CHOICE OF LAW RULES AND THE MAJOR PRINCIPLES OF BRAZILIAN PRIVATE INTERNATIONAL LAW

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I. INTRODUCTION

A Portuguese colony since its discovery in 1500, Brazil became the United Kingdom of Portugal and the Algarves in 1808, when the royal family fled Napoleon and began to reside in Rio de Janeiro. In 1822, Brazil became an independent political entity under the reign of D. Pedro I. In 1824, D. Pedro I promulgated Brazil's first Constitution. Since 1899, Brazil has had a republican form of government. During this period, seven Constitutions have been promulgated, with the one presently in force dating from 1988.

The scattered statutorily created provisions of Private International Law contained in the Portuguese *Ordenações* (Compilations) continued in force in Brazil after independence. Regulation No. 737 and the Commercial Code, both dating from 1850, established conflict of law rules for contracts. The law on Civil Marriage, Decree No. 370 of 1890, contained conflicts rules for that institution.

In his 1860 *Draft Civil Code* (*Esboço*), Teixeira de Freitas presented conflict of laws legislation that was both an organic whole and scientifically grounded. However, like the other draft codes that followed it, such as those drafted by Nabuco de Araujo (1879), Felício dos Santos (1881) and Coelho Rodrigues (1893), none of which ever became law.

In 1899, Clóvis Beviláqua presented his draft Civil Code, which, with modifications, was ultimately adopted in 1916 as Brazil's Civil Code. He began with a Law of Introduction in which matters relating to Private International Law were fully developed. The technique used at the time in Europe had influenced Beviláqua. The German Civil Code of 1896 contained a Law of Introduction, and the Swiss Civil Code had a "Final Title" with independently numbered articles. In 1899, Carlos de Carvalho published his *Direito Civil Brasileiro Recompilado ou Nova Consolidação das Leis Civis* (Recompilation of Brazilian Civil Law or a New Consolidation of Civil Laws), which purported to be a "simple ascertainment of the law in force."

The Civil Code was enacted in 1916, and went into effect in 1917. Thus, for the first time, Brazil had available an organic body of rules on conflicts,

incorporated in the Introduction to the Civil Code. In two aspects, however, the Introduction did not follow Beviláqua's draft. It was designated simply as an Introduction, and many proposed provisions of private international law were omitted. Legal scholars of the time lamented the mutilation that had occurred.

In 1939, the deficiencies of the Introduction led to naming a Commission for its reform, as well as the reform of the Civil Code itself. The draft of the reform of the Introduction, prepared by Filadelfo Azevedo, Hahnemann Guimarães and Orozimbo Nonato, was enacted by Decree-Law No. 4.657 of September 4, 1942. Called the *Law of Introduction*, it took effect on October 24, 1942, replacing the 1916 Introduction. The new statute, which retained the same structure as the 1916 Introduction, basically limited itself to introducing the principle of domicile for determination of personal law, to prohibiting *renvoi* and to stating rules on characterization.

With the objective of reforming the Law of Introduction, the Federal Government, through Decrees No. 51.005 of 1961 and No. 1.940 of 1962, entrusted Professor Haroldo Valladão with preparation of a draft bill, which he submitted in 1964. Prof. Valladão preferred to draft a separate law with 91 articles, covering "subjects superior to all areas of law." A Revising Committee, composed of Luiz Gallotti, Oscar Tenório and Haroldo Valladão himself, studied the draft bill and approved it in 1970, with certain amendments and a change in title to a draft "Code of Application of Juristic Norms." Even though it constituted an important legal milestone, this draft never became law. In 1984, Senator Nelson Carneiro resubmitted Valladão's work as Bill No. 264/84, but this also failed to pass. The quarter of a century that had elapsed since preparing the draft, the obsolescence of its articles because of legislative changes, and the fact that Brazil was in the initial throes of a Constitutional Convention all help explain the draft's rejection.

The conflicts rules in force today in Brazil continue to be Articles 7 through 19 of the Introduction to the Civil Code of 1942, as well as scattered other laws. Among these may be cited, as examples, Articles 88 and 90 of the Code of Civil Procedure of 1973, which regulate international jurisdiction, and Constitutional Amendment No. 9 of 1977 and Law No. 6.515 of 1977, which respectively permit and regulate divorce.

II. CHOICE OF LAW RULES

INDIVIDUALS

In modern times, two principal systems are used to determine the law applicable to matters of personal status: that of nationality (*lex patriae*) and that of domicile (*lex domicilii*). Long before it was adopted by Article 3 (III) of the French Civil Code of 1804, and fervently defended by Pasquale Mancini (1851 and 1852), the principle of nationality had already been utilized in the Portuguese *Ordenações*. Faithful to its Lusitanian tradition, Brazilian law adhered to this system.[1]

[1] This is apparent in art. 3, § 1 of Decree No. 737 of Nov. 25, 1850; art. 9 of Decree No. 3.084 of Nov. 5, 1898; art. 25 of Carlos de Carvalho's New Consolidation of Civil Law of August 11, 1899, which provided: "The civil status and capacity of foreigners resident in Brazil are governed by the laws of the nation to which they belong."

The Portuguese system was not retained through inertia, for Teixeira de Freitas, inspired by Savigny, had proposed the domiciliary system in Articles 26 and 27 of his Draft Civil Code. The doctrine, led by Pimenta Bueno, the first Brazilian jurist to write a treatise on private international law, and seconded by Pedro Lessa and Beviláqua, reacted against his proposal.

The various drafts for codification of Civil Law, including that of Beviláqua, which became law, espoused the traditional view. Thus, Article 8 of the Introduction to the Civil Code of 1916 provided: "The law of a person's nationality determines his civil capacity, family rights, personal relations of spouses and the marital property system, it being lawful to opt for the Brazilian marital property system." In the absence of nationality, or where there was more than one nationality, Article 9 subsidiarily adopted the law of domicile.

At the same time, a majority of South American countries, which were also largely countries of immigrants, (including Argentina, which was influenced by the Draft Code of Teixeira de Freitas) followed the rule of domicile. In view of the intransigent Brazilian position defending the law of nationality as the choice of law for personal status, the Bustamante Code relegated the issue to the discretion of each contracting party.[2] This brought it bitter criticism from legal scholars.

In 1922, during the Juridical Congress of Rio de Janeiro, Rodrigo Otávio successfully championed the acceptance of the domiciliary principle, asserting that it represented, for new countries with a vast territorial reach, "a requirement of public order, imposed by the highest sentiments of legitimate defense of national life." Even though Eduardo Spínola, João Monteiro, Bulhões de Carvalho, Filadelfo Azevedo, Orozimbo Nonato and Hahnemann Guimarães would later close ranks in defense of the principle of domicile, it was surely the outbreak of the Second World War and the consequent evidence of the existence of racial pockets inside national territory, that underscored the wisdom of the teachings of Teixeira de Freitas, and that caused the Federal Government, through the hasty expedient of Decree-Law No. 4.657 of 1942, to publish the Law of Introduction to the Civil Code. The principal innovation of this Law of Introduction lay in its consecration of the principle of domicile to govern personal status, thus breaking with the encrusted tradition of our Private International Law.

