droit privé », art. préc. p. 134-137.

273 Expressions empruntées à Claude J. BERR, « L'influence de la construction européenne sur l'évolution du droit privé français », *Mélanges Pierre-Henri Teitgen*, Paris, Pedone, 1964, p. 1-21.

274 Alors que le traité d'Asunción ne fait aucune mention à la protection du consommateur, plusieurs initiatives de réglementation de la matière au plan régional ont vu le jour depuis qu'une réunion du Groupe Marché Commun du 30 juin 1993 a estimé que la Commission de protection du consommateur devait poursuivre son travail visant à définir d'une politique de protection du consommateur pour le Mercosur (Procès-verbal du 30 juin 1993, *Boletim de Integração Lationo-Americana*, 10/38, 1993). Selon la doctrine, une telle démarche s'imposait dès lors que l'on prétend établir des conditions réelles et uniformes de concurrence au sein d'un marché commun (C. SALOMÃO FILHO, « O Mercosul como modelo de regulação do Mercado », in João Grandino Rodas (coord.), *Contratos internacionais*, *op. cit.*, p. 401-426, p. 411 sq). Outre les initiatives au plan du conflit de lois et du conflit de juridictions (cf. Protocole de Santa Maria sur la juridiction internationale en matière des relation de consommation du 17 décembre 1996 - CMC/DEC. 10/96, toujours pas en vigueur, et le récent *Projet de Résolution du Groupe marché*

commun sur le droit applicable aux contrats internationaux conclus par les consommateurs du 18 et 19 août 2010), un projet de *Règlement commun de protection du consommateur dans le cadre Mercosur* avait été présenté aux États membres par le CT-7 entre le 25 à 29 novembre 1997. En termes généraux, le texte de ce projet, Recommandation n° 1/97 (Acta nº 8/97 del Comité Técnico nº 7 sobre Defensa del Consumidor, anexo III), adressé à la Commission du commerce du Mercosur, fixait les questions relatives à la protection du consommateur faisant l'objet d'unification au niveau du Bloc. L'adoption de ce projet de règlement était la condition pour débuter, au sein de chaque Etat membre, le processus de ratification du Protocole de Santa Maria de 1996 (art. 18 de ce Protocole), ainsi que pour l'entrée en vigueur des cinq Résolutions concernant le consommateur adoptées en 1996 par le Groupe marché commun. Il s'agit des résolutions 123/96 à 127/96 (disponibles à l'adresse : http://www.mercosur.int/show?contentid=3093), qui traitent respectivement : (i) de la définition des concepts de base en matière de protection du consommateur ; (ii) des droits fondamentaux du consommateur ; (iii) de la protection de la santé et de la sécurité du consommateur ; (iv) de la publicité commerciale ; et (v) de la garantie contractuelle. Il est à noter que lors de la mise en place du Projet de règlement, le CT-7 a décidé de ne pas adopter un « *Regulamento* » (droit dérivé), comme l'avait établi la Résolution 126/94 du Groupe Marché Commun (MERCOSUR/GMC/RES n° 126/94 - Defesa do consumidor), mais un « *Protocolo* » et, à ce titre, l'intégrer aux traités constitutifs du Mercosur (droit originaire). Certes, ce projet de réglementation matérielle du droit de la consommation au niveau du Mercosur a été rejeté par les États membres lors de la 25e Réunion de la Commission du commerce du Mercosur, réalisée en Montevideo le 9 et 10 décembre 1997 (Doc. n° 7/97), au motif qu'elle conduirait au démantèlement des mesures nationales de protection des consommateurs, plus particulièrement au Brésil et en Argentine. En effet, allant au-delà d'un rapprochement de législations nationales en la matière, le projet de règlement devait réaliser une véritable unification du droit de la protection du consommateur, ce qui a provoqué l'opposition des Etats membres en raison des effets dérogatoires des normes nationales que le procédé engendre. Ainsi, grâce à un ample mouvement associatif mené par les militants consuméristes brésiliens, ce projet de réglementation a fait l'objet de critiques sévères de la part du gouvernement brésilien, pour qui son adoption représenterait, au Brésil, une régression inacceptable des niveaux de protection en la matière (quand bien même ni le Paraguay ni l'Uruguay ne disposaient des règles spécifiques de protection des consommateurs jusqu'alors). Cf. C. LIMA MARQUES, « Regulamento Comum de Defesa do Consumidor do Mercosul – Primeiras Observações sobre o Mercosul como Legislador da Proteção do Consumidor », *RDC*, nº 23-24 (1997), p. 79-103, p. 101 sq ; « Mercosul como Legislador em Matéria de Direito do Consumidor – Crítica ao Projeto de Protocolo de Defesa do Consumidor », *RDC*, nº 26 (1998), p. 53-76, p. 74 ; « Direitos do Consumidor no Mercosul: algumas sugestões frente ao impasse », *RDC*, n° 31 (1999), p. 16-44; A. P. GAIO JÚNIOR, *A Proteção do Consumidor no Mercosul*, São Paulo, LTr, 2003, p. 125. V. aussi Th. BOURGOIGNIE (ed.), *L'intégration économique régionale et la protection du consommateur,* Ed. Yvon Blais, 2009, p. 319 sq et p. 355 sq, respectivement ; et B. GRAEFF et W. M. PEREIRA, « L'initiative d'harmonisation régionale du droit de la consommation : les exemples du Mercosur et de l'OEA », in Ch. Quézel-Ambrunaz (dir.), *Les défis de l'harmonisation européenne du droit des contrats*, Chambéry : université de Savoie, 2012, p. 25-36. Nonobstant cette « tentative avortée » de codification de règles matérielles dans le cadre régional, l'obligation d'aboutir à un texte commun en la matière persiste, puisque la Résolution 126/94 demeure en vigueur. En attendant l'avènement d'une réglementation portant les règles uniformes en la matière ou l'adoption de l'actuelle proposition d'un protocole sur la loi applicable aux contrats internationaux conclus par les consommateurs, c'est la loi du marché de commercialisation des produits qui est

sur la définition des concepts de base en matière de protection du consommateur a été récemment adoptée au sein du Mercosur[275]. Parmi les définitions y figurant, se trouve celle du consommateur, considéré comme celui qui achète un produit pour son usage personnel, en dehors du cadre de son activité professionnelle. Cette définition aura un impact sur l'ordre juridique national des États membres puisqu'en harmonisant ladite notion en droit interne elle peut aboutir à une approche unique et, parfois, plus restrictive que celle retenue par le droit des certains États membres[276]. Par ailleurs, avant l'avènement de la Résolution 34/2011, le Tribunal Permanent de Révision du Mercosur (TPR) avait retenu, dans son avis consultatif n° 1/2007, une définition commune de consommateur en interprétation de l'art. 2, inc. 6 du Protocole de Buenos Aires sur la compétence internationale en matière contractuelle de 1994 (Décision CMC n° 01/94) qui converge avec la définition retenue par Résolution n° 34/2011, d'autant plus que celle-ci englobe le consommateur personne morale, comme l'avait admis par hypothèse ledit avis. Ainsi, malgré le caractère non contraignant de ses avis consultatifs, le TPR indiquait déjà clairement qu'au sein du Mercosur la définition de consommateur en matière de contrats internationaux pourrait être différente de celle retenue en droit interne[277].

La doctrine souligne également que, dans ce domaine, la décision prise par les autorités du Mercosur le 30 juin 1993 de bâtir une véritable politique commune de protection du consommateur[278] a eu pour conséquence de provoquer l'avènement de la loi argentine de protection du consommateur, loi n° 24.240 du 22 septembre 1993[279].

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applicable, conformément à l'art. 2 de la Résolution du Groupe Marché Commun n° 126/94 (cf., parmi d'autres, Eduardo Antônio KLAUSNER, *Direitos do Consumidor no Mercosul e na União Européia*: acesso e efetividade, 2ª Ed., Curitiba, Juruá, 2007, p. 85).

275 Mercosur/GMC/Res n° 34/2011 du 17 décembre 2011. A propos, v. FELDSTEIN DE CARDENAS (S. L.) et KLEIN VIEIRA (L.), "La noción de consumidor en el Mercosur", *Cuadernos de Derecho Transnacional* (Octubre 2011), VOL. 3, Nº 2, p. 71-84.

276 Cela semble être le cas par rapport aux droits brésilien et argentin, où la définition de consommateur comprend les personnes, notamment de la famille, à qui le rapport de consommation profite directement (cf. art. 2, par. unique CDC ; art. 1 de la Loi n° 24.240 d'octobre 1993). La définition retenue par la Résolution 34/2011 est aussi plus restrictive que celle figurant dans l'Annexe I du Protocole de Santa Maria sur la juridiction en matière de contrats conclus par les consommateurs (MERCOSUR/CMC/Decisión 10/96, toujours pas en vigueur).

277 À propos, v. LIMA MARQUES (C.), « Brésil - Rapport national », in D. Fernandez Arroyo (dir.), *La protection des consommateurs dans les relations internationales*, Asunción : La Ley, 2010, p. 47-96.

278 Procès-verbal de la réunion du Groupe Marché Commun du 30 juin 1993, Boletim de Integração Lationo-Americana, 10/38, 1993.

279 Newton DE LUCCA, « Processos comunitários de integração econômica e a proteção dos consumidores », *RDC* 16 (1995), p. 29-36, p. 34.

Dans le domaine du droit international privé, le Mercosur réglemente les matières considérées d'intérêt commun et nécessaires à la consolidation de l'intégration économique[280]. Dans ce domaine, l'un des premiers instruments adoptés en matière de conflit de lois a été le *Protocole de Saint-Louis* sur la loi applicable à la responsabilité résultant d'accidents de la circulation routière entre les États membres du Mercosur de 1996[281]. Par exception au principe fondée sur l'adage *lex loci delicti*, l'alinéa 2 de l'art. 3 de ce Protocole dispose que si ceux qui ont causé l'accident ou ceux qui en ont subi le dommage sont des personnes domiciliées dans un autre État membre, c'est le droit interne de ce dernier qui s'applique. Outre la règle du lieu du délit, l'art. 3 du *Protocole de Saint-Louis* prévoit, *in fine*, la possibilité d'incidence du principe de proximité[282].

Or, dans le cadre du Mercosur, aucune réglementation interne des États membres ne semble avoir abandonné ou tout au moins nuancé les critères rigides et fixes au profit d'un critère souple et flexible en matière d'obligation extracontractuelle[283]. Par ailleurs, hormis la solution figurant au premier paragraphe de l'art. 30 de la *loi Vénézuélienne de droit international privé* du 6 août 1998[284], qui détermine la loi applicable aux obligations contractuelles à défaut de

280 C. LIMA MARQUES, « *Procédure civile internationale et Mercosur : pour un dialogue des règles universelles et régionales* », art. préc., p. 465-484

281 Protocolo de São Luiz sobre Matéria de Responsabilidade Civil Emergente de Acidentes de Trânsito de 1996 (CMC / DEC. 1 / 96). Promulgué par le décret nº 3.856, du 3 juillet 2001.

282 Dans son cours à l'Académie de Droit International de La Haye, P. Lagarde définit ce principe comme étant « le principe qu'un rapport de droit doit être régi par la loi du pays avec lequel il entretient les liens les plus étroits et qu'un litige doit être rattaché, autant qu'il est possible, au for le plus proche. » (Cf. P. LAGARDE, «Le principe de proximité en droit international privé», *Recueil des cours,* 1986-I, t.196, p. 9 sq, p. 27.

283 La lex loci delicti est également consacrée dans les sources internationales. Ainsi les articles 165 à 169 du Code Bustamante : art. 165 – Les obligations résultant de la loi sont régies par le droit que les a établies ; art. 167 – Les obligations résultant des délits ou des fautes sont assujetties au même droit applicable au délit ou à la faute d'où ils procèdent ; art. 168 – Les obligations résultant d'actes ou d'omissions, dans lesquels intervient une faute ou négligence non sanctionnée par la loi, sont régies par le droit du lieu où la négligence ou la faute a eu lieu ; art. 169 – La nature et les effets des différentes catégories d'obligations, ainsi que leur extinction, sont régies par la loi de l'obligation dont il s'agit. V. aussi, l'art. 43 du *Traité de Montevideo* de 1940 : Les obligations ne résultant pas d'une convention sont régies par la loi du lieu où le fait licite ou illicite s'est produit et, le cas échéant, par la loi régissant les relations juridiques y afférentes. (Notre traduction).

284 Publiée à la « Gazette Officielle » nº 36.511 du 6 août 1998. Entrée en vigueur le 6 février 1999. Sur l'ensemble, v. VIEIRA DA COSTA CERQUEIRA (F.), « Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur », Thèse, préc., p. 194 sq.

choix[285], le principe de proximité ne semble applicable à aucun autre Etat membre du Mercosur, où il n'est envisagé que de *lege ferenda* et toujours restreint à la seule matière contractuelle[286], malgré des propositions déjà faites par la doctrine pour l'introduction du principe en matière délictuelle[287].

Si les différents projets de réforme du droit international privé actuellement en cours d'examen dans certains États membres du Mercosur se sont largement inspirés de la doctrine nord-américaine en la matière et des récentes conventions internationales, notamment la Convention de Mexico de 1994 sur la loi applicable aux contrats internationaux, pour consacrer dans leurs systèmes de conflit de lois en matière contractuelle des critères flexibles[288], rien ne nous semble interdire de penser que leur aboutissement, après des longues années en cours d'examens dans les Assemblées nationales, n'aura lieu que

285 Artículo 30. « *A falta de indicación válida, las obligaciones convencionales se rigen por el Derecho con el cual se encuentran más directamente vinculadas. El tribunal tomará en cuenta todos los elementos objetivos y subjetivos que se desprendan del contrato para determinar ese Derecho. También tomará en cuenta los principios generales del Derecho Comercial Internacional aceptados por organismos internacionales* ».

286 En Argentine, deux projets de réforme du droit international privé sont en cours d'examen auprès du Pouvoir législatif. Ont été retenus comme critère subsidiaire la loi de l'État avec lequel le contrat présente « les liens les plus étroits », abandonnant ainsi les critères de rattachement rigides établis par le Code civil de 1871. Il s'agit des articles 2607 du *Livre VIII du Projet de Loi d'Unification du Code civil argentin et du 1er paragraphe de l'article 72 du Projet de Code de Droit International Privé*. Alors que ces deux Projets se placent dans la même lignée que les législations modernes, en adoptant le critère flexible et indéterminé fondé sur le principe de proximité, ils diffèrent néanmoins en ce qui concerne la manière dont le juge devra déterminer la loi présentant des liens plus étroits avec le contrat. En effet, tandis que le premier Projet est resté vague à cet égard, le second retient la notion de prestation caractéristique. Au Brésil, le critère des « liens les plus étroits » a été retenu dans deux projets de réforme de la Loi d'Introduction au Code civil de 1942, qui ne sont cependant plus en cours d'examen auprès du Sénat (Projet de Loi nº 4. 905/95 - *Projet de Loi d'Application des Normes Juridiques* ; Projet de Loi sur l'Application de Normes Juridiques de 2004). Ces propositions sont restées vagues la sur la manière dont le juge devra déterminer la loi présentant des liens plus étroits avec le contrat. Sur ces projets de réforme, v. VIEIRA DA COSTA CERQUEIRA (F.), « Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur », art. préc., p. 194 sq). Il convient de mentionner que l'actuelle proposition de modification du paragraphe 2 de l'art. 9 de la Loi sur l'application des normes du droit brésilien visant à introduire le critère de l'autonomie en matière contractuelle (PL 1782/2011) est silencieux à l'égard du principe de proximité.

287 En ce sens, v. LIMA MARQUES (C.), « Novos rumos do Direito Internacional Privado quanto às obrigações resultantes de atos ilícitos (em especial de acidentes de trânsito », *Revista dos Tribunais*, vol. 690 (1998), p. 71-92.

288 A propos, v. VIEIRA DA COSTA CERQUEIRA (F.), « Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur », art. préc., p. 194 sq.

grâce à l'infléchissement des réticences à un critère flexible[289], pour le moins source d'insécurité juridique[290], provoqué par l'avènement du *Protocole de Saint-Louis* de 1996. En effet, bien qu'il ne constitue pas le seul texte applicable dans les autres États membres du Mercosur en ce sens, le *Protocole de Saint-Louis* peut contribuer à la modernisation des droits des conflits nationaux d'autant plus qu'il reflète, par ses solutions, le besoin de flexibilité des critères rigides normalement employés dans la règle nationale de conflit de lois déjà pressentie et mise en lumière par la doctrine avant même son avènement[291].

Il convient toutefois de remarquer que si le Brésil n'a pas encore adopté la proximité comme un principe de portée générale en matière d'obligations ou comme un critère de rattachement *stricto sensu*, comme l'ont évoqué quelques propositions de modernisation de la Loi d'application des normes du droit brésilien[292], la possibilité d'incidence de ce principe en matière des accidents de la circulation routière en vertu du droit du Mercosur, est le signe d'une possible inflexion future du système conflictuel, jusqu'à présent marqué par des rattachements exclusivement objectifs et rigides.

III. VOIES JURIDICTIONNELLES D'APPLICATION DU DROIT PRIVE : BREF APERÇU

Le droit privé brésilien s'applique tant par le juge étatique (A) que par l'arbitre conventionnellement investi des pouvoirs juridictionnels (B).

A. La voie judiciaire : une voie traditionnelle

À la dichotomie judiciaire qui connaît certains pays, comme la France ou la Suisse (certains cantons), s'oppose l'unité judiciaire brésilienne pour le règlement des litiges concernant l'ensemble du droit privé (1). L'autorité des décisions des cours supérieures connaît, par

289 Réticence qui n'est pas partagée par toute la doctrine. En ce sens, on a regrette que ce soit le seul texte fondé sur le principe de proximité applicable au Brésil : TIBURCIO (C.), « La diversité des sources du droit international privé – Rapport brésilien », art. préc., p. 184.

290 Comme l'a constaté Mme H. Gaudemet-Tallon à l'égard de la Convention de Rome, «la souplesse du rattachement est appréciable, mais elle peut aussi être un facteur d'incertitude […]» (Hélène GAUDEMET-TALLON, « Convention de Rome de 19 Juin 1980 », *JCP - Europe*. 1996. Fasc. 3201, p. 6)

291 Pour le Brésil, v. la proposition de modification du texte de l'art. 9 de la Loi sur l'application des normes du droit brésilien faite par C. LIMA MARQUES, « Novos rumos do Direito Internacional Privado quanto às obrigações resultantes de atos ilícitos (em especial de acidentes de trânsito », art. préc., p. 89.

292 Cf. pour les obligations contractuelles l'avant-projet de loi nº. 4905/1995 (art. 11).

ailleurs, un régime bien particulier (2).

1. L'unicité judiciaire brésilienne

Au Brésil prévaut l'unité juridictionnelle pour le règlement des litiges concernant l'ensemble du droit privé, sauf en matière prud'homale[293]. Cette unicité juridictionnelle est observée en droit civil, en droit de l'entreprise et en droit de la consommation. Par rapport à ce dernier, les tribunaux de droit commun sont compétents, malgré l'existence d'un code spécifique (CDC). Cela amène certains auteurs à défendre la nécessité de créer des juridictions spécialisées en matière de droit de la consommation afin de rendre la protection du consommateur « plus effective »[294].

Il est à noter que la justice commerciale a existé au Brésil dès 1808, lors de l'ouverture de ses ports au commerce international, avec la création de la *Real Junta do Comércio, Agricultura, Fabricas e Navegação* le 23 août 1808. Le Regulamento n° 738, du 25 novembre 1850 a supprimé la *Real Junta do Comércio* et donné leur règlement aux tribunaux de commerce alors créés par le Regulamento n° 737, de la même date. Ce « rétablissement » de la justice commerciale, peu après la promulgation du Code de commerce exprime certainement l'influence française et résulte de la distinction du droit civil et du droit commercial réalisée par les deux ordres juridiques à cette époque. Ces tribunaux ont été toutefois supprimés ultérieurement par le décret Impérial n° 2.662, du 9 octobre 1875. Depuis la justice étatique commune est devenue compétente pour juger tous les litiges commerciaux, y compris ceux relatifs au redressement et à la liquidation judiciaires des entreprises. Pour ces derniers, les tribunaux de première instance ont l'habitude de créer des varas spécialisées. L'organisation judiciaire concernant la justice commune varie dans chaque État fédéré. Une juridiction spéciale en la matière demeure toutefois en vigueur : il s'agit du *Tribunal Maritime Administratif*, crée par le décret n° 20.829, du 21 décembre 1931, et réglementé par le décret n° 24.585, du 5 juillet 1934. Ce tribunal s'est vu attribué des compétences disciplinaires et pénales en cas d'accidents de la navigation et constitue, en même temps, un organe de l'administration publique chargé de tenir différents registres.

Il est à noter, également, que malgré cette unicité juridictionnelle, la spécificité de certaines matières (le droit de la consommation ou des

293 A propos, v. SILVA BRAGA (V.), « L'organisation juridictionnelle », *Introduction du droit brésilien, op. cit*., p. 89-124 ; PAÏVA DE ALMEIDA (D.), « Données fondamentales pour la comparaison en droit public français et brésilien », art. préc., p. 62-65.

294 Cf. ARMELIN (D.), « Le consommateur et le procès: rapport brésilien », in Travaux de l'Association Henri Capitant, Tome LVII – *Le consommateur : journées colombiennes* (24-28 septembre 2007), *op. cit*., p. 625 634, p. 654.

entreprises en difficulté) entraîne des dérogations aux règles communes de la procédure civile unifiée depuis 1939.

2. L'autorité des décisions des cours supérieures

Comme dans la plupart des pays, les cours supérieures brésiliennes ont la fonction primordiale de contrôle et d'uniformisation de l'interprétation de la loi. Si leur fonction de création du droit ne peut plus être contestée, des spécificités existent quant à l'effet obligatoire de décisions réitérées des tribunaux supérieurs.

Alors que la chose jugée a un caractère relatif, depuis des années, les cours supérieures brésiliennes édictent des énoncés (« súmulas »), qui consolident des décisions réitérées ne faisant plus l'objet de divergence au sein des tribunaux supérieurs (STF/STJ/TST). Par cette pratique, les cours supérieures renforcent bien leur pouvoir de création du droit[295]. Dans la majorité des cas, ces énoncés sont suivis par les chambres des cours supérieures et des cours d'appel, au point même de fonctionner comme moyen de non-recevabilité des pourvois formés sur la base de chefs de compétence constitutionnels. Ils ont une force persuasive auprès des juges du fond et jouent un rôle dissuasif vis-à-vis des plaideurs, pas toujours convaincus de l'intangibilité de ces énoncés. L'encombrement des tribunaux supérieurs et la pratique interne d'application systématique des énoncés avec force obligatoire ont conduit récemment le législateur à attribuer l'effet obligatoire à certains énoncés émanant du STF (« súmula vinculante ») par l'Amendement constitutionnel n° 45 du 30 décembre 2004, dans les conditions établies par la Loi n° 11.417 du 19 décembre 2006[296]. Le caractère obligatoire de la « súmula vinculante » ne doit cependant pas conduire à son assimilation à la règle du précédent, car la « súmula vinculante » est un énoncé rédigé selon une procédure spéciale et autonome des décisions qui lui ont servi de fondement. De surcroît, elles font l'objet d'un système spécial de publicité qui diffère de celui propre à une décision de justice.

L'impact des « súmulas vinculantes » du STF sur le droit privé est cependant limité aux questions, non de moindre importance, relevant du champ d'application de la Constitution, dont le STF est le « Gardien ». D'une trentaine de « súmulas vinculantes » adoptées par le STF jusqu'à présent, seulement une concerne le droit privé. Il s'agit de la « súmula vinculante » n° 25, qui établit l'illicéité de l'emprisonnement civil du

295 Cf. l'art. 4 de la Loi d'Introduction de 1942 : « dans les cas non prévus par la loi, le juge décidera en appliquant l'analogie, les usages et les principes généraux de droit ».

296 *DOU* du 20 déc. 2006. Cette loi réglemente l'art. 103-A de la Constitution de 1988 et modifie la Loi n° 9.784 du 29 janv. 1999 sur l'édition, la révision et l'annulation des énoncés contraignants par le STF.

dépositaire infidèle, quelle que soit la modalité du dépôt[297]. De par leur origine, elles contribueront néanmoins à la « constitutionnalisation » du droit privé brésilien.

Le grand juge de droit privé au Brésil demeure le STJ, qui n'a cependant pas le pouvoir d'édicter des énoncés obligatoires. C'est donc les « súmulas » non obligatoires qui jouent le rôle primordial en droit privé. Celles-ci peuvent acquérir une plus grande importance avec l'avènement des nombreuses clauses générales à l'intérieur du Code civil de 2002, car des groupes de cas suggérant l'application de telle ou telle clause générale tendent à être constitués. La formation des groupes de cas par les énoncés du STJ ne doit toutefois pas porter atteinte à la nature et à finalité primordiale de la clause générale, à savoir à son aptitude à être concrétisée en fonction de la réalité des cas d'espèce et à promouvoir l'ouverture du système de droit privé[298].

Enfin, les énoncés prononcés par les cours supérieures brésiliennes ne doivent cependant pas être confondus avec des « énoncés » formulés par la doctrine portant sur les dispositions du Code civil de 2002, notamment sur les clauses générales. Ces derniers constituent, en effet, la synthèse de la pensée de magistrats, professeurs, avocats, notaires et d'autres acteurs de la vie juridique brésilienne ayant pour tâche d'étudier les différents livres du nouveau Code civil au sein de divers comités thématiques des Journées de droit civil organisées par le Conseil de la Justice Fédérale. Plus récemment, ces Journées ont été étendues à la matière commerciale, 57 énoncés ayant été adoptés lors de la première Journée de droit commercial réalisé du 22 au 24 octobre 2012 au Centre d'études judiciaires de la Justice fédérale[299]. Il est à noter que les « énoncés » approuvés au sein de ces comités n'expriment pas la position du Conseil, encore moins celle du STJ. La prise en compte de ces « énoncés » par la doctrine et leur invocation par les juges, toutes instances confondues, attestent en revanche l'autorité scientifique qui leur est accordée par l'ensemble des professions juridiques[300].

297 Súmula Vinculante n° 25, en application de l'art. 5, LXVII et § 2 de la CF/88 combiné avec l'art. 7, § 7 du Pacte de San José de Costa Rica et avec l'art. 11 du Pacte international sur les droits politiques et civils.

298 En ce sens, MENKE (F.), « A interpretação das cláusulas gerais : a subsunção e a concreção dos conceitos », art. préc., p. 9-35.

299 Les énoncés de la première Journée de droit commercial ont trait à diverses questions liées au droit commercial, comme la société à responsabilité limitée individuelle (Eireli), l'enregistrement des marques et des brevets, les noms de domaine, l'application du Code de protection des consommateurs aux contrats commerciaux, la fonction sociale du contrat et la récupération judiciaire des entreprises.

300 L'ensemble des « énoncés » approuvés dans le cadre de ces Journées de droit civil a fait récemment l'objet d'une compilation : R. R. AGUIAR JUNIOR (org.), *Jornada de Direito Civil*, Brasília : CJF, 2007. Les 57 énoncés de la première Journée de droit commercial sont disponibles à l'adresse : http://www.jf.jus.br/cjf/CEJ-Coedi/Enunciados%20aprovados%20

B. L'arbitrage: une voie en expansion

Au Brésil, les principaux textes régissant l'arbitrage sont la loi n° 9.307 de 1996, l'Accord sur l'arbitrage commercial international dans le cadre du Mercosur, signé à Buenos Aires le 23 juillet 1998, la Convention interaméricaine sur l'efficacité extraterritoriale des sentences et des décisions arbitrales étrangères de 1979, la Convention interaméricaine sur l'arbitrage commercial international de 1975, la Convention de New York pour la reconnaissance et l'exécution de sentences arbitrales étrangères du 10 juin 1958 et le Protocole sur la clause d'arbitrage signée à Genève en 1923.

Certains aspects de la loi brésilienne sur l'arbitrage de 1996 méritent d'être soulignées. Le premier est que la justice arbitrale présente un champ d'application *ratione personae* très étendu : toutes les personnes capables contractuellement peuvent se servir de l'arbitrage (art.1er). Il n'y a pas ici à distinguer entre commerçant et non-commerçant ou entre professionnel et non-professionnel, comme en droit français, par exemple. Il faut cependant que – *ratione materiae* - la question litigeuse porte sur des « droits patrimoniaux disponibles ». Le champ de la loi brésilienne est tellement large que même les contrats conclus par les consommateurs, ainsi que les contrats d'adhésion peuvent être soumis à l'arbitrage (art. 4). En effet, si le CDC établit comme abusive la clause qui prévoit l'arbitrage obligatoire (art. 51, VII), il reste néanmoins silencieux sur la clause compromissoire librement négociée. La loi sur l'arbitrage lui étant postérieure et prévoyant expressément la forme et les conditions de validité de la clause compromissoire insérée dans les contrats d'adhésion semble être un argument de poids pour l'élargissement du champ d'application de cette loi aux contrats conclus par les consommateurs[301]. Par ailleurs, l'art. 4, V CDC encourage expressément l'utilisation de mécanismes alternatifs de règlement des différends dans les litiges concernant les rapports de consommation[302]. Quoi qu'il en soit, les clauses obéissent à des règles spéciales, comme celle sur la clause compromissoire figurant

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na%20Jornada%20de%20Direito%20Comercial.pdf

301 Une décision en cours d'instance de la Cour d'appel de Rio de Janeiro l'a ainsi admise: TJRS : Agravo de Instrumento n° 2001.002.09325, 2ª Câmara Civil, cité par I. AGUILAR VIEIRA, « L'arbitrage au Brésil », art. préc., p. 2. Sur la polémique autour de l'arbitrabilité des litiges de consommation, v. LIMA MARQUES (C.), « Rapport national : droit brésilien », art. préc.

302 Le avant-projet de révision du CDC sur la contractation électronique envisage rendre nulle toute clause compromissoire ou d'élection de for conclue par le consommateur (conformément à la rédaction suggérée de l'art. 101, III par le *Projet visant améliorer les dispositions du chapitre I du Titre I du CDC et réglementer le commerce électronique, cf.* notes 154 et 155, *supra*).

dans l'art. 4, § 2 de la Loi n° 9.307 de 1996.

À l'égard des sociétés d'économie mixte et des sociétés d'État, le droit brésilien ne dispose pas d'une règle telle que celle de l'art. 2060 du Code civil français, selon laquelle « *des catégories d'établissements publics à caractère industriel et commercial peuvent être autorisées par décret à compromettre* ». Sur ce point, une zone grise existait dans la pratique arbitrale au Brésil. On trouvait une certaine résistance à accepter l'arbitrage tant de la part des autorités que du pouvoir judiciaire, la disponibilité des droits concernant les personnes de droit public ou les sociétés dont l'État était actionnaire majoritaire faisant souvent obstacle à l'admission de la clause compromissoire dans les contrats les concernant[303]. Les quelques affaires portées devant les tribunaux brésiliens par les sociétés brésiliennes visant l'annulation d'une convention d'arbitrage ont plutôt connu des succès, notamment par rapport aux arbitrages rendus à l'étranger. Cependant, deux décisions des cours d'appel (*Paraná – aff. Energética Rio Pedrinho S/A vs. Copel Distribuição S/A* ; et District Fédéral – aff. CAESB) ont reconnu l'effet positif de la convention d'arbitrage concernant des sociétés brésiliennes d'économie mixte[304]. En 2005, le STJ a définitivement reconnu la validité de la clause arbitrale signée par des entités étatiques[305], solution qui s'est affirmée depuis au sein de sa jurisprudence[306]. Il convient également de mentionner que la loi sur les concessions de 1995[307] et la loi sur les partenariats public-privé de 2004 admettent le recours aux modes alternatifs de règlement des différends relatifs aux contrats qu'elles régulent, dont l'arbitrage[308].

