

PRIVATE INTERNATIONAL LAW IN BRAZIL: A BRIEF OVERVIEW¹

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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;

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- 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 law⁵; 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 subjects⁶. This same criterion is adopted in several other countries, such as France, Belgium, Spain and Italy⁷.

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 Bevilacqua, *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 Osiris 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 Borrás 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 seat⁸. 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 nationals¹⁰. 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 passport¹¹. The 1934 Constitution also allowed aliens to enter and leave the country, provided that they complied with the legal requirements¹². 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 country¹³. The 1937 Constitution maintained the same rules¹⁴. The 1946 Constitution, for its turn, kept an identical legal treatment with regard to entry and exit of the country and abandoned the quota system¹⁵. 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 legislation¹⁶.

Infra-constitutional legislation currently in force¹⁷, establishes that an alien does not need an exit visa to leave the country¹⁸ and has to possess a visa and a passport in order to enter Brazilian territory¹⁹. It also determines the possibility of *deportation*, if an alien enters illegally or overstays the visa²⁰, of *expulsion*, if the alien's presence is considered contrary to national interest, public policy and good morals²¹ and of *extradition*, if the alien has committed a crime abroad²².

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 nationals²³. 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 system²⁴. 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 property²⁵.

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, Rel.^a Min.^a 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 Constitution²⁶. 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 being²⁸. 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 person²⁹.

However, aliens may suffer some limitations regarding the acquisition of real property in rural areas³⁰, Brazilian ships³¹ or communications media³².

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 possible³³. Other authors take the opposite position³⁴. 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 text³⁵. 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 equally³⁶, 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 aliens³⁷. Some contend that any legislation establishing discriminatory limitations on the right of aliens to work is unconstitutional³⁸. Consequently, proponents of this view consider unconstitutional the statute that conditions the practice of law by aliens on reciprocity³⁹, 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.

Constitution⁴⁰, and all prohibitions to exercise some professions such as public interpreter⁴¹, customs dispatcher⁴², as well as the Labor Laws provision⁴³ that requires that two-thirds of all workers be Brazilian nationals⁴⁴.

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 Constitution⁴⁵, and the silence of the constitutional text to admit expulsion. Pedro Lessa, Ruy Barbosa and Germano Hassloscher, 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 expulsion⁴⁶.

2.3. Determination of the applicable legislation⁴⁷

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 domestic⁴⁸. In Brazil, these rules are basically comprised in the Introductory Law to the Norms of Brazilian Law⁴⁹.

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 Griffiths 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 proximity⁵¹.

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 Brazil⁵³.

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 Saxoferato⁵⁴.

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 law⁵⁵.

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 reexamined⁵⁶.

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 rule⁵⁷.

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 laws⁵⁸.

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, article 3.1.

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 law⁵⁹”.

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’Exception 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, occasionally, *renvoi*.”

61 Id. at 85.

with fraud shall be deemed void and ineffective⁶².

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 than 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 disagreement⁶⁵.

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 respected⁶⁶. 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 act and res judicata*." This principle applies not only in the domestic sphere but also in what concerns private international law issues⁶⁷.

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 principles⁶⁸.

2.4. Jurisdiction⁶⁹

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 legislation⁷⁰.

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 Carnelutti⁷¹, 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 undue⁷³.

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 2002⁷⁶.

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 unacceptable⁷⁷.

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 Brazil⁷⁸.

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 connections⁷⁹.

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 Court⁸⁰.

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 listed⁸². 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 case⁸⁴.

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 Brazil⁸⁵, 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 Andrigli. 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 judgements⁸⁶

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;*

durante a ocupação do território francês na Segunda Guerra Mundial. Sentença do Juízo de primeiro grau que extinguiu 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 expresse 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 prática 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 service⁸⁸, postal service⁸⁹ or service through affidavit⁹⁰. 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-explanatory.

In addition to the above mentioned requirements, the foreign decision shall not be contrary to the Brazilian international public policy⁹¹. 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 letters⁹²

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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