Article 7 of the Law of Introduction, which is still in force, provides: "The law of the country in which the person is domiciled determines the legal rules on the beginning and end of legal personality, his name, capacity, and family rights." The principal scholars of Private International law in Brazil interpret current private law on capacity in the following fashion:

(1) Serpa Lopes emphasizes that Article 7 of the Law of Introduction applies to both *de facto* and *de jure* capacity, since it makes no distinctions between the

[2] Article 7 of the Bustamante Code provides: "Each contracting State shall apply as personal law that of the domicile or that of nationality or that which its domestic legislation may have prescribed, or may hereafter prescribe."

two. Thus the law of the domicile always prevails, subject to limitations imposed by reasons of public order. Such limitations are justifiable, since "legal capacity is constantly filtered by notions of public order."[3]

(2) According to Tenório, civil capacity is regulated by personal law. He emphasizes that the question of the capacity for rights and their exercise are in confrontation because of Article 3 of the Civil Code and Article 7 of the Law of Introduction. The former enshrines "the principle of equality between citizens and foreigners as to the acquisition and enjoyment of civil rights." *Per se*, the literal wording of Article 7 of the Law of Introduction makes capacity depend upon the law of the domicile, meaning that any incapacities declared therein must be recognized. However, Article 3 of the Civil Code, which provides "that the law shall not distinguish between persons in the acquisition and enjoyment of civil rights," makes "such lack of capacity ineffective if it does not exist in our legislation." Thus, for example, our legislation does not recognize presumptive death, or the incapacity of a priest to marry, even if created in the law of domicile.[4]

(3) For Batalha, the *caput* of Article 7 of the Law of Introduction alludes to *de facto* capacity, since he deems *de jure* capacity "is confused with legal personality and special legal capacity, whose exercise are governed by the same laws that regulate diverse juristic situations, such as *lex rei sitae, lex sucessionis, lex obligationis, lex loci delicti commissi*, etc."[5]

(4) Relying on the traditional doctrine of Teixeira de Freitas, on Brazilian Constitutions, and on Article 2 of the Civil Code, Valladão considers that personality is always governed by Brazilian law. In his view, Article 8 of the Introduction does not embrace *de jure* capacity, nor even general capacity or personality, which are regulated by Brazilian law.[6] Article 7 of the Law of Introduction does not mention personality *per se*, and the word "capacity," which comes after "the beginning and the end of personality" can only mean *de facto* capacity. In this way, by virtue of public order, Brazilian law governs personality.[7]

The Brazilian choice of law with respect to capacity, *de facto* or *de jure*, is the law of the domicile, conditioned by Brazilian public order. Thus the general rule is the application of the law of the domicile and the exception is application of Brazilian law, whenever the former is contrary to the national public order. Thus, Valladão's position is untenable, for it turns the exception into a rule, as well as signifying a return to the antiquated criterion of territoriality. The Draft Code of Application of Juristic Norms contains the following rule in Article 22: "The existence and the recognition of personality are governed by Brazilian law." Even

[3] Miguel de Serpa Lopes, 2 *Comentários à Lei de Introdução ao Código Civil* 62 (Freitas Bastos: Rio 1959).

[4] Oscar Tenório, 1 *Direito Internacional Privado* 431 (§ 620) (Freitas Bastos: Rio 11th ed. 1976).

[5] Wilson de Souza Campos Batalha, 2 *Tratado de Direito Internacional Privado* 85 (RT: São Paulo 2d ed. 1977).

[6] Articles 2 and 3 of the Civil Code.

[7] Haroldo Valladão, 2 *Direito Internacional Privado* 7 (Freitas Bastos: Rio 2d ed. 1977).

though Article 25 provides that "Special incapacity with respect to rights is governed by the law that governs the substance of these rights if they do not manifestly contradict public order," the general rule on personality faithfully portrays the above- cited viewpoint of Valladão, which is divorced both from our national tradition and from the developing comparative experience of Private International Law.

LEGAL ENTITIES

Before the Civil Code went into effect, Brazil had recognized the existence of foreign legal entities, both public and private. Carlos de Carvalho dedicated several articles of his *New Consolidation* to this topic. Article 162 recognized the capacity of a private foreign legal entity, although with certain restrictions. According to Article 160, the determinative criterion for the nationality of a legal entity was the place of its constitution. In addition to reaffirming this principle, Article 163 asserted that recognition of that capacity by Brazil did not signify a new creation of personality, but only subordinated such capacity to territorial laws. Finally, the requirements for considering a legal entity as a national were set forth in Article 161.[8]

The provisions relating to legal entities, which in Beviláqua's draft had been placed in the body of the Code,[9] were moved to Articles 19 through 21 of the Introduction of 1916 upon the initiative of the Senate because they concerned international law. Those articles reflected the traditional principles of Brazilian law

[8] Articles 160 through 163 of the New Consolidation of the Civil Laws provided:
Art. 160 — The nationality of legal entities depends upon the place where the act of their organization was celebrated, and results from the sovereignty which originally recognized their personality, not that of the individual persons who now compose it or may do so; and obtains so long as there is no change in headquarters or domicile.
Art. 161 — The following are deemed domestic:
(a) every company organized within the territory of the Republic and authorized by law;
(b) simple or *comandita* partnerships organized solely by Brazilians outside the country, if the document is filed in Brazil and the firm name registered in Brazil;
(c) companies created abroad, if they have an establishment or purpose in Brazil.
Sole paragraph — In order to acquire a Brazilian vessel it is not enough that the company be domestic; the majority of partners must be Brazilians when it is not a corporation.
Art. 162 — A foreign private legal entity shall not enjoy active civil capacity in the Republic, except for commercial or civil companies that are not anonymous or limited by shares, unless they obtain the recognition of their legal personality from the Federal Government.
Art. 163 — Legal capacity and the sphere of action of a foreign legal entity are determined by its domestic law; the recognition of such capacity by an act of Brazilian sovereignty does not imply a new creation or personality, but rather subordinates this capacity to our territorial laws, viz.:
(a) before commencing to do business the conditions of publication and registration must have been complied with, where so determined by law.
(b) all acts performed in the Republic shall be subject to its respective laws and regulations and to the jurisdiction of its courts, without any possibility of claiming any exception based upon its charter.
(c) its representative must be invested with full and unlimited powers to deal with and resolve all transactions.
(d) a bond to secure the acts performed in Brazil may be required.
(e) it may be subject to special supervision.

[9] Book I, Title I, Chap. II.

that "foreign legal entities may be recognized" and that "the domestic law of legal entities determines their capacity". The *caput* and § 1 of Article 11 of the 1942 Law of Introduction decreed: "Organizations that have purposes of collective interest are governed by the law of the State in which they are organized. § 1 — They may not, however, have Brazilian branches, agencies or establishments before their constitutive documents have been approved by the Brazilian government and are subject to Brazilian law."

Serpa Lopes points out that even though in Brazilian law the criterion for determining the status of a legal entity had always been governed by its respective domestic law,[10] Article 11 of present Law of Introduction created another criterion, the law of the statute under which the legal entity is constituted. This article is inconsistent with Article 60 of Decree-Law No. 2.627 of 1940 — the old Companies Law. While Article 11 chooses the place of constitution of the company as the governing law, Article 60 institutes a two-fold test for determining Brazilian nationality: organization in accordance with Brazilian law and location of the administrative headquarters within Brazil. The harmonizing solution encountered was to utilize the precept of Article 11 in the international sphere to resolve territorial conflicts among laws where a Brazilian domestic legal entity is involved, while utilizing the principle of Article 60 to characterize the Brazilian nationality of corporations. Finally, a distinction was drawn between recognition of the legal entity so as to permit it to practice isolated legal acts, both by reason of the previous Introduction and the existing Article 11, and between permitting the carrying out business activities when Brazilian governmental approval was required.[11]

Dolinger views the provision now in force as an interpretative complement to the 1916 text, and he concludes from the juxtaposition of the two introductory laws that "the recognition of personality and the determination of capacity of legal entities in Brazilian Private International Law derive from the law of their nationality, which is determined by the country of their constitution...." Later, he distinguishes between the recognition of a foreign legal entity and its doing business within Brazilian territory. The former derives solely from the law of its nationality, whereas the latter depends upon the submission of its constitutive acts to the Brazilian authorities and its subjection to Brazilian law. As to the incompatibility of Article 11 of the 1942 Law of Introduction with Article 60 of Decree-Law No. 2.627 of 1940, which has been retained in force by Law No. 6.404 of 1976, he accepts the solution offered by Serpa Lopes, adapted as follows: "The nationality of a legal entity within the sphere of our Private International law is characterized by the country of its constitution; however, in order to be deemed Brazilian, a company, besides being constituted in our country, must establish its administrative headquarters here."[12]

Valladão considers that the present Law of Introduction did not repeat the principle of recognition of foreign legal entities that appeared in Article 19 of the

[10] 1916 Introduction, art. 20.