303 Comme l'a justement remarqué un auteur, autant le critère subjectif semble être simple à cerner, autant le critère objectif d'arbitrabilité des litiges semble plus compliqué puisque la loi ne dit pas ce qu'il faut entendre par fondé sur le « droits patrimoniaux disponibles » ; si ces derniers sont souvent identifiés comme droits pouvant faire l'objet d'une convention, il convient d'y voir plutôt une manière dont ces droits peuvent être disposés qu'une véritable définition. Cf. GARCIA DA FONSECA (R.), « Arbitrating in Brazil. A practitioner's checklist », *RArb* 28 (2011), p. 29-43, p. 38.

304 Citées par WALD (A.), « Le droit brésilien de l'arbitrage », in *Le droit brésilien: ..., op. cit.*, p. 405-432.

305 STJ, REsp 612439/RS, Rapporteur J. O. de Noronha, 2e Chambre, affaire jugée le 25/10/2005, DJ 14/09/2006, p. 299.

306 En dernier lieu, v. STJ, REsp. 904.813/PR, Compagás c/ Passarelli, Rapporteur Nancy Andrighi, 3e Chambre, affaire jugée le 20/10/2011, note A. Wald, *RArb* 33 (2012), p. 361-376. V. auparavant STJ, REsp 606345/RS, Rapporteur J. O. de Noronha, 2e Chambre, affaire jugée le 17/05/2007, *DJ* 08/06/2007, p. 240; MS 11.308/DF, Rapporteur L. Fux, 1re Section, affaire jugée le 09/04/2008, *DJe* 19/05/2008 (et précédents du STF cités).

307 Loi 8987/95, dont l'art. 23, XV établit que parmi les clauses et les conditions essentielles du contrat de concession de service public doivent figurer celles relatives aux « for et modes de solution amiable des litiges contractuels ».

308 Loi n° 11.079 du 30 décembre 2004, dont l'art. 11, III stipule que le projet de contrat

Une autre particularité de la loi brésilienne sur l'arbitrage est que, tout en affirmant le caractère juridictionnel et autonome de l'arbitrage, elle établit des règles plus détaillées sur les liens de coopération entre la justice arbitrale et la justice étatique, le rôle et les situations d'appui de cette dernière étant bien définis par la loi. La jurisprudence actuelle tend à respecter cette autonomie, notamment en matière de saisine du tribunal et de son fonctionnement ainsi qu'en matière de mesures conservatoires et provisoires[309], n'admettant l'exercice par le juge étatique de sa fonction d'appui que dans le cas expressément prévu par la loi d'arbitrage. Plus largement, suite à la déclaration de la constitutionnalité de loi brésilienne sur l'arbitrage de 1996 par le STF en 2001[310], les tribunaux brésiliens, en particulier le STJ, se montrent très en faveur de l'arbitrage[311]. Illustratif à cet égard fut l'adoption par le STJ, le 28 juin 2012, de la *Súmula* n° 485, selon laquelle « la loi sur l'arbitrage s'applique aux contrats contenant une clause d'arbitrage, encore que conclus avant son édiction ».

Une dernière particularité à souligner est le critère utilisé par la loi brésilienne pour reconnaître le caractère interne ou international de l'arbitrage. À rebours du droit français, référence en la matière, le droit brésilien, suivant le critère de la Convention de New York de 1958, considère comme international l'arbitrage qui s'est déroulé à l'étranger (art. 34). Il y a ici une forte tradition territorialiste, propre d'ailleurs au droit international privé brésilien.

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L'intérêt du droit brésilien n'étant aujourd'hui plus à démontrer, cette étude veut néanmoins inviter les juristes à visiter les données fondamentales du droit privé brésilien lors de leurs études

pourra prévoir de mécanismes privés de solution des différends, y compris l'arbitrage, à être réalisé au Brésil, en langue portugaise, conformément à la loi n° 9.307 du 23 septembre 1996, afin de résoudre les conflits résultant ou en rapport avec le contrat.

309 Remarquons que très récemment, le STJ a mis fin à une forte controverse en la matière, en décidant que dès lors que le tribunal arbitral est constitué, il est le seul compétent pour prononcer des mesures conservatoires et provisoires. C'est seulement en cas de refus d'exécution par la partie contre laquelle une telle mesure est prononcée que le recours aux tribunaux étatiques est admis. À défaut d'un tribunal arbitral déjà constitué, la compétence pour prononcer de telles mesures d'urgence demeure dans le ressort du juge étatique. Cf. STJ, Resp 1.927.974/RJ, Itarumã c/ PCBIOS, Rapporteur Nancy Andrighi, 3e Chambre, affaire jugée le 10/06/2012, RArb 36 (2013) (à paraître).

310 STF, AgRg dans SE 5.206/ES, affaire jugeé le 12/12/2011, Rapporteur Sepúlveda Pertence, RTJ 190, p. 908-1027.

311 Cf. WALD (A.), GERDAU DE BORJA (A.) et DE MELO VIEIRA (M.), « A posição dos tribunais brasileiros em matéria de arbitragem no último biênio (2011-2012) », *RArb* 35 (2012), p. 15-31.

comparatives concernant l'une de ses institutions. La méthode choisie pour la réalisation de cette étude ne saurait exclure d'autres approches susceptibles de s'imposer en fonction de la démonstration envisagée. Quant au fond, elle ne saurait être exhaustive, des pans des matières et des problématiques corrélatives ayant été volontairement mis de côté pour des besoins de synthèse.

La réalisation de cette étude est fondée sur la conviction de l'importance des éléments de droit positif jugés fondamentaux pour la compréhension de la structure et du fonctionnement des ordres juridiques susceptibles d'être mis en comparaison. La connaissance de tels éléments permet au comparatiste d'avancer avec moins de risque sur le terrain toujours mouvant qu'est le système juridique d'autrui.

Enfin, à côté d'une littérature foisonnante de présentation et de comparaison du droit privé brésilien avec d'autres ordres juridiques, puisse ce panorama contribuer à une meilleure appréhension du système de droit privé brésilien, ainsi qu'à attirer l'attention des juristes pour les études du droit brésilien, qui se présente comme un vaste chantier de droit comparé.

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NEUE REGELUNGEN DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS IN BRASILIEN

RECENTDEVELOPMENTSINBRAZILIANINTERNATIONALCIVIL PROCEDURE

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Zusammenfassung: Aufgrund des voranschreitenden Reformprozesses im Hinblick auf die brasilianische Zivilprozessordnung finden gegenwärtig zahlreiche Veränderungen Einzug in das internationale Zivilverfahrensrecht. Unter anderem sieht ein Gesetzentwurf des brasilianischen Nationalkongresses Änderungen bei der internationalen Zuständigkeitsregelungen und der Wahl des Gerichtsstandes vor. Dies wird in Zukunft relevant bei internationalen Wirtschaftstransfers sein. Ziel dieser Arbeit ist es, durch eine genauere Analyse der Lehre und Rechtsprechung, die Unterschiede zwischen der aktuellen Zivilprozessordnung und dem Gesetzesvorhaben herauszuarbeiten.

Schlüsselworte: Brasilianische Zivilprozessordnung - internationale Zuständigkeit - Wahl des internationalen Gerichtsstandes.

Abstract: The international civil procedure is undergoing transformations in Brazil, due to the project of the new Civil Procedure Code, which is still pending enactment by the National Congress. Among several alterations, the project will bring changes regarding the rules of international jurisdiction and choice of forum, which are of utmost importance for international business transactions. Therefore, scholar and jurisprudential controversies about these institutes are analyzed, considering both the current Civil Procedure Code and the project still under consideration by the Congress.

Keywords: Brazilian Civil Procedure Code - international jurisdiction - choice of forum.

EINFÜHRUNG

Juristische Beziehungen, die internationale Elemente einbeziehen, führen zu zwei Fragestellungen: die Frage nach der Zuständigkeit und die Frage nach dem anzuwendenden Recht. Die Bestimmung des zuständigen Gerichts stellt dabei die erste Herausforderung für die Parteien dar. Im Idealfall legt die nationale Rechtsordnung fest, welche Gerichte für bestimmte Streitsachen zuständig sind. Dies erwirkt ein gewisses Maß an Rechtssicherheit bei den Rechtssubjekten. Die internationale Zuständigkeit zeigt sich daher als grundlegendes Institut des internationalen Zivilverfahrensrechts.

Parallel zur internationalen Zuständigkeit erlauben die Rechtsordnungen des Öfteren, dass die Parteien – aufgrund ihrer Willensautonomie – die Zuständigkeit der Gerichte teilweise abbedingen oder auswählen können. Die Wahl des Gerichtsstandes ist entscheidend, weil sie die gesetzliche vorgeschriebene Zuständigkeit eines Gerichtes auf internationalen Ebenen verändern kann.

In diesem Sinne versuchen wir, die zukünftigen Änderungen dieser grundlegenden Institute des internationalen Zivilverfahrensrechts, welche sich momentan im Entstehen befinden, zu beleuchten[1]. Zu diesem Zweck ziehen wir eine Vergleichsparallele zwischen den Regelungen der internationalen Zuständigkeit und der Wahl des Gerichtsstandes der heutigen Zivilprozessordnung und denen, welche der zukünftigen Rechtslage entsprechen. Wir hoffen, dass dieser Vergleich dazu beitragen wird, die Entwicklung des internationalen Zivilprozesses in Brasilien im Rahmen der Rechtslehre und der Rechtsprechung zu veranschaulichen.

1. INTERNATIONALE ZUSTÄNDIGKEIT

Die Artikel 88 und 89 der brasilianischen Zivilprozessordnung und ihre jeweiligen Absätze legen Voraussetzungen fest, unter denen die brasilianischen Gerichte ihre Gerichtsbarkeit ausüben können oder müssen. Obwohl die Redaktion der Vorschrift sich wortwörtlich mit „internationaler Zuständigkeit“ bei der Zuständigkeitseinschränkung der nationalen oder internationalen Gerichte ausdrückt, wollen wir daran erinnern, dass dieser Ausdruck in sich selbst missverständlich ist.

In der Regel übt der Staat seine Gerichtsbarkeit bei

1 In unseren Kommentaren benutzen wir als Referenz die Version des Projektes der Zivilprozessordnung (Gesetzesprojekt Nr. 6025/2005) vom November 2012, bereits genehmigt durch die Sonderkommission des Nationalkongress.

Interessenkonflikten aus. Die Gerichtsbarkeit veräußert daher diese staatliche Macht[2]. Die Funktion der Gerichtsbarkeit wird abstrakt und uneingeschränkt an alle Organe der Judikative zugeteilt. Dabei fließt sie allmählich durch einen Konkretisierungsprozess bis sie an das für die Entscheidung des Konfliktes kompetente Gerichtsorgan gelangt. Auf dieser Weise und durch Zuständigkeitsregeln wird die Gerichtsbarkeit innerhalb ihrer ausübenden Organen verteilt[3].

In diesem Sinne bezieht sich die in der Zivilprozessordnung erwähnte internationale Zuständigkeit nicht auf ein technisches Zuständigkeitskonzept, sondern auf die jeweilige Definition von Gerichtsbarkeit[4]. Der Grund dieser Bestätigung ist, dass die Artikel 88 und 89 die Fälle aufführen, in denen die brasilianische Judikative zuständig ist[5]. Dabei soll hervorgehoben werden, dass die hiermit analysierten Vorschriften sich nicht auf eine spezifische Übertragung eines Teils der Gerichtsbarkeit auf ein bestimmtes Gerichtsorgan beziehen. Erst nach Überprüfung der Ausübungsmöglichkeiten der brasilianischen Gerichtsbarkeit wird die Rechtsordnung detaillierter die Umstände aufzeigen und festlegen, wann ein bestimmtes Gerichtsorgan zuständig wird. Somit wird die Zuständigkeit bestimmt[6].

Wichtig ist es, hervorzuheben, dass die bestimmenden Normen der Prozessordnungen – als Normen des Öffentlichen Rechts – auch unilaterale Normen sind, das heißt, die Artikel 88 und 89 der Zivilprozessordnung können nicht zur Festlegung der Gerichtsbarkeit einer ausländischen Gerichtsgewalt dienen. Im Gegenteil: der brasilianische Gesetzgeber würde damit in die Rechtshoheit des ausländischen Staates eindringen. Gemäß Celso Agricola Barbi:

> *Die Gerichtsbarkeit erleidet eine Einschränkung ab dem Moment in der sie effektiv in einer anderen Gerichtsbarkeit einwirkt: es handelt sich dabei um das Effektivitätsprinzip, das heißt, die Macht, das Urteil zu vollstrecken, zumal es andere Länder gibt, die ebenfalls das Urteil in ihrem Lande nicht anerkennen und daraufhin dessen Vollstreckung in*

2 CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. *Teoria Geral do Processo*. 23. Auflage. São Paulo: Malheiros, 2007, Seite 30.

3 CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. *Teoria Geral do Processo*. 23. Auflage. São Paulo: Malheiros, 2007, Seite 248.

4 Aufgrund der Ratifizierung des Gebrauchs des Ausdruckes *Kompetenz* durch die Rechtslehre und Rechtsprechung erlauben wir uns dessen Anwendung während des gesamten Textes.

5 CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. *Teoria Geral do Processo.* 23. Auflage. São Paulo: Malheiros, 2007, Seite 249.

6 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, Seite 85.

> *ihrem Lande nicht durchführen würden. Dies würde zur faktischen Unwirksamkeit des Urteils führen*[7].

Somit ist es unangebracht, die Ausübung der Gerichtsbarkeit durch einen ausländischen Staat aufgrund des in den Artikeln 88 und 89 der Zivilprozessordnung falschen Bilateralismus festzulegen. Die Behauptung jedoch, dass ein brasilianischer Richter auf der Grundlage fehlender Effektivität seine Gerichtsbarkeit in einer bestimmten Streitsache nicht ausüben dürfte, ist möglich. In diesem Falle wäre sein Urteil im Ausland nicht vollstreckbar.

1.1. Ausdrückliche Annahmen der Zivilprozessordnung zur Ausübung der brasilianischen Gerichtsbarkeit

Der Artikel 88 der Zivilprozessordnung nennt die Alternativen bei denen eine konkurrierende Zuständigkeit besteht. Das heißt, der Artikel 88 erlaubt, dass verschiedene Rechtssachen auch durch ausländische Gerichte entschieden werden. Demzufolge kann das im Ausland ausgesprochene Urteil – unter der Voraussetzung, dass es mindestens eine der drei Fällen[8] des Artikels 88 entspricht – in Brasilien gültig und vollstreckbar sein. Voraussetzung ist, dass das Urteil von dem Obersten Gerichtshof (*Superior Tribunal de Justiça – STJ*), gemäß den Anforderungen der Artikel 15 und 17 des Einführungsgesetzes der brasilianischen Gesetzesnormen (*Lei de Introdução às Normas de Direito Brasileiro – LINDB*) anerkannt wird[9]. Diese Anforderungen beziehen sich auf die Notwendigkeit, dass das Urteil durch einen

7 BARBI, Celso Agricola. *Comentários do Código de Processo Civil*.9. Auflage. Rio de Janeiro: Forense, 1994, Seite 239.

8 Laut José Carlos Barbosa Moreira, sind die Voraussetzungen der internationalen Zuständigkeit nicht kumulativ sondern alternativ: "eine jede genüge für sich alleine. Die brasilianische Justiz ist daher zuständig, wenn der Beklagte in Brasilien wohnhaft ist, selbst wenn die Rechtssache infolge einer im Ausland geschehenen Tat verursacht wurde. Das Gleiche gilt für den Fall, wenn die Strafauflage in Brasilien zu vollziehen ist und der Angeklagte im Ausland wohnhaft ist." In MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva. 1994, Seite 140. Der Oberste Gerichtshof (STJ) äußerte sich bereits in diesem Sinne: "Internationale Zuständigkeit – zusammenhängende Rechtssachen. Die Zuständigkeit des brasilianischen Gerichts liegt vor wenn eine der in den Artikeln 88 und 89 der Zivilprozessordnung vorgesehenen Annahmen vorliegt. Das brasilianische Recht wählte nicht den Zusammenhang als Kriterium zur Festlegung der internationalen Zuständigkeit die, aufgrund dessen, auch nicht fortführbar ist". (Oberster Gerichtshof, Revision Nr. 2170/SP, Berichterstatter: Minister Eduardo Ribeiro. *Tagesanzeiger der Justiz* vom 30.09.1990, Seite 08842, *Zeitschrift des Obersten Gerichtshofes*, siehe 00012, Seite 00361).

9 Gesetzesverordnung Nr. 4.657 vom 4. September 1942 mit der Redaktion des Gesetzes 12.376 vom 2010.

zuständigen Richter ausgesprochen wurde, gemäß der Gesetzgebung des Ursprungslandes. Zur Anerkennung ist es ebenso wichtig, dass die beteiligten Parteien geladen wurden oder ein Versäumnisurteil ergangen ist; dass das Urteil rechtskräftig wurde; dass das Urteil im verurteilenden Land vollstreckbar ist; und, schließlich, dass das ausländische Urteil nicht die brasilianische Rechtshoheit, die öffentliche Ordnung und die Sittlichkeit verletzt[10]. Zu bemerken sei noch, dass die Verordnung Nr. 9 des Obersten Gerichtshofes[11] zusätzliche Kriterien festlegt, wie die Beglaubigung des ausländischen Urteils durch den brasilianischen Konsul und die entsprechende Übersetzung durch einen brasilianischen vereidigten Übersetzer zu erfolgen hat.

Der Artikel 89 sieht andererseits die Annahmen vor, in denen die Zuständigkeit der brasilianischen Gerichte die aller anderen Länder ausschließt. Somit kann das im Ausland ausgesprochene Urteil unter einer der zwei erwähnten Voraussetzungen in Brasilien nicht anerkannt werden[12].

Nachfolgend beschäftigen wir uns mit den Kontroversen bezüglich der in der Zivilprozessordnung ausdrücklich erwähnten Annahmen der Ausübung der brasilianischen Gerichtsbarkeit, seien sie konkurrierend und ausschließlich.

a) Wohnsitz des Beklagten in Brasilien

Der Artikel 88, Abs. I der Zivilprozessordnung bestimmt den Wohnsitz des Beklagten als Kriterium zur Festlegung der brasilianischen Gerichtsbarkeit. Es ist wichtig darauf hinzuweisen, dass der Artikel 12 des Einführungsgesetzes der brasilianischen Gesetzesnormen ebenfalls zur Festlegung der Zuständigkeit der brasilianischen Gerichtsbarkeit und zur Lösung einer bestimmten Streitsache das Kriterium des Wohnsitzes des Beklagten anwendet. Die Artikel 70 bis 78 des Zivilgesetzbuches befassen sich mit dem Sitzkonzept und mit dem Wohnsitzkonzept[13].

Helio Tornaghi[14] ist der Meinung, dass der Artikel 94, § 3 der

10 BARBI, Celso Agrícola. *Comentários ao Código de Processo Civil*.9. Auflage. Rio de Janeiro: Firenze, 1994, Seite 241.

11 Ab der Verfassungsänderung Nr. 45 vom 2004, sieht der Art. 105, I, Buchstabe i der brasilianischen Verfassung vor, dass das Oberste Gerichtshof (STJ) für die Anerkennung ausländischer Urteile zuständigkeit ist. Bis dahin lag die Zuständigkeit bei dem Brasilianischen Bundesverfassungsgericht (STF).

12 BARBI, Celso Agricola. *Comentário ao Código de Processo Civil.* 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 243.

13 BARBI, Celso Agrícola. *Comentário ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 241.

14 TORNAGHI, Hélio. *Comentários ao Código de Processo Civil*. Band 1, São Paulo: RT, 1974, Seite 305.

Zivilprozessordnung eine andere Interpretation des Wortes „Wohnsitz" des Absatzes I des Artikels 88 gibt. Gemäß Artikel 94, § 3 muss die Klage am Wohnsitz des Klägers erhoben werden, wenn der Beklagte weder wohnhaft noch ansässig in Brasilien ist. Wenn Letzterer ebenfalls nicht in Brasilien ansässig ist, so wird die Klage an irgendeinem Gerichtsstand eingereicht". Helio Tornaghi unterscheidet zwischen Zivil- und Verfahrenswohnsitz und versteht unter dem Letzteren den Ort, wo der Beklagte sich befindet.

So versteht Tornaghi, dass diese Vorschrift das Gericht ermächtigt, die Klage eines in Brasilien wohnhaften Klägers anzuerkennen im Falle, dass dieser der einzige Verbindungsfaktor der Klage zum Lande darstellen sollte. Dies wiederum würde eine weitere konkurrierende Zuständigkeitsannahme der brasilianischen Gerichtsbarkeit darstellen. Carmen Tiburcio stimmt dieser Theorie nicht zu, indem sie meint, dass der Artikel 94, § 3 sich auf das Kapitel der internen Zuständigkeit beziehe und somit in harmonischer Form mit dem Artikel 88 interpretiert werden muss:

> *wenn in Brasilien eine Pflicht erfüllt werden muss oder wenn die Klage ihren Ursprung in einer in Brasilien erfolgten Handlung oder eines Geschehnisses hat (Artikel 88, II und III) dessen Anerkennungskompetenz bei dem Gericht intern liegt und der Beklagte nicht in Brasilien wohnhaft ist. Die Lösung ist, die Klage bei dem Gerichtsstand des Klägers einzureichen, gemäß Artikel 94, § 3*[15].

Tornaghi meint ebenfalls, dass die Zivilprozessordnung, in diesem gleichen Artikel 94, § 3, klarstelle, dass das Wohnungskonzept an und für sich genügt, um die Zuständigkeit der brasilianischen Gerichtsbarkeit zu begründen[16]. Barbosa Moreira ist der Ansicht, dass das Wohnsitzkonzept dem „lex fori" entspreche, d. h. das Konzept der brasilianischen Gesetzgebung[17].

In Bezug auf den Sitz der juristischen Person sieht der Artikel 88, Einzelparagraph, vor, dass die ausländische juristische Person ihren Sitz in Brasilien hat, wenn sie hier durch Tochterunternehmen, Filiale oder Zweigniederlassungen repräsentiert wird. Dazu äußerte sich Barbosa Moreira dahingehend, dass es nicht notwendig sei, dass der

15 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, Seite 456.

16 TORNAGHI, Hélio. *Comentários ao Código de Processo Civil,* Band 1, São Paulo: RT, 1974, Seite 305.

17 MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In: *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva 1994, Seite 142.

Rechtsstreit seine Ursache in einer Handlung der Tochterunternehmen habe, um die Zuständigkeit Brasilianischer Gerichte zu begründen. Es genüge, dass sich eine Agentur, Filiale oder Zweigniederlassung der ausländischen juristischen Person in Brasilien befindet, um in Brasilien verklagt werden zu können. Barbosa Moreira und Barbi[18] hingegen teilen das Verständnis, dass diese Vorgabe restriktiv interpretiert werden soll, wobei der Einzelparagraph des Artikels 88 nur für Klagen über ausgeführte Handlungen der Agentur, Filiale oder Zweigniederlassung, die in Brasilien ansässig sind, anwendbar ist[19].

Es stellt sich die Frage, wie die Anwendung des Einzelparagraphs des Artikels 88 sich zu der Theorie der ökonomischen Gruppe verhält. Laut dieser Theorie sind die in verschiedenen Teilen der Erde präsenten Agenturen, Filialen und Zweigniederlassungen Teile einer selben ökonomischen Gruppe und führen ein bestimmtes Muster in Bezug auf die Wirkung der Wirtschaftspolitik aus. Große Unternehmen mit internationaler Wirkung, trotz ihrer bei den Tochtergesellschaften zerstreuten Entscheidungsmacht und juristischer Diversität[20], besitzen eine ökonomische Einheit die dazu führt, eine Konfusion der Personalitäten oder der Aktivitätswirkungskreise und hauptsächlich eine Konfusion der Vermögen anzunehmen.

In diesem Sinne führt die Herstellung einer juristischen Beziehung mit irgendeiner Unternehmensgesellschaft einer ökonomischen Gruppe mit ausländischer Wirkung zu Zweifeln in Bezug auf die Ausdehnung der Inzidenz des Artikels 88, Einzelparagraph der Zivilprozessordnung. Mit anderen Worten ist es notwendig zu klären, ob zur Ausübung der brasilianischen Gerichtsbarkeit – auf der Grundlage des Einzelparagraphs des Artikels 88 – die juristische Beziehung mit der brasilianischen Agentur, Filiale oder Zweigniederlassung gegeben ist; oder ob es andererseits genügt, wenn die juristische Beziehung zwischen irgendeiner Einheit der ökonomischen Gruppe mit Agenturen, Filialen oder Zweigniederlassungen in Brasilien hergestellt wird.

Über dieses Thema entschied der Oberste Gerichtshof (STJ) in dem Revisionsverfahren Nr. 63.981/SP[21] in dem Sinne, dass die globalisierte Wirtschaft es ermöglicht, eine Klage bei den brasilianischen Gerichten einzureichen, selbst wenn die juristische Beziehung zwischen dem brasilianischen Verbraucher und einem

18 BARBI, Celso Agrícola. *Comentários ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1944, Seiten 241 und 242.

19 MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva, 1994, Seiten 142 und 143.

20 MELLO, Celso D. de Albuquerque. *Direito Internacional Econômico*. Rio de Janeiro: Renovar, 2003, Seite 104.

21 Oberster Gerichtshof. Revision Nr. 63981/SP, Berichterstatter Minister Aldir Passarinho Junior, 4. Senat. *Tagesanzeiger der Justiz* vom 20.11.2000. Seite 296.

ausländischen Unternehmen mit Sitz außerhalb Brasiliens besteht. Und das, weil die wirtschaftliche Gruppe des in Frage gestellten Unternehmens ebenfalls in Brasilien ansässig war und somit die Annahme des Einzelparagraphs des Artikels 88 der Zivilprozessordnung gegeben wäre. Hervorzuheben ist jedoch, dass der angeführte Fall sich auf eine Annahme der Verbraucherbeziehung bezog, für welche die brasilianische Gesetzgebung einen Sonderstatus zum Schutz des Verbrauchers einräumt.

b) Erfüllung der Verpflichtung in Brasilien

In Bezug auf den Erfüllungsort der Verpflichtung, äußert Pontes de Miranda[22], dass dieser festgelegt werden kann (a) durch den ausdrücklich oder konkludent geäußerten Willen der Parteien des Rechtsgeschäfts; (b) aufgrund der Verpflichtungsnatur; oder (c) aufgrund des Gesetzes. In diesem Falle meint der Autor, dass der Absatz II des Artikels 88 der Zivilprozessordnung „den Leistungsort als Voraussetzung unabhängig von dem Wohnsitz ausreichen lasse", sodass „jedweder Leistungsort – mit Ausnahme eines notwendigen Sondergesetzes („lex specialis") – je nach dem Willen der Parteien unter Vereinbarung eines anderen geändert werden kann". Auf diese Weise versteht Pontes de Miranda, dass die explizite oder implizite Festlegung des Leistungs- oder Erfüllungsortes für die Vollendung des Rechtsgeschäfts obligatorisch ist.

Barbi erwähnt, dass die im Absatz II des Artikels 88 der Zivilprozessordnung vorgesehene Norm bereits im Artikel 12 des Einführungsgesetzes der brasilianischen Gesetzesnormen ist, und zwar dort wo die Zuständigkeit für diese Annahmen als konkurrierend definiert wird. In diesem Fall, dem Autor nach, ist der Ort an dem die Verpflichtung eingegangen wird unbeachtlich: relevant ist lediglich, dass deren Erfüllung auf brasilianischem Boden erfolgt[23].

Tornaghi bekräftigt ebenfalls, dass der Ort an den die Verpflichtung eingegangen wurde, unbeachtlich ist.

> *Damit die brasilianische Gerichtsbarkeit in diesem Falle zuständig wird, ist es notwendig, dass in Brasilien der „locus destinatae solutionis" ist, das heißt, der Ort an dem die Ausführung zu erfolgen hat. Die Freiheit des Schuldners der eine Teilzahlung in Brasilien tätigte obwohl er dazu nicht verpflichtet*

22 PONTES DE MIRANDA, Francisco Cavalcanti. *Comentários ao Código de Processo Civil*, Band II, Rio de Janeiro: Forense, 1973, Seite 190.

23 BARBI, Celso Agricola. *Comentários ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 242.

> *war, gibt dem Gläubiger nicht die Freiheit, bei brasilianischen Gerichten die Restzahlung zu fordern*[24].

In Bezug auf die Verpflichtungen des Absatzes II des Artikels 88 ist Tornaghi der Meinung, dass es nicht genüge, jegliche Vertragsverpflichtung mit brasilianischem Erfüllungsort zu berücksichtigen. Notwendig ist, dass die Hauptverpflichtung – die der Anlass des Interessenkonfliktes ist – in Brasilien erfüllt werden muss[25].

c) Klagen, die ihren Ursprung in einem in Brasilien eingetretenen Umstand oder einer in Brasilien vorgenommenen Handlung haben

Bei der dritten Annahme der konkurrierenden Zuständigkeit brasilianischer Gerichte wird auf jedwedes juristisch relevantes Geschehen Bezug genommen – erlaubt oder unerlaubt, mit oder ohne ausländische Beteiligung – welches als Folge einen Anspruch aufweist[26].

Laut Celso Agricola Barbi, bezieht sich die Annahme des Artikels 88, Absatz III „auf eine Tat, die auf einer in Brasilien geschehenen Tatsache beruht. Das heißt, wenn die Klage als Grund diese Tatsache oder Tat hat“[27]. Für Helio Tornaghi ist es zum Zwecke des Absatzes III des Artikels 88 einfach notwendig, dass der Grund der Tat auf brasilianischem Boden liegt[28].

Die brasilianischen Gerichte verfügen über internationale konkurrierende Zuständigkeit für transnationale Schäden, die über das Internet erfolgen, nur in den Fällen, die unter dem Artikel 88 der Zivilprozessordnung vorgeschrieben sind[29]. Somit, wenn der Beklagte

24 TORNAGHI, Helio. *Comentários ao Código de Processo Civil*. Band 1, São Paulo: RT, 1974, Seite 306.

25 TORNAGHI, Helio. *Comentários ao Código de Processo Civil*, Band 1, São Paulo: RT, 1974, Seite 306.

26 PONTES DE MIRANDA, Francisco Cavalcanti. *Comentários ao Código de Processo Civil*, Band II, Rio de Janeiro: Forense, 1973, Seiten 193 und 194. Pontes de Miranda schließt die rechtszeugende?? Tatsachen und Taten strenger Bedeutung, die nicht erlaubten rechtszeugenden Tatsachen und Taten, Taten der unerlaubte, die rechtszeugenden Tatsachen/Taten sowie die Rechtsgeschäfte allesamt in der Gruppe der rechtszeugenden Fakten, Tatsachen und Taten ein.