[11] Serpa Lopes, *supra* note 3, at 7-53.

[12] Jacob Dolinger, *Direito Internacional Privado* 442-445 (Freitas Bastos: Rio 1986).

former Introduction, because it was unnecessary in view of the constitutional principle of the equality of foreigners and Brazilians. The principal consequence of recognition is that a foreign legal entity is deemed equivalent to a Brazilian. It is impossible, however, to recognize capacity broader than that of Brazilian legal entities. The principal restriction on private foreign legal entities is that they may do business in Brazil only with the approval of the Brazilian government. This principle, which is more than 100 years old in Brazil, corresponds to the classic distinction between recognition of existence, with the capacity to practice isolated juristic acts,[13] which is governed by the law under which the company was constituted; and doing business, the actual achievement of company purposes, which depends upon Brazilian law. To govern the existence and the capacity of foreign private legal entities, Valladão's draft bill chose the law under which they were constituted. He understood that the law that regulates the existence of a legal entity is that disciplining its constitution. He did not regard *the law of constitution* and *the law of the place of constitution* as identical, for a legal entity can be constituted in one place in accordance with the law of another.

PROPERTY

While Brazil was still a colony, Portuguese law followed the principles of the Italian *statuta* school. The first in Brazil to depart from the *statuta* doctrine was Pimenta Bueno. Even though he followed the unitary principle of Savigny, Pimenta Bueno's thinking was decidedly original. He admitted that the royal statutes covered both movable and immovable property but saw a difference between them derived from the very nature of things. Movable property has no fixed base in a territory, cannot be subjected permanently to the law of the locale, normally does not reflect upon its security, and is, in addition, highly circulative. It cannot depend solely upon the law of one territory, and so is generally submitted to the personal law of its respective owner. Only exceptionally is it subjected to the law of its situs.[14]

Teixeira de Freitas considered the distinction between movable and immovable property to be false, since it derived from a fiction that ceased in the face of proof of the existence of things in a determined place. Although following Savigny's system of applying the law of the situs to both movable and immovable property, Freitas eventually eliminated the exceptions for movable property in transit. In order to do so, he located such property in time. In Article 411 of his Draft Civil Code, the situs of movable things was where they were found on the date of acquisition of the alleged *in rem* rights, or on the date of acquiring

[13] *I.e.*, to bring suit in court.

[14] These three types of exception are: "1st. When the law of their present situs attaches them to immovable property for legal effects; 2d. When it places them under its special jurisdiction, either as pledges or guaranty of debt, or in the case of an embargo, attachment, privilege and preferences, or in instances of seizure under some legal title, prohibition on export, etc.; 3d. When local law establishes some other positive determination respecting them, or prohibits application of the personal law of the owner." Antonio Pimenta Bueno, *Direito Internacional Privado* 87 (J. Villeneuve: Rio 1863).

possession, or where they were found on the date on which a judicial proceeding or action was filed concerning them.[15]

Even though adopting a unitary regime, the drafts of a Civil Code by Nabuco de Araújo[16] Felício dos Santos,[17] Coelho Rodrigues,[18] as well as the "New Consolidation of Civil Laws" by Carlos de Carvalho,[19] did not espouse Teixeira de Freitas' formula.

Clóvis Beviláqua dedicated two articles of the introductory title of his draft Civil Code to this subject. In Article 33,[20] he adopted the same interpretation of Savigny's theory that had been made by Article 11 of the Argentine Civil Code.[21] In Article 34,[22] he gives us a glimpse of the influence of Teixeira de Freitas' formula using location in time, which had already been evident in the Draft by Coelho Rodrigues. Article 33 was amended by the Revising Committee,[23] and also in the substitute submitted to the Chamber of Deputies by Andrade Figueira,[24] so

[15] Article 411: "The place of the existence of immovable things in the Empire or outside it, is their location; and that of movable things, where they are found on the date of acquisition of *in rem* rights are alleged over them, or where they are found on the date on which a judicial suit or proceeding concerning them is filed."

[16] Article 47 — "Immovable property located in Brazil, and movables found here . . . are subject to Brazilian law."

[17] Article 23 — "Immovable property located in Brazil and movables found here are subject to Brazilian law."

[18] Article 19 — "Movable goods, like immovable property, are subject to the law of the place of their location."
Article 20 — "Movable goods, whose location is changed during the course of litigation involving them, continue subject to the law of the location which they had when that action was commenced." In this last article there is evidence of the influence of the "location of the elements of choice" theory of Teixeira de Freitas.

[19] Article 30 — "Territorial law governs property located in Brazil."

[20] Article 33 — "Movable goods that the owner always carries with him and all those destined for transport from one place to another, are governed by the personal law of the owner. Movable goods having a permanent location are, like immovables, subject to the law of their location."

[21] Art. 11. Los bienes muebles que tienen situación permanente y que se conservan sin intención de transportalos, son regidos por las leyes del lugar en que estan situados, pero los muebles que el proprietario lleva siempre consigo, o que son de su uso personal, esté o no en su domicilio, como también los que se tienen para ser vendidos o transportados a otro lugar, son regidos por las leyes del domicilio del dueño.

[22] Article 34 — "Movable goods, whose location is changed pending an *in rem* action over them, continue subject to the law of the location they had when that same action was begun.

[23] Article 33 — "Movable property is governed by the law of the nationality of the owner. Property with a permanent location, however, like immovable property, is subject to the law of the situs."

[24] Article 33- "Property, whether movable, immovable or in the soil, is subject to the law of its situs, except the first is subject to the personal law of the owner as to those goods that he always carries with him or are for his personal use and those which he has to be sold or transported to another place, and are subject to the law of their initial situs if this changes during the pendency of an *in rem* action thereon."

that Article 10 of the 1916 Introduction is quite similar to the wording of that substitute:

> Movable or immovable property is subject to the law of the situs, provided, however, that the personal law of the owner governs movable property that he uses personally, or that he always has with him, as well as that destined for transportation to other places.
>
> Sole paragraph 1: Movable property whose situs changes during the course of an *in rem* action involving it, continues to be subject to the law of the situs it had at the beginning of the litigation.

It is important to summarize the criticism made by Machado Villela of Article 10 because of its acuity and relevance. The Coimbra master speaks of three formulations of the concept. Although easily determinable as to content, the formula *goods of personal use*, literally interpreted, makes it appear that personal law must be permanent. In view of its inspiration in Savigny, however, such governance must be interpreted only in the instance of the uncertainty or variability of the situs of the property. The formula *property that the owner always has with him* should also be understood in light of its doctrinal source, imagining that the legislator was referring to the case of the relocation of the owner. The formula *property destined for transportation* must be considered as conforming to the idea of movement, including goods that, due to commercial transactions, are destined for transport or that are already in transit. After showing that the exceptions of Article 10 embrace the juristic relationships within which the property is itself considered *"uti singuli,"* he asserts that the rule in question is indefensible in theory and harmful in practice. It is indefensible because the personality of laws is not comprehensible in relation to things that are external to a person, even though they may serve him. It is harmful because it diverges from the generally adopted system, thereby subtracting important values from the rule of law of a country.[25]

The present Law of Introduction to the Civil Code treats matters relating to interterritorial conflicts of *in rem* rights in Article 8, which provides:

> To characterize property and to regulate the relations concerning it, the law of the country in which it is situated shall be applied.
>
> § 1. The law of the place of the domicile of the owner shall be applied to movable property that the owner brings with him or destines for transport to other places.
>
> § 2. Pledges are governed by the law of the domicile of the person in whose possession the pledged thing is found.

Tenório is of the opinion that Article 8 of the present Law of Introduction is technically superior to its predecessor. The rule of *lex rei sitae*, applied *uti singuli* to movables and immovables, has certain exceptions. Even though the distinction between types of movable property may create obstacles, the objective is to avoid brusque changes in the law regulating royal acts. He agrees that the exceptional application of the law of the owner's domicile is the most fitting, since it is almost

[25] Álvaro da Costa Machado Villela, *O Direito Internacional Privado no Código Civil Brasileiro* 254-257 (Imprensa de Universidade: Coimbra 1921).

always the law of the location of the property. "The objective of the legislator was to fix the *lex rei sitae* for pledges, avoiding the uncertainties of determining the place of the thing. We consider the pledged thing, therefore, located at the domicile of the person who has direct possession thereof. Legal domicile, by involving the *lex rei sitae*, is a reflection of an interpretation of the legal text, in light of its own terms and its purposes."[26]

For Amílcar de Castro, property is characterized by the law of the place where the thing is located. Article 8 refers to property as a unit (*uti singuli*) and to *in rem* rights as an attribution of the interest directly to the person of the owner (*jus in re*). The same article confirmed the unitary system, encompassing permanently affixed movables and immovables. With respect to pledges, his opinion is that "Article 8 § 2 abandoned the general rule, ordering, as an exception, observance not of the *jus rei sitae* at the actual situs of the thing, but rather the law of the place of domicile of its possessor at the moment of creating the pledge."[27]

Haroldo Valladão considers that neither Article 8 of the 1942 Law of Introduction nor Article 10 of the 1916 Introduction caught the idea of movement inherent in the exceptions created by Savigny. Both provisions, which began in original sin as copies of the bad text of the Argentine Civil Code, resulted in uncertain and confusing formulations. Interpreting the text now in effect, he finds that it contemplates property considered individually — *uti singuli*, and is limited to rights in real property — *jura in re*. It does not reach either the question of capacity nor the effects and substance of acts. Preliminarily, it is up to the *lex rei sitae* to clarify property — characterization *lex causae*. As a general rule, it is incumbent upon the *lex rei sitae* to regulate rights included in the law of things. With respect to the exceptions, the solution is to interpret them strictly, *i.e.* subjecting to the law of the owner's domicile "only those movables that have not been permanently fixed here [in Brazil]." He considers § 2 of Article 8 absurd, an unfortunate copy of Article III of the Bustamante Code, which could lead to "pledged personal property... permanently located in Brazil [being] governed by the foreign law of the domicile of the person who habitually has possession of such property... the domicile of the pledge creditor." Haroldo Valladão confesses that he followed Teixeira de Freitas in preparing the referred to articles in his draft bill in order to avoid the excesses of Savigny. Valladão refers generically to property, without specification, and entrusts to the *lex rei sitae* the governing of all rights that are part of the law of things,[28] including incapacity to enjoy and acquire rights *in rem*, as *lex causae*.[29] With respect to acquisition of rights by adverse possession (*usucaptio*), he adopts the law of the place where the time period is completed.[30]

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[26] 2 Tenório, *supra* note 4, at 163.

[27] Amílcar Castro, *Direito Internacional Privado* (Forense: Rio 1987).

[28] Article 43 — "Property, possession and respective *in rem* rights are governed by the law of the situs."

[29] Article 24 — "Specific legal incapacities are governed by the law that regulates the substance of these rights, insofar as they are not incompatible with Brazilian law."

[30] Article 44 — "The acquisition of possession and *in rem* rights is governed by the law of the situs of the property on the date on which the respective conditions were complied with, and those of alleged rights

For Serpa Lopes, Article 8 refers to property interests in a broad sense, it being understood that they are *uti singuli* and not *uti universitas*. He considers that the criterion is almost identical with the former Introduction because, in principle, the *lex rei sitae* is applicable to both movable and immovable property. Only as an exception does the law of the owner's domicile govern movable property carried by the owner or destined to be transported to other places. Obviously, all other movable property is governed by the *lex rei sitae*. Comparing the present provision with Article 10 of the Introduction of 1916, he asserts that the latter was clearer. It required not only that the movable property be for personal use, but also that the owner had it with him. He also points out that the present provision refers expressly to characterization, which is governed by the country of location. He is more critical of Article 8 § 2's criterion of the domicile of the owner of a thing given in pledge in relation to corporeal things than for intangibles, due to the substantial differences in each type of pledge.[31]

OBLIGATIONS: FORM

Since colonial times, our national law has enshrined the principle *locus regit actum*. The *Ordenações Filipinas* (Philippian Compilation promulgated in 1603) decreed that "contracts made abroad should be governed by the common law and the Laws of that Kingdom where those instruments and contracts were made."[32]

Both Regulation No. 737 of 1859,[33] and the Consular Regulation of 1847 maintained this principle. In the doctrine, Pimenta Bueno,[34] Teixeira de Freitas,[35] and Carlos de Carvalho[36] took the same position.

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in rem actions, according to the same law on the date on which the judicial proceeding commenced.

Sole paragraph. Conditions that occurred during the period when the law of the prior situs was in effect will be recognized, including the lapse of time for adverse possession."

[31] 2 Serpa Lopes, *supra* note 3, at 155-183.

[32] Book 3, Tit. 59, § 1.

[33] Article 3 — "The laws and commercial usage of foreign countries govern: ...§ 2 — the form of contracts agreed to abroad, except for cases provided in this Code, and contracts performable within the Empire, that were celebrated by Brazilians in places where there was a Brazilian Consul."

[34] "Thus donations, wills, marriage agreements or others drafted under the terms of local law, are everywhere held valid as to their external formalities, except for the cases we shall later treat. This principle, which is expressed by the maxim *locus regit actum*, is generally recognized, and could not be otherwise, since it is founded upon eminently worthy reasons decisive for the interests of countries and their subjects. In truth, without it a person who was outside his own country would often see himself unable or only with great difficulty able to take actions or to make dispositions, since he would not be able to observe the external form required by his national law or that of another foreign law. Form was certainly not invented to hinder acts or to impede transactions, so that one must accept this luminous principle." Pimenta Bueno, *supra* note 14, at 105.

[35] Article 406 — "The laws and customs of foreign countries govern the form of contracts agreed therein." Freitas, *Consolidação das Leis Civis* 241-241 (Jacintho Ribeiro dos Santos: Rio 1915).

[36] Article 33 — The formalities of legal acts are ruled by the laws and customs of the country in which they are celebrated.

Article 11 of the 1916 Introduction to the Civil Code expressed the principle in question as: "The extrinsic form of public or private acts shall be governed by the law of the place of performance." The use of the imperative in the wording of this article led to a debate on whether the rule was mandatory or optional, an argument that occurred centuries ago when the rule was first established. It is known that the earliest supporters propounded the obligatory nature of the rule, whereas later supporters were inclined to deem it only optional. Machado Villela[37] and Tenório[38] interpreted the rule literally as mandatory. The majority of legal scholars, however, considering, *inter alia*, the tradition of our law and the direction taken by the case law, have preferred to interpret the rule as optional.[39]

Nothing similar to Article 11 of the Introduction of 1916 is found in the 1942 Law of Introduction. In an unconvincing response to criticism, the Committee that drafted the 1942 Law defended itself by stating that its elimination was merely to end the bitter controversy over whether the rule in question was mandatory or optional, and that it had not introduced any basic change in the prior system, since "various new precepts have resulted in the validity of acts performed in the form established in the place of performance, although adherence to this rule is not strictly obligatory."[40] It was not apparent that, in addition to the traditional doubt, a new controversy arose over the legal effect of the rule[41] because Art. 9 § 1 of the Law of Introduction's provisions on the matter are limited to form.

Article 34 — The formalities of acts celebrated by Brazilians in those places where there is a Brazilian consular agent, will observe Brazilian law, so that they can be executed in Brazil. Carlos de Carvalho, *supra* note 1, at 13.

[37] 2 Valladão, *supra* note 7, at 26; Batalha, *supra* note 5, at 327-8; Machado Villela, *supra* note 25, at 226.

[38] 2 Tenório, *supra* note 4, at 38.

[39] *See* Rodrigo Otávio, 1 *Manual do Código Civil Brasileiro* 333 (part 2, Livraria Jacintho: Rio 1932); Clóvis Beviláqua, *Princípios Elementares de Direito Internacional Privado* 255, 258 (Freitas Bastos: Rio 3d ed. 1938); 2 Valladão, *supra* note 7, at 30-31.