27 BARBI, Celso Agricola. *Comentários ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 242.

28 TORNAGHI, Helio. *Comentários ao Código de Processo Civil*. Band 1, São Paulo: RT, 1974, Seite 306.

29 ROBERTO, Wilson Furtado. *Dano Transnacional e internet*: direito aplicável e competência internacional. Curitiba: Juruá, 2010, Seite 117.

– unabhängig seiner Nationalität – in Brasilien wohnhaft ist[30], wird die brasilianische Gerichtsbarkeit zur Lösung des Konflikts zuständig sein, selbst wenn die für den Angriff auf die Ehre des Individuums (Brasilianer oder Ausländer) benutzte Webseite im Ausland betrieben wird[31].

Die brasilianischen Gerichte verfügen auch über konkurrierende internationale Zuständigkeit, wenn ein gegen das Persönlichkeitsrecht verstoßendes Ereignis oder wenn eine rechtswidrige Tat auf brasilianischem Boden erfolgt ist. Wilson Furtado ist der Meinung, dass „aus dem Wortlaut der Vorschrift zu entnehmen ist, dass sowohl der Ort der zugrunde liegenden Tat (begangene unerlaubte Tat) als auch die daraus resultierenden Folgen (vollendetes unerlaubtes Geschehnis) die Gerichtsbarkeit festlegen“[32]. Ein Problem zeigt sich in Bezug auf die Interpretation des Artikels 88, Absatz III der Zivilprozessordnung: die Tatsache, dass nicht genügend Rechtsprechung vorhanden ist, um das Thema Schadenstatort in Bezug auf den elektronischen Raum entsprechend zu interpretieren.

Der einzige Präzedenzfall auf dem Obersten Gerichtshof (STJ) liegt bei der Analyse der Revision Nr. 1.168.547/RJ. In diesem Fall geht es um die Frage, ob eine natürliche, in Brasilien wohnhafte Person im Falle eines Dienstleistungsvertrages, in dem der Gerichtsstand Spanien ist, das brasilianische Gericht zum Tätigwerden auffordern kann. Hierzu: die Klägerin arbeitete als Tänzerin und Direktionsassistentin einer typisch brasilianischen Show für ein spanisches Unternehmen. Die Vorführungen fanden in Europa und Afrika statt. Monate nach Vertragsabschluss „besuchte die Klägerin die elektronische Adresse des Unternehmens über das Internet und stellte fest, dass die Seite verschiedene Aufnahmen ihrer Person, entsprechend zusammengestellt aus Veranstaltungen an denen sie teilnahm, zeigte. Einige davon wurden für Werbungszwecke verwendet“[33]. Die Autorin reichte mit der Begründung, der Inhalt sei über das Internet weltweit ohne ihre Zustimmung verfügbar eine Klage wegen immaterieller und materieller Schäden ein.

Der Oberste Gerichtshof berücksichtigte, dass die rechtswidrige Tat in Brasilien vorgenommen wurde, gemäß Artikel 88, Absatz III der

30 Einschließlich die einfache Wohnung (Artikel 7, § 8 des Einführungsgesetzes der brasilianischen Gesetzesnormen) oder der Ort an dem sich die Person befindet, falls sie keinen gewöhnlichen Wohnsitz hat (Artikel 73 des Zivilgesetzbuches).

31 ROBERTO, Wilson Furtado. *Dano Transnacional e internet:* direito aplicável e competência internacional. Curitiba: Juruá, 2010, Seite 105.

32 ROBERTO, Wilson Furtado. *Dano Transnacional e internet*: direito aplicável e competência internacional.Curitiba: Juruá, 2010, Seite 109.

33 Oberster Gerichtshog , Revision Nr. 1168547/RJ, Berichterstatter Minister Luis Felipe Salomão, Vierter Senat. *Tagesanzeiger der Justiz* vom 07.02.2011, Seite 4.

Zivilprozessordnung und legte als Gerichtsstand den Ort, an dem die elektronische Seite zugänglich war, fest:

> *Wenn die bemängelte unrichtige Tat über das Internet geschieht, unabhängig vom vorgesehenen Gerichtsstand der Dienstleistung, selbst wenn dieser im Ausland ist, ist im Falle eines Konflikts das brasilianische Gericht zuständig, zumal die Klägerin hier ihren Wohnsitz hat und auch von hier aus die Information ausgetragen wurde. Somit wird die Klage unter Berücksichtigung einer in Brasilien durchgeführten Tat typisiert und mit der Annahme des Artikels 88, Absatz III der Zivilprozessordnung begründet*[34].

Das Votum des Berichterstatters berücksichtigte des Weiteren, dass der negative Effekt der rechtswidrigen Tat eine größere Rückwirkung am Ort, an dem die benachteiligten Personen wohnen, bzw. arbeiten, haben wird: „somit kann die Klage am Gerichtsstand des Handlungs- bzw. Erfolgsortes eingereicht werden, selbst wenn der Beklagte eine juristische Person ist und einen anderweitigen Wohnsitz hat, zumal die negative Auswirkung der rechtswidrigen Tat größtenteils am Ort in dem der Kläger wohnt oder arbeitet geschieht“[35].

Anscheinend ist die Position der brasilianischen Gerichte zu diesem Fall noch nicht eindeutig, zumal keine Präzedenzfälle vorliegen.

d) In Brasilien gelegene Immobilien

Die Tatsache, dass lediglich brasilianische Gerichte befugt sind, Prozesse bezüglich in Brasilien gelegener Immobilien zu entscheiden, stimmt überein mit der allgemeinen Tendenz der souveränen Staaten, diese Beurteilungsmöglichkeit aufgrund der öffentlichen Ordnung *lato sensu* und der nationalen Sicherheit einzuschränken[36]. Auch bei zwei ausländischen Parteien sind für Klagen bezüglich in Brasilien gelegener Immobilien brasilianische Gerichte zuständig. Diese Regel ist ebenfalls im Artikel 12, § 1 des Einführungsgesetzes der brasilianischen Gesetzesnormen vorgesehen.

Der Meinungsstreit hinsichtlich dieser Anordnung bezieht sich

34 Oberster Gerichtshof, Revision Nr. 1168547/RJ, Berichterstatter: Minister Luis Felipe Salomão, Vierter Senat. *Tagesanzeiger der Justiz* vom 07.02.2011, Seite 3.

35 Oberster Gerichtshof, Revision Nr. 1168547/RJ, Berichterstatter: Minister Luis Felipe Salomão, Vierter Senat. *Tagesanzeiger der Justiz* vom 07.02.2011, Seite 11.

36 ARAUJO, Nadia de. *Direito Internacional Privado: Teoria e Prática Brasileira*. Rio de Janeiro: Renovar, 2008, Seite 246.

auf die Natur der Klagen bezüglich Immobilien. So ist es kontrovers, ob die Vorgabe sich auf dingliche Klagen über Immobilien einschränkt oder ob sie, andererseits, ebenfalls jedwede Klage dieser Art betrachtet. Erwähnt sei noch, dass die brasilianische Zivilprozessordnung über diese Kontroverse schweigt, anders als die EU-Verordnung Nr. 44/2001 des Rates der Europäischen Union mit der die dinglichen Immobilienklagen sich auf die staatliche Gerichtsbarkeit beschränken[37].

Pontes de Miranda meint in Bezug auf diese Diskussion, dass die hiermit analysierte Vorschrift auf alle persönliche oder dingliche Immobilienklagen anwendbar ist[38]. Der Jurist fügt hinzu, dass es irrelevant sei, ob es sich um eine Feststellungs-, Gestaltungs- oder Leistungsklage handele.

Celso Agricola Barbi ist der Meinung, dass der Text der Zivilprozessordnung umfassend ist und sich nicht auf dingliche Klagen beschränkt, sondern sich jedweden Klagen widmet, wie jene über Anmietung, Kauf und Verkauf, Anleihen und andere[39]. Barbosa Moreira ist ebenfalls der Meinung, dass die Vorschrift alle Immobilien betreffenden Klagen umfasst[40].

Tornaghi jedoch ist anderer Meinung: für ihn beziehen sich diese Klagen ausschließlich auf dingliches Recht; es genügt nicht, dass der Streit sich auf jede Art von Immobiliensachen bezieht[41].

Über diese Debatte äußerte sich bereits das Brasilianische Bundesverfassungsgericht (*Supremo Tribunal Federal – STF*)[42], mit der Behauptung, dass die Vorschrift die ausschließliche Zuständigkeit

37 Der Artikel 22.1 der EU-Verordnung Nr. 44/2001 schreibt vor: „Ohne Rücksicht auf den Wohnsitz sind ausschließlich zuständig: (1) für Klagen, welche dingliche Rechte an unbeweglichen Sachen sowie die Miete oder Pacht von unbeweglichen Sachen zum Gegenstand haben, die Gerichte des Mitgliedstaats, in dem die unbewegliche Sache liegend sind. Jedoch sind für Klagen betreffend die Miete oder Pacht unbeweglicher Sachen zum vorübergehenden privaten Gebrauch für höchstens sechs aufeinander folgende Monate auch die Gerichte des Mitgliedstaats zuständig, in dem der Beklagte seinen Wohnsitz hat, sofern es sich bei dem Mieter oder Pächter um eine natürliche Person handelt und der Eigentümer sowie der Mieter oder Pächter ihren Wohnsitz in demselben Mitgliedstaat haben".

38 PONTES DE MIRANDA, Francisco Cavalcanti. *Comentários do Código de Processo Civil*. Band II, Rio de Janeiro: Renovar, 2008, Seite 246.

39 BARBI, Celso Agricola. *Comentários ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 243.

40 MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In:*Temas de Direito Processual.* 5. Serie. Rio de Janeiro: Saraiva, 1994, Seite 143.

41 TORNAGHI, Helio. *Comentários ao Código de Processo Civil*. Band 1, São Paulo: RT, 1974, Seite 308.

42 Brasilianisches Bundesverfassungsgericht, Beschwerde gegen die Entscheidung des Vorsitzenden zum Plenum des Brasilianischen Bundesverfassungsgerichtes bezüglich Beschwerde über ausländisches Urteil Nr. 7101, Berichterstatter Minister Maurício Corrêa (Präsident). *Tagesanzeiger der Justiz* vom 14.11.03, Seite 12.

der brasilianischen Gerichte für persönliche oder dingliche Klagen über in Brasilien befindlichen Immobilien vorsieht. Es hat den Anschein, dass dies die überwiegende Meinung der Rechtsprechung ist. Wichtig ist daran zu erinnern, dass die Festlegung der ausschließlichen Zuständigkeit die Bestätigung des ausländischen Urteils nicht ermöglicht, sowie die Wahl des Gerichtsstandes hindert[43]. Dies bedeutet jedoch nicht, dass das ausländische Gericht über die Klage nicht entscheiden darf. Selbst wenn diese Annahme in der ausschließlichen Zuständigkeit eingegliedert ist, hat diese Tatsache keinen Einfluss auf die Zuständigkeit des ausländischen Gerichtes, das heißt, die Regeln der ausschließlichen Zuständigkeit besitzen keine überterritorialen Effekte. Wenn die Möglichkeit besteht, die Klage in einem anderen Land einzureichen und diese dort auch entschieden werden kann, beeinflusst die ausschließliche Zuständigkeit eines brasilianischen Gerichtes keinesfalls die Parteien des Rechtsstreits. .

Ein weiterer wichtiger Punkt dieser Vorschrift ist noch hervorzuheben. Im Hinblick auf die im Wortlaut des Absatzes I des Artikels 89 „Klagen bezüglich Immobilien" ist die Rechtsprechung der Ansicht, dass im Falle einer im Ausland getroffener vertraglichen Vereinbarung von geschiedenen Eheleute bezüglich der Aufteilung der Güter, der Oberste Gerichtshof diese Vereinbarung anerkennt, auch wenn die Vereinbarung sich auf in Brasilien gelegene Immobilien bezieht[44]. Dies sei durch Artikel 89 Abs. I nicht ausgeschlossen, da der Wortlaut nur Urteile erfasst, nicht aber auch vertragliche Vereinbarungen. Wichtig ist zu bemerken, dass es nur eine Ausnahme zur Anerkennung gibt: entstehende Zweifel in Bezug auf die Gültigkeit der Abmachungen.

e) Nachlass und Teilung der in Brasilien befindlichen Güter

Der Absatz II des Artikels 89 der Zivilprozessordnung bezieht sich auch auf die Tatsache, dass einige Güter in Brasilien liegen. Für den Nachlass und die Aufteilung der Güter sind brasilianische Gerichte ausschließlich zuständig, selbst dann wenn der Verstorbene Ausländer

43 MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In: *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva, 1994, Seite 141.

44 In diesem Sinne werden folgende Entscheide erwähnt: Oberster Gerichtshof . Angefochtenes ausländisches Urteil Nr. 979, Berichterstatter Minister Fernando Gonçalves, *Tagesanzeiger der Justiz* vom 29.08.05, Seite 134; Oberster Gerichtshof. Angefochtenes ausländisches Urteil Nr. 3269, Berichterstatter Minister João Otávio de Noronha, Sondersenat. Elektronischer *Tagesanzeiger der Justiz* vom 22.05.2012 und Oberster Gerichtshof, angefochtenes ausländisches Urteil Nr. 4913. Berichterstatter: Minister João Otávio de Noronha, Sondersenat, Elektronischer *Tagesanzeiger der Justiz* vom 22.05.2012: alle Entscheide bekräftigen die Stellung des Obersten Gerichtshof über die Bestätigung eines ausländischen Urteils bezüglich eines zwischen geschiedene Eheleute abgeschlossenen Vertrages.

war und im Ausland lebte.

Nach der herrschenden Lehre bezieht sich Art. 89 Abs. 2 auf Fälle des Nachlasses und der Verfügung von Todes wegen, hinsichtlich beweglichen und unbeweglichen Sachen die sich in Brasilien befinden. In diesem Sinne äußerte sich Pontes de Miranda in dem er der davon ausgeht, dass diese Vorschrift das Ziel hat, Interventionen ausländischer Gerichte bezüglich des Klagen über den Nachlass oder Verfügungen von Todes wegen zu vermeiden, ohne zu überprüfen, ob der Erblasser Ausländer ist oder nicht, auch wenn er seinen Wohnsitz außerhalb Brasiliens hat[45]. Pontes de Miranda äußert sich in dem Sinne, dass der Artikel 89, Absatz II, unter Gütern in Brasilien auch die beweglichen Sachen in Brasilien versteht. Der Jurist schließt in dieser Kategorie auch Aktien von brasilianischen und ausländischen Unternehmen mit Filialen oder Agenturen in Brasilien ein; Wechsel; bei brasilianische Finanzinstitutionen angelegte Gelder, vorausgesetzt dass deren Abhebung nicht ausschließlich von dem Kontoinhaber bei einer ausländischen Filiale oder Agentur gemacht werden kann oder zum ausländischen Banktransfer verfügbar ist[46].

Celso Agricola Barbi[47] bezieht sich ebenfalls auf die Vorschrift als lediglich anwendbar hinsichtlich des Nachlasses und Güterteilungen von Todes wegen, in dem er darauf abstellt, dass die Güter des Nachlasses ebenfalls beweglich, lebend oder immobil sein können. Helio Tornaghi[48] und Barbosa Moreira[49] folgen der gleichen Orientierung.

Umstritten ist jedoch auf welcher Art von Teilung sich der Gesetzgeber im Absatz II des Artikels 89 bezog, das heißt, geht es lediglich um die Teilung von Todes wegen oder ist auch die Teilung unter Lebenden unter den ausschließlichen Zuständigkeiten der brasilianischen Gerichte mit inbegriffen.

Die obersten Gerichte äußerten sich bereits über das Thema. Anfänglich, laut Carmen Tiburcio[50], interpretierte das Brasilianische Bundesverfassungsgericht (STF) die besagte Vorschrift ebenfalls mit dem Einschluss der Teilung der Güter unter Lebenden in Brasilien

45 PONTES DE MIRANDA, Francisco Cavalcanti. *Comentários ao Código de Processo Civil*, Band II, Rio de Janeiro: Forense, 1973, Seite 195.

46 PONTES DE MIRANDA, Francisco Cavalcanti. *Comentários ao Código de Processo Civil*, Band II, Rio de Janeiro: Forense, 1973, Seite 195 bis 196.

47 BARBI, Celso Agricola. *Comentários ao Código de Processo Civil*, 9. Auflage, Rio de Janeiro: Forense, 1994, Seite 243.

48 TORNAGHI, Helio. *Comentários ao Código de Processo Civil*, Band 1, São Paulo: RT, 1974, Seiten 308 und 309.

49 MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva, 1994, Seite 143 und 144.

50 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, Seite 453.

und verweigerte somit die Bestätigung verschiedener ausländischer Scheidungsurteile, welche die Teilung von Immobilien in Brasilien zum Gegenstand hatten. Jedoch zu Beginn der 80er Jahre[51], änderte das Brasilianische Bundesverfassungsgericht (STF) seine Einstellung und ließ zu, dass die Vorgabe ausschließlich für Bestandsaufnahmen und Teilungen von Todes wegen Geltung hatte. Laut der Autorin war dies das vorwiegende Verständnis des Obersten Gerichtshof (STJ). Neuerdings jedoch, mit der Revision Nr. 275.985/SP[52], kam der Oberste Gerichtshof (STJ) zur Schlussfolgerung, dass brasilianische Gerichte für die Durchführung der Nachlass und Teilung von in Brasilien befindlichen Gütern zuständig sind (sei es unter Lebenden oder von Todes wegen).

Unter Berücksichtigung, in jeglicher Form, des mehrheitlichen Verständnisses der Rechtslehre, dass der Artikel 89, Absatz II sich nur auf die Bestandsaufnahme und Teilung von Tod wegen bezieht, ist die Behandlung des Themas der Teilung unter Lebenden fraglich.

In diesem Sinne, im Falle einer Teilung von beweglichen Gütern im Ausland und Immobilien in Brasilien, wird die ausschließliche Zuständigkeit der brasilianischen Gerichtsbarkeit in Frage gestellt. Kraft des Artikels 89, Absatz I, würde auch die Zuständigkeit zur Entscheidung der beweglichen Güter im Ausland hinzugezogen. Alternativ stellt sich die Frage, ob eine Zusammenlegung der Zuständigkeiten, das heißt, der brasilianische Richter würde aufgrund des Artikels 89, Absatz I, über Immobilien entscheiden und der brasilianische oder ausländische Richter würde – ununterscheidbar – über die beweglichen Güter im Ausland unterscheiden. Somit ergäbe sich die Annahme der konkurrierenden Zuständigkeit[53]. Der Oberste Gerichtshof (STJ) besitzt jedoch einen Präzedenzfall in dem Sinne, dass die von der ausländischen Gerichtsbarkeit durchgeführte Teilung

51 In diesem Zusammenhang, siehe Brasilianisches Bundesverfassungsgericht, Beschwerde gegen Entscheidung des Vorsitzenden an Kammerplenum über ausländisches Urteil Nr. 2492. In: *Revista Trimestral de Jurisprudência*, Band 101, 1982, Seite 69.

52 Oberster Gerichtshof. Revision Nr. 275.985/SP, Berichterstatter Minister Sálvio de Figueiredo Teixeira. *Tagesanzeiger der Justiz* vom 13.10.03, Seite 366.

53 Das Brasilianische Bundesverfassungsgericht behandelte bereits das Thema. Differenzierte jedoch nicht die Gütertypen – mobile oder immobile – die sich im Ausland befanden. Im erwähnten Fall verstand das Brasilianische Bundesverfassungsgericht, dass im Falle einer Scheidungsteilung – mit Güter sowohl in Brasilien als auch im Ausland – läge die Kompetenz bei den Angehörigkeitsstaaten beider Eheleute, in denen sie wohnhaft und ansässig wären. Konsequenterweise entschied sich das Brasilianische Bundesverfassungsgericht für die Anerkennung des ausländischen Urteils über die Teilung der Güter des Paares, selbst wenn die Güter in Brasilien sich befänden. (Brasilianisches Bundesverfassungsgericht. Beschwerde gegen Entscheidung des Vorsitzenden an Kammerplenum: ausländisches Urteil Nr. 2396, Berichterstatter Minister Thompson Flores, Plenum, *Tagesanzeiger der Justiz* vom 28.12.1978, Seite 10573).

aufgrund einer Scheidung in Brasilien anerkannt werden kann, selbst wenn Immobilien zu teilen sind. Diese Handlungsweise erscheint uns nicht als die zutreffendste Alternative.

In einer ausschließlichen Teilung von ausländischen Immobilien erscheint uns die bilaterale Anwendung des Artikels 89, Absatz I nicht geeignet für die Ablehnung der Gerichtsbarkeit der brasilianischen Gerichtsbarkeit. Es ist jedoch notwendig, dass die brasilianische Gerichtshoheit die zukünftige Auswirkung ihrer Entscheidung überdenkt, hauptsächlich vor dem Hintergrund, dass es eine Tendenz der Gerichtsverordnungen diverser Länder ist, ihre Zuständigkeiten für Klagen über Immobilien an die Gerichtsstände der jeweiligen Immobilien zu übertragen.

Es hat den Anschein, dass in einem Scheidungsprozess mit der Teilung von lediglich beweglichen Gütern – sei es in Brasilien oder im Ausland – die Gerichtsbarkeit sowohl von der brasilianischen als auch von der ausländischen Gerichtshoheit ausgeübt werden kann. Dies ergibt, wie bereits erwähnt, die Annahme der konkurrierenden Zuständigkeit. Damit ist die Annahme möglich, dass die Aufzählung der Fälle der internationalen Gerichtsbarkeit der Zivilprozessordnung beispielhaft ist und, dass auch andere Umstände existieren, unter denen die brasilianische Gerichtsbarkeit ausgeübt werden darf.

1.2. Annahmen der nicht ausdrücklich in der Zivilprozessordnung vorgesehenen Ausübung der brasilianischen Gerichtsbarkeit

In der Rechtslehre und in der Rechtsprechung wird über die Existenz anderer Annahmen zur Ausübung der brasilianischen Gerichtsbarkeit – außer der in den Artikeln 88 und 89 der Zivilprozessordnung erwähnten Fällen – dahingehend diskutiert, ob diese Vorschriften eine abschließende oder beispielhafte Liste darstellt.

Celso Agricola Barbi vertritt die Meinung, dass der Staat eine direkte Abgrenzung seiner Gerichtsbarkeit festlegen kann, indem er die ihm unterliegenden Fälle ausdrücklich benennt und, implizit, die restlichen ausschließt[54]. In Bezug auf die Artikel 88 bis 90 ist Barbi der Ansicht, dass „direkt“ festgelegt wurde, „in welchen Fällen die brasilianische Gerichtsbarkeit zuständig ist“[55]. Auf dieser Weise hat es den Anschein, dass der Autor die vorgegebene Aufstellung als abschließend für die Ausübungsannahmen der brasilianischen Gerichtsbarkeit hält.

54 BARBI, Celso Agricola. *Comentários ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 240.

55 BARBI, Celso Agricola. *Comentários ao Código de Processo Civil*. 9. Auflage. Rio de Janeiro: Forense, 1994, Seite 240.

Anderer Meinung ist Helio Tornagui[56], in dem er meint, dass der Artikel 94, § 3 der Zivilprozessordnung eine weitere Annahme der internationalen Zuständigkeit aufführt und somit zu verstehen ist, dass die dargestellten Fälle der Artikel 88 und 89 nur beispielhaft sind. Pontes de Miranda hat das Verständnis, dass „die Vorschriften lediglich das Thema der Zuständigkeit der brasilianischen Gerichte ab betreffen. Die Artikel 88 bis 90 führen nur die Klagearten auf"[57], was den beispielhaften Charakter der besagten Vorschriften unterstreiche. verstärkt.

José Carlos Barbosa Moreira[58] vertritt die Meinung, dass die aufgelisteten Fälle in den Artikeln 88 und 89 zur Festsetzung der Voraussetzungen, unter denen die brasilianische Justiz kompetent zur Lösung eines bestimmten Streits ist, nicht abschließend sind und somit nur eine beispielhafte Aufstellung darstellen. Um seine Meinung zu erläutern meint Barbosa Moreira, dass die Zivilprozessordnung sich nicht auf Fälle der freiwilligen Gerichtsbarkeit bezieht, das heißt, in solchen Fällen in denen es keinen Beklagten und keine Klage gibt, wie bei einvernehmlicher Trennung der Ehegatten, der Gütereinnahme von Verschollenen, die Betreuung von Geisteskranken, und anderen Fällen.

In diesem Sinne ist der Autor der Ansicht, dass die Gesetzeslücke in dieser Angelegenheit mit der Anwendung unserer internen Zuständigkeitsregeln – die Rechtsvorschrift, die das zuständige brasilianische Gerichtsorgan zur Entscheidung einer Rechtssache definiert – auch die internationale Zuständigkeit zweckhalber festlegen solle. In Bezug, jedoch, auf die freiwillige Gerichtsbarkeit ist keine ausdrückliche Zuständigkeitsregel in der Gesetzgebung zu finden. Somit, auch wenn nicht vollkommen zufriedenstellend, sollten die Analogie und die allgemeinen Rechtsprinzipien Anwendung finden. Haroldo Valladão ist ebenfalls dieser Meinung[59].

Botelho de Mesquita meint ebenfalls, dass die in der Vorschrift aufgeführten Annahmen beispielhaften Charakter besitzen, weil einige Prinzipien des internationalen Rechtes, wie das Prinzip der Vermeidung der Rechtsverweigerung und das Effektivitätsprinzip, einzuhalten sind. Deshalb sind neue Anwendungsannahmen der Artikel 88 und 89 der Zivilprozessordnung möglich[60].

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56 TORNAGHI, Helio. *Comentários ao Código de Processo Civil*. Band I. São Paulo: RT, 1974, Seite 305

57 PONTES DE MIRANDA, Francisco Cavalcanti. *Comentários ao Código de Processo Civil*. Band II, Rio de Janeiro: Forense, 1973, Seite 193.

58 MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva, 1994, Seite 144.

59 VALLADÃO, Haroldo, *Direito Internacional Privado*, Band III, Rio de Janeiro: Freitas Bastos, 1978, Seiten 132, 133, 134 und 137.

60 MESQUITA, José Ignácio Botelho de. Über die internationale Kompetenz und ihre

Für Leonardo Greco ist die Auflistung des Artikels 88 der Zivilprozessordnung ebenfalls nicht abschließend und somit kann praktisch jedes Klageverfahren gegenüber brasilianischen Gerichten eingereicht werden, nur wenn das Effektivitätsprinzip eingehalten wird. Dem Autor zufolge: „wenn das Effektivitätsprinzip nicht gefährdet wird, kann das Verfahren der brasilianischen Justiz vorgetragen werden, selbst wenn keine der Annahmen der Absätze I bis III des Artikels 88 vorhanden sind“[61].

Antenor Madruga[62] ermittelt, dass die brasilianischen Obergerichte bereits die Möglichkeit hatten, sich über weitere internationale Zuständigkeitsannahmen – die nicht in der jetzigen Zivilprozessordnung aufgeführt werden – zu äußern. Beispiel zu dieser Bemerkung ist der Beschwerde Nr. 64, mit dem der Oberste Gerichtshof (STJ) vorgab, dass „die internationale Zuständigkeit (Gerichtsbarkeit) der brasilianischen Gerichtshoheit sich nicht nur in der Analyse der Artikel 88 und 89 der Zivilprozessordnung – dessen Inhalt nicht abschließend ist – erschöpft[63].

1.3. Geplante Änderungen hinsichtlich der Ausübung der brasilianischen Gerichtsbarkeit im Projekt der Zivilprozessordnung

Die letzte Version des Projektes der Zivilprozessordnung versuchte die technische Ungenauigkeit der Nomenklatur „internationale Zuständigkeit“ zu korrigieren, in dem sie Vorschriften über das Thema im Kapitel „Grenzen der nationalen Gerichtsbarkeit“ einfügte. Die Vorschriften haben insgesamt dien Bezug zu der brasilianischen Gerichtsbarkeit beibehalten.

Die Ausarbeitung des Gesetzesvorhabens unterteilt die Zuständigkeitsregelungen in drei Vorschriften. Der erste Artikel behält den Wortlaut des aktuellen Artikels 88 *CPC* bei. Um zu verdeutlichen, dass die drei vorgesehenen Zuständigkeitsregelungen nicht kumulativ zu verstehen sind, hat der Gesetzgeber die Verbindung “oder„ zwischen den einzelnen Vorschriften eingefügt. Darüber hinaus bezieht sich der dritte Absatz ausdrücklich auf einen Umstand oder eine in Brasilien

Informationsprinzipien. In *Revista do Processo* 50-51, 1988, Seite 56.

61 GRECO, Leonardo. Die internationale Kompetenz der brasilianischen Justiz. In *Revista da Faculdade de Direito de Campos*, Jahr VI, Nr. 7, Dezember 2005, Seiten 180 und 181.

62 MADRUGA, Antenor. *Homologação de sentença estrangeira de falência*.Verfügbar in: http://www.conjur. com.br/2011-jun-22/judiciario-estrangeiro-nao-decretar-falencia-empresa-brasileira. Abgerufen am 23.01.2013.

63 Oberster Gerichtshof. Beschwerde Nr. 64/SP, Berichterstatterin Ministerin Nancy Andrighi, dritter Senat. Elektronischer Tagesanzeiger der Justiz vom 23.06.2008. Im gleichen Sinne siehe Brasilianisches Bundesverfassungsgericht. Rechtshilfeersuchschreiben Nr. 9697, Berichterstatter Minister Carlos Velloso (Präsident). *Tagesanzeiger der Justiz* vom 24.04.2001.

vorgenommene Handlung als Klagegrund[64].

Danach fügte der Gesetzgeber im Projekt eine zweite Vorschrift ein, dessen „Caput" identisch mit dem Vorhergehenden ist. Darin wurden drei Annahmen der brasilianischen Gerichtsbarkeit hinzugefügt[65]. Die erste Annahme dieser Vorschrift bezieht sich auf Unterhaltsklagen wenn (a) der Kläger in Brasilien wohnhaft oder ansässig ist; oder (b) der Beklagte Verbindungen zu Brasilien unterhält wie Besitz oder Eigentum von Gütern, Einkünfte oder Empfang von finanziellen Begünstigungen. Für die Unterhaltsklagen wurde also die Möglichkeit eingeräumt, die Gerichtsbarkeit aufgrund (a) des Wohnsitzes des Klägers („forum actoris") oder (b) der Existenz von Vermögen am Gerichtsstand („forum patrimonii") auszuüben.

Die zweite in das Projekt eingefügte Annahme der Vorschrift bezieht sich auf Verbraucherbeziehungen, also wenn der Verbraucher in Brasilien wohnhaft ist. Die Norm trägt eine weitere Annahme der Gerichtsbarkeitsausübung in Bezug auf den Wohnsitz des Autors vor mit der wahrscheinlichen Absicht die Wirksamkeit des Verbraucherrechtes in der brasilianischen Gesetzgebung zu gewährleisten. Diese ist Teil der öffentlichen Ordnung. Aus der Unternehmensperspektive unterwirft die Vorschrift potenziell jedes Unternehmen der brasilianischen Gerichtsbarkeit. Als Beispiel nimmt man einen durch einen Verbraucher getätigten Kauf im Ausland von einem Unternehmen, das keinerlei Kontaktstellen in Brasilien hat; es genügt, dass der Verbraucher in Brasilien wohnhaft oder ansässig ist, damit die brasilianische Gerichtsbarkeit hergestellt wird.