[40] "*A propos* the form of legal transactions, as the absence of a rule similar to that of Article 11 of the former Introduction has been questioned, the Committee takes this opportunity to clarify that it did not introduce any basic alteration into the former system, even though it eliminated the wording that had generated profound controversies over the mandatory or optional character of the traditional rule.

But the validity of acts performed in the form determined by the place in which they are carried out results from various new provisions, although compliance therewith is not strictly mandatory.

Thus Art. 17 recognized, in principle, the efficacy of acts, as well as any unilateral declarations, issued outside Brazil, conditioned only upon considerations of public order; the following precept expressly consigned the option of Brazilians to have recourse to the consular authorities for various purposes, an adoption formerly implicit in the consular regulations.

Evidence that is so closely linked to form continues to be governed by the *lex fori*, except for proof excluded by Brazilian law.

Lastly, the generic rule of Article 9 for obligations presupposes application of the law of the place where they were incurred, including the respective form; § 1 confirms the requirement of compliance with an essential form prescribed by our law, if the obligation is to be enforced in Brazil.

Otherwise, characterizing the essential rule of the Glossators, it was emphasized in the § 1 of Art. 9 that the observance of an essential formal requirement under Brazilian law did not prejudice compliance with the particular features of foreign law as to the extrinsic requirements of the act." *Arquivos do Ministério da Justiça e Negócios Interiores* 58, n. 1 (June 1943).

Because the rule is traditionally, customarily and internationally accepted, doctrinal writers have tried to prove it is in effect in the present Brazilian system of private international law. They have done so in several ways. Eduardo Espínola and E. Espínola Jr. emphasize that, notwithstanding the absence in the Law of Introduction of a provision similar to Article 11 of the former Introduction, *locus regit actum*, as a rule of normal jurisdiction, "continues to govern, with the exception of the final part of Article 13, which rejects evidence inadmissible under Brazilian law." They reach this conclusion by taking into consideration that the Article in question submits proof of facts occurring outside Brazil to the law in force at the place of occurrence, and the method of concluding juristic acts is included within such means of proof.[42]

For Amílcar de Castro, "Brazilian law has always adhered to the rule *locus regit actum* and, under the principle of the continuity of laws, confirmed by Article 2 of that same Law of Introduction, this rule is still in effect."[43]

Tenório feels that the precept relating to form, found in Article 9 § 1 of the Law of Introduction, applies only to obligations to be performed in Brazil and subject to essential requirements of form in Brazilian legislation. Since the rule *locus regit actum* has been internationally recognized, it prevails even in the absence of a legal provision. Thus, by its nature and substance, the cited rule continues as part of Brazilian private international law, even though the text of Article 11 of the Introduction was not reproduced.[44]

According to Batalha, the Law of Introduction confirmed "in principle" the rule *locus regit actum* in Article 9 § 1. It also determined that for obligations that are to be performed in Brazil and depend upon a special form, this requirement of form should be observed, even though the particular features of foreign law relative to the extrinsic requirements of the act were also permissible.[45]

Valladão feels that the Law of Introduction was omissive on this subject matter, with Article 180 of the Bustamante Code,[46] which he characterizes as incomplete, confused and inconsequential, inspiring the "weird" § 1 of Article 9 of the Law. He regards the requirement of observance of special forms of Brazilian law with respect to obligations to be performed in Brazil as an exception to the general rule of *locus regit actum*. But the phrasing of the last clause — "provided, however, that the peculiarities of foreign law as to extrinsic requirements of the act

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[41] Amílcar de Castro, *supra* note 27, at 516.

[42] Eduardo Espínola & Eduardo Espínola Filho, 2 *A Lei de Introdução ao Código Civil Brasileiro Comentada* 579-580, 586 (Freitas Bastos: Rio 1944).

[43] Amílcar Castro, *supra* note 27, at 516.

[44] 2 Tenório, *supra* note 4, at 43-44.

[45] 2 Batalha, *supra* note 5, at 326.

[46] Art. 180 — "The law of the place of the contract and that of its performance shall be applied simultaneously to the necessity of executing a public deed or document for the purpose of giving effect to certain conventions and to that of reducing them to writing."

are permissible" could lead to the paradox of having "a public instrument of Brazilian law with the extrinsic requirements of foreign law."[47]

Case law has affirmed the continuation of the rule. Thus, the decision of the Guanabara State Supreme Court in Civil Appeal No. 49.839, which adopted the opinion of Clóvis Paula da Rocha,[48] this decision upheld the validity and enforceability of the holographic will of Gabriella Bensanzoni Lage Lillo, made in Italy, her country of domicile, in conformity with Italian law, under the principle of *locus regit actum*. Even though this principle was not specifically provided for in the present Law of Introduction, it was held to be a customary precept of Brazilian law.[49] This decision was affirmed by the Federal Supreme Court; the Reporter, Justice Luiz Gallotti, invoking the same legal opinion of Clovis Paula da Rocha, stated that in this case "the principle *locus regit actum* is indubitably applicable."[50]

Review of Brazilian doctrine and case law supports the conclusion that *locus regit actum* is in effect in our law. It must be emphasized, however, that despite its noncontroversial appearance, this choice of law rule contains doubts with serious legal implications. The main one lies in the difficulty of differentiating form from substance,[51] which makes the reach of the maxim debatable. Moreover, questions relating to its basis and character have not yet been satisfactorily resolved.[52]

A step in the right direction was the Draft Bill of the General Law of the Application of Juristic Norms, which provided that the traditional law of the place of performance governed the extrinsic form of instruments.[53] This left open,

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[47] 2 Valladão, *supra* note 7, at 30, 32.

[48] "The principle *locus regit actum*, dating from customary law ever since Bartolus, the 13th Century Post-Glossator, was affirmed in the *Ordenações Filipinas*, Book III, Title 59, note 1; in Regulation No. 737 of 1850, art. 3 § 2; in the *Consolidação* of Teixeira de Freitas, arts. 406-7 and in arts. 857-858 of his *Esboço* (Draft Code). On this principle, Art. 11 of the former Law of Introduction of the Civil Code of 1916 stated: 'The extrinsic form of public and private acts shall be governed by the law of the place of performance.' The present Law of Introduction to the Civil Code has no general rule in this respect, in contrast to what occurred under the prior legal document, which adopted the above-mentioned principle for legal transactions in general, including wills as a species of the genus. Notwithstanding, the precept continues in Brazilian law, as a customary principle. Thus we do not see how one can deny validity and enforceability to a holographic will made by the testatrix in accordance with the formalities of the law of Italy, the place where it was drafted, dated and signed, by a person who was domiciled there." *Arquivos do Ministério da Justiça* 73-77, n. 104 (Dec. 1967).

[49] Diário de Justiça da Guanabara 45, ap. 19 (Jan. 29, 1970).

[50] 61 R.T.J. 99-104 (1972).

[51] "Se non chè la uniformità d'opinioni intorno a tal punto del diritto internazionale privato è più apparente che reale; perdura tuttavia la confusione derivata dal non aver esattamente fissata la portata della regola; ancora oggi non si concordi nel determinare il concetto di "atto" o quello di "forma", e sono spesso considerati elementi estrinseci di validità di un negozio giuridico alcuni che invece sono elementi sostanziali, o viceversa; grandi differenci si trovano nelle disposizioni dei vari Stati: difference nei guiudicati, anche di uno stesso paese, e in identici casi, alcuni scrittori vogliono che la regola locus regit actum sia obbligatoria sempre altri facoltativa; alcuni che non possa essere applicata agli atti solenni, altri no, ecc." G.C. Buzzati, L'Autorità Delle Leggi Stranieri Relative Alla Forma Degli Atti Civili.

[52] Paul Lerebours-Pigeonnière & Yvon Loussouam, *Droit International Privé* 433 (Dalloz: Paris 1970).

[53] Art. 29 — "The extrinsic form of public or private acts is governed by the law of the place of

however, three other possible options: the law regulating the substance of the act (*lex causae*); the law of the nationality or domicile of the declaring party; or, finally, the law of the common nationality or domicile of contracting parties. Although adopting the centuries-old rule, this wording gives explicit support to other choice of law criteria accepted by comparative law, and obviates the once epidemic academic discussion of the mandatory nature of *locus regit actum*. The Revising Committee of 1970, in an attempt to make the Bill an even stronger weapon in the fight against annulling documents for mere extrinsic defects, added Art. 29 § 2: "Acts that would be valid under Brazilian law will not be nullified in Brazil because of a defect in extrinsic form."[54]

OBLIGATIONS: SUBSTANCE

Articles 4 and 5 of Regulation No. 737 of November 25, 1850, confirmed the law of the place of performance (*lex loci executionis*).[55] Teixeira de Freitas preferred the law of the place of performance, literally reproducing the precepts of Regulation No. 737 in Articles 409 and 410 of his *Consolidação das Leis Civis* (Consolidation of Civil Laws) and retaining the same choice of law element in Article 1962 of his Draft Code.[56]

In the *caput* of Article 13, the 1916 Introduction to the Civil Code adopted the law of the place of contracting (*lex loci contractus*), whereas in its subsequent paragraph, it retained the traditional orientation of the law of the place of performance (*lex loci executionis*).[57]

The *caput* of Article 9 of the current Law of Introduction, applicable to contracts between persons present at the same site, continues to prescribe the law of the place of contracting (*lex loci contractus*). Contracts between people not

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performance, if either the form of the law regulating the substance of the act or that of the law of the nationality or domicile of the declarer, or that common to the contracting parties, need not be observed."

[54] For an exegesis of the provisions of this Draft Bill of the General Law on the extrinsic form of acts, see 2 Valladão, *supra* note 7, at 31-36.

[55] Art. 4 — "Commercial contracts agreed to in a foreign country but performable in the Empire, shall be governed and decided by the commercial legislation of Brazil.

Art. 5 — Debts between Brazilians contracted in foreign countries are presumed to be contracted according to the laws of Brazil."

[56] Article 1962 — "The effects of contracts celebrated within or without the Empire, to be performed in the Empire, shall be judged by the laws of the Empire, whether the parties be citizens or foreigners. But the effects of contracts that are to be performed outside the Empire, even if celebrated in the Empire, shall be judged by the laws and uses of the country in which they are to be performed, whether the parties be citizens thereof or not."

[57] Art. 13 — "In the absence of a stipulation to the contrary, the law of the place where they were assumed governs the substance and effects of obligations.

Sole paragraph. The following, however, shall always be governed by Brazilian law: I — Contracts entered into in foreign countries, when performable in Brazil; II — Obligations contracted between Brazilians in foreign countries; III — Acts relating to immovable property located in Brazil; IV — Acts relating to the real mortgage system of Brazil."

present at the same place, however, covered by § 2 of that Article, are subject to the law of the residence of the proponent.[58]

The most influential Brazilian writers on private international law do not always follow the same paths in their analysis of the legislation about the substance of contracts.[59] For Serpa Lopes, since the phrase "in the absence of a stipulation to the contrary" is found in Article 13, the doctrine of free choice of the parties is confirmed. Such freedom, however, is not absolute, and is to be exercised only in subsidiary areas, not where mandatory rules apply. In relation to the present Article 9 of The Law of Introduction, after distinguishing the concepts of freedom of

[58] Art. 9 — "To characterize and regulate obligations, the law of the place where they are constituted shall govern. ...

§ 2 — An obligation resulting from a contract shall be deemed constituted at the place where the proponent resides."

[59] "La substance et les effets des obligations, même si lex parties contractantes sont des étrangers, seront réglés, sauf stipulation expresse des intéressés, par la loi du lieu du contrat. Ce principe de la *lex loci contractus*, généralisé par la disposition de l'article 424 du Code de commerce qui concerne lex lettres de change, est tout à fait acceptable et même défendu par des voix autorisées, quand lex parties ne sont pas de la même nationalité. Entre outre, la disposition brésilienne laisse ouverte le champ a l'interventions de la volonté, tout en respectant le principe de l'autonomie. Evidemment, si elle respecte les lois territoriales rigoureusement obligatoires, basées sur des raisons d'ordre public, les parties contractantes, ou ceux qui font des actes unilatéraux peuvent déterminer la loi régulatrice du fond et des effets de l'acte. A défaut d'une manifestation positive et valable dans ce sens, la substance et l'effet des obligations qui découlent des contrats ou des déclarations unilatérales de volonté, entre personnes vivantes, sont réglés par la loi du lieu de la célébration des actes, sauf violations du droit national des parties contractantes ou des disposicions d'ordre public de la loi territoriale. L'éxecution de ces obligations depend de la loi du lieu de l'éxecution" (Rodrigo Otávio, *Le Droit International Privé dans la Legislation Brésilienne* 137-138 (Sirey: Paris 1915).

"Voluntary juristic acts, notably contracts, are governed, from the point of view of their substance and effects, by the law which the parties contemplated in contracting. In domestic law the contract is law between the contracting parties. In international law, it is only logical that it should have the same scope." Tito Fulgêncio, *Síntese de Direito Internacional Privado* 142 (Freitas Bastos: Rio 1937).

"The correct opinion appears to me to be that which, in the first place, respects freedom of choice. This is not to say that individual desires are to be elevated into a dominant force whose command overrules legal determinations. In order to produce legal effects, individual volition must be placed in some way under the aegis of the law, from which it draws all of its social efficacy. Thus, the rules of public order prohibit volition from producing juristic effects counter to its provisions. The perpetual transfer of personal liberty and other similar acts cannot be performed in Brazil; if they are concluded abroad, they cannot be enforced here.

"Placed within its natural limits and acting in accordance with the law, volition is the causative force for conventional and unilateral obligations. Consequently, in international relations, one should be permitted to choose the law to which freely contracted obligations are submitted. Nevertheless, as legal analysis plainly distinguishes the substance, the effects and the execution, volition can rule only in respect of the first two of these. Execution naturally falls under the domain of the law of the place where it is carried out. On the other hand, volition may not be express, but may be clearly discerned from presumptions. Since, however, these should not produce arbitrary variations, they should be fixed by law or the doctrine."

"In contracts *inter absentes*, it will at first appear difficult to apply the *lex loci contractus*, because of the hesitance, noted in the doctrine, as to the determination of the moment in which the obligational link is forged in such cases. ... By adopting the system of dispatch, which seems to me the best grounded and which both the Civil and Commercial Codes accepted (articles 1086 and 127, respectively) the contract is therefore supposed signed at the moment in which the acceptance is sent, the place of contracting is precisely that whence the acceptance is dispatched. *Videtur consumari contractus in loco ubi acceptatio facta est, quia illic utriurque consensus coivit*" Beviláqua, *supra* note 39, at 358-359, 361-362.

choice and public interest,[60] he first questions whether the law in force permits freedom of choice when permitted by the law of the place of creation of the obligation. Second, he questions whether free choice is permitted when the conflict is governed by Brazilian law itself. He concludes by accepting freedom of choice, based upon logic and sound doctrine, when a mandatory law does not apply. Free choice is also a valid criterion when Brazilian law governs the contract. In his opinion, the criterion adopted by Article 9 in dealing with the problem of conflicts in characterizations relating to obligations, diverges from the classical doctrine of *lex fori*, which was also enshrined by the Bustamante Code. He concludes that despite the contrary opinions of certain writers, in practice it is not always possible to disregard the *lex fori*.[61]

Before dealing with freedom of choice, Amílcar de Castro speaks of the existence of mandatory, optional and supplemental rules[62] and distinguishes freedom of choice from voluntary submission.[63] He believes that jurists have persisted in the expedient sophistry of Dumoulin, trying to introduce the illusory concept of freedom of choice into Private International Law. He finally arrives at the conclusion, following in Niboyet's footsteps, that this principle does not exist in this branch of law.[64] Analyzing positive Brazilian law, Amílcar de Castro states that it does not distinguish "between consideration of contracts celebrated in the *forum* and attribution of effects to contracts executed abroad,"[65] for Article 9 of the Law of Introduction confirms, as the choice of law element, the *jus loci contractus*.