Die dritte von dem Gesetzgeber eingeführte Annahme bezieht sich auf die ausdrückliche oder stillschweigende Unterwerfung der Parteien der brasilianischen Gerichtsbarkeit. Die Vorschrift legt die Möglichkeit fest, die brasilianische Gerichtsbarkeit aufgrund der Willensautonomie auszuwählen, indem sie die Wahl des brasilianischen Gerichtsstandes zulässt. Es ist anzumerken, dass der Gesetzgeber andere Situationen, die nicht in der vorhergehenden Ordnung vorgesehen

64 Es ist Aufgabe der brasilianischen Gerichtshoheit die Bearbeitung und Entscheidung der Klagen in denen: I – der Angeklagte – unabhängig seiner Staatsangehörigkeit – in Brasilien wohnhaft ist; II – de Schuld in Brasilien zu verbüßen ist; oder III – die begründete Tat oder Tatsache in Brasilien geschehen ist. Einzelparagraph – Zum Zwecke des Absatzes I ist vorauszugehen, dass die ausländische juristische Person hier. zu Lande eine Agentur, Filiale oder Zweigniederlassung besitzt.

65 Des Weiteren ist es Aufgabe der brasilianischen Gerichtshoheit die Bearbeitung und Entscheidung der Klagen über: I – Alimente, wenn a) der Kläger in Brasilien wohnhaft oder ansässig ist; oder b) der Angeklagte Verbindungen zu Brasilien unterhält wie Besitz oder Eigentum von Gütern, Einkünfte oder Empfang von finanziellen Begünstigungen; II – Konsumbeziehungen, wenn der Verbraucher in Brasilien wohnhaft oder ansässig ist; III – Fälle bei denen die Parteien – formell oder informell – der brasilianischen Gerichtsbarkeit unterliegen.

waren herstellt. In diesen darf die brasilianische Gerichtshoheit ihre Gerichtsbarkeit ausüben. In gleicher Weise ist zu beobachten, dass die Annahme sehr weit ausgelegt wird und erlaubt, dass ausländische Parteien in Brasilien Prozesse führen können, selbst wenn sie keinerlei Verbindungselemente mit dem Gerichtsstand haben.

Es ist darauf hinzuweisen, dass der Gesetzgeber nicht klarstellt, ob die drei in der Vorschrift eingefügten Annahmen des Projektes den Umständen der ausschließlichen oder konkurrierenden Ausübung der brasilianischen Gerichtsbarkeit entsprechen. Es besteht die Möglichkeit der Behauptung, aufgrund des identischen Gesetztextes mit dem ersten Artikel, dass die Vorschrift ebenfalls Annahmen zur konkurrierenden Zuständigkeit darstellt. Jedoch sind bei dieser Annahme einige Ungewissheiten implizit.

In Bezug auf den Vorschlag der Unterhaltsklagen – dessen Ziel die Einfachheit und Beschleunigung der Alimente ist – wäre die Annahme einer ausschließlichen Gerichtsbarkeit ein Hindernis zur Klage eines im Ausland ansässigen Klägers gegenüber einem in Brasilien ansässigen Beklagten. Es bestünde ein Konflikt mit dem Absatz I des vorhergehenden Artikels, der dem aktuellen Artikel 88, Absatz I der Zivilprozessordnung entspricht. Da es sich außerdem um ausschließliche Zuständigkeit handelt, wäre es dem Kläger unmöglich, eine Klage im Ausland – dort wo der Beklagte wohnhaft ist – zwecks Beschleunigung der Ladung einzureichen, um dann im Nachhinein die Vollstreckung des Urteils in Brasilien zu erwarten. Es hat aber den Anschein, dass es sich um konkurrierende Zuständigkeit handelt, damit der Kläger der Unterhaltsklage so effizient wie möglich sein Ziel erreichen kann.

Bei Verbraucherklagen andererseits würde die Annahme, dass sie der konkurrierenden Zuständigkeit unterliegen, dazu führen, dass ein ausländisches Urteil in Brasilien vollstreckt würde. Dies liefe dem Zweck, den brasilianischen Verbraucher zu schützen, zuwider. Dieses Verständnis würde allerdings erlauben, dass der Verbraucher einen Prozess im Ausland führen würde, falls ihm diese Alternative besser erschiene.

In Bezug auf die Annahme der Unterwerfung der Parteien unter die brasilianische Gerichtsbarkeit würde dies bedeuten, dass konkurrierende Zuständigkeit die Folge wäre, das heißt, es wäre erlaubt, dass das Urteil eines im Ausland ergangenen Urteils in Brasilien vollstreckt würde. Dies ergäbe also eine Nichtbeachtung der Parteien in Bezug auf die Wahl des brasilianischen Gerichtsstandes und würde die Nichtanerkennung des ausländischen Urteils ermöglichen, zumal die ausländische Gerichtshoheit unzuständig wäre. Andererseits würde die Anerkennung der Annahme der ausschließlichen Zuständigkeit die Wahlmöglichkeit eines anderen Gerichtsstandes durch die Parteien

ausschließen.

Der dritte Artikel des Projektes widmet sich dem Thema der Ausübung der brasilianischen Gerichtsbarkeit und gibt, in seiner Substanz, die Redaktion des Artikels 89 der Zivilprozessordnung wieder. Er nennt ausdrücklich zwei Fälle der ausschließlichen Gerichtsbarkeit[66]. Der erste Absatz wurde wortwörtlich aus der aktuellen Redaktion des Absatzes I des Artikels 89 übernommen. Im Absatz II wurde jedoch der Satz „in Sachen der Erbfolgen" hinzugefügt und damit die ausschließliche Zuständigkeitder brasilianischen Hoheit zur Bestandsaufnahme und Güterteilung von Todes wegen klargestellt.

2. WAHL DES GERICHTSSTANDES

Bei Streitigkeiten mit ausländischem Bezug ist es üblich, dass die Parteien den für sie günstigsten Gerichtsstand wählen. In diesem Sinne, kann die Wahl des Gerichtsstandes die Ausübung der Gerichtsbarkeit des Staates sowohl ausdehnen als auch ersetzen[67].

Im brasilianischen Recht sieht der Artikel 111 der Zivilprozessordnung die Möglichkeit der Wahl des Gerichtsstandes durch die Parteien vor[68]. Es ist jedoch hervorzuheben, dass dieser Vorschlag sich ausschließlich auf die Annahme der Wahl des Gerichtsstandes im nationalen Bereich bezieht; es gibt somit auf dieser Weise keine ausdrückliche Bestimmung in der brasilianischen Gesetzgebung in Bezug auf die Wahl des Gerichtsstandes auf internationaler Ebene.

Aufgrund dieser Unvorhersehbarkeit wurde die Annahme einer Klausel über die Wahl des Gerichtsstandes im brasilianischen Recht polemisiert. Und dies, weil es fraglich ist, ob der Wille der Parteien die Normen über die Festlegung der Zuständigkeit der brasilianischen Gerichtshoheit der Zivilprozessordnung verändern könnte, zumal es Normen des öffentlichen Rechts sind und direkt aus der Bundesgerichtshoheit fließen[69]. Somit wird die Möglichkeit

66 Es obliegt der brasilianischen Gerichtsbarkeit, unter Ausschluss jedweder anderen: I – Die Anerkennung von Klagen über in Brasilien befindlichen Immobilien; II – In Sachen der Erbfolgen, die Durchführung der Bestandsaufnahme und Teilung der in Brasilien befindlichen Gütern, auch wenn der Autor des Nachlasses Ausländer oder im Ausland wohnhaft war.

67 Im französischen Recht, zum Beispiel, wird die Möglichkeit der Ernennung eines Gerichtsstandes zur Ausübung der Gerichtsbarkeit mit der gewählten Nomenklatur „*clause attributive de juridiction*" evident.

68 Artikel 111. Die Kompetenz bezüglich des Gegenstandes und der Hierarchie ist durch Konvention der Parteien unübertragbar; diese können jedoch die Kompetenz aufgrund des Wertes und des Territoriums modifizieren, in dem sie den Gerichtsstand wählen, an dem die Aktion über Rechte und Pflichten eingereicht wird. § 1 – Die Vereinbarung wirkt jedoch nur wenn vertraglich und formell festgehalten und sich auf einen einzigen Gerichtsfall bezieht. § 2 – Der vertragliche Gerichtsstand verpflichtet die Erben und Nachfolger der Parteien.

69 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, Seite

in Frage gestellt, ob es erlaubt wäre, dass die Willensautonomie die Aussagen der brasilianischen Prozessordnung überragen könnte. Auf dieser Weise könnten die Parteien ihren Prozess bei der brasilianischen Justiz führen, selbst wenn dies nicht konkret in den Artikeln 88 und 89 der Zivilprozessordnung vorgesehen ist[70]. Andererseits könnte die Wahl eines nicht brasilianischen Gerichtsstandes zur Lösung der in den Artikeln 88 und 89 der Zivilprozessordnung erwähnten Angelegenheiten zur Folge haben, dass die Ausübung der brasilianischen Gerichtsbarkeit vermieden würde. Im Prinzip ist die Ausübung der Gerichtsbarkeit von staatlichem Interesse.

Aus der Sicht von Carmen Tiburcio würden im Falle, dass die Parteien frei unter sich den Gerichtsstand gemäß den Vorgaben des Artikels 88 der Zivilprozessordnung wählen, die Souveränität des Staates und die öffentliche Ordnung nicht verletzt sein, weil diese Verordnung die Voraussetzung der konkurrierenden Zuständigkeit der brasilianischen Gerichtshoheit vorsieht. Wenn jedoch die Auswahl eines anderen Gerichtsstandes – gemäß der im Artikel 89 aufgelisteten Zuständigkeiten – vereinbart würde, so wäre diese Klausel ungültig, zumal sie damit den Staat von der Ausübung der Gerichtsbarkeit ausschließen würde[71].

Im Hinblick, dass die herrschende Lehre die Wahl des Gerichtsstandes zulässt[72], sind wir der Meinung, dass die diesbezüglich uneinheitliche Rechtsprechung zu erwähnen ist.

Im Jahre 1957 äußerte sich das Brasilianische Bundesverfassungsgericht(STF) zum ersten Mal zu dem Thema[73]. Es handelte sich um eine Schadensersatzklage die auf einer Nichterfüllung der sich aus einem Transportvertrag ergebenden, in Brasilien zu erfüllenden, Pflichten beruht, wobei die Parteien Montevideo als Gerichtsstand für den Fall von möglicherweise auftretenden Streitigkeiten aus dem Vertrag wählten. Das Brasilianische Bundesverfassungsgericht

85.

70 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, Seite 86.

71 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, Seite 87.

72 In diesem Sinne, siehe: TORNAGHI, Helio. *Comentários ao Código de Processo Civil*, Band I, São Paulo: RT, 1974, Seite 307; MOREIRA, José Carlos Barbosa. Probleme in Bezug auf internationale Streitigkeiten. In *Temas de Direito Processual*. 5. Serie. Rio de Janeiro: Saraiva, 1994, Seite 146; MESQUITA, José Ignácio Botelho de. Über die internationale Kompetenz und ihre Informationsprinzipien. In *Revista do Processo* 50-51, 1988, Seite 57; STRENGER, Irineu. In: *Contratos Internacionais do Comércio*, 2. Auflage, São Paulo: Editora Revista dos Tribunais, 1992, Seiten 256 bis 258.

73 Brasilianisches Bundesverfassungsgericht, Beschwerde Nr. 30636. Berichterstatter Minister Cândido Motta, erster Senat, Entscheid vom 29.05.1957. *Zusammenfassung:* Band 00298-01, Seite 393.

(STF) war der Ansicht, dass gemäß Artikel 12 des Einführungsgesetz der brasilianischen Gesetzesnormen[74], mit Ausnahme der Vorschriften seines 1. Paragraphen[75], die Wahl *ad libitum* von den Parteien durch formelle Vereinbarung geändert werden könne, zumal der Inhalt der besagten Vorschrift nicht dem öffentlichen Recht unterliege und die in ihr beinhalteten Norm nicht der brasilianischen Staatshoheit obliege.

1989 lehnte der Oberste Gerichtshof (STJ) die Wahlklausel des Gerichtsstandes nach den Voraussetzungen des Artikels 88 ab[76]. Laut des Justizgerichtes darf in Seetransportverträgen, in denen die Warenausschiffung in Brasilien vorgesehen ist, der von den Parteien gewählte vertraglichen Gerichtsstand nicht geltend gemacht werden, im Hinblick auf dem Vorrang des Absatzes II des Artikels 88 der Zivilprozessordnung. Der Oberste Gerichtshof (STJ) argumentierte auch mit dem Prinzip der Unterwerfung, zumal die unterliegende Partei der ursprünglichen Klage sich erst nach der Niederlage an die Gerichtsstandesklausel erinnerte. In diesem Falle verstand das Gericht, dass es eine stillschweigende Änderung des Gerichtsstandes ab dem Moment gab, als die Lösung des Streits anfänglich in Brasilien – ohne jedwede Klausel der Zuständigkeitsänderung – passierte.

Eine weitere Verneinung über die Anwendung der Gerichtsstandwahlklausel durch der Oberste Gerichtshof (STJ) geschah im Jahre 2000[77]. Im besagten Fall schloss die Brasoil mit drei Unternehmen einen Vertrag ab zur Umwandlung eines Erdöltransportschiffes in einer schwimmenden Plattform (Festlandsockel). Die Brasoil forderte zur Durchführung des Vertrages als Garantie, dass zwei nordamerikanische Versicherungsgesellschaften einen performance bond-Vertrag mit den drei Unternehmen abschließen sollten. Der Wert dieses Vertrages entsprach dem Wert des Schiffumwandlungsvertrages und hatte als Gerichtsstand New York. Anschließend, unter Angabe der Nichtberücksichtigung des Vertrages, reichte die Brasoil in Rio de Janeiro eine Klage über Schaden- und Klage auf Schadensersatz kumuliert mit der Eintreibung des Versicherungsscheins gegenüber der Vertragsunternehmen und der Versicherungsgesellschaften mit der Aussicht, letztere würden den performance bond bezahlen[78]. Das Justizgericht äußerte ausdrücklich,

74 Artikel 12. Die brasilianische Gerichtshoheit ist kompetent wenn der Angeklagte in Brasilien wohnhaft ist oder wenn die auferlegte Tat hier durchzuführen ist.

75 Artikel 12, § 1: Nur der brasilianischen Gerichtshoheit obliegt die Anerkennung der Klagen die Immobilien in Brasilien betreffen.

76 Oberster Gerichtshof. Wiederaufnahmeklage Nr. 133/RS. Berichterstatter Minister Claudio Santos, Revisor Minister Sálvio de Figueiredo Teixeira. RT Band 656, Seite 180.

77 Oberster Gerichtshof, Revision Nr. 251.438/RJ, vierter Senat, Berichterstatter Minister Barros Monteiro, DJU vom 02.10.2000, Seite 173.

78 TIBURCIO, Carmen. *Temas de Direito Internacional.* Rio de Janeiro: Renovar, 2006. Seiten 84 und 85.

dass die konkurrierende Zuständigkeit des brasilianischen Richters nicht auf den Willen der Parteien reduziert werden darf und erkannte die Überlegenheit der Gerichtsstandwahl-Klausel nicht an. Obwohl es uns unrichtig vorkommt, entschied das Justizgericht treffend mit der Nichtanerkennung der besagten Klausel, zumal im Vertrag zwischen den Versicherungsgesellschaften und den für die Durchführung der Arbeiten verantwortlichen Unternehmen der Gerichtsstand New York festgelegt wurde. Es handelt sich daher um einen untergeordneten Vertrag des Hauptvertrages, in welchen die Klägerin nicht als Partei erscheint. Der Gerichtsstand in den Vereinigten Staaten kann also nicht über die im Artikel 88, Absatz II der Zivilprozessordnung aufgeführte Zuständigkeiten vorwiegend sein. Die Klausel, die für die Veränderung der Zuständigkeit der brasilianischen Judikative verantwortlich ist, gehört zu einem untergeordneten Vertrag des Hauptvertrages, in dem die Brasoil keine der Parteien ist.

Zu einem späteren Zeitpunkt erkannte der Oberste Gerichtshof (STJ) die Gültigkeit der Klausel an: in einem Fall bezüglich des Verkaufs und Kaufs einer Immobilie in Miami, in den Vereinigten Staaten Nordamerikas[79]. Laut Justizgericht hat der Artikel 88 der Zivilprozessordnung nicht genügend Macht über die Grundsätze bezüglich der Gerichtsstandwahl und über die Tatsache, dass der Autor nicht über einen festen Wohnsitz in Brasilien verfügt. Schließlich wurde argumentiert, dass der Vertrag im Ausland geschlossen wurde, an der Stelle wo sich die betreffende Immobilie befand.

Der Oberste Gerichtshof (STJ) stimmte auch der Gerichtsstandwahlklausel im Jahre 2005 zu[80], mit der Behauptung, dass die Gerichtsstandwahl gültig ist, vorausgesetzt die Nichttangierung des öffentlichen Interesses. Das selbe Gericht urteilte jedoch im Jahre 2008 zugunsten einer Nichtanerkennung der Gerichtsstandwahlklausel und erwähnte dabei vorhergehende Entscheidungen in dieser Richtung[81]. Es handelte sich um Allgemeine Geschäftsbedingungen über Verteilung zwischen RS Components Limited und RS do Brasil Comércio, Importação, Exportação, Consultoria e Representações Ltda., in dem ausdrücklich der Gerichtsstand des Vereinigten Königreichs als kompetent zur Klärung eventueller Streitigkeiten gewählt wurde. Das Gericht verstand die Nichtfortführung des Streits zumal die Verteilungsverpflichtung – obwohl im Ausland festgelegt – in Brasilien

79 Oberster Gerichtshof, Revision Nr. 505208 AM 2003/0042379-0. Berichterstatter Minister Carlos Alberto Menezes Direito. Dritter Senat. DJ vom 13.10.2003, Seite 363, RDR Band 29, Seite 343, RSTJ Band 187, Seite 304.

80 Oberster Gerichtshof, Revision Nr. 242.383/SP, Berichterstatter Minister Humberto Gomes de Barros, dritter Senat. DJ vom 21.03.2005, Seite 360.

81 Oberster Gerichtshof, Revision Nr. 804306/SP, Berichterstatterin Ministerin Nancy Andrighi, drittes Senat, DJe vom 03.09.2008.

zu erfüllen war, was der Annahme des Artikels 88, Absatz II entspricht und unveränderlich ist[82].

Bezugnehmend auf einen internationalen Importvertrag garantierte nochmals der Oberste Gerichtshof (STJ) im Jahre 2010[83] die Anwendung der Gerichtsstandwahlklausel und meinte, auf der Grundlage vorhergehender Entscheidungen, dass die Wahl des Gerichtsstandes gültig ist, vorausgesetzt, dass sie das öffentliche Interesse nicht verletzt. Im vorliegendem Falle wurde Bologna (Italien) – Ort an dem der Vertrag geschlossen wurde – als gültiger Gerichtsstand und Durchführungsort der Verpflichtung anerkannt, da die Prozessfragilität der Rechtsmittelklägerin nicht identifiziert und auch kein Hindernis zum Justizzugang der Partei festgestellt wurde.

Schließlich erschien die neulich getroffene Entscheidung des Obersten Gerichtshofes (STJ) über die Nichtanerkennung der Gerichtsstandwahlklausel, die Spanien als zuständig erklärte[84]. Es handelt sich um die Möglichkeit einer natürlichen, in Brasilien wohnhaften Person, die brasilianische Gerichtsbarkeit anzurufen in einer Angelegenheit der vertraglichen Dienstleistung mit der Gerichtsstandklausel in jenem Lande. Die Klägerin stellte fest, dass ihre Erscheinung in unangebrachter Weise über eine ausländische elektronische Internetseite weltweit ausgestrahlt wurde und reichte eine Klage in Brasilien ein mit der Forderung immaterieller und materieller Entschädigung. Das Oberste Justizgericht erkennt die konkurrierende Zuständigkeit der brasilianischen Gerichtshoheit auf der Grundlage des Artikels 88, Absatz III der Zivilprozessordnung, zumal die schädigende Tat gegenüber der Erscheinung der in Brasilien wohnhaften Klägerin auch in Brasilien geschah unter der Voraussetzung, dass die Bilder der Autorin nicht nur in Spanien sondern weltweit abgerufen werden konnten. Das Oberste Justizgericht fügte hinzu, dass die Gerichtsstandwahlklausel des im Ausland abgeschlossenen Dienstleistungsvertrages – trotz der Annahme durch die brasilianische

82 Viele Autoren sind der Meinung, dass die Klausel der Gerichtstand-Wahl in diesem Falle nicht vorrangig ist, nicht wegen den vom Gericht genannten Gründen, sondern weil es sich um allgemeinen Geschäftsbedingungen handelte. Wenn die Gerichtstandwahl-Klausel von Natur aus vereinbarend ist, so könnte niemals eine ausdrücklich zwischen den Parteien vereinbarte Klausel Bestandteil allgemeiner Geschäftsbedingungen sein der, wiederum, die Natur eines bereits vereinbarten Vertrages hat, der von dem Lieferant der Dienstleistung oder des Produktes vorgefasst wurde und deshalb auch keinen vorherigen Verhandlungen oder nachträglichen Änderungen seiner bereits festgelegten Klauseln unterliegt. Andere Autoren sehen wiederum kein Hindernis in dieser Klausel im Falle der allgemeinen Geschäftsbedingungen, mit Ausnahme jedoch der Verbraucherverträge.

83 Oberster Gerichtshof, Revision Nr. 1177915/RJ, Berichterstatter Minister Vasco Della Giustina, dritter Senat. DJe vom 24.08.2010.

84 Oberster Gerichtshof, Revision Nr. 1168547/RJ, Berichterstatter Minister Luis Felipe Salomão, vierter Senat, DJe vom 07.02.2011.

Judikative – kein Hindernis zur Klageeinreichung in Brasilien darstellt, trotz der konkurrenzfähigen Zuständigkeit. Schließlich verstärkte das Justizgericht seine konträre Einstellung gegenüber der Klausel und bekräftigte, dass die Entschädigungsklage der Klägerin nicht auf den Vertrag beruht, sondern auf Bildern und Erscheinungen die von der Angeklagten – ohne Zustimmung der Klägerin – benutzt wurden. Daher hat die Klausel gemäß Artikel 88 der Zivilprozessordnung keine Geltung.

Nach all diesem Vortrag ist die Feststellung möglich, dass der Oberste Gerichtshof (STJ) seine Meinung über die Annahme der ausländischen Gerichtsstandwahlklausel offen hält. Die opinio juris des Justizgerichts hat den Anschein nicht stabil zu sein. Dies bewirkt momentane Zweifel bei den Parteien bezüglich der ausländischen Vertragsabschlüsse.

In Bezug auf das Thema präsentiert das Projekt einer neuen Zivilprozessordnung jedoch einige technische Fortschritte. Die Vorschrift über die internationale Zuständigkeit, wie angedeutet, lässt die Hypothese der ausdrücklichen oder stillschweigenden Unterordnung unter die brasilianische Gerichtsbarkeit zu und eröffnet so zweifelsfrei die Möglichkeit der Bestimmung der Gerichtsbarkeit.

Außerdem führte der Gesetzgeber eine neue Vorschrift hinzu, mit der die brasilianische Gerichtsbarkeit von der Bearbeitung und die Entscheidungsfällung der Prozesse befreit wird, wenn in einem Vertrag eine ausländische Gerichtsstandwahlklausel steht, die von dem Beklagten in seiner Klageerwiderung in Frage gestellt wird[85]. Im Gegensatz zur jetzigen Zivilprozessordnung, wird auf diese Weise eine ausdrückliche Behandlung der Gerichtsstandwahl im Falle der ändernden Gerichtsbarkeit gegeben. Der Einzelparagraph der neuen Verordnung stellt jedoch klar, dass eine Änderung der brasilianischen Gerichtsbarkeit in den Annahmen der ausschließlichen ausländischen Zuständigkeiten nicht möglich ist.

Das Kapitel über interne Zuständigkeit enthält Anordnungen über die Wahl des brasilianischen Gerichtsstandes gemäß der aktuellen Vorschrift des Artikels 111 der Zivilprozessordnung[86]. Es ist angebracht zu erwähnen, dass während der Diskussionen über das Projekt erwägt wurde, die Gerichtsstandwahl in Allgemeinen Geschäftsbedingungen

85 Es gehört nicht zur brasilianischen Kompetenz die Prozessbearbeitung und -entscheidung, wenn in einem Vertrag eine ausländische Gerichtsstandwahlklausel steht die von dem Beklagten in seiner Klageerwiderung in Frage gestellt wird. Einzelparagraph – Die im „Caput" dieses Artikels vorgeschriebene Anordnung findet keine Anwendung in Sachen der internationalen Kompetenz dieses Kapitels.

86 Die Parteien können die Kompetenz aufgrund des Wertes und des Ortes ändern, in dem sie den Gerichtsstand wählen an dem die Klagen bezüglich Rechte und Verpflichtungen eingereicht werden.

zu verbieten; dieser Vorschlag wurde abgelehnt. Als Alternative schließt der Gesetzgeber eine generelle Annahme ein bezüglich einer generellen Erklärung über die Unwirksamkeit der Gerichtsstandwahl in allen Fällen, in denen sie sich missbräuchlich zeigt[87]. Es handelt sich jedoch um eine Anordnung des Kapitels der internen Zuständigkeit. Ihre Anwendung bei der Wahl eines ausländischen Gerichtsstandes bleibt ungeklärt.

In gleicher Weise äußerte sich der Gesetzgeber nicht ausdrücklich über die eventuelle Wahl eines ausländischen Gerichtsstandes in Allgemeinen Geschäftsbedingungen über Verbraucherbeziehungen. Es hat den Anschein, dass diese Annahme möglich ist unter Berücksichtigung, dass die Entscheidungszuständigkeit in Prozessen über die Verbraucherbeziehungen nicht ausdrücklich mit der brasilianischen Exklusivität fixiert wurde. Dies könnte ab einer systematischen Auslegung dazu führen, dass die brasilianische Gerichtsbarkeit durch eine ausländische austauschbar wäre. Es sei nochmals ausdrücklich erwähnt, dass die Ablehnung einer missbräuchlichen Gerichtsstandwahl nur im Bereich der internen Zuständigkeit vorgesehen ist.

SCHLUSSBETRACHTUNG

Das Projekt der Zivilprozessordnung hat zum Ziel, einige Unstimmigkeiten und Kontroversen des aktuellen Prozessmodus der internationalen Zuständigkeit und Gerichtsstandwahl auszubessern. Durch die neue Redaktion erklärt der Gesetzgeber, dass die Annahmen der konkurrierenden internationalen Zuständigkeiten nicht kumulativ sind. Der Gesetzgeber scheint auch die technisch unkorrekte Anwendung des Ausdrucks „internationale Zuständigkeit“ sanieren zu wollen.

In Bezug auf die vorhandenen Vorgaben der jetzigen Zivilprozessordnung, präsentiert das Projekt ein Minimum an Redaktionsänderungen. Ausnahme hierzu bildet die Hinzufügung einer neuen Vorschrift mit drei Hypothesen zur Ausübung der brasilianischen Gerichtsbarkeit, wobei jedoch nicht geklärt wird, ob diese Hypothesen ausschließlich oder konkurrierend sind. Während unserer Studie konnten wir einige praktische Konsequenzen bei der Erwägung einer jeder Annahme der neuen Vorschrift betrachten, ungeachtet ihres konkurrierenden oder ausschließlichen Charakter.

Das Projekt stellt mit Sicherheit einen großen Fortschritt dar, indem es ausdrücklich erlaubt, dass die Parteien den brasilianischen oder jedweden ausländischen Gerichtsstand zur Beseitigung von Interessenkonflikte in den Vertragsbeziehungen auswählen dürfen.

87 Die Gerichtsstandwahlklausel kann von Amts wegen vor der Ladung ungültig erklärt werden wenn sie missbräuchlicher Natur ist. Zu diesem Zeitpunkt befiehlt der Richter die Weiterleitung des Prozesses an das Gericht des Wohnsitzes des Angeklagten.

Diese Möglichkeit schließt die derzeitigen Unsicherheiten der Rechtsprechung aus und erlaubt somit, dass Brasilien eine hohe Position als Konkurrent im Außenhandel erreichen kann.

Es ist aber nicht zu übersehen, dass tatsächlich das Projekt einige der alten interpretativen Kontroversen aufzeigt, indem es die aktuelle Redaktion der Zivilprozessordnung beibehält. In den Verbraucherbeziehungen erweckt es in der neuen Form neue Fragestellungen: nicht nur in Bezug auf internationale Zuständigkeiten, sondern auch und tatsächlich in Bezug auf die Wahlmöglichkeit eines ausschließlichen ausländischen Gerichtsstandes. Ein weiterer Punkt ist die Redaktionsausdehnung, die erlaubt, dass die Parteien sich formell oder stillschweigend der brasilianischen Gerichtsbarkeit unterwerfen können, ohne, dass es ein Verbindungselement zwischen dem Rechtsstreit und dem Gerichtsstand bedarf.

Selbst wenn die durch das Projekt der Zivilprozessordnung einzuführenden Änderungen Fortschritte des internationalen Zivilverfahrensrechts für Brasilien darstellen können, so werden doch verschiedene Fragen über die Anwendbarkeit der neu anzuwendenden Vorgaben des Gesetzgebers forterhalten bleiben.

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ZUSTÄNDIGKEIT DER GLIEDSTAATEN IN FÖDERALEN SYSTEMEN FÜR DEN ABSCHLUSS VÖLKERRECHTLICHERVERTRÄGE:*BRASILIEN UND DEUTSCHLAND IM VERGLEICH*

TREATY-MAKING POWER OF MEMBER STATES IN FEDERAL SYSTEMS: A COMPARISON BETWEEN BRAZIL AND GERMANY

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Zusammenfassung: Die Verteilung der Außenkompetenzen zwischen Gliedstaaten und Bund stellt eine wesentliche verfassungsrechtliche Frage in fast allen föderalen Systemen. Der Umfang der beschränkten Vertragsschlusskompetenz von Gliedstaaten ist international unterschiedlich. Die meisten Bundesstaaten haben sich für eine umfassende Bundeskompetenz entschieden. Andere schließen die Gliedstaaten völlig vom völkerrechtlichen Verkehr nicht aus. Ziel dieser Arbeit ist es, die Vertragsschlusskompetenz der Gliedstaaten in Brasilien und in Deutschland zu untersuchen. Bei der Verteilung der auswärtigen Kompetenzen zwischen Bund und Gliedstaaten haben diese Staaten unterschiedliche Wege gewählt. Während in Brasilien die Union die alleinige Zuständigkeit im Bereich der Außenbeziehungen hat, genießen die deutschen Bundesländer eine beschränkte Vertragsfähigkeit. Der Zweck ist nicht festzustellen, welches System das Beste ist, sondern aus den Erfahrungen dieser Länder ihre Lösungen für den Konflikt zwischen einheitliche Repräsentation des Staates und Handlungsfreiheit der Gliedstaate auf internationale Ebene wie auch deren Auswirkungen auf die Außenpolitik des Gesamtstaates aufzuzeigen.

Schlüsselwörter: Föderalismus - Vertragsschlusskompetenz - Rechtsvergleich.