[60] "The function of public order is a remedy in the sense of the non-enforcement of a foreign law whenever such enforcement would have a prejudicial effect upon the country where it was to be carried out. Freedom of choice...is the option to choose a determined law." 2 Miguel Serpa Lopes, *supra* note 3, at 199- 200.

[61] *Id.* at 202-204.

[62] "Mandatory contain criteria that must necessarily be used in the legal review of the act..." "Optional are those which, up to a certain point, permit private parties to choose between two or more criteria for the review of their acts..." "Supplementary are those that impose a determined criterion for cases where the manifestation of volition of the parties, permitted by the optional provision, shows itself to be deficient, void or non- existent..." Amílcar de Castro, *supra* note 27, at 434- 437.

[63] By fixing his domicile or executing a contract in a certain country, a person is voluntarily submitting to the juridical system of that country. But in both cases, the person is performing an act which results in the application of law, without in the strict sense choosing any law.

"By the expression 'freedom of choice' is meant that the parties, executing their contracts in the place where they normally do so, if the situation is not normal, may choose to have it interpreted under any law, foreign or domestic, which has a relation to it." *Id.* at 437.

[64] "Parties do not have the option of choosing the law to govern their transactions; rather they have the freedom to transact or to conduct their business within the special law available to them in their forum. Within this special law organized exclusively by the national legal system they find a mandatory, optional or supplementary provision regulating their expressions of volition." *Id.* at 444.

"...[L]'autonomie de la volonté, considérée comme le pouvoir de choisir soi-même la loi compétente, n'y existe pas." J.P. Niboyet, "La Théorie de l'autonomie de la volonté," 16 *Recueil des Cours de l'Académie de Droit International* 7 (1927 I).

"...[L]a volonté des parties ne suffit pas à internationaliser un contract de manière a s'affranchir des règles imperatives du droit interne, qui perdraient, dès lors, tout leur force obligatoire." J.P. Niboyet, *Manuel de Droit International Privé*, n. 686, *cited in* 2 Tenório, *supra* note 3, at 175.

[65] Amílcar de Castro, *supra* note 27, at 433, 445.

In relation to contracts made at a distance, he believes that Art. 9 § 2 of the Law of Introduction reproduces Article 1087 of the Civil Code.[66] The difference in wording between the two should be apparent, since the verb "to reside" in § 2 has the connotation of "to be found, to be, to be present." Thus, the place in which the proponent resides means where he physically is. Thus, § 2 confirms the provisions of Art. 9, retaining a rule identical to that of Article 13 of the revoked Introduction to the Civil Code.[67] He regards obligations created under a foreign jurisdiction as valid in Brazil, as a general rule, if they have been "characterized and governed by the law of the country in which created." If, however, under § 1 of Article 9, the obligation to be performed in Brazil has an essential formal requirement, this must be observed, even though the peculiarities of foreign law relating to the form of the act are permitted. This paragraph contrasts the substance with the form of a contract, by treating as "essential form" that which is normally denominated *ad solemnitatem* form, which encompasses the requirements necessary for the obligation to exist. In conclusion, he considers that not even for granting or denying effect to contracts concluded abroad does complete freedom of choice obtain, since the parties cannot choose the law they desire.[68]

Tenório places freedom of choice among the most important of elements of choice of law. He states that, within domestic law, the principle of freedom of choice is a liberty granted to the contracting parties by the law itself, with a very clear distinction between mandatory and optional rules. There are two opposing views in conflicts of law. According to the first, freedom of choice is much more extensive in private international law than in domestic law. But the second does not give the parties freedom to choose the law that will govern their contract. He does not, however, see any satisfactory arguments in favor of the trend that would have mandatory laws lose such character in Private International Law. If a law is mandatory, all acts dependent on its application are subordinate to it. Conflicts between mandatory laws are resolved by the rules of Private International Law and not by the volition of the contracting parties.

The expression "in the absence of a stipulation to the contrary" that appears in Article 13 of the repealed Introduction to the Civil Code created controversy because it was ambiguous. To some, it meant an express designation of the proper law to govern contracts, whereas others believed it permitted the parties to select the law for their contracts. Tenório views that statutory language as signifying "the parties could determine the law of their contract, excluding application of the law of the place where the obligation was created. The general principle was and is that of the law *lex loci contractus*."[69] Such law may, in turn, direct that local law to be

[66] Article 1087 — "A contract is deemed celebrated in the place where it was proposed." Tenório considers the reference to Article 1087 of the Civil Code unnecessary. "This provision, incontestably one of domestic law, considers the place where the contract was proposed inside Brazilian geographical areas, when the contracting parties are Brazilian residents, or, in other words, when the offer is formulated by a resident of Brazil at the time of the offer, and is received by another resident of Brazil on that occasion." 2 Tenório, *supra* note 4, at 179.

[67] Amílcar de Castro, *supra* note 27, at 446.

[68] *Id.* at 447, 448.

[69] 2 Tenório, *supra* note 4, at 176.

applied, or that of the nationality or domicile of the parties, or even another, thus possibly accepting actual freedom of choice.

Article 9 of the 1942 Law of Introduction does not refer to freedom of choice, nor does it deviate in any case from the rule of the law of the country where the obligations are created, in favor of the application of Brazilian law, as the Introduction to the Civil Code had done.[70] Thus, in accordance with this article, the law of the place of the obligation governs both characterization and substance, without excluding freedom of choice if permitted by the law of the country where the obligation was constituted.

The general rule of Article 9 of the Law of Introduction governs contracts between persons present in Brazil. As to contracts between those abroad, the choice of law rule chosen in § 2 was the residence of the proponent.[71] Thus "the place of residence of the person from whom the *initial offer* came determines the law to be applied to the contract."[72] Brazilian law has distanced itself from the domiciliary system because that system is too rigid to be applied to contracts, except where the capacity to contract obligations is concerned. The element of residence is more in accord with the mobility of business and should be treated with flexibility. "Residence, as part of the conflicts rule under examination, is a simple fact, that of the place of the proposal."[73]

According to Batalha, no explicit legal provision is needed in order to exercise freedom of choice. This principle may be utilized in the areas of dispositive, optional and supplemental laws, and also in the interstices not covered by such norms. This principle is not capable, however, of setting aside a mandatory law of the forum imposing a choice of law element. Given the mandatory nature of Article 9 of the Law of Introduction, freedom of choice can only be exercised,

[70] "The innovations contrary to the law of the place of contract do not bring any benefit to the solution of conflict of law problems. The same is true in respect to the exceptions to the general rule. In this particular, the sub- paragraph of Article 13 of the Introduction broke with the unity of the system, by ordaining the application of Brazilian law to certain contracts, such as those agreed in foreign countries and to be performed in Brazil. The Law of Introduction (1942) orders the application of the law of the place where the obligations were contracted, so as to characterize and govern them. It does not permit exceptions, leaving to case law and commentary the consideration of situations arising from so-called property contracts. "From the above ideas, we must conclude that the 1942 Law of Introduction to the Civil Code is superior on this point." *Id.* at 187-88.

[71] "When examining prior law, we must note that Art. 13 of the Introduction admitted the principle of free choice in private international law, even for obligations contracted within Brazil. One of the principal criticisms of this provision was that it accentuated the antagonism between the precept of freedom of choice as a principle of private international law, and, in the strict sense, the denial of that same precept in domestic law. Art. 9 of the present Law of Introduction abolished this illogical antagonism; obligations contracted in Brazil no longer fall within the realm of freedom of choice. But an obligation contracted abroad may be subject to Brazilian law in case the law of the place of contracting permits freedom of choice, and the parties resolve to choose Brazilian law." *See id.* at 177.

[72] *Id.* at 180.