Abstract: The division of external competences between member states and the federal government is a substantial constitutional issue in almost all federal systems. The extent of limited treaty-making powers of member states is internationally diverse. Most states have opted

for a broad federal competence. Others leave the member states not completely out of international relations. The aim of this paper is to examine the treaty-making power of the member states in Brazil and Germany. In the distribution of external powers between the federal government and the member states Brazil and Germany have chosen different paths. While in Brazil the Union has exclusive competence in the field of external relations, the German member states enjoy a limited treaty-making capacity. The purpose is not to determine which system is the best, but from the experiences of these countries demonstrate their solutions to the conflict between the single representation of the state and the freedom of the member states at international level as well as their effects on the foreign policy of the state as a whole.

Keywords: Federalism - Treaty-making power - Comparative law.

1. EINFÜHRUNG

Der Umfang der Völkervertragsschlusskompetenz unterscheidet sich je nach der Natur des betreffenden Subjekts. In diesem Sinne kann die Vertragsschlussbefugnis unbeschränkt sein, soweit das Völkerrechtssubjekt Träger aller völkerrechtlicher Rechte und Pflichten ist. Grundsätzlich besitzen lediglich die Staaten derartige Völkerrechtssubjektivität. Sie sind also die „originären" Völkerrechtssubjekte.

Daneben haben diejenigen Völkerrechtssubjekte partielle Vertragsfähigkeit, die nicht alle Rechte oder Pflichten genießen, welche den souveränen Staaten im Völkerrecht eingeräumt werden. Dazu dienen als Beispiel die Gliedstaaten von Bundesstaaten, sofern ihnen durch die jeweilige Verfassung eine beschränkte Völkervertragsschlusskompetenz eingeräumt wird.

In diesem Zusammenhang hat die Völkerrechtssubjektivität von Gliedstaaten kumulativ verfassungsrechtliche und völkerrechtliche Voraussetzungen. Einerseits muss ihre Völkerrechtsfähigkeit in der innerstaatlichen Verfassung bestimmt werden und andererseits muss ihre Völkerrechtssubjektivität von anderen Völkerrechtssubjekten anerkannt werden. Dies erfolgt durch den Abschluss völkerrechtlicher Verträge mit den Gliedstaaten[1]. Folglich besteht eine völkerrechtliche

1 Vgl. IPSEN, Knut. *Völkerrecht*. 5. Aufl. München: Beck, 2004, S. 76-77; SCHWEITZER, Michael. *Staatsrecht* III. 9. Aufl. Heidelberg: C.F. Müller, 2008, S. 44; SEIDEL, Peter. *Die Zustimmung der Bundesregierung zu Verträgen der Bundesländer mit auswärtigen Staaten gemäß Art. 32 III GG*. Berlin: Duncker & Humblot, 1975, S. 18-22; STEIN, Torsten; VON BUTTLAR, Christian. *Völkerrecht*. 12. Aufl. Köln: Carl Heymanns, 2009, S. 70; STREINZ, Rudolf. Art. 32. In: SACHS, Michael (Ed.). *Grundgesetz*. Kommentar. 5. Aufl. München:

Vermutung für eine unbeschränkte völkerrechtliche Handlungsfähigkeit der Gliedstaaten nicht[2].

Mit der rechtlichen Möglichkeit, dass die Gliedstaaten eines Föderalstaates völkerrechtliche Verträge mit dritten Staaten abschließen dürfen, erhebt sich die Frage, ob das Handeln der Organe seiner Gliedstaaten dem Bundesstaat zurechenbar ist. Vom Standpunkt der herrschenden Lehre aus haftet der Gesamtstaat für die Verletzung völkerrechtlicher Verträge durch die Gliedstaaten, da im Völkerrecht grundsätzlich die Bundesstaatsstruktur nicht berücksichtigt wird. In diesem Sinne tritt der Bundesstaat im völkerrechtlichen Verkehr nach außen prinzipiell als Einheitsstaat auf[3].

Der Umfang der beschränkten Vertragsschlusskompetenz von Gliedstaaten ist international unterschiedlich. In der Gegenwart statten die meisten bundesstaatlichen Verfassungen die Gliedstaaten nicht mit der Zuständigkeit im Bereich der auswärtigen Gewalt aus[4]. Beispiele in diesem Zusammenhang sind die US-amerikanische Verfassung und die brasilianische Verfassung. In Brasilien verfügen die Bundesstaaten über keine Vertragsschlussbefugnisse. Im Gegensatz dazu ist eine beschränkte Vertragsfähigkeit der Gliedstaaten in Bundesstaaten „europäischen Typus“ wie Deutschland, Schweiz und Belgien vorgesehen[5].

Die Verteilung der Außenkompetenzen zwischen Gliedstaaten und Bund stellt eine wesentliche verfassungsrechtliche Frage in fast allen föderalen Systemen[6]. Denn dabei geht es um das Spannungsverhältnis zwischen einer weitestgehenden Erhaltung substaatlicher Kompetenzen auf der einen und einheitliche Vertretung und größtmöglicher Handlungsfähigkeit des Gesamtstaats auf internationaler Ebene auf der anderen Seite[7].

Ziel dieser Arbeit ist es, die Vertragsschlusskompetenz der Gliedstaaten in Brasilien und in Deutschland zu untersuchen. Der Rechtsvergleich zwischen beiden Ländern lässt sich damit begründen, dass sie repräsentative Modelle für die bestehenden Föderalsysteme

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Beck, 2009, Rn. 6 und WILDHABER, Luzius. *Treaty-Making Power and Constitution: an international and comparative study*. Basel: Helbing & Lichtenhahn, 1971, S. 261 und 263.

2 GEIGER, Rudolf. *Grundgesetz und Völkerrecht.* München: Beck, 2009, S. 112.

3 Vgl. BLECKMANN, Albert. *Grundgesetz und Völkerrecht.* Berlin: Duncker & Humblot, 1975, S. 210; DOEHRING, Karl. *Völkerrecht*. 2. Aufl. Heidelberg: C.F. Müller, 2004, S. 66; IPSEN, a.a.O., S. 638-639; SCHWEITZER, a.a.O., S. 44 und WILDHABER, a.a.O., S. 266-269.

4 Vgl. SCHWEITZER, a.a.O., S. 44 und STREINZ, a.a.O., Art. 32 Rn. 1.

5 Deshalb werden diese Staaten als „offene Bundesstaaten“ bezeichnet. Vgl. KAISER, Friederike. *Gemischte Abkommen im Lichte bundesstaatlicher Erfahrungen*. Tübingen: Mohr Siebeck, 2009, S. 1.

6 FASTENRATH, Ulrich. *Kompetenzverteilung im Bereich der auswärtigen Gewalt*. München: Beck, 1986, S. 115ff.

7 KAISER, a.a.O., S. 1.

in der Welt sind. Außerdem weist die brasilianische Verfassung interessante Parallelen zur Verfassungsrechtsordnung Deutschlands auf. Denn diese Staaten bei der Verteilung der auswärtigen Kompetenzen zwischen Bund und Gliedstaaten unterschiedliche Wege gewählt haben.

Bei der Untersuchung der Vertragsschlusskompetenz der Gliedstaaten in Brasilien und Deutschland werden die Hauptmerkmale der nationalen Rechtssysteme, die für die vorliegende Arbeit von Interesse sind, dargestellt. In Betracht kommen insbesondere: die verfassungsrechtlichen und gesetzlichen Bestimmungen zum Thema, die Kontroversen in der Literatur und die Position der Rechtssprechung. Hierbei werden die Besonderheiten und Schwächen der Systeme identifiziert.

Die Arbeit schließt sich mit einer umfassenden Betrachtung der Kompetenzverteilung zwischen Bund und Gliedstaaten im Bereich der auswärtigen Politik unter Berücksichtigung der Ergebnisse der Analyse der Vertragsschlusskompetenz der Gliedstaaten in Brasilien und in Deutschland. Der Zweck ist nicht festzustellen, welches System das Beste ist, sondern aus den Erfahrungen dieser Länder ihre Lösungen für den Konflikt zwischen einheitliche Repräsentation des Staates und Handlungsfreiheit der Gliedstaate auf internationale Ebene wie auch deren Auswirkungen auf die Außenpolitik des Gesamtstaates aufzuzeigen.

2. BRASILIEN

Brasilien nahm die Form des Föderalstaates im Jahr 1889 mit der Ausrufung der Republik, die in den nachfolgenden Verfassungen gehalten wurde, obwohl der Föderalismus der Verfassung von 1967 und deren Änderung 1/69 nur nominal wurde[8]. Art. 1° der Verfassung von 1988 beschreibt Brasilien als eine Föderative Republik[9], die sich in einem Zusammenspiel von verschiedenen Ebenen konstituiert: die Bund, die Bundesstaaten, die Gemeinden und der Bundesdistrikts. Jede Ebene hat ihre eigene exekutiven und legislativen Vertretungen.

Die brasilianische Verfassung geht vom Grundsatz der Enumeration der Unionskompetenzen aus. Die Residualkompetenz verbleibt den Bundesstaaten. Im Bezug auf die Verteilung der legislativen Zuständigkeiten wird Brasilien in der Regel als eine dezentrale Föderation bezeichnet, denn die Verfassung von 1988 berechtigt die subnationalen Regierungen, einen Großteil der anfallenden Steuern

8 SILVA, José Afonso da. *Curso de Direito Constitucional Positivo.* 26. ed. São Paulo: Malheiros, 2006a, S. 99.

9 Art. 1° CF schreibt vor: „Die Föderative Republik Brasilien in Gestalt des unauflöslichen Bundes der Staaten und Gemeinden und des Bundesdistrikts konstituiert sich als Demokratischer Rechtsstaat." [Übersetzung aus JöR Bd. 38, 1989, S. 462].

autonom zu erheben und über deren Verwendung zu bestimmen. Trotz dieser klaren Dezentralisierung sieht die Verfassung auch sehr viel legislative Kompetenz für die Union vor. Außerdem hat diese einen großen Spielraum, um landesweite Politiken anzustoßen und zu koordinieren[10].

Im Bereich der Außenpolitik ist das nicht anders. Die brasilianische Verfassung gestattet den Gliedstaaten der föderativen Republik kein Recht zum Abschluss völkerrechtlicher Verträge. Art. 21 I CF bestimmt die ausschließliche Zuständigkeit der Union für die Beziehungen zu ausländischen Staaten und den Beitritt zu internationalen Organisationen.

Aus dieser Regel folgt, dass die Organe der Union diejenige sind, die den Föderalstaat im Bereich der auswärtigen Angelegenheiten vertreten. In diesem Kontext ist die Union kein Vertragspartner, sondern der Föderalstaat – die Föderative Republik Brasiliens – der die Völkerrechtssubjektivität besitzt. Die Union wiederum ist lediglich eine juristische Person des öffentlichen Rechts[11].

Demgemäß haben die Bundesstaaten, der Bundesdistrikt und die Gemeinden nach dem brasilianischen Recht keine Kompetenzen im Rahmen der auswärtigen Gewalt. Sie sind also als juristische Personen des öffentlichen Rechts zu betrachten. Gemäß Art. 18 CF umfasst die politisch-administrative Ordnung der Föderativen Republik Brasiliens die Union, die Bundesstaaten, den Bundesdistrikt und die Gemeinden. Sie sind alle, nach der brasilianischen Verfassung, autonom.

Einige Autoren sind jedoch der Auffassung, dass aufgrund der Regel von Art. 52 V CF die Bundesstaaten eine beschränkte Vertragsschlusszuständigkeit besitzen[12]. Nach dieser Bestimmung dürfen die Bundesstaaten gewisse Außengeschäfte abschließen, sofern sie dafür die Genehmigung des Bundessenats haben.

Art. 52 V CF bestimmt: "Der Bundessenat ist alleinzuständig für die Genehmigung von externen Finanzgeschäften im Interesse von Union, Staaten, Bundesdistrikt, Territorien und Gemeinden"[13]. Die Territorien werden nicht als Einzelheiten des brasilianischen Föderalstaates betrachtet. Sie sind vielmehr nach Art. 18 Abs. 2 CF Bestandteilen der Union. Deswegen ist ihre Nennung im Art. 52 V CF unnötig, da die Vorschrift durch den Verweis auf die Union auch die

10 ARRETCHE, Marta. Föderalismus in Brasilien. In: FONTAINE, Dana de la; STEHNKEN, Thomas (Hrsg.). *Das politische System Brasiliens*. Wiesbaden: VS Verlag, 2012, S. 139ff.

11 Vgl. SILVA, a.a.O., 2006a, S. 494-495 und 620.

12 Vgl. BAHIA, Saulo José Casali. *Tratados internacionais no direito brasileiro*. Rio de Janeiro: Forense, 2000, S. 25 und MELLO, Celso Duduvier de Albuquerque. *Direito Constitucional Internacional*. 2. ed. Rio de Janeiro: Renovar, 2000, S. 302.

13 Übersetzung aus JöR Bd. 38, 1989, S. 474.

Territorien umfasst[14].

Im Kontrast dazu wird hier die Ansicht vertreten, dass Art. 52 V CF keine Vertragsschlusskompetenz der Bundesstaaten begründet. Diese Vorschrift bezieht sich nur auf Verträge zwischen Bundesstaaten und Privatunternehmen, mit dem Ziel, im Ausland Kredit aufzunehmen[15]. Ein Beispiel hierfür sind die Bereitschaftskreditabkommen mit dem IWF.

Obwohl der IWF eine internationale Organisation ist, die Völkerrechtssubjektivität besitzt, sind die Bereitschaftskreditabkommen zwischen ihm und dem entsprechenden Land keine völkerrechtlichen Verträge. Sie sind vielmehr bloße Absprachen. Der IWF selbst qualifiziert solche Abkommen nicht als internationale Verträge, sondern als *arrangements*. Außerdem werden die Bereitschaftskreditabkommen mit dem IWF nicht beim Generalsekretär der UNO gemäß Art. 102 der UNO-Satzung registriert, im Gegensatz zu dem geltenden Registrierungserfordernis für die internationalen Verträge[16].

Folglich handelt es sich bei „externen Finanzgeschäften" im Sinne von Art. 52 V CF nicht um völkerrechtliche Verträge gemäß Art. 49 I CF sowie Art. 84 VIII CF[17]. Im Rahmen des Art. 52 V CF handeln die Bundesstaaten also nicht als Völkerrechtssubjekte, sondern als öffentliche Rechtssubjekte.

In der brasilianischen Lehre wird die Frage heftig diskutiert, ob die Union Verträge abschließen darf, die Materien der ausschließlichen Gesetzgebungskompetenz der Bundesstaaten regeln. Nach Art. 151 III CF ist es der Union verwehrt, Befreiungen von Steuern einzurichten, die in die ausschließliche Kompetenz der Bundesstaaten, des Bundesdistrikts oder der Gemeinden fallen. Es geht um das Verbot der sog. „heteronomen Steuerbefreiungen". Dabei handelt es sich um Steuerbefreiungen, die per Gesetz der öffentlichen Körperschaft eingeräumt werden, die aber nicht zuständig ist für die Einrichtung der Steuer, auf welche sich die Befreiung bezieht.

Zu beachten ist, dass die Verfassung Ausnahmen für das Verbot

14 Vgl. SILVA, José Afonso da. *Comentário Contextual à Constituição*. 3. ed. São Paulo: Malheiros, 2007, S. 415.

15 Art. 52 V CF bezieht sich also auf die sog. *State contracts*. Vgl. dazu MAZZUOLI, Valerio de Oliveira. O Senado Federal e o problema das operações externas de natureza financeira: exegese do art. 52, inc. V, da Constituição Brasileira de 1988 à luz do Direito Internacional. In: SILVA, Roberto Luiz; MAZZUOLI, Valerio de Oliveira (Hrsg.). *O Brasil e os acordos econômicos internacionais,* São Paulo: Revista dos Tribunais, 2003, S. 110.

16 Näheres dazu siehe MAZZUOLI, a.a.O., S. 120-125.

17 Vgl. SOARES, Guido Fernando Silva. The Treaty-Making Process under the 1988 Federal Constitution of Brasil. In: RIESENFELD, Stefan A.; ABBOTT, Frederick M. (Eds.). *Parliamentary Participation in the Making and Operation of Treaties: a comparative study*. Dordrecht: Martinus Nijhoff, 1994, a.a.O., S. 190.

von heteronomen Steuerbefreiungen enthält und zwar in Art. 155 § 2° XII lit. e und Art. 156 § 3° II CF. Nach diesen Bestimmungen kann die Union im Rahmen des Außenhandels durch ein Ergänzungsgesetz die Befreiung von bundesstaatlichen und gemeindlichen Steuern einräumen. In Betracht kommen insbesondere die bundesstaatliche Steuer auf Waren- und Dienstleistungsumlauf (ICMS) und die gemeindliche Dienstleistungssteuer (ISS).

Bei einem Ergänzungsgesetz handelt es sich um eine besondere Form des Gesetzes, das nur in den Bereichen erlassen wird, in denen dies ausdrücklich von der Verfassung vorgesehen ist. Das Ergänzungsgesetz dient dem Zweck, verfassungsrechtliche Bestimmungen genauer zu erklären oder der Verfassung etwas hinzuzufügen. Ergänzungsgesetze unterscheiden sich von einfachen Gesetzen darin, dass sie verschiedenen Abstimmungsverfahren unterworfen sind. Während einfache Gesetze mit einfacher Mehrheit zugestimmt werden, ist es bei Ergänzungsgesetzen eine Beschlussfassung mit absoluter Mehrheit erfordert.

In diesem Kontext wirft die Regel von Art. 151 III CF die Frage auf, ob die Union durch internationale Verträge Befreiungen von Steuern einräumen darf, die in die ausschließliche Kompetenz der Bundesstaaten fallen. Darüber herrscht Uneinigkeit in der Literatur.

Trotz der ausschließlichen Kompetenz der Union im Bereich der Außenbeziehungen (Art. 21 I CF) ist ein Teil der Lehre der Auffassung, dass nach dem Wortlaut des Art. 151 III CF die Union nicht zuständig ist, völkerrechtliche Verträge abzuschließen, die sich auf Befreiungen von bundesstaatlichen Steuern beziehen[18].

Vertreter dieser Ansicht argumentieren, dass die Möglichkeit derartiger Außenkompetenzen der Union eine Einmischung in die verfassungsrechtlichen Gesetzgebungsbefugnisse der Bundesstaaten bedeuten würde. Dadurch würden der Grundsatz der Kompetenzverteilung im Bundesstaat sowie die Autonomie der Gemeinde und des Bundesdistrikts verletzt. In diesem Zusammenhang wäre der von der Union abgeschlossene Vertrag verfassungswidrig.

Diese Ansicht führt zu dem Ergebnis, dass die Steuerbefreiungen und die Steuervergünstigungen, die im Vertrag von Asunción vorgesehen werden, für die Bundesstaaten, die Gemeinden und den Bundesdistrikt nicht verbindlich sind. Die Vertragsbestimmungen beziehen sich nur auf die Bundessteuer[19].

Ein Teil der Anhänger dieser Auffassung hält daran fest, dass angesichts der Regel von Art. 60 § 4° I CF der Union nicht einmal

18 Vgl. MARTINS, Ives Gandra da Silva. Tributação no Mercosul. In: MARTINS, Ives Gandra da Silva (Hrsg.). *Tributação no Mercosul*. São Paulo: RT, 2002, S. 34-37.

19 Vgl. BAHIA, a.a.O., S. 30; CARRAZZA, Roque Antonio. Mercosul e Tributos Estaduais, Municipais e Distritais. *Revista de Direito Tributário*, São Paulo, n. 64, 1994, S. 189-190 und STJ, REsp 90871/PE, vom 17.06.1997.

durch Verfassungsänderung die Kompetenz eingeräumt werden kann, heteronome Steuerbefreiungen zu bewilligen. Laut dieser Bestimmung sind Verfassungsreformvorhaben, deren Inhalt zur Abschaffung der Bundesstaatsform tendiert, unzulässig[20].

Außerdem vertreten einige Autoren den Standpunkt, dass sogar bei den Ausnahmenfällen von Art. 155 § 2° XII lit. e und Art. 156 § 3° II CF die Union durch internationale Verträge die Befreiung der betreffenden Steuern nicht einräumen kann. Denn der Oberster Brasilianischer Bundesgerichtshof (STF) hat schon ausgesprochen, dass von Brasilien abgeschlossene internationale Verträge Materien nicht regeln können, die unter dem verfassungsrechtlichen Vorbehalt eines Ergänzungsgesetzes stehen[21].

Eine andere Ansicht spricht für die Verfassungsmäßigkeit der Bewilligung von heteronomen Steuerbefreiungen durch internationale Verträge. Nach dieser Auffassung liegt das Problem in der kontroversen Rechtsnatur der Union. Nach dem brasilianischen Verfassungsrecht hat die Union einen doppelten Charakter: einerseits handelt sie innerstaatlich als Bestandteil der Föderativen Republik Brasiliens (Art. 18 CF) und andererseits ist sie dafür zuständig, die Republik nach außen zu vertreten (Art. 21 I CF). In beiden Fällen ist die Union allerdings als öffentliches Rechtssubjekt anzusehen.

Nach dieser Ansicht ist der Adressat der Verwehrung von Art. 151 III CF nicht die Union als Vertreter der Republik im Bereich der Außenbeziehungen, sondern die Union, wenn sie innerstaatlich als Bestandteil der Föderation handelt. Folglich bedeutet die Regel von Art. 151 III CF keine Einschränkung der *Treaty-making Power* der Republik[22].

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20 Vgl. BAHIA, a.a.O., S. 29 und FILHO, Oswaldo Othon de Pontes Saraiva. Tributação no Mercosul. In: MARTINS, Ives Gandra da Silva (Hrsg.). *Tributação no Mercosul*. São Paulo: RT, 2002, S. 507. Kritisch dazu AMARAL, Antonio Carlos Rodrigues do. Tributação no Mercosul. In: Martins, SILVA, Ives Gandra da (Hrsg.). *Tributação no Mercosul.* São Paulo: RT, 2002, S. 495.

21 Vgl. STF, ADI-MC 1480/DF, Berichterstatter Minister Celso de Mello, vom 04.09.1997, in: RTJ, Bd. 179, S. 496 und SILVA, Sergio André R. G. da. Possibilidade jurídica da concessão de isenções de tributos estaduais e municipais por intermédio de tratado internacional. *Revista Tributária e de Finanças Públicas*, São Paulo, v. 68, 2006b, S. 285-286.

22 Vgl. BAHIA, a.a.O., S. 32; BARRAL, Welber; PRAZERES, Tatiana Lacerda. Isenção de Tributos Estaduais por Tratados Internacionais. *Revista Dialética de Direito Tributário*, São Paulo, n. 70, 2001, S. 142-143; MACHADO, Hugo de Brito. Tributação no Mercosul. In: MARTINS, Ives Gandra da Silva (Hrsg.). *Tributação no Mercosul*. São Paulo: RT, 2002, S. 92-93; MAZZUOLI, a.a.O., S. 321-322; VELLOSO, Carlos Mário da Silva. Tratados Internacionais na Jurisprudência do Supremo Tribunal Federal. In: AMARAL, Antonio Carlos Rodrigues do (Ed.). *Tratados Internacionais na Ordem Jurídica Brasileira*. São Paulo: Lex Editora: Aduaneiras, 2005, S. 22-27 und XAVIER, Alberto. *Direito tributário internacional do Brasil*. 6. ed. Rio de Janeiro: Forense, 2005, S. 1151-153.

Im gleichen Sinne hat der STF schon ausgesprochen, dass die Bewilligung von heteronomen Steuerbefreiungen durch internationale Verträge verfassungsmäßig ist. Nach Ansicht des Gerichts bezieht Art. 151 III CF sich nur auf die Innenkompetenzen der Union. Ihre Befugnis nach Art. 21 I CF bleibt unberührt[23].

Darüber hinaus stellen die Anhänger dieser Auffassung fest, dass das rechtliche Verbot der Bewilligung von heteronomen Steuerbefreiungen durch internationale Verträge die Eingliederung Brasiliens in die Weltwirtschaft beeinträchtigt[24].

In diesem Zusammenhang ist die zunehmende Bedeutung der Dienstleistungen im internationalen Handel zu betonen. Wie bereits dargestellt beziehen die zwei Steuern, die vom Verbot des Art. 151 III CF betroffen sind, sich auf Dienstleistungen.

In Betracht kommen vor allem die Beteiligung des Landes an der WTO sowie an dem MERCOSUR. In diesem Kontext umfasst der Integrationsprozess im MERCOSUR notwendigerweise die Harmonisierung von indirekten Steuern, die von der Befreiung bundesstaatlicher sowie gemeindlicher Steuern abhängen kann[25]. Was regionale Integrationsprozesse in Lateinamerika angeht, widerspricht dieses Verbot daher der Regel von Art. 4° CF: „ Die Föderative Republik Brasilien strebt die ökonomische, politische, soziale und kulturelle Integration der Völker Lateinamerikas mit dem Ziel der Bildung einer lateinamerikanischen Nationengemeinschaft an“.

Nach der hier vertretenen Ansicht verstößt die Einräumung von heteronomen Steuerbefreiungen durch völkerrechtlicher Verträge nicht dem föderativen Pakt. Die brasilianische Verfassung ist verpflichtet, die legislative und finanzielle Autonomie der Bundesstaaten und Gemeinden zu gewährleisten. Dies muss aber nicht die außenpolitische Souveränität des Landes einschränken.

In diesem Zusammenhang soll es immer eine enge Kooperation zwischen der Union und den Bundesstaaten bzw. Gemeinden geben, wenn die Erstere den Abschluss eines internationalen Vertrags, dessen Gegenstand die Befreiung von bundesstaatlichen bzw. gemeindlichen Steuern betrifft, beabsichtigt. Dabei können die Interessen der Betroffenen berücksichtigt werden und die Republik sichert ihre Beweglichkeit nach außen.

3. DEUTSCHLAND

Die Tradition des Föderalismus in Deutschland reicht bis zum Heiligen Römischen Reich zurück. Dieses staatliche

23 Vgl. STF, RE 229096/RS, Berichterstatter Minister Ilmar Galvão, vom 16.08.2007.

24 Vgl. BARRAL; PRAZERES, a.a.O., S. 145.

25 Vgl. SILVA, a.a.O., 2006b, S. 288.

Organisationsprinzip wurde jedoch erst im Jahr 1949 im Grundgesetz verfassungsrechtlich verankert[26].

Art. 20 Abs. 1 GG sieht das Bundesstaatsgebot vor: „Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat". Daneben bestimmt die Ewigkeitsgarantie des Art. 79 Abs. 3 GG: „Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung […] berührt werden, ist unzulässig". Dabei sind zwei zentrale Merkmale jeder föderalstaatlicher Ordnung, nämlich: (1) der Bund setzt sich aus Gliedstaaten zusammen und; (2) diese Glieder nehmen an der Willensbildung des Bundes teil[27].

Das Grundprinzip für die föderale Kompetenzverteilung des GG enthält Art. 30: „Die Ausübung der staatlichen Befugnisse und die Erfüllung der staatlichen Aufgaben ist Sache der Länder, soweit dieses Grundgesetz keine andere Regelung trifft oder zulässt". Das heißt, in der Regel haben die Länder die Kompetenz, ausnahmsweise hat der Bund die Kompetenz[28].

Die Ausnahme bildet Art. 32 GG für die auswärtigen Beziehungen. Art. 32 Abs. 1 GG heißt: „Die Pflege der Beziehungen zur auswärtigen Staaten ist Sache des Bundes". Der Bund hat also grundsätzlich die Befugnis, Deutschland nach außen zu vertreten. Damit wird dem Gedanken von einheitlicher Vertretung nach außen Rechnung getragen. Dies bedeutet aber nicht, dass der Bund eine exklusive Kompetenz im Bereich der auswärtigen Beziehungen hat. Beim völkerrechtlichen Verkehr wirken die Länder auch mit[29].

Die Kompetenz der Länder zum Abschluss völkerrechtlicher Verträge ist in Art. 32 Abs. 3 GG niedergelegt. Es ist hervorzuheben, dass nach dem Wortlaut des Art. 32 GG neben der Vertragsschlusskompetenz keine weiteren Kompetenzen der Länder im Rahmen der auswärtigen Gewalt bestehen. Die Länder besitzen also kein aktives und passives Gesandtschaftsrecht und sie können keine fremden Staaten anerkennen[30].

Nach dem Wortlaut des Art. 32 Abs. 3 GG dürfen die Länder mit Zustimmung der Bundesregierung Verträge mit auswärtigen Staaten[31] in denjenigen Bereichen abschließen, für die sie die

26 Ausführlich zur historischen Entwicklung des deutschen Bundesstaates siehe RENZSCH, Wolfgang et al. Föderalismus. In: DETTERBECK, Klaus et al (Hrsg.). *Föderalismus in Deutschland*. München: Oldenbourg, 2010, S. 8ff.

27 RENZSCH, a.a.O., S. 1.

28 SCHLÜTER, Karen. Föderale Kompetenzverteilung am Beispiel der Bundesrepublik Deutschland. In: DETTERBECK, Klaus et al (Hrsg.). *Föderalismus in Deutschland*. München: Oldenbourg, 2010, S. 56.

29 GEIGER, a.a.O., S. 109 und SCHLÜTER, a.a.O., S. 74.

30 Vgl. BLECKMANN, a.a.O., S. 204 und STREINZ, a.a.O., Art. 32 Rn. 49ff.

31 Damit ist keine Begrenzung auf Staaten gemeint. Der Anwendungsbereich des Art. 32 Abs.

Gesetzgebungszuständigkeit besitzen. Dabei geht es um Verträge, deren Gegenstand der ausschließlichen oder konkurrierenden Gesetzgebungsbefugnis der Länder unterliegt.

Ausschließliche Gesetzgebungszuständigkeit haben die Länder dort, wo der Bund keine ausschließliche oder konkurrierende Gesetzgebungskompetenz hat, vor allem in den Bereichen der Bildungspolitik, Kultur, Polizei und im Bereich kommunaler Angelegenheiten.

Die Rahmengesetzgebung wurde als Folge von der Föderalismusreform im Jahr 2006 abgeschaffen[32]. Früher haben die Rahmenvorschriften des Bundes die Vertragsschlussbefugnis der Länder begrenzt. Andererseits besitzen die Länder konkurrierende Gesetzgebungskompetenz im Rahmen des Art. 74 GG, solange und soweit der Bund von seiner Gesetzgebungsbefugnis nicht durch Gesetz Gebrauch gemacht hat (Art. 72 Abs. 1 GG). Hat ein Land einen Vertrag über eine Materie des Art. 74 GG abgeschlossen und schließt der Bund später einen Vertrag über dieselbe Materie ab, bleiben die Verträge völkerrechtlich parallel in Kraft. Nur innerstaatlich geht das Vertragsgesetz des Bundes dem früheren Vertrag des Landes vor (Art. 31 GG). Außerdem entfällt für die betreffende Materie die Abschlusskompetenz der Länder gemäß Art. 32 Abs. 3 GG *ex nunc*[33].

Für eine Reihe von Materien, für deren Regelung der Abschluss völkerrechtlicher Verträge typisch ist, erkennt andererseits das GG dem Bund eine ausschließliche Gesetzgebungskompetenz zu, wie zum Beispiel über die „auswärtigen Angelegenheiten", über die Ein- und Auswanderung und die Auslieferung, die Handels- und Schiffahrtsverträge und die internationale Verbrechensbekämpfung[34].

Art. 32 Abs. 3 GG dient einer „präventiven Bundesaufsicht" zur Vermeidung eines Widerspruchs zwischen Länderverträgen und Bundesinteressen. Die Bundesregierung hat dabei ein politisches Ermessen mit der Grenze des Rechtsmissbrauchs. Falls der Vertrag ohne Zustimmung der Bundesregierung abgeschlossen wird, ist er innerstaatlich unwirksam. Die herrschende Lehre geht davon aus, dass der Vertrag auch als völkerrechtlich unwirksam anzusehen ist, da

3 GG erfasst also alle Völkerrechtssubjekte außer dem Heiligen Stuhl. Für den Abschluss von Konkordaten brauchen die Länder also keine Zustimmung der Bundesregierung. Dazu siehe FASTENRATH, a.a.O., S. 141; KUNIG, Philip. Völkerrecht und staatliches Recht. In: GRAF VITZTHUM, Wolfgang (Hrsg.). *Völkerrecht*. 4. Aufl. Berlin: De Gruyter, 2007, S. 111; SCHLÜTER, a.a.O., S. 73; SCHWEITZER, a.a.O., S. 46; SEIDEL, a.a.O., S. 28-29; STREINZ, a.a.O., Art. 32 Rn. 14ff. und Rn. 48 und ZIPPELIUS, Reinhold. *Deutsches Staatsrecht.* 31. Aufl. München: Beck, 2005, S. 511.

32 SCHLÜTER, a.a.O., S. 64.

33 Vgl. SEIDEL, a.a.O., S. 40 und STREINZ, a.a.O., Art. 32 Rn. 26ff. und Rn. 54ff.

34 GEIGER, a.a.O., S. 111.

die Völkervertragsschlusskompetenz der Länder sich nach dem GG richtet und hiermit ist die Zustimmung der Bundesregierung auch eine völkerrechtliche Bedingung. Die Bundesregierung kann allerdings jederzeit eine nachträgliche Zustimmung in Form der Genehmigung erteilen[35].

Nach Auffassung des BVerfG will Art. 32 Abs. 3 GG nicht die Landesgesetzgebung in einen Gegensatz zur Landesverwaltung stellen. Diese Bestimmung bezieht sich vielmehr auf den Unterschied zwischen der Gesetzgebung von Bund und Ländern. Deshalb dürfen die Länder auch Verwaltungsabkommen abschließen, sofern sie die Gesetzgebungsbefugnis für die entsprechende Materie besitzen. Obwohl ein Teil der Lehre die Zustimmung der Bundesregierung bei Verwaltungsabkommen für unnötig hält, gilt in der Praxis, dass die Zustimmung auch für den Abschluss von Verwaltungsabkommen durch die Länder erforderlich ist[36].

Art. 32 Abs. 3 GG nimmt in seinem Wortlaut also nur Bezug auf Verträge, welche die Gesetzgebung und Verwaltung betreffen. Verträge, die sich nicht auf die Gesetzgebung beziehen – wie z.B. politische Verträge im Sinne des Art. 59 Abs. 2 GG – fallen hingegen nach Art. 32 Abs. 1 GG in die Kompetenz des Bundes[37].

Wie in der brasilianischen Rechtsordnung ist im deutschen Recht streitig die zentrale Frage, ob der Bund Verträge abschließen darf, die Materien der ausschließlichen Gesetzgebungskompetenz der Länder regeln. Hierüber herrscht Uneinigkeit in der Lehre und das BVerfG hat diese Frage bisher noch nicht entschieden[38].

Die sog. zentralistische Auffassung spricht für eine unbeschränkte Völkervertragsschlusszuständigkeit des Bundes. In diesem Sinne gibt Art. 32 Abs. 3 GG den Ländern nur ein konkurrierendes Vertragsschlussrecht und daher kann der Bund auch in den Bereichen völkerrechtliche Verträge abschließen, wo die Länder ausschließliche Gesetzgebungszuständigkeit besitzen.

Dafür werden im Wesentlich folgende Argumente vorgebracht: die Formulierung „können" des Art. 32 Abs. 3 GG suggeriert, dass nicht nur die Länder die Vertragsschlusskompetenz haben, sondern dass vielmehr auch der Bund zum Vertragsschluss befugt ist; der Wortlaut

35 Vgl. GEIGER, a.a.O., S. 112; SCHWEITZER, a.a.O., S. 46; SEIDEL, a.a.O., S. 76-80; STEIN; VON BUTTLAR, a.a.O., S. 70 und STREINZ, a.a.O., Art. 32 Rn. 61ff.

36 Vgl. FASTENRATH, a.a.O., S. 140-141; REGEHR, Fritjof. *Die völkerrechtliche Vertragspraxis in der Bundesrepublik Deutschland.* München: UNI-Druck, 1974, S. 128; SCHWEITZER, a.a.O., S. 45 und 70; SEIDEL, a.a.O., S. 28 und 70-71; STREINZ, a.a.O., Art. 32 Rn. 50; ZIPPELIUS, a.a.O., S. 512 und WILDHABER, a.a.O., S. 307.

37 Vgl. BLECKMANN, a.a.O., S. 205; FASTENRATH, a.a.O., S. 147-149; KUNIG, a.a.O., S. 112; REGEHR, a.a.O., S. 129 und SEIDEL, a.a.O., S. 27.

38 GEIGER, a.a.O., S. 112ff.

des Art. 32 Abs.1 GG; das Prinzip der Einheit des Bundesstaates nach außen; und schließlich die Begründung, dass sich Art. 32 Abs. 3 GG nur auf die Gesetzgebungskompetenzen der Länder bezieht, nicht aber auf die Verteilung von Vertragsschlusszuständigkeiten zwischen Bund und Ländern.

Nach der sog. föderalistischen Auffassung hingegen ist die Vertragsschlusskompetenz des Bundes beschränkt. Er kann also keine Verträge abschließen, wo die Länder ausschließlich für die Gesetzgebung zuständig sind. Danach ist die Vertragsschlusszuständigkeit der Länder gemäß Art. 32 Abs. 3 GG exklusiv.

Diese Ansicht wird hauptsächlich damit begründet, dass der Bund durch eigene Verträge die Gesetzgebungskompetenz der Länder aushöhlen könnte. Außerdem könne der Bund nicht Verträge über Materien der ausschließlichen Landesgesetzgebung abschließen, da er sie nicht alleine in innerstaatliches Recht umsetzen kann. In diesem Sinne hat der Bund keine Abschlusskompetenz, da er die Transformationskompetenz nicht besitzt. Diese verbleibt vielmehr bei den Ländern[39].

Eine strittige Frage stellt sich im Zusammenhang mit dem innerstaatlichen Vollzug von Verträgen über Gegenstände der Landesgesetzgebung, die der Bund abgeschlossen hat. Nach der strikt zentralistischen Ansicht besitzt der Bund nicht nur das Vertragsschlussrecht, sondern auch die Zuständigkeit für die Transformation bzw. die Erteilung des Vollzugsbefehls.

Diese Auffassung ist allerdings problematisch, sofern der Bund durch den Abschluss und die Transformation völkerrechtlicher Verträge die Ländergesetzgebungskompetenz aushöhlen könnte. Deshalb wird andererseits die Ansicht vertreten, dass in diesen Fällen nur die Länder die Kompetenz für die Transformation bzw. den Vollzugsbefehl haben. Die Umsetzung der völkerrechtlichen Verträge im innerstaatlichen Bereich sowie die Rangfrage richten sich nach den Länderverfassungen.

Im sog. Lindauer Abkommen[40] haben sich der Bund und die Länder über das Vorgehen beim Abschluss völkerrechtlicher Verträge im Bereich der Ländergesetzgebungszuständigkeit durch den Bund geeinigt. Nach dem Wortlaut dieser Absprache bleibt der Bund grundsätzlich auch im Bereich der ausschließlichen Gesetzgebungskompetenzen

39 Nach der zentralistischen Auffassung hingegen steht dem Bund neben der unbeschränkten Abschlusskompetenz auch eine umfassende Transformationskompetenz zu. Näheres zu den Meinungen zur Auslegung des Art. 32 GG siehe BLECKMANN, a.a.O., S. 204-207; FASTENRATH, a.a.O., S. 115-118; REGEHR, a.a.O., S. 142-149; SCHWEITZER, a.a.O., S. 47; SEIDEL, a.a.O., S. 41-43 und 52-62; STEIN; VON BUTTLAR, a.a.O., S. 70ff; STREINZ, a.a.O., Art. 32 Rn. 31ff. und ZIPPELIUS, a.a.O., S. 511.

40 Verständigung zwischen der Bundesregierung und den Staatskanzleien der Länder über das Vertragsschließungsrecht des Bundes vom 14.11.1957.

der Länder, insbesondere Kulturabkommen, völkerrechtlich handlungsbefugt. Vor dem Vertragsschluss soll er aber innerstaatlich die Zustimmung der Länder einholen, da diese innerstaatlich an der Umsetzung des Vertrags beteiligt sind[41].

Danach geht das Abkommen von einem Auseinanderfallen von Abschluss- und Transformationskompetenz aus: der Bund besitzt ein unbeschränktes Abschlussrecht. Im Bereich der ausschließlichen Gesetzgebungskompetenz der Länder sind diese allerdings für die Umsetzung in innerstaatliches Recht allein zuständig. Diese Lösung hat den Vorteil, dass die Länder ihr Mitwirkungsrecht bewahren und der Bund gleichzeitig seine außenpolitische Beweglichkeit behält[42] .

Die Verfassungsmäßigkeit des Lindauer Abkommens ist allerdings bis heute umstritten. Nach der föderalistischen Ansicht wäre eine Kompetenzübertragung auf den Bund gemäß Ziffer 3 des Lindauer Abkommens[43] nur durch eine Verfassungsänderung nach Art. 79 GG möglich. Das GG hat die Zuständigkeiten und ihre Aufteilung zwischen Bund und Ländern abschließend geregelt. Deshalb wäre eine derartige Übertragung verfassungswidrig.

Die zentralistische Ansicht bringt auch Bedenken gegen Ziffer 3 vor. Nach dieser Auffassung verändere diese Bestimmung die in Art. 32 GG festgelegte Beteiligungsform der Länder zu einem nicht eingeräumten Mitwirkungsrecht und dies beschränke die Entscheidungsfreiheit des Bundes im Rahmen seiner Vertragsschlusszuständigkeit[44].

Art. 32 Abs. 2 GG schreibt vor, dass der Bund vor dem Abschluss eines völkerrechtlichen Vertrags, der die besonderen Verhältnisse eines Landes berührt, verpflichtet ist, das Land rechtzeitig anzuhören. Die Stellungnahme des Landes ist für den Bund nicht verbindlich. Sinn der Anhörung ist es, dem betroffenen Land Gelegenheit zu geben, Anregungen und Bedenken vorzubringen. Keine besondere Berührung liegt vor, wenn alle Länder grundsätzlich gleich betroffen sind. In diesem Fall werden die Länderinteressen vom Bundesrat gemäß Art. 59 Abs. 2 GG wahrgenommen[45].

41 Vgl. FASTENRATH, a.a.O., S. 119; SCHWEITZER, a.a.O., S. 48 und STEIN; VON BUTTLAR, a.a.O., S. 71.

42 Vgl. FASTENRATH, a.a.O., S. 117-118.

43 Diese Vorschrift bestimmt: "Soweit völkerrechtliche Verträge auf Gebieten der ausschließlichen Zuständigkeit der Länder eine Verpflichtung des Bundes oder der Länder begründen sollen, soll das Einverständnis der Länder herbeigeführt werden."

44 Näheres zu dieser Diskussion siehe BLECKMANN, a.a.O., S. 208-209; KUNIG, a.a.O., S. 112; SCHWEITZER, a.a.O., S. 48-49; SEIDEL, a.a.O., S. 44-45; STREINZ, a.a.O., Art. 32 Rn. 39ff und ZIPPELIUS, a.a.O., S. 512.

45 Vgl. FASTENRATH, a.a.O., S. 161-162; KUNIG, a.a.O., S. 113; SCHWEITZER, a.a.O., S. 49; SEIDEL, a.a.O., S. 37; STEIN; VON BUTTLAR, a.a.O., S. 71 und STREINZ, a.a.O., Art. 32 Rn. 43ff.

Letztlich ist darauf hinzuweisen, dass die Bundesländer durch den Bundesrat in Angelegenheiten der EU mitwirken können (Art. 23 Abs. 2 GG). Der Grund dafür liegt darin, dass mit der Kompetenzübertragung auf die EG innerstaatliche Kompetenzen zugunsten des Bundes verschoben wurden. Ziel der Einräumung von Beteiligungsrechten der Länder bei europäischen Angelegenheiten ist es also, den Verlust an Regelungszuständigkeiten zu kompensieren[46].

Die Mitwirkung der Länder über den Bundesrat erfolgt nicht nur durch die umfassende Unterrichtungspflicht der Bundesregierung gemäß Art. 23 Abs. 2 Satz 2 GG, sondern auch mit der Berücksichtigung der Stellungnahmen vom Bundesrat durch die Bundesregierung. Je nach der Intensität einer Berührung von Länderinteressen erhielt der Bundesrat stärkere Einwirkungsmöglichkeiten auf die Willensbildung des Bundes[47].

In Bereichen ohne Schwerpunkte von Länderinteressen (Art. 23 Abs. 4 und Abs. 5 Satz 1 GG) berücksichtigt die Bundesregierung die Stellungnahme des Bundesrates, ohne an diese gebunden zu sein. Bei Schwerpunkten von Länderinteressen (Art. 23 Abs. 5 Satz 2 GG) ist andererseits die Auffassung des Bundesrates durch die Bundesregierung maßgeblich zu berücksichtigen. Maßgebliche Berücksichtigung bedeutet in diesem Kontext ein Letztentscheidungsrecht des Bundesrats. Die Bundesregierung darf aber von dieser letzten Entscheidung abweichen, aufgrund der Berechtigung des Bundes, seine gesamtstaatliche Verantwortung zu wahren (Art. 23 Abs. 5 Satz 2 GG)[48].

Schließlich ist in Fällen ausschließlicher Länderkompetenzen (in Bereichen der Kultur, der schulischen Bildung und des Rundfunks) die Wahrung der Mitgliedschaftsrechte Deutschlands in der EU vom Bund auf einen vom Bundesrat benannten Vertreter der Länder zu übertragen (Art. 23 Abs. 6 Satz 1).

Der Vertrag von Lissabon verleiht den Parlamenten der Mitgliedstaaten direkte Mitwirkungsrechte gegenüber EU-Organen. Für die Wahrnehmung dieser Rechte bei der Subsidiaritätskontrolle sowie bei institutionellen Entscheidungen schaffte das Gesetz über die Ausweitung und Stärkung der Rechte des Bundestags und des Bundesrats in Angelegenheiten der EU (das sog. Ausweitungsgesetz) die innerstaatlichen Voraussetzungen. Die aus dem Vertrag von Lissabon erwachsenden Rechte der nationalen Parlamente machten ebenfalls entsprechende Anpassungen des GG erforderlich, nämlich in Art. 23, 45 und 93 GG. Solche Anpassungen wurden durch eine

46 Vgl. STREINZ, Rudolf. Art. 23. In: SACHS, Michael (Ed.). *Grundgesetz*. Kommentar. 5. Aufl. München: Beck, 2009, Rn. 14.

47 Vgl. KUNIG, a.a.O., S. 113-114 und STEIN; VON BUTTLAR, a.a.O., S. 73-74.

48 Vgl. STREINZ, a.a.O., Art. 23 Rn. 103ff.

Grundgesetzänderung geschaffen[49].

Das Zustimmungsgesetz zum Lissabon-Vertrag sowie das Gesetz zur Änderung des GG und das Ausweitungsgesetz waren Gegenstände verfassungsgerichtlicher Rechtsbehelfe vor dem BVerfG. Das Urteil bestätigte die Vereinbarkeit des Vertrags von Lissabon mit dem GG. Das BVerfG verlangte jedoch eine Stärkung der Beteiligungsrechte von Bundestag und Bundesrat[50].

Mit dem Integrationsverantwortungsgesetz und die Änderung des Gesetzes über die Zusammenarbeit zwischen Bund und Ländern in Angelegenheiten der EU wurden die Vorgaben des BVerfG-Urteils über die Mitwirkung von Bundestag und Bundesrat umgesetzt. Außerdem werden durch diese Normen die Unterrichtungspflichten der Bundesregierung und die Beteiligungsrechte der Bundesländer festgesetzt.

Die Bundesregierung unterrichtet den Bundesrat umfassend in der Regel schriftlich über alle EU-Vorhaben, die für die Länder von Interesse sein könnten. Darüber hinaus können die Bundesländer – nach der Dimension der Betroffenheit ihrer Interessen oder Kompetenzen – in abgestufter Weise an der Festlegung der EU-Politik Deutschlands teilnehmen: (1) durch Mitwirkung an Beratungen zur Gestaltung deutscher Verhandlungspositionen, soweit der Bundesrat an einer entsprechenden inneren Maßnahme zu beteiligen hätte oder die Bundesländer innerstaatlich zuständig wären; (2) durch Mitwirkung von Ländervertretern an den Verhandlungen, soweit grundlegende Interessen der Länder betroffen sind und; (3) durch Übertragung der Verhandlungsführung auf die Länder bei EU-Vorhaben, welche die ausschließlichen Ländergesetzgebungskompetenzen in Bereichen der Kultur, der schulischen Bildung und des Rundfunks betreffen[51].

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49 Nach Art.23 Abs. 1 wird folgender Abs. 1a eingefügt: „Der Bundestag und der Bundesrat haben das Recht, wegen Verstoßes eines Gesetzgebungsakts der Europäischen Union gegen das Subsidiaritätsprinzip vor dem Gerichtshof der Europäischen Union Klage zu erheben. Der Bundestag ist hierzu auf Antrag eines Viertels seiner Mitglieder verpflichtet. Durch Gesetz, das der Zustimmung des Bundesrates bedarf, können für die Wahrnehmung der Rechte, die dem Bundestag und dem Bundesrat in den vertraglichen Grundlagen der Europäischen Union eingeräumt sind, Ausnahmen von Artikel 42 Abs. 2 Satz 1 und Artikel 52 Abs. 3 Satz 1 zugelassen werden.“ Dem Art. 45 wird folgender Satz beigefügt: „Er kann ihn auch ermächtigen, die Rechte wahrzunehmen, die dem Bundestag in den vertraglichen Grundlagen der Europäischen Union eingeräumt sind.“ Und in Art. 93 Abs. 1 Nr. 2 werden die Wörter „eines Drittels“ durch die Wörter „eines Viertels“ ersetzt.

50 Im Einzelnen zum Urteil des BVerfG zum Vertrag von Lissabon siehe CEIA, Eleonora Mesquita. *Die verfassungsgerichtliche Kontrolle völkerrechtlicher Verträge: Eine rechtsvergleichende Untersuchung zwischen Brasilien und Europa*. Baden-Baden: Nomos, 2011, S. 79-84.

51 Siehe AUSWÄRTIGES AMT. Zusammenarbeit mit Bundesländer und Bundesrat in EU-Fragen. In:

4. SCHLUSSFOLGERUNG

Für jeden Föderalstaat stellt die Kompetenzverteilung zwischen dem Bund und seinen Gliedstaaten auf dem Gebiet der auswärtigen Beziehungen ein zentrales Thema dar. Es geht um die Frage, ob die Kompetenzverteilung in Fragen der Innenpolitik auch für das Handeln in auswärtigen Angelegenheiten gelten soll oder ob in jedem Falle eine alleinige Zuständigkeit des Bundes anzunehmen ist. Die meisten Bundesstaaten haben sich für eine umfassende Bundeskompetenz entschieden[52].

Ein Beispiel hierfür ist Brasilien. Im Name einer einheitlichen Repräsentation nach außen postuliert die brasilianische Verfassungsordnung die ausschließliche Kompetenz des Gesamtstaates für den Bereich der internationalen Beziehungen. Folglich haben die Gliedstaaten kein Recht zum Abschluss völkerrechtlicher Verträge.

Wiederum schließen andere Bundesstaaten die Länder völlig vom völkerrechtlichen Verkehr nicht aus. Zu ihnen zählt Deutschland. Art. 32 Abs. 1 GG weist dem Bund die grundsätzlich ausschließliche Aufgabe zu, im Verhältnis zu anderen Staaten die gesamtstaatliche Repräsentation Deutschlands wahrzunehmen. Andererseits sieht der Art. 32 Abs. 3 GG eine Landeskompetenz im Bereich des Vertragsschlusses vor. Die Länder sind allerdings zur Eingehung völkervertraglicher Beziehungen nur solange befugt, als und soweit ihnen die Gesetzgebungskompetenz für die betreffende Vertragsmaterie zusteht[53].

In der Tat treten die Bundesländer in vielfältigen Formen als außenpolitische Akteure auf. Sie schließen Abkommen mit anderen Völkerrechtsubjekten auf dem Gebiet der Kulturpolitik, Wirtschaftsförderung und Entwicklungspolitik. Das kann in Kooperation mit dem Bund, aber auch im Konflikt geschehen.

Dagegen gibt es in Brasilien keine Möglichkeit von Konflikt, da dort die Union die ausschließliche Zuständigkeit für den Bereich der internationalen Beziehungen hat. Und die Gliedstaaten haben keine Handlungsfreiheit im völkerrechtlichen Verkehr.

Trotz der Unterschiede stehen das brasilianische Recht und das deutsche Recht vor einer gemeinsamen Frage: Darf der Bund Verträge abschließen, die Sachgebieten der ausschließlichen Gesetzgebungskompetenz der Bundesstaaten regeln?

Der STF und ein wichtiger Teil der Doktrin verstehen, dass die Union der einzige Vertreter der Republik im Bereich der Außenbeziehungen ist. Außerdem würde das rechtliche Verbot

www.auswaertiges-amt.de/DE/Europa/DeutschlandInEuropa/MitwirkungBundesrat_node.html, abgerufen am 10. April 2013.

52 GEIGER, a.a.O., S. 108.

53 GEIGER, a.a.O., S. 111.

des Abschlusses von internationalen Verträgen, die Materien der ausschließlichen Gesetzgebungskompetenz der Bundesstaaten betreffen, die Eingehung Brasiliens völkerrechtlicher Verpflichtungen beeinträchtigt.

Andererseits herrscht im deutschen Recht über diese Frage Uneinigkeit. Die sog. zentralistische Auffassung spricht für eine unbeschränkte Völkervertragsschlusszuständigkeit des Bundes. Nach der sog. föderalistischen Auffassung hingegen ist die Vertragsschlusskompetenz des Bundes beschränkt. Er kann also keine Verträge abschließen, wo die Länder ausschließlich für die Gesetzgebung zuständig sind.

Offensichtlich ist die Wahl des Modells untrennbar mit der historischen Entwicklung des Föderalismus in jedem Land gebunden. Brasilien, wo die Union schon immer stärker als die Gliedstaaten war, nimmt ein zentralistisches Modell an, nach dem die Union allein für die Eingehung internationalen Beziehungen mit anderen Staaten zuständig ist. Deutschland, wo die Bundesländer immer eine herausragende Stellung innerhalb der Föderation hatten, nimmt wiederum ein föderalistisches Modell an, nach dem die Bundesländer eine beschränkte Vertragsfähigkeit haben.

Unabhängig vom angenommenen Modell – zentralistisch oder föderalistisch – ist das Wesentliche die Zusammenarbeit zwischen dem Bund und die Gliedstaaten bei der Gestaltung und Durchführung der auswärtigen Beziehungen, so dass die Interessen aller Glieder der Föderation umfassend berücksichtigt werden.

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DAS SYSTEM DER RECHTSMITTEL IN DER BRASILIANISCHEN ZIVILPROZESSORDNUNG

THE BRAZILIAN APPELLATE SYSTEM

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Zusammenfassung: Dieser Artikel soll einen Einblick in das System der Rechtsmittel in Brasilien geben. Zu diesem Zweck konzentriert sich der Artikel auf die gemeinsame Struktur und die Terminologie der einzelnen Rechtsmittel und hebt das Verhältnis der Rechtsmittel zueinander sowie die jeweiligen Besonderheiten hervor. Der Artikel beginnt zum besseren Verständnis mit einem kurzen Überblick über den Gerichtsaufbau in Brasilien, bevor die einzelnen Rechtsmittel detailliert und systematisch erläutert werden.

Schlüsselworte: Rechtsmittelverfahren – Zivilprozessrecht – Gerichtsaufbau

Abstract: This article aims to give an introduction to the Brazilian Appellate System. For this purpose, the article focuses on the common structure and terminology of the different appeals and highlights their interrelation as well as procedural idiosyncrasies. The article starts with a general definition and an overview of the Brazilian Judicial System, followed by a detailed and systematic presentation of the different appeals.

Keywords: Appellate Procedure - Code of Civil Procedure - Judicial System

A. EINFÜHRUNG

Ziel dieses Artikels ist es, die Rechtsmittel der brasilianischen Zivilprozessordnung aus einer systematischen Perspektive heraus darzustellen und dem Leser einen strukturierten Überblick zu verschaffen, wobei in diesem Rahmen nicht auf alle Einzelheiten und

Meinungsstreite der zahlreichen Aspekte des komplexen brasilianischen Rechtsmittelsystems eingegangen werden soll. Vielmehr sollen die Struktur, also der Aufbau und das Verhältnis der einzelnen Rechtsmittel zueinander sowie deren spezifischen Besonderheiten nachvollziehbar aufgezeigt werden um somit dem Leser eine Grundlage für eine eingehendere Rechtsvergleichung zu bieten.

Bevor die einzelnen Rechtsmittel dargestellt werden, sollen kurz einige Grundsätze des brasilianischen Rechtsmittelsystems sowie der grobe Aufbau der Judikative mit der entsprechenden Terminologie erläutert werden, um das Verständnis zu erleichtern und den Ablauf eines Rechtsmittelverfahrens in Brasilien besser nachvollziehen zu können.

I. Begriff

Als Rechtsmittel gelten nach brasilianischer Gesetzgebung diejenigen Rechtsbehelfe, mit denen eine Entscheidung eines Gerichts im selben Rechtsstreit angegriffen werden kann[1], wobei über das Rechtsmittel in der Regel die nächsthöhere Instanz entscheidet. Dies ist allerdings, wie bei den folgenden Darstellungen der einzelnen Rechtsmittel noch näher ausgeführt wird nicht ausnahmslos der Fall, sodass der Begriff der Rechtsmittel der brasilianischen Zivilprozessordnung, des *Código de Processo Civil*, insbesondere im Hinblick auf den Devolutiveffekt aus rechtsvergleichender Perspektive nicht zu eng verstanden werden darf. So erreicht der Rechtsmittelführer zwar mit der Einlegung eines Rechtsmittels eine verfassungsrechtlich garantierte[2] Überprüfung der angefochtenen Entscheidung. Unterschiedlich ausgeprägt ist dabei jedoch die Reichweite des Devolutiveffekts in dem Sinne, dass das überprüfende Organ wie im Regelfall die nächsthöhere Instanz, aber etwa auch ein weiteres Kollegialorgan desselben Gerichts oder sogar das die angefochtene Entscheidung erlassende Organ selbst sein kann. Darüber hinaus kommt den Rechtsmitteln der brasilianischen Zivilprozessordnung grundsätzlich auch ein Suspensiveffekt zu, wobei jedoch auch hier wiederum einige Ausnahmen bestehen auf die an den entsprechenden Stellen hingewiesen wird. Welche Rechtsbehelfe nach dem *Código de Processo Civil* als Rechtsmittel gelten kann der abschließenden Aufzählung in Art. 496 entnommen werden.

1 MOREIRA, José Carlos Barbosa. *Comentários ao Código de Processo Civil* Vol. V. 15ª ed.: Forense, Rio de Janeiro, 2009, Seite 233.

2 Ob eine solche verfassungsrechtliche Garantie auf eine Überprüfung gerichtlicher Entscheidung besteht ist mangels ausdrücklicher Erwähnung nicht unumstritten, im Ergebnis aber mehrheitlich anerkannt.

II. Aufbau der Judikative

Die Gerichtsbarkeit in Brasilien ist in die ordentliche Gerichtsbarkeit der Bundesstaaten (*Justiça Comum Estadual*), die Bundesgerichtsbarkeit[3] (*Justiça Federal*) die Arbeitsgerichtsbarkeit (*Justiça do Trabalho*), die Wahlgerichtsbarkeit *(Justiça Eleitoral)* und die Militärgerichtsbarkeit (*Justiça Militar*) aufgeteilt. Wenn nachfolgend von *zweiter Instanz* die Rede ist, ist damit die zweite Instanz der ordentlichen Gerichtsbarkeit gemeint, wobei die Grundstruktur auch für die weiteren Gerichtsbarkeiten gelten, die allerdings teilweise einige Besonderheiten aufweisen, worauf, soweit es für das Verständnis des einzelnen Rechtsmittels notwendig ist, an entsprechender Stelle hingewiesen wird

Die Richter der ersten Instanz sind die sogenannten *Magistrados*, die als Einzelrichter entscheiden. Der Eintritt in die Richterlaufbahn erfolgt dabei im Rahmen einer Aufnahmeprüfung, die allen Absolventen eines Studiums der Rechtswissenschaften offensteht. Die zweite Instanz bilden die *Tribunais de Justiça – TJ* – die sich teils aus Richtern, die auf Grund ihres Alters und ihrer Verdienste aus der ersten Instanz aufsteigen, und teils aus Vertretern der Anwaltschaft und des *Ministério Público*[4] zusammensetzen. Die Entscheidung über das eingelegte Rechtsmittel erfolgt innerhalb der *Tribunais de Justiça* in den *Câmaras* oder *Turmas*, Kammern die sich aus drei Richtern, den sogenannten *Desembargadores*, zusammensetzen.

Die Entscheidungen des Einzelrichters in der ersten Instanz heißen *Sentenças*, wenn sie Endurteile darstellen und *Decisões Interlocutórias*, wenn sie das Verfahren nicht abschließen. In der zweiten Instanz, also an den *Tribunais de Justiça*, wird die getroffene Entscheidung, wenn sie durch ein Kollegialorgan ergeht, *Acórdão* genannt.

An dieser Stelle sei darauf hingewiesen, dass es in Brasilien grundsätzlich keine Zuständigkeitsregelungen abhängig vom Streitwert gibt[5] sondern ausschließlich auf Grund der Sache, sodass bis auf wenige Ausnahmen die *Tribunais de Justiça* in der Regel nicht wie etwa die Landgerichte in erster oder zweiter Instanz entscheiden[6].

3 Die Bundesgerichtsbarkeit ist ausschließlich zuständig für Sachen, die den Bund oder Bundesbehörden betreffen, Art. 109 der *Constituição Federal* von 1988.

4 Das *Ministério Público* ist ein Organ, das in seiner Position im Justizsystem einer Staatsanwaltschaft ähnelt, wobei die Befugnisse sowohl in der Breite als auch in der Tiefe umfassender sind und Zuständigkeiten in allen Rechtsbereichen bestehen. Im Rahmen dieses Artikels ist insbesondere die Kontrollfunktion des *Ministério Público* relevant.

5 Eine Ausnahme besteht bei den *Juizados Especiais*, ein alternativer Rechtsweg mit geringeren formellen Anforderungen für Streitigkeiten mit geringem Streitwert.

6 Die wenigen im Rahmen dieses Artikels nicht bedeutsamen Ausnahmen werden weiter unten

Oberhalb der *Tribunais de Justiça* befinden sich im ordentlichen Rechtsweg im brasilianischen Gerichtssystem der *Superior Tribunal de Justiça – STJ –* als Oberster Gerichtshof der ordentlichen Gerichtsbarkeit [7] und der *Supremo Tribunal Federal – STF –* als Verfassungsgericht (beide in Brasília), deren Richter Ministros heißen.