[73] *Id.* at 180-81.

under both private international and domestic law, in the absence of an imperative law.[74]

Brazilian law has traditionally utilized the theory of *lex loci celebrationis*, also called *lex loci contractus*, as a subsidiary element of choice. This was what Article 13 of the former Introduction meant, even though it permitted stipulations to the contrary, except for the provisos contained in its sole paragraph, as well as in Article 9 of the Law of Introduction currently in force.[75]

The principal criticisms to which this doctrine is subject are that the place of celebration is fortuitous and that its localization is difficult. In respect to contracts by correspondence, § 2 of Article 9 of the Law of Introduction, maintaining uniformity with Article 1087 of the Civil Code, considers a contract celebrated in the place in which it was proposed, since the difference in terminology between them is apparent, according to a note by Amílcar de Castro.[76]

Valladão states that Brazilian law "has always adopted the principle of freedom of choice in the matter of contractual obligations."[77] He traces its parentage from Article 5 of Regulation 737 of 1850, Pimenta Bueno, Teixeira de Freitas, the Nabuco and Coelho Rodrigues Drafts, the Consolidation of Carlos de Carvalho, the Beviláqua Draft and its confirmation in the Article 13 of the 1916 Introduction. Doctrinally, this principle was supported by Ferreira Coelho, Gomes de Castro, Espínola, Tito Fulgêncio and Carlos de Carvalho. Beviláqua, in his turn, refuted the opinion of Machado Villela that the option could only be exercised between supplementary choices under a mandatory rule (that of the place of contracting), making it clear that this interpretation was incorrect.

Despite its omission in the 1942 Law of Introduction, the principle of freedom of choice did not disappear. Valladão explains the absence of the principle in question from the law in effect: "It was an expression prohibited by the dictatorial regime under which Brazil suffered, and *which also explains the absence of the place of contracting or of choice* in the Civil Procedure Code of 1939-40."[78] He defends his position by case law on the choice of forum.[79] Invoking

[74] 2 Batalha, *supra* note 5, at 252-254.

[75] "It may be observed, however, that this law is not the only one to govern the contractual relationship in a totalitarian fashion. In the first place, the general capacity of contracting parties is governed by their personal (domiciliary) law; specific capacity for certain contracts (*e.g.* the purchase of Brazilian ships, in terms of Article 155 of the Federal Constitution) is governed by Brazilian law when such contracts have an element linking them to Brazilian territory. Mistakes and defects of volition are governed by the law of the place of celebration, as prerequisites for the validity of their substance. Contracts concerning the legal regime of property situated in Brazil are subordinated to Brazilian law. When performance of contracts must take place in Brazil, one must keep in mind provisions of Brazilian public order, such as those dealing with usury, granting of moratoriums, the foreign trade regime, prohibitions on payments in gold or in foreign currency or in Brazilian currency at a determined exchange rate." *Id.* at 262-263.

[76] *Id.* at 248-252.

[77] 1 Valladão, *supra* note 7, at 366.

[78] *Id.* at 366.

[79] 2 Valladão, *supra* note 7, at 185-186.

the doctrine, he cites Tenório and Espínola, even though they only consider choice valid with respect to optional laws.

The law of the place of the constitution of voluntary obligations is the first subsidiary law of freedom of choice. The revoked Article 13 of the Introduction used "where they were contracted" for "the substance and effects". The present Article 9 of the Law of Introduction says "where they were constituted."[80] Thus, the law of the place of constitution of a voluntary obligation governs its validity and effects. Questions referring to execution, such as form of payment, currency, delivery, release and indemnification, are for the *lex loci executionis*. The Article in question also speaks of characterization, incorporating Article 164 of the Bustamante Code, which extends the principle of *lex causae* to obligations.[81]

Valladão thought that the Law of Introduction was unfortunate in setting up a uniform subject matter rule that a contractual obligation "is deemed created in the place where the proponent resides."[82] This provision, an unthinking copy of Article 1185 of the Bustamante Code, deviates from the traditional Brazilian choice of law rule of the law of the place where the contract was proposed, "since residence of the proponent, requiring a *lasting stay* to be actually established, is not a synonym for 'place in which it was proposed' or 'the place where the proponent may be found'."[83] He further emphasizes that the paragraph in question does not resolve the problem when the person has more than one residence or no residence.[84]

[80] "The distinction between *substance and effect* on the one hand (*lex loci contractus*) and manner of performance on the other (*lex loci executionis*) came from the Beviláqua Draft, which took it from Art. 4 of the Portuguese Commercial Code of 1888 (mode of performance). This distinction traces its parentage in France back to Weiss and Despagnet (1886); in Holland to Asser (1879); in Italy to all writers and commentators on Article 9 of the Code of 1865 ("la sostanza e gli effetti delle obbligazioni si reputano regolati della legge del luogo in cui gli atti furono fatti"), many of which were cited by Beviláqua in his discussion of Article 13 of the Introduction in the Legislature, and which had in Brazil whole-hearted support from Lafayette Pereira (Draft Code DIP, 58 and 59) and in the works of Pimenta Bueno, following Foelix, who had followed Story, in turn accompanied by Huber and Voets and all the way back to Bartolus..." 2 Valladão, *supra* note 7, at 188.

[81] *Id.* at 188-189.

[82] Art. 9 § 2.

[83] "Since Beviláqua, the majority of the doctrinal writers have understood that in Brazilian law the time of the formation of a contract by correspondence is the dispatch of the acceptance or the reply. This is based upon Article 127 of the Commercial Code and Article 1086 of the Civil Code. The place of the formation of the contract by correspondence is where the offer is dispatched from by reason of Article 1087, although Breno Fischer is a respected dissenter therefrom. Note that the offer must be accepted. The Treaty of Montevideo and the Benelux Convention speak of the place of dispatch of an initial offer which is accepted. The Uruguayan Code preferred, in Article 1265 of the Civil Code, to unify place and time: 'en el lugar y el acto en que la respuesta del que acepto el negocio llega al proponente.'

"From the point of view of Private International Law, Beviláqua preferred the criterion of the place of dispatch but selected the *lex fori* (§ 54); Rodrigo Octávio accepts the place from which the offer came, which is that of *lex fori*, since it is that of Brazilian law (n. 395); also Espínola (§ 68 and Law of Introduction II/571) and Fischer (no. 218). Serpa Lopes opted for the system of *lex fori* for private international law (Vol. II at 360) and Tenório (Law of Introduction no. 634) as well, by adopting the place of residence of the offeror, in Article 9 § 2 of the Law of Introduction." 1 Valladão, *supra* note 7, at 373. See also Vol. II at 189-90.

[84] For a comparative law treatment of the problem, *see* 2 Valladão, *supra* note 7, at 190.

Finally, he calls attention to the fact that using the system of the law of the place of the offer may be detrimental, subjecting Brazilians "to the laws of over-developed countries from *whence come the offers* of loans, assistance, etc.... to be accepted by us."[85]

Because of the absolute language of the *caput* of Article 9 of the present Law of Introduction, one cannot say that the doctrine of freedom of choice exists as an indication of the applicable rule under Brazilian Private International Law. The parties are left exclusively with the exercise of contractual liberty in the sphere of supplementary provisions of applicable law, as determined by the *lex loci contractus*.

The cited Article adopts the *lex loci contractus*, also called the *lex loci celebrationis*, as the choice of law rule for the substance or foundation of contracts between persons present in Brazil. By itself this rule has revealed itself incapable of satisfactorily resolving the complexities of the substance of contracts. This has led some writers[86] to make a distinction that does not exist in the present Law of Introduction: validity and effects are governed by the law of the constitution of the obligation, but performance by the law of the place of performance.

With respect to contracts between absent persons, notwithstanding the efforts of Amílcar de Castro and Batalha to interpret reside as *to be found*, the choice of law rule fixed by Brazilian law is the law of the residence of the proponent. With respect to the fear expressed by Valladão that offers generally come from over-developed countries, and the position of Tenório that the proponent is always the one who makes the initial proposal, one should point out that Articles 1080 through 1083 of the Civil