Zu den Zuständigkeiten des *STJ* gehört unter anderem diejenige über den *Recurso Especial* (die Revision) zu entscheiden, der gegen die *Acórdãos* der *Tribunais de Justiça,* also der Urteile der zweiten Instanz, eingelegt werden kann, wobei die Überprüfung auf eine Verletzung von Bundesrecht durch das entsprechende Urteil beschränkt ist. Dabei besteht die Hauptfunktion des *STJ* darin eine Vereinheitlichung der Auslegung und Anwendung von Bundesrecht sicherzustellen.

Gegen die Entscheidung des *STJ*, aber auch aller anderen *Tribunais*, kann der *Recurso Extraordinário* beim *STF* eingelegt werden, wobei in diesem Falle entsprechend der Funktion des *STF* als Hüter der Verfassung die Überprüfung auf eine Verletzung von Verfassungsrecht durch das angefochtene Urteil beschränkt ist.

Nach diesem kurzen für ein besseres Verständnis notwendigen Überblick über die einzelnen Instanzen folgt nun eine genauere Darstellung der einzelnen Rechtsmittel:

Gemäß dem *Código de Processo Civil* (Lei n° 5.869 vom 11. Januar 1973), Art. 496 sind folgende Rechtsmittel statthaft: a) *Apelação*, b) *Agravo*, c) *Embargos Infrigentes*, d) *Embargos de Declaração*, e) *Recurso Ordinário*, f) *Recurso Especial,* g) *Recurso Extraordinário* und h) *Embargos de Divergência*.

An dieser Stelle weisen wir noch kurz darauf hin, dass dem Kongress ein Gesetzesvorhaben zur Abstimmung vorliegt mit dem eine neue Zivilprozessordnung - *Código de Processo Civil* – geschaffen werden soll. Der aktuelle *Código de Processo Civil* aus dem Jahre 1973 hat zwar bereits vereinzelte Reformen erfahren, allerdings wird nunmehr eine grundsätzliche Erneuerung angestrebt, um insbesondere die Prozessökonomie zu stärken. Die geplanten Änderungen werden jedoch nicht entscheidend in die Strukturen der vorhandenen Rechtsmittel eingreifen, sodass die einzelnen Rechtsmittel sowie die auf sie anwendbaren Regelungen bestehen bleiben.

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kurz aufgeführt.

7 Die weiteren Obersten Gerichtshöfe sind das *Tribunal Superior do Trabalho* – TST (Bundesarbeitsgericht), das *Tribunal Superior Eleitoral* – TSE (Bundeswahlgericht), und das *Superior Tribunal Militar* – STM (Bundesmilitärgericht). Der *Superior Tribunal de Justiça* ist sowohl für Rechtsmittel gegen Entscheidungen der ordentlichen Gerichtsbarkeit der Bundesstaaten (*Justiça Estadual Comum*) als auch für solche der Bundesgerichtsbarkeit (Justiça Federal), dessen zweite Instanz die Bundesregionalgerichte (*Tribunais Regionais Federais*) sind, zuständig.

B. DIE EINZELNEN RECHTSMITTEL IM DETAIL

I. Apelação[8]

a) Grundsätzliches

Grundsätzlich ist es das Ziel des *Código de Processo Civil* eine konkrete Verknüpfung zwischen der Form einer angefochtenen Entscheidung und einem entsprechenden auf diese Form der Entscheidung zugeschnittenem Rechtsmittel herzustellen, sodass für jede Form einer Entscheidung immer eine entsprechende Form eines Rechtsmittels besteht.

Gemäß Art. 513 CPC ist die *Apelação* das statthafte Rechtsmittel gegen *Sentenças*, also Urteile der ersten Instanz, die den Prozess durch Sach- oder Prozessurteil beenden. Das bedeutet, dass mit diesem Rechtsmittel ausschließlich Urteile der *Magistrados* angefochten werden können und somit keine Urteile der *Tribunais de Justiça*, auch wenn sie dort ausnahmsweise in erster Instanz ergehen. Daraus ergibt sich auch, dass nur letztere für die Entscheidung über die *Apelação* zuständig sind. Wie in der Einführung angedeutet sind etwa Oberlandesgerichte als Berufungsgerichte für Urteile der Landgerichte dem brasilianischen Gerichtssystem fremd. Ferner ist die *Apelação* auch bei Versäumnisurteilen statthaft, da die Möglichkeit eines Einspruchs gegen das erste Versäumnisurteil im *Código de Processo Civil* nicht vorgesehen ist.

Die *Apelação* muss als Grundform der Rechtsmittel des *Código de Processo Civil* verstanden werden, was insofern bedeutsam ist als das die entsprechenden Regelungen subsidiär auch bei allen anderen Rechtsmitteln gelten.

Im Rahmen der *Apelação* kann die *Câmara* oder *Turma* des *Tribunal de Justiça* in zweiter Instanz das angefochtene Urteil grundsätzlich komplett überprüfen, wobei neue Tatsachen allerdings wie bei der Berufung der ZPO nur unter eingeschränkten Bedingungen neu vorgebracht werden können. Hier muss der Kläger gemäß Art. 517 des CPC nachweisen, dass er es auf Grund höherer Gewalt unterlassen hat, diese im Ausgangsverfahren vorzubringen.

8 Auch wenn einzelnen Rechtsmittel denen der deutschen ZPO in Aufbau sowie Sinn und Zweck weitgehend entsprechen mögen, soll hier dennoch die brasilianische Terminologie verwendet werden, um den Besonderheiten beider Rechtssysteme Rechnung zu tragen und Missverständnissen vorzubeugen.

b) Legitimation

Die *Apelação* kann von der im Prozess (teil-)unterlegenen Partei, von einem Dritten, der einen Nachteil durch das Urteil erleidet, und auch vom *Ministério Público* eingelegt werden, wenn es sich um ein Verfahren handelt, in dem dieses im Rahmen seiner Kontrollfunktion beteiligt ist[9]. Hierbei handelt es sich um eine der allgemein im brasilianischen Rechtsmittelsystem anzuwendenden Normen (Art. 499 CPC), die somit auch bei den anderen Rechtsmittel entsprechende Anwendung findet. Ebenso ist es der gegnerischen Partei möglich, sich der *Apelação* anzuschließen.

c) Weitere Voraussetzungen

Die *Apelação* kann sich auf *errores in iudicando* oder *errores in procedendo* stützen.

Ein *error in procedendo* im Sinne des *Código de Processo Civil* besteht dabei in einem Verfahrensfehler, der zur Ungültigkeit des Urteils führt. In diesem Fall begehrt die unterlegene Partei nicht die Abänderung des Urteils sondern die Erklärung der Ungültigkeit, mit dem Ziel, dass der Rechtsstreit an die erste Instanz zurückverwiesen wird, wo ein neues Urteil ergeht, indem der Verfahrensfehler behoben wird oder ein Prozessurteil ergeht, falls es sich um einen unheilbaren Mangel handelt.

Ein *error in iudicando* liegt bei einer Verletzung materiellen Rechts vor. In diesen Fällen begehrt die unterlegene Partei eine Abänderung des Urteils, also eine Entscheidung eines Kollegialorgans, die das ursprüngliche Urteil korrigiert und ersetzt.

Die *Apelação* kann grundsätzlich in jedem Rechtsstreit eingelegt werden, wobei es keinen *Berufungswert* als Zulässigkeitsvoraussetzung gibt. Eine solche Beschränkung durch einen bestimmten Wert ist dem brasilianischen Rechtsmittelsystem grundsätzlich fremd und findet sich daher auch bei keinem der anderen Rechtsmittel[10].

9 Art. 127 ff. *Constituição Federal*.

10 Im Falle einer Streitigkeit von geringem Streitwert und geringer Komplexität besteht, wie in der Einführung angedeutet, in Brasilien die Möglichkeit einen alternativen Rechtsweg, die *Juizados Especiais*, zu wählen, dessen Verfahren weitaus schneller beendet wird und weniger formelle Voraussetzungen verlangt. Darüber hinaus besteht in der Regel auch keine Anwaltspflicht wie dies im ordentlichen Rechtsweg unabhängig vom Streitwert immer der Fall ist. Bei diesem alternativen Rechtsweg ist die *Apelação* allerdings nicht statthaft. Es besteht lediglich die Möglichkeit eine gesonderte Überprüfung eines Kollegialorgans desselben Gerichts zu begehren. Auch hier gibt es keinen Berufungswert, allerdings besteht in diesem

d)Verfahren

(1) Verfahren vor dem *Iudex a quo.*

Die Berufung muss innerhalb einer Frist von 15 Tagen (Art. 508 des CPC) ab Zustellung des Urteils schriftlich eingereicht werden und an denjenigen Richter gerichtet werden, der die Entscheidung verkündet hat (Art. 514 des CPC). Dieser überprüft zunächst, ob die *Apelação* alle Zulässigkeitsvoraussetzungen erfüllt (Gerichtskostenvorschuss, Frist, Form, Statthaftigkeit usw.). Neben den allgemeinen Zulässigkeitsvoraussetzungen prüft der Richter a quo darüber hinaus ob die Begründung der *Apelação* möglicherweise bereits der gefestigten Rechtsprechung des *STJ* oder des *STF*[11] widerspricht.

Falls der Richter die *Apelação* für zulässig erachtet[12] entscheidet er in einem nächsten Schritt, ob auf Grund der Einlegung der *Apelação* ein Suspensiveffekt besteht oder nicht[13]. Schließlich stellt er die *Apelação* dem Beklagten zur Erwiderung zu. Ist die Erwiderung erfolgt kann der Richter erneut überprüfen, ob die *Apelação* zulässig ist. Falls er seine Entscheidung beibehält, leitet er den Rechtsstreit dem *Tribunal de Justiça* weiter. Diese Vorprüfung der Zulässigkeit durch den *Iudex a quo* nach der Einlegung des Rechtsmittels, die im Ergebnis zu einer doppelten Zulässigkeitsprüfung führt, ist ein für die Rechtsmittel in der brasilianischen Zivilprozessordnung typisches Verfahren. Eine im Urteil selbst enthaltene von Amts wegen beizufügenden Erklärung ein Rechtsmittel sei etwa wegen der grundsätzlichen Bedeutung der Sache statthaft ist dem brasilianischen System hingegen fremd.

Fall Anwaltspflicht.

11 Der STJ ist zuständig für die Vereinheitlichung der Anwendung und Auslegung von Bundesrecht während der STF das oberste Organ der Rechtsprechung und gleichzeitig Verfassungsgericht ist. Beide können im Rahmen ihrer internen Verfassungen "*súmulas*" aufstellen. Dies sind auf einer Vielzahl von gleichen Entscheidungen beruhende mehrheitlich anerkannte Auslegungsvorschriften. Ursprünglich bestand die Funktion lediglich darin die gefestigte Rechtsprechung zu veröffentlichen ohne eine Bindungswirkung zu entfalten. Allerdings besteht eine Tendenz dahingehend sich bei der Bindungswirkung der anglo-amerikanischen Form der precedents anzunähern, was unter anderem anhand des Art. 518 des CPC deutlich wird.

12 Sollte der Richter die *Apelação* für nicht zulässig erachten so ist der *Agravo*, eine Beschwerde, statthaft wie weiter unten noch zu sehen sein wird.

13 Grundsätzlich besteht bei Einlegung der *Apelação* ein Suspensiveffekt. Es bestehen allerdings zahlreiche Ausnahmen bei denen aber wiederum in bestimmten Fällen auf Antrag einer Partei der Suspensiveffekt durch den Richter erklärt werden kann. Gegen diese Entscheidung kann ebenfalls eine Beschwerde in Form des *Agravo* eingelegt werden.

(2) Verfahren vor dem *Iudex ad quem*

aa) Kollegialentscheidung

Gemäß der Arts. 547 und 548 des CPC erhält der Rechtsstreit vor dem *Tribunal de Justiça* eine neue Verfahrensnummer bevor einer der *Desembargadores* als Berichterstatter ausgelost wird.

Im Normalfall erfolgt das Verfahren in einer der *Câmaras*, der Kollegialorgane, die mit jeweils drei Richtern besetzt sind. In diesem Fall verfasst derjenige Richter dem der Prozess zugelost wurde, der sogenannte *Relator*, als Berichterstatter ein Votum, das er zusammen mit der Akte dem neuesten Mitglied der *Turma* oder *Câmara*, dem sogenannte *Revisor,* weiterleitet. Der *Revisor* studiert die Akte und bestimmt dann einen Termin. Der dritte *Desembargador* erhält keine Akteneinsicht vor dem Termin, erst während der Verhandlung erfährt er den Inhalt des Rechtsstreits, wobei er aber wie die anderen *Desembargadores* jederzeit, auch nach dem Bericht des *Relators* und des *Revisors* und der möglichen mündlichen Vorträge der Prozessbevollmächtigten[14], Einsicht verlangen kann, falls er glaubt nicht in der Lage zu sein ohne Einsicht ein Votum abzugeben.

bb) Entscheidung durch den Einzelrichter

Wie bereits erwähnt handelt es sich bei Entscheidung durch das Kollegialorgan um den Idealfall. Häufig folgt das Verfahren aber nicht diesen Vorschriften sondern nimmt einen kürzeren Weg.

Gemäß Art. 557 des CPC hat der Berichterstatter bevor er die Akten dem *Revisor* zuleitet die Möglichkeit als Einzelrichter zu entscheiden. Gemäß des Art. 557, caput, des CPC kann der Berichterstatter die *Apelação* gegebenenfalls schon ohne Entscheidung des Kollegialorgans verwerfen bzw. zurückweisen.

Dies ist der Fall, wenn die *Apelação* offensichtlich unzulässig oder offensichtlich unbegründet ist oder zu der ständigen oder gefestigten Rechtsprechung des entscheidenden Gerichts, des *STF* oder des *STJ*, in Widerspruch steht.

In der ersten Variante des Art. 557 des CPC ist die *Apelação* schon offensichtlich unzulässig, was der Fall ist, wenn auf den ersten Blick deutlich wird, dass die Zulässigkeitsvoraussetzungen wie etwa die Einzahlung des Gerichtskostenvorschusses, die Statthaftigkeit, die

14 In Brasilien besteht im ordentlichen Gerichtsverfahren grundsäztlich in jeder Instanz Anwaltspflicht.

Form, Frist usw. nicht vorliegen. Auch wenn bereits eine Überprüfung durch den Richter *a quo* vorgenommen wurde geschieht es nicht selten, dass erst der Richter *ad quem* die fehlende Zulässigkeit bemerkt. Ebenso ist die *Apelação* weiterhin unzulässig, wenn die Parteien einen Vergleich geschlossen haben oder sich der Rechtsstreit erledigt hat.

In der zweiten Variante weist der Einzelrichter die *Apelação* zurück, wenn diese offensichtlich unbegründet ist. Auch in diesem Fall muss die Unbegründetheit für den Berichterstatter sofort ohne eingehende Prüfung erkennbar sein.

Gemäß Art. 557 CPC, *caput*, ist es auch möglich, dass der Berichterstatter die *Apelação* zurückweist, wenn diese der ständigen oder gefestigten Rechtsprechung a) des zuständigen Gerichts oder b) des *STJ* oder des *STF* widerspricht. Im Grunde handelt es sich hierbei nur um einen Unterfall der zweiten Variante, nur dass hierbei ausdrücklich auf die Rechtsprechung verwiesen wird.

Ebenso kann der Berichterstatter auf der anderen Seite aber auch prüfen, ob er der *Apelação* nicht schon als Einzelrichter stattgibt. Gemäß Art. 557 § 1° A ist dies der Fall soweit die angefochtene Entscheidung zu der ständigen oder gefestigten Rechtsprechung des *STF* oder *STJ* in Widerspruch steht.

Zusammenfassend kann demnach der Richter der ersten Instanz, neben der Überprüfung der allgemeinen Zulässigkeitsvoraussetzungen, gemäß Art. 518, § 2° des CPC entscheiden die *Apelação* nicht zuzulassen, sollte diese der gefestigten Rechtsprechung des *STJ* oder *STF* widersprechen. Der Berichterstatter der zweiten Instanz kann gemäß Art. 557, *caput*, des CPC die *Apelação* verwerfen, wenn diese offensichtlich unzulässig oder unbegründet ist oder der ständigen oder gefestigten Rechtsprechung des zuständigen Gerichts, des *STJ* oder des *STF* widerspricht. Und gemäß § 1° dieses Artikels kann der Berichterstatter als Einzelrichter der *Apelação* stattgeben, sollte die angefochtene Entscheidung der gefestigten Rechtsprechung des *STF* oder *STJ* widersprechen. In diesem Zusammenhang ist es wichtig darauf hinzuweisen, dass die Regelung des Art. 518 § 2° des CPC nur für die Apelação gilt, die Regelung des Art. 557 § 1° und caput des CPC jedoch für alle Rechtsmittel[15].

Die Möglichkeit eine Entscheidung als Einzelrichter auf der Grundlage der Rechtsprechung der höheren Gerichte vorzunehmen zeigt deutlich den zunehmenden Einfluss des anglo-saxonischen Rechtssystems auf das brasilianische Rechtssystem, das sich im Wesentlichen auf romanisch-germanische Wurzeln stützt. Im Rahmen dieser Entwicklung wurden das Institut der *precedents* des *common law* wie auch die umfangreichen Entscheidungsbefugnisse

15 Dies gilt allerdings wiederum nicht im Falle der *Embargos de Declaração*, wie noch zu sehen sein wird.

des Berichterstatters mit dem Ziel, die Prozessökonomie zu fördern, übernommen.

Die Erfahrung an den Gerichten hat jedoch gezeigt, dass diese Möglichkeit den Prozess schnell abzuschließen von den Richtern der ersten und zweiten Instanz mit Vorsicht zu nutzen ist, da eventuell der Sinn und Zweck ins Gegenteil verkehrt werden kann. Dies deshalb, da bei jeder dieser Entscheidungen wiederum ein neues Rechtsmittel statthaft ist. Im ersten Fall, in dem der Richter der ersten Instanz die *Apelação* für unzulässig erklärt ist der *Agravo de Instrumento* als eine Art sofortiger Beschwerde statthaft. Im zweiten Fall, in dem der Berichterstatter der zweiten Instanz die *Apelação* verwirft oder das erstinstanzliche Urteil aufhebt oder abändert ist der *Agravo Interno* als Beschwerde gegen die Art und Weise der Entscheidung durch einen Einzelrichter statthaft, wie weiter unten noch zu sehen sein wird.

Der entscheidende Richter sollte sich daher sicher sein, dass über die gleichen Rechtsfragen bereits vorher in höheren Instanzen gleich entschieden wurde und diese Entscheidung(en) auf den zu beurteilenden Rechtsstreit unmittelbar angewendet werden können, bevor er von den oben dargestellten Möglichkeiten Gebrauch macht. Dabei sollte er gegenüber den Parteien deutlich machen, dass die zu vergleichenden Rechtsfragen gleich gelagert sind und somit folglich eine gleiche Entscheidung angebracht ist, um insbesondere den Kläger der *Apelação* zu überzeugen, dass ein weiteres Rechtsmittel voraussichtlich wenig erfolgsversprechend sein wird.

Sollten die Artikel 518 und 557 des CPC fehlerhaft angewandt worden sein eröffnet sich die Möglichkeit ein neues Rechtsmittel einzulegen mit dem Ziel die streitige Rechtsfrage in dem sich anschließenden Rechtsmittelverfahren inzident zu klären, wodurch eine Erledigung des Verfahrens noch weiter hinausgeschoben wird. Daher sollte gerade der Berichterstatter der *Tribunais de Justiça* sorgfältig überprüfen, ob eine Entscheidung als Einzelrichter angemessen erscheint.

An dieser Stelle soll noch darauf hingewiesen werden, dass es selbstverständlich auch bei einer Kollegialentscheidung möglich ist ein Rechtsmittel wegen Unzulässigkeit zu verwerfen oder, falls die angefochtene Entscheidung offensichtlich mit der Rechtsprechung der oberen Gerichte übereinstimmt, zurückzuweisen und ebenso, falls sie dieser entspricht, diesem stattzugeben. Demnach kann also alles was auf Basis des Art. 557 des CPC als Einzelrichter entschieden wird auch ebenso durch das Kollegialorgan entschieden werden mit dem Unterschied, dass die Beschwerde in Form des *Agravo Interno* nicht statthaft ist. Das bedeutet, dass eine Entscheidung durch das Kollegialorgan gegebenenfalls aus prozessökonomischen Gründen sogar die adäquatere Entscheidung sein kann.

e) Nebenentscheidungen

Zwei Nebenentscheidungen können möglicherweise im Rechtsmittelverfahren erfolgen: die Vereinheitlichung der Rechtsprechung und die Erklärung der Verfassungswidrigkeit.

(1) Die Vereinheitlichung der Rechtsprechung

Sollten eine *Câmara* oder *Turma* von der Rechtsprechung einer anderen *Câmara* oder *Turma* abweichen kann eine Partei beantragen, dass über diese Rechtsfrage innerhalb des Gerichts gesondert und abschließend entschieden wird. Neben dem Antrag einer Partei kann auch ein Richter als Mitglied der *Câmara* oder *Turma* von Amts wegen eine solche gesonderte Entscheidung beantragen. Neben dem Antrag auf eine gesonderte Entscheidung können die unterschiedlichen Ansichten innerhalb desselben Gerichts darüber hinaus auch Anknüpfungspunkt für ein weiteres Rechtsmittel sein wie später noch zu sehen sein wird.

(2) Erklärung der Verfassungswidrigkeit

Die Kontrolle der Verfassungsmäßigkeit in Brasilien erfolgt auf einem Sonderweg, der sich dadurch auszeichnet, dass zwei verschiedene Modelle parallel nebeneinander existieren. Zum einen das in Europa vorherrschende konzentrierte Modell österreichischer Herkunft, in dem über die Verfassungsmäßigkeit einer Norm abstrakt von einem obersten Verfassungsgericht entschieden wird und zum anderen das dezentralisierte Modell nordamerikanischer Herkunft, in der die Entscheidung über die Verfassungsmäßigkeit von Normen konkret von jedem Richter vorgenommen werden kann. Insbesondere Letzteres ist im Rahmen dieses Artikels aus rechtsvergleichender Perspektive einer näheren Erläuterung wert.

In der ersten Instanz kann in Brasilien jeder Richter über die Verfassungswidrigkeit einer Norm entscheiden, wobei die Norm in diesem Fall lediglich in dem konkreten Rechtsstreit unangewendet bleibt. Handelt es sich um ein Kollegialorgan muss im höheren Plenarorgan desselben Gerichts mit absoluter Mehrheit über die Verfassungswidrigkeit eines Gesetzes oder einer Verordnung entschieden werden (Art. 97 *Constituição Federal)*. Daher kann folglich, sollte in einem der eingelegten Rechtsmittel vor dem *Tribunal de Justiça* die Verfassungswidrigkeit einer Norm beanstandet werden, weder der Einzelrichter noch die *Turma* oder *Câmara* über die Verfassungsmäßigkeit entscheiden, sondern nach Anhörung des

Ministério Público nur das Organ des Gerichts, das alle oder die Mehrheit der *Desembargadores* vereint.

Hierbei ist insbesondere zu beachten, dass eine Vorlage nur notwendig ist, wenn über die Verfassungswidrigkeit entschieden werden soll und diese entscheidungserheblich ist. Ist der Berichterstatter der Meinung, dass die Frage der Verfassungswidrigkeit von keiner Bedeutung für die Entscheidung über das Rechtsmittel ist oder dass die im Streit stehende Norm verfassungsgemäß ist, ist eine Vorlage an das Plenarorgan nicht notwendig. Ebenso wenig ist eine Vorlage notwendig, wenn über die Verfassungsmäßigkeit der entsprechenden Norm bereits innerhalb des Gerichts oder durch den STF entschieden wurde.

II. Agravo

Unter der Bezeichnung *Agravo* werden verschiedene ähnliche Rechtsmittel geführt, die verschiedene Formen einer Beschwerde darstellen: der *Agravo Retido*, der *Agravo de Instrumento*, der *Agravo Interno* und der *Agravo em Recurso Especial* sowie der *Agravo em Recurso Extraordinário.*

a) Agravo Retido und Agravo de Instrumento

Sowohl der *Agravo Retido* als auch der *Agravo de Instrumento* (Art. 522 ff. CPC) sind gegen Entscheidungen des Richters der ersten Instanz die keine Endurteile sind statthaft und müssen innerhalb einer Frist von 10 Tagen eingelegt werden. Das bedeutet also, dass bei Endurteilen, egal ob Prozess- oder Sachurteil, ausschließlich die *Apelação* statthaft ist. Anfechtbare Entscheidungen in diesem Sinne sind etwa solche, die Beweisanträge ablehnen, Nebeninterventionen für unzulässig erklären usw.

Ob in diesem Fall der *Agravo Retido* oder der *Agravo de Instrumento* statthaft sind, hängt von weiteren Voraussetzungen ab.

(1) Agravo Retido

Grundsätzlich muss ein Beschluss des Gerichts mit dem *Agravo Retido* und nicht mit dem *Agravo de Instrumento* angefochten werden (Art. 522 CPC). Der entscheidende Unterschied zu letzterem besteht darin, dass über den *Agravo Retido* nicht sofort entschieden wird, sondern erst im Falle einer *Apelação*. Sinn und Zweck dieser Form des *Agravo* ist es die Prozessökonomie zu fördern, da somit nicht eine Entscheidung des Gericht überprüft werden muss auf deren Fehlerhaftigkeit es am Ende für die Begründung des Urteils nicht ankommt. Weist der Richter zum Beispiel den Antrag des Klägers einen Zeugen zu hören ab und

ergeht am Ende ein Urteil zu Gunsten des Klägers, besteht auf Seiten des Klägers kein Interesse diese Entscheidung anzufechten. Sollte er durch das Urteil jedoch benachteiligt sein kann er ein Rechtsmittel auf diese ihn vermeintlich benachteiligende Entscheidung stützen. Aus diesem Grund obliegt es auch den Parteien im Wege der *Apelação* oder der Erwiderung auf den *Agravo Retido* einzugehen. Ohne speziellen Antrag darf das Gericht der zweiten Instanz über den *Agravo Retido* nicht entscheiden.

(2) Agravo de Instrumento

Ebenso wie der *Agravo Retido* ist auch der *Agravo de Instrumento* als Beschwerde gegen Entscheidungen die keine Endurteile sind statthaft. In dieser Form wird der *Agravo* allerdings direkt an das Beschwerdegericht, also das *Tribunal de Justiça*, gerichtet[16]. Es handelt sich somit um ein gesondertes Verfahren, dass parallel zu dem Hauptverfahren vor dem Gericht der ersten Instanz, das nicht ausgesetzt wird, stattfindet.

Weil diese Form des Agravo eine unmittelbare sofortige Entscheidung erfordert, ist sie nur in folgenden Ausnahmefällen möglich: a) im Falle eines drohenden schweren Nachteils, der später nicht mehr behoben werden kann, b) in Situationen, in denen der *Agravo de Instrumento* vom Gesetz ausdrücklich vorgeschrieben wird[17], oder c) in weiteren Fällen, in denen eine Beschwerde in Form des *Agravo Retido* unangemessen erscheint[18].

Der *Agravo de Instrumento* muss wie schon angedeutet bei dem Beschwerdegericht, dem *Tribunal de Justiça*, eingelegt werden. Der Rechtmittelführer muss allerdings die Einlegung vor dem Richter *a quo* protokollieren lassen und eine Abschrift einreichen, damit der Richter

16 Für die Einlegung des *Agravo* bestehen bestimmte formelle Voraussetzungen. Das Gesetz legt dabei ausdrücklich fest, dass Ablichtungen der Klageschrift, der angefochtenen Entscheidung, der Bevollmächtigungen und ein Nachweis über die Einzahlung des Vorschusses eingereicht werden müssen. Darüber hinaus müssen noch alle weiteren Dokumente eingereicht werden, die zum Verständnis der Sache notwendig sind, auch wenn sich dies nicht ausdrücklich aus dem Gesetz ergibt.

17 Unter den im Gesetz aufgeführten Fällen befinden sich etwa die Entscheidung des Richters der ersten Instanz die *Apelação* nicht zuzulassen oder die *Apelação* zwar zuzulassen, dies aber ohne Suspensiveffekt.

18 Der *Agravo* muss notwendigerweise in Form des *Agravo de Instrumento* eingelegt werden, wenn er sich gegen die Entscheidung des Richters den Streithelfer nicht zuzulassen richtet, da er in diesem Fall voraussichtlich keine *Apelação* einlegen kann, in der die Entscheidung überprüft werden könnte. Ebenso ist die Form des *Agravo de Instrumento* notwendigerweise einzulegen, wenn die Unzuständigkeit gerügt werden soll, da dies im Rahmen der *Apelação*, im Gegensatz zu Berufung, zwar grundsätzlich möglich ist, sich aus prozessökonomischen Gründen aber nicht anbietet.

seine Entscheidung gegebenenfalls abändern kann, was bei dem *Agravo Retido* logischerweise schon bereits direkt nach Einlegung möglich ist.

Wenn der *Agravo de Instrumento* am *Tribunal de Justiça* eingelegt wird kann der Berichterstatter zunächst überprüfen, ob er die Beschwerde als Einzelrichter verwirft. Dies geschieht in Form des Art. 557 des CPC. In diesem Fall bedarf es auch keiner Anhörung der gegnerischen Partei, da diese durch die Entscheidung keine Nachteile erleidet, sodass das Fehlen eines kontradiktorischen Verfahrens auch keinen Mangel der Entscheidung darstellt.

Sollte der Berichterstatter den *Agravo de Instrumento* nicht von vornhinein verwerfen muss er prüfen, ob dieser nicht in Form des *Agravo Retido* hätte eingelegt werden müssen. In diesem Fall wird er den *Agravo de Instrumento* in einen *Agravo Retido* umwandeln und ohne Entscheidung an den Richter des Ausgangsgericht zurückverweisen, so dass erst im Wege einer möglichen *Apelação* über die Beschwerde entschieden wird[19].

Falls der *Agravo de Instrumento* nicht umgewandelt wird, muss der Richter auch über einen möglicherweise gestellten Antrag der Partei über den Suspensiveffekt entscheiden. Auch wenn über den *Agravo de Instrumento* sofort und parallel zum Hauptprozess durch den Richter *ad quem* entschieden wird, was grundsätzlich eine schnelle Entscheidung gewährleisten soll, kann es vorkommen, dass während der Zeit die für eine Entscheidung benötigt wird dem Rechtsmittelführer bereits irreparable Nachteile entstehen. Einen solchen Nachteil zu vermeiden ist gerade aber das ureigenste Ziel dieses Rechtsmittels. Darum ist es möglich im Rahmen des *Agravo de Instrumento* einen speziellen Antrag zu stellen mit dem Ziel das Verfahren der ersten Instanz bis zu einer Entscheidung des Beschwerdegerichts auszusetzen.

Nach der Entscheidung über eine Aussetzung des Hauptverfahrens muss der Berichterstatter entscheiden, ob er dem *Agravo de Instrumento* als Einzelrichter stattgibt. Wie bereits ausgeführt gilt der Art. 557 CPC nicht ausschließlich für die *Apelação*, sondern auch für die anderen Rechtsmittel. Es sei jedoch darauf hingewiesen, dass in diesem Fall eine solche Entscheidung nicht ohne die Anhörung der gegnerischen Partei ergehen kann.

Falls der Berichterstatter nicht als Einzelrichter entscheidet, bestimmt er einen Termin an dem das Kollegialorgan entscheidet,

19 Gemäß Art. 527, einziger Paragraph, des CPC kann die Entscheidung des Einzelrichters den *Agravo de Intrumento* in einen *Agravo Retido* umzuwandeln genauso wie die Entscheidung über den Suspensiveffekt im Rahmen des *Agravo de Instrumento* nicht angefochten werden. Die Rechtsprechung hat jedoch anerkannt, dass diese Entscheidung mit dem "*Mandado de Segurança*" angefochten werden kann, der eigentlich kein Rechtsmittel darstellt sondern eine eigene Klageform, sodass die Vorschrift der Unanfechtbarkeit tatsächlich deutlich abgeschwächt wird, auch wenn diese Einschränkung dem Wortlaut nicht widerspricht.

wobei es in diesem Fall keinen *Revisor* gibt.

b) Agravo Interno

Grundsätzlich sollen alle Urteile und Beschlüsse von dem zuständigen Kollegialorgan, also der *Câmara* oder *Turma*, getroffen werden. Mit dem Ziel die Prozessökonomie zu fördern ist es allerdings wie schon gesehen häufig möglich auch als Einzelrichter zu entscheiden.

Der *Agravo Interno*, auch *Agravo Regimental* genannt, ist das statthafte Rechtsmittel gegen diese Einzelentscheidungen des Berichterstatters. Er muss innerhalb von 5 Tagen eingelegt werden und hat das Ziel, dass über das Rechtsmittel über das vorher eine Entscheidung durch den Einzelrichter ergangen ist erneut durch das zuständige Kollegialorgans entschieden wird wie es dem vorgesehenen Grundsatz entspricht.

Der *Agravo Interno* muss ebenfalls die allgemeinen Zulässigkeitsvoraussetzungen wie Frist, Form, Legitimation usw. erfüllen. Bei den anderen Rechtsmitteln erlaubt das Fehlen einer dieser Voraussetzungen grundsätzlich die Entscheidung des Einzelrichters, der das Rechtsmittel verwerfen kann. Im Rahmen des *Agravo Interno* widerspricht dies jedoch dem Sinn und Zweck des Rechtsmittels, sodass eine Entscheidung durch das Kollegialorgan zwingend ist. Bei einer Verwerfung durch den Einzelrichter wäre sogar möglich erneut einen *Agravo Interno* einzulegen, was das Verfahren erneut verzögern würde und das Ziel einer Entscheidung durch den Einzelrichter, die Prozessbeschleunigung, in sein Gegenteil verkehren würde.

c) Agravo em Recurso Especial und Agravo em Recurso Extraordinário

Ebenso wie bei der *Apelação* besteht auch bei dem *Recurso Especial*, der Revision zum STJ , und dem *Recurso Extraordinário*, der Urteilsverfassungsbeschwerde, die noch behandelt werden eine doppelte Zulässigkeitsprüfung, zunächst vor dem Richter *a quo*[20] und danach vor dem Richter *ad quem*. Gegen die Entscheidung des *Desembargador* als Einzelrichter des Gerichts *a quo*, der den *Recurso Especial* oder *Recurso Extraordinário* nicht zulässt, ist entsprechend der *Agravo em Recurso Especial* oder der *Agravo em Recurso Extraordinário* statthaft.

Der Art. 544 des CPC, der für diesen Fall den *Agravo* als statthaftes Rechtsmittel vorsieht enthält selbst keine spezifische Bezeichnung des *Agravo*. Die allgemein anerkannte Bezeichnung als *Agravo em Recurso Especial* bzw. *Agravo em Recurso Extraordinário*

20 Normalerweise ist liegt dies in der Zuständigkeit des Vorsitzenden der *Câmara* oder des Vizepräsidenten des *Tribunal.*

hat lediglich den Sinn Missverständnissen vorzubeugen und folgt der vom STJ und STF verwendeten Terminologie.

Der *Agravo* des Art. 544 des CPC muss innerhalb einer Frist von 10 Tagen eingelegt werden und wird dann an den STJ bzw. den STF weitergeleitet. An diesen Gerichten hat der Berichterstatter ebenfalls die Möglichkeit als Einzelrichter zu entscheiden. Die einzelnen Befugnisse des Berichterstatters legt § 4° dieses Artikels fest, der dem Aufbau des oben dargestellten Art. 557 des CPC entspricht. Gegen die Entscheidung des Berichterstatters am STJ oder am STF den Agravo zu verwerfen, ihn zurückzuweisen, oder das Urteil entsprechend abzuändern kann ebenfalls der *Agravo Interno* gemäß der Arts. 545 und 557 des CPC eingelegt werden, da es sich um eine Entscheidung des Einzelrichters handelt. Wenn der Berichterstatter der Meinung ist, dass die angefochtene Entscheidung fehlerhaft ist, er aber nicht als Einzelrichter über das eingelegte Rechtsmittel entscheiden kann bestimmt er einen Termin für die Verhandlung über den *Recurso Especial* oder *Recurso Extraordinário*, sodass dementsprechend das Kollegialorgan entscheidet.

Die Entscheidung ergeht in diesem Fall nicht über den Agravo sondern über das angefochtene Urteil selbst. Für die gegnerische Partei besteht zu diesem Zeitpunkt nicht mehr die Möglichkeit, gegen die Zulässigkeit des *Agravo* vorzugehen, da im Rahmen der Verhandlung nunmehr über das angefochtene Urteil und nicht über den Agravo selbst entschieden wird.

III. Embargos de Declaração

Zwar sind die *Embargos de Declaração*, mit denen Unklarheiten im Urteil oder Beschluss gerügt werden können, ausdrücklich in Art. 496 des CPC als Rechtsmittel aufgeführt. Ob es sich aber tatsächlich um ein Rechtsmittel handelt ist äußerst fragwürdig, denn die *Embargos de Declaração* werden bei dem Richter eingelegt, der das Urteil verkündet hat, sodass kein nächsthöheres Organ über das Rechtsmittel entscheidet und somit ein Devolutiveffekt fehlt.

Die Embargos de Declaração sind bei jeder Entscheidung in jeder Instanz statthaft. Daher sind sowohl Beschlüsse als auch Urteile der ersten Instanz, Entscheidungen eines Berichterstatters als Einzelrichter und Urteile der Kollegialorgane anfechtbar. Da die *Embargos de Declaração* diese sehr eigenwillige Ausprägung des Devolutiveffekts aufweisen, indem über das Rechtsmittel von demjenigen Organ entschieden wird, dass die angefochtene Entscheidung erlassen hat ist eine Entscheidung durch einen Einzelrichter im Sinne des Art. 557 des CPC nicht möglich.

Das Hauptargument den *Embargos de Declaração* die Qualität

als Rechtsmittel abzusprechen liegt allerdings in der Natur dieses *Embargos* selbst, da sein Ziel nicht die Aufhebung und Abänderung einer Entscheidung, sondern lediglich die Korrektur eventueller Unklarheiten ist, die die angefochtene Entscheidung enthält. Der Rechtsmittelführer kann eine Abänderung somit höchstens in Ausnahmefällen indirekt erreichen. Ein häufig zitiertes Beispiel für eine indirekte Abänderung ist etwa das Urteil, das zur vom Beklagten in der Klageerwiderung angeführten Einrede der Verjährung schweigt. In diesem Fall kann es möglich sein, dass der Richter, indem er eine entsprechende Korrektur vornimmt schließlich das Urteil auf Grund der Einrede abändert. Möglich ist auch, dass der Tenor aus Nachlässigkeit im Widerspruch zu den Entscheidungsgründen steht, sodass durch die *Embargos de Declaração* eine Änderung erfolgt. Im Normalfall wird jedoch bei Einlegung der *Embargos de Declaração* lediglich eine Unklarheit behoben, ohne dass das Urteil oder der Beschluss inhaltlich verändert werden[21].

Ein Urteil weist Ungenauigkeit auf, wenn es: a) auf einen der Anträge nicht eingeht, b) über angeführte Argumente der Parteien hinweggeht, c) oder auf von Amts wegen zu behandelnden Rechtsfragen nicht eingeht. Eine Entscheidung ist ferner unklar, wenn sie teilweise oder im Ganzen unverständlich ist etwa weil sie handschriftlich verfasst wurde, unverständliche Ausdrücke benutzt oder sich zu keiner der Rechtsfragen klar äußert. Die Entscheidung ist widersprüchlich, wenn sie logisch nicht nachvollziehbare entgegengesetzte Schlussfolgerungen zieht.

Im Rahmen der *Embargos* ist es wichtig darauf hinzuweisen, dass seine Einlegung gemäß Art. 528 des CPC die Fristen anderer gegen dieselbe Entscheidung statthafter Rechtsmittel hemmt. So beginnen etwa zum Beispiel mit Veröffentlichung des Urteils die entsprechenden Fristen, 5 Tage für die *Embargos de Declaração* und 15 Tage für die *Apelação*, parallel zu laufen. Sollten in diesem Falle die *Embargos de Declaração* eingelegt werden führt dies dazu, dass die Frist für die Einlegung der *Apelação* ausgesetzt wird und erst nach der Entscheidung über die *Embargos de Declaração* wieder zu laufen beginnt. Der Sinn hinter dieser Regel ist einfach: zunächst müssen die Unklarheiten der Entscheidung ausgeräumt werden bevor überhaupt eine Abänderung im Rahmen der *Apelação* angestrebt werden kann.

Daraus ergibt sich auch, dass die Entscheidung über die *Embargos de Declaração* das angefochtene Urteil etwa nicht ersetzen,

21 Wenn es sich um einen Rechts- oder Verfahrensmangel handelt, sind nicht die *Embargos de Declaração*, sondern die *Apelação* (wenn der Mangel in einem Endurteil enthalten ist), der *Agravo* (wenn es sich um eine Entscheidung, die kein Endurteil darstellt oder um eine Entscheidung des Berichterstatters als Einzelrichter handelt) oder der *Recurso Especial* oder *Recurso Extraordinário* (wenn ein Urteil eines Kollegialorgans einen Mangel enthält) statthaft.

sondern lediglich ergänzen und somit mit diesem eine neue Einheit bilden[22].

IV. Embargos Infrigentes

Die *Embargos Infrigentes* stellen in Brasilien eine absolut anachronistische Form der Rechtsmittel dar, deren Vorhandensein mangels wissenschaftlicher oder praktischer Rechtfertigung schwer nachvollziehbar ist.

Gemäß Art. 530 des CPC sind die *Embargos Infrigentes* bei nicht einstimmigen Urteilen, die im Verfahren der *Apelação* oder der *Ação Rescisória*[23] ergangen sind und ein Endurteil der ersten Instanz abgeändert haben statthaft. Durch die letzte Voraussetzung hat der brasilianische Gesetzgeber den Anwendungsbereich dieses Rechtsmittels gegenüber der vorherigen Norm, die eine Abänderung nicht gefordert hatte, signifikant eingeschränkt.

Grundvoraussetzung ist zunächst, dass es sich um ein Urteil eines Kollegialorgans handelt. Daher sind die *Embargos Infrigentes* bei Beschlüssen der ersten Instanz oder Entscheidungen des Einzelrichters in der zweiten Instanz nicht statthaft. Zusätzlich darf das Urteil nicht einstimmig ergangen sein, es muss daher zumindest ein abweichendes Votum vorliegen. Die Statthaftigkeit entfällt ferner, wenn das nicht einstimmige Urteil das angefochtene Urteil nicht abgeändert haben sollte oder schon als offensichtlich unzulässig verworfen wurde. Das gleiche gilt für Urteile im Falle der *Ação Rescisória*.

Ziel der *Embargos Infrigentes* ist es nicht ein einstimmiges Urteil zu erreichen, was angesichts der bereits erfolgten nicht einstimmigen Entscheidung im Rahmen der *Apelação* oder der *Ação Rescisória* in einer erneuten Entscheidung auch wohl nicht erreicht würde. Zweck soll es vielmehr sein eine erneute Überprüfung der Sache zu erreichen, diesmal mit Rücksicht auf die abweichende Meinung.

Der erneuten Entscheidung im Rahmen der *Embargos Infrigentes* liegen die gleichen Tatsache der Ausgangsentscheidung zu Grunde. Ferner sind für die *Embargos Infrigentes* nicht die einzelnen unterschiedlichen Begründungen, sondern ausschließlich die unterschiedliche Ergebnisse entscheidend. Sollten daher alle

22 Dies ergibt sich auch bereits daraus, dass die Entscheidung über die *Embargos de Declaração* von demselben Organ erlassen wird, dass auch die angefochtene Entscheidung selbst erlassen hat und dass Sinn und Zweck lediglich die Beseitigung von Unklarheiten, nicht der Entscheidung als solcher ist.

23 Die *Ação Rescisória* ist eine selbstständige Klage, mit der die Aufhebung und Ersetzung eines Urteils, das bereits rechtskräftig ist, erreicht werden kann. Dies ist nur in Ausnahmenfällen möglich in denen das Interesse an einer neuen Entscheidung das Interesse an der Aufrechterhaltung der Rechtskraft und somit der Rechtssicherheit übertrifft.

Desembargadores zum gleichen Ergebnis gekommen sein, dies aber mit unterschiedlicher Begründung sind die *Embargos Infrigentes* nicht statthaft.

Die *Embargos Infrigentes* werden innerhalb des gleichen Verfahrens behandelt und normalerweise von einem höheren Organ innerhalb desselben Gerichts entschieden. Der Berichterstatter bei der Entscheidung über die *Embargos Infrigentes* darf nicht derselbe sein, der auch Berichterstatter im Rahmen der *Apelação* war. Idealerweise ist daher sogar Berichterstatter ein Richter, der an dem angefochtenen Urteil überhaupt nicht mitgewirkt hat. Dieser Berichterstatter wiederum legt die Entscheidung nur dem Kollegialorgan vor, wenn nicht eine der Voraussetzungen des Art. 557 des CPC vorliegen und er als Einzelrichter entscheiden kann.

V. Recurso Ordinário

Die *Apelação* ist wie gesehen, dass statthafte Rechtsmittel gegen *Sentenças*, also Endurteile der ersten Instanz.

Unter Umständen kann es aber ausnahmsweise vorkommen, dass auf Grund der Funktion der Parteien oder der zu entscheidenden Sache das *Tribunal de Justiça* das in erster Instanz zuständige Gericht ist.

In diesem Fall ist nicht die *Apelação*, sondern der *Recurso Ordinário* des Art. 496 des CPC das statthafte Rechtsmittel. Zuständig für die Entscheidung dieses Rechtsmittels ist wahlweise der STJ oder der STF. Im Grunde handelt es sich aber trotz unterschiedlicher Bezeichnung und Voraussetzungen wie bei der *Apelação* um ein ordentliches Rechtsmittel mit dem einzigen Unterschied, dass es sich wie gesehen gegen Urteile eines Kollegialorgans richtet und vor dem STJ oder STF entschieden wird. Das Verfahren des *Recurso Ordinário*, der auch *Recurso Ordinário Constitucional* genannt wird, da er seine Grundlage in der Verfassung findet[24], ist daher auch ähnlich dem Verfahren der *Apelação* aufgebaut.

Der *Recurso Ordinário* muss innerhalb einer Frist von 15 Tagen bei dem Präsidenten oder Vize-Präsidenten des Gerichts, dessen Entscheidung angefochten wird eingelegt werden. Dieser nimmt

24 Gemäß Art. 539 des CPC erfolgt eine Entscheidung über den *Recuso Ordinário*: I – durch den STF, im Falle der *Mandados de Segurança*, habeas data und einstweiligen Verfügung, wenn diese in einziger Instanz von den oberen Gerichtshöfen abgelehnt wurden: II – durch den STJ: a) die *Mandados de Segurança*, die in einziger Instanz von den *Tribunais Regionais Federais* (Bundesregionalgerichte) oder durch die *Tribunais* der Bundesstaaten oder des Bundesdistrikts abgelehnt wurden; b) Sachen, in denen ein ausländischer Staat oder eine Internationale Organisation oder eine Stadt oder eine ausländische Person, die sich im Land dauerhaft aufhält, Partei sind.

analog Art. 518 des CPC eine Vorprüfung der Zulässigkeit vor, sodass der *Recurso Ordinário* verworfen wird, sollte der gegen gefestigte Rechtsprechung des *STF* oder *STJ* widersprechen.

Welches Rechtsmittel wiederum gegen diese Entscheidung der Nichtzulassung statthaft ist wird nicht einheitlich beantwortet, wobei die herrschende Meinung eine analoge Anwendung des Art. 544 CPC vornimmt. Das Rechtsmittelverfahren vor dem *STJ* oder STF ist wie bereits dargestellt dem der *Apelação* nachgebildet. Zunächst wird daher auch hier ein Berichterstatter ausgewählt der, entsprechend dem Art. 577 CPC, auch als Einzelrichter entscheiden kann.

Der *Recurso Ordinário* hat, wie bereits angedeutet, auf Grund seines Ausnahmecharakters im System der Rechtsmittel der brasilianischen Zivilprozessordnung nur eine untergeordnete Bedeutung, so dass die weiteren Einzelheiten an dieser Stelle nicht ausführlicher behandelt werden.

VI. Recurso Especial

a) Zweck

Der *Recurso Especial* ist statthaft gegen Urteile der *Tribunais de Justiça* der Bundesstaaten sowie der Regionalen Bundesgerichte, der *Tribunais Regionais Federais*[25]. Unstatthaft ist er bei Beschlüssen oder Urteilen der ersten Instanz, Entscheidungen eines Einzelrichters sowie gegen Urteile andere oberster Gerichthöfe.

Im Gegensatz zur der *Apelação* oder dem *Recurso Ordinário* weist der *Recurso Especial* einige Besonderheiten in der Reichweite des Devolutiveffekts und im Prüfungsumfang auf. Insbesondere letzteres hat große praktische Relevanz, da im Rahmen des *Recurso Especial* keine erneute Feststellung von Tatsachen erfolgt und sich die Begründung des *Recurso Especial* somit ausschließlich auf eine fehlerhafte Rechtsanwendung stützen kann. Diese Beschränkung ergibt sich unmittelbar aus der Verfassung, nach der der *STJ* im Rahmen des *Recurso Especial* eine einheitliche Auslegung und Anwendung von Bundesrecht garantieren soll. Darüber hinaus setzt eine Entscheidung über den *Recurso Especial* voraus, dass alle streitigen materiellen Punkte im angefochtenen Urteil bereits behandelt und entschieden

25 Die Bundesregionalgerichte stellen wie gesehen die zweite Instanz der Bundesgerichtsbarkeit dar, die ausschließlich für Verfahren zuständig sind die den Bund und seine Behörden betreffen. Der *STJ*, dessen Hauptfunktion in der Vereinheitlichung der Anwendung und Auslegung von Bundesrecht liegt, ist sowohl für die Überprüfung der Entscheidungen der ordentlichen Gerichtsbarkeit der Bundesstaaten als auch derjenigen der Bundesgerichtsbarkeit zuständig.

worden sind[26].

b) Statthaftigkeit

Gemäß Art. 105, III der Verfassung ist der *STJ* für die Entscheidung über den *Recurso Especial* zuständig, wenn das angefochtene Urteil:

a) gegen Bundesrecht verstößt:

Jedes Mal, wenn ein *Tribunal de Justiça* oder ein *Tribunal Regional Federal* ein Urteil erlässt, dass Bundesrecht oder einen Internationalen Vertrag (dieser wird über Bundesrecht in nationales Recht umgewandelt) verletzt ist der *Recurso Especial* statthaft. Daraus folgt, dass sich eine Anfechtung des Urteils nicht auf die Verletzung des Rechts eines Bundesstaates oder Verfassungsrecht stützen kann.

b) die Norm einer Regierung eines Bundesstaates für rechtmäßig erklärt, dessen Unvereinbarkeit mit Bundesrecht behauptet wurde.

Im Rahmen der Statthaftigkeit des *Recurso Especial* ist klarstellend darauf hinzuweisen, dass mit Norm einer Regierung nicht ein Gesetz des Bundesstaates, sondern untergesetzliche Exekutivnormen gemeint sind. Wenn es darum geht die Vereinbarkeit des Rechts eines Bundesstaates mit dem Bundesrecht zu überprüfen ist der *Recurso Extraordinário* das statthafte Rechtmittel, nicht der *Recurso Especial*.

c) Bundesrecht anders auslegt als dies in Urteilen anderer *Tribunais* geschehen ist.

c) Verfahren

Der *Recurso Especial* muss innerhalb einer Frist von 15 Tagen innerhalb des Ausgangsverfahrens vor dem Gericht a quo eingelegt werden, wo im Regelfall der Vizepräsident eine vorläufige Überprüfung der Zulässigkeit vornimmt. Wie oben gesehen ist gegen eine ablehnende Entscheidung der Agravo em Recurso Especial statthaft. Wenn diese Hürde genommen worden ist werden die Akten dem *STJ* zugestellt und dort einem Berichterstatter zugeteilt.

26 Hierbei handelt es sich um die Voraussetzung des sogenannten "*prequestionamento*".

Beim *STJ* kann wiederum der Berichterstatter gemäß Art. 577 CPC als Einzelrichter entscheiden, wobei auch hier der *Agravo Interno* statthaft ist, oder einen Termin bestimmen, damit das Kollegialorgan entscheidet.

Gegen diese Entscheidung sind, wie bei jeder anderen Entscheidung auch, die *Embargos de Declaração*, sowie der *Recurso Extraordinário* statthaft. Letzteres ist der Fall, wenn die Entscheidung Verfassungsrecht verletzt. Ebenso können die *Embargos de Divergência* eingelegt werden, die weiter unten genauer dargestellt werden und mit denen im Fall divergierender Entscheidungen zweier Organe desselben Gerichts eine Entscheidung des Senats verlangt werden kann.

VII. Recurso Extraordinário

a) Zweck

Für den *Recurso Extraordinário* ist ausschließlich der *STF* zuständig, der als Höchster Gerichtshof und Verfassungsgericht eine Doppelfunktion innehat.

Der *Recurso Extraordinário* ist grundsätzlich gegen alle Entscheidungen, also auch gegen solche der ersten Instanz, statthaft. Da aber gefordert wird, dass das angefochtene Urteil in einziger oder letzter Instanz ergangen ist wird er in der Regel nur gegen solche Urteile statthaft sein, die von einem Kollegialorgan erlassen wurden.

b) Statthaftigkeit

Gemäß Art. 102 III der Verfassung, besteht die Zuständigkeit des *STF* darin über den *Recurso Extraordinário*, der gegen Urteile in letzter oder einziger Instanz ergangen sind zu entscheiden, wenn das Urteil:

a) gegen Verfassungsrecht verstößt.

Dabei handelt es sich um eine allgemeine Voraussetzung dieses Rechtsmittels, der die weiteren speziellen Varianten mit umfasst. Eine Verletzung der Landesverfassung reicht nach dieser Vorschrift ausdrücklich nicht aus.

b) die Verfassungswidrigkeit internationaler Verträge oder Bundesrecht feststellt.

Nach dieser Vorschrift ist es demnach nicht möglich, den

Recurso Extraordinário einzulegen, wenn im Urteil ausdrücklich die Verfassungsmäßigkeit von Bundesrecht oder internationalen Verträgen erklärt wurde. In diesem Fall kann allerdings dieses Rechtsmittel unter der Variante a) statthaft sein, da dort lediglich ein Verstoß gegen Verfassungsrecht möglich sein muss.

c) ein Gesetz oder eine Norm einer Regierung eines Bundesstaates für mit der Verfassung vereinbar erachtet.

Sollte das Urteil ein Gesetz oder eine untergesetzliche Norm der Landesregierung wegen vermeintlicher Verfassunswidrigkeit unangewendet gelassen haben, ist der *Recurso Extraordinário* nicht unter der Variante c), sondern wiederum unter der Variante a) statthaft.

d) Landesrecht für mit Bundesrecht vereinbar erachtet

In der brasilianischen Rechtsordnung existiert grundsätzlich keine ausdrückliche Hierarchie zwischen Bundes- und Landesrecht. Ein Konflikt zwischen Bundes- und Landesrecht muss daher im Rahmen der Kompetenzverteilung zwischen den Bundesstaaten und dem Bund gelöst werden. Da die entsprechenden Bestimmungen sich jedoch in der Verfassung selbst befinden ist Inhalt der Entscheidung über dieses Rechtsmittel im Ergebnis das Verfassungsrecht.

c) Verfahren

Das Verfahren des *Recurso Extraordinário* ist dem des *Recurso Especial* nachgebildet. Er muss innerhalb von 15 Tagen bei dem Gericht a quo eingereicht werden, wo zunächst eine vorläufige Zulässigkeitsprüfung stattfindet, die normalerweise durch den Vize-Präsidenten durchgeführt wird. Gegen eine ablehnende Entscheidung ist der *Agravo em Recurso Extraordinário* statthaft. Ist diese Hürde überwunden werden die Akten dem *STF* zur Entscheidung vorgelegt, wobei auch hier zunächst ein Berichterstatter ausgewählt wird.

Beim *STF* kann der Berichterstatter gemäß Art. 557 CPC als Einzelrichter entscheiden, wogegen wiederum der *Agravo Interno* statthaft ist oder, wenn er davon ausgeht, dass eine Einzelentscheidung nicht angemessen ist, einen Termin für eine Entscheidung des Kollegialorgans festlegen. Gegen die Entscheidung des Kollegialorgans sind wiederum die *Embargos Declaratórios* statthaft und ausnahmsweise auch die *Embargos de Divergencia*.

Der Hauptunterschied zwischen dem *Recurso Especial* und dem *Recurso Extraordinário* besteht in der Zulässigkeitsvoraussetzung der *Repercussão Geral* (grundsätzliche Bedeutung), die mit der

Verfassungsreform von 2004 eingeführt und 2007 konkretisiert wurde, wobei das klare Ziel die Verringerung der zu bearbeitenden Verfahren am *STF* war. Vor der Änderung hatte der *STF* über 116.216 Verfahren zu entscheiden, wovon alleine 54.575 *Recursos Extraordinarios* waren[27].

Gemäß Art. 102 § 3° der *Constituição Federal* von 1988 ist der Recurso Extraordinário nur statthaft, wenn der Kläger neben der Verletzung der Verfassung auch geltend macht, dass die zu entscheidende Sache von grundsätzlicher Bedeutung ist. Gemäß Art. 543-A des CPC ist eine Sache von grundsätzlicher Bedeutung, wenn sie politische, wirtschaftliche, gesellschaftliche oder juristische Fragen betrifft, die über die Interessen der Beteiligten hinausgehen. Ferner liegt eine grundsätzliche Bedeutung vor, wenn die angefochtene Entscheidung der gefestigten Rechtsprechung des *STF* widerspricht.

Zunächst muss der Berichterstatter überprüfen, ob er den Recurso Extraordinário bereits verwerfen kann, da möglicherweise Zulässigkeitsvoraussetzungen wie die Einhaltung der Frist etc. fehlen oder ein Rechtsmittelverzicht vorliegt. Sollten die allgemeinen Sachurteilsvoraussetzungen vorliegen legt der Berichterstatter den *Recurso Extraordinário* dem Plenum vor, so dass dieses in einer prozessualen Vorprüfung ermittelt, ob eine *Repercussão Geral* geben ist. Hierüber entscheidet das Plenum und wenn es das Vorliegen mit einer hierfür notwendigen 2/3-Mehrheit[28] verneint, kann der Berichterstatter im Wege einer Einzelentscheidung den Recurso Extraodinário mangels grundsätzlicher Bedeutung verwerfen. Nur wenn das Plenum der Meinung ist, dass eine Repercussão Geral gegeben ist kann eine Entscheidung über den Recurso Extraordinário ergehen.

Sollte bereits eine Entscheidung in gleicher Sache gefallen sein, muss selbstverständlich nicht erneut über das Vorhandensein einer grundsätzlichen Bedeutung entschieden werden. Ebenso kann die Turma, das Teilorgan des STF, das für die Entscheidung über den Recurso Extraordinário zuständig ist und aus 5 Richtern besteht, logischerweise auch mit 4 Stimmen das Vorhandensein feststellen, sodass in diesem Fall eine Vorlage an das Plenum unnötig wird.

d) Recursos Repetitivos

Ebenfalls in Anbetracht der hohen Anzahl von zu entscheidenden Verfahren und der daraus folgenden erheblichen Verzögerung hat der Gesetzgeber einen weitere Mechanismus geschaffen mit dem die Entscheidungen des STF und des STJ über den Rechtsstreit hinaus Wirkung entfalten sollen.

27 Die Zahlen des *STF* finden sich unter folgende Adresse: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=REAIProcessoDistribuido.

28 Der STF setzt sich aus 11 *Ministros* zusammen.

Gemäß Arts. 543-B und 543-C des CPC kann ein Gericht, sollte es feststellen, dass wegen einer Rechtsfrage mehrere *Recursos Especiais* oder *Recursos Extraordinários* eingelegt worden sind einen oder mehrere dieser *Recursos* auswählen und an den *STF* oder *STJ* leiten und die anderen Verfahren bis zu einer Entscheidung aussetzen. Nach der endgültigen Entscheidung über den Rechtsstreit erfolgt dann die Entscheidung über die Zulässigkeit der weiteren Verfahren unter der Beachtung der Rechtsprechung des *STF* oder *STJ* in dieser Sache. Ebenso wie die Voraussetzung der *Repercussão Geral* beim *Recurso Extraordinário* wurde auch diese Voraussetzung noch nicht komplett in der gerichtlichen Praxis umgesetzt und führt noch zu operationalen Schwierigkeiten.

VIII. Embargos de Divergência

Die *Embargos de Divergência* haben das Ziel die Rechtsprechung innerhalb des *STF* und des *STJ* zu vereinheitlichen.

Sie sind statthaft gegen Urteile der Turma, die im Rahmen über die Entscheidung des *Recurso Extraordinário* oder des *Recurso Especial* ergangen sind und die einer Entscheidung desselben Gerichts in einem anderen Urteil widersprechen.

Sie müssen innerhalb einer Frist von 15 Tagen eingelegt werden. Nach der Zuteilung an einen Berichterstatter überprüft dieser, ob die *Embargos de Divergência* zulässig sind. Falls es an einer der allgemeinen Zulässigkeitsvoraussetzungen oder einer Divergenz in der Rechtsprechung mangelt wird das Rechtsmittel verworfen.

Sollten die *Embargos de Divergência* zulässig sein stellt der Berichterstatter diese der gegnerischen Partei zu und leitet sie danach dem nächsthöheren Organ zur Entscheidung zu, falls nicht entschieden werden kann welche Auslegung vorherrscht: diejenige in dem angefochtenen Urteil oder die in der Vergleichsentscheidung. Ebenso kann aber auch das Kollegialorgan entscheiden, dass die *Embargos de Divergência* schon gar nicht zulässig waren, etwa weil entgegen der Ansicht des Berichterstatters eine divergierende Rechtsprechung nicht vorliegt.

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PBL

Online
July, 2013

Print issue
August, 2013

PBL

Year 1 | Number 1 | 2013

www.panoramaofbrazilianlaw.com

ISSN 1075-1343 (print)
ISSN 2318-1516 (online)

Year 1, No 1, 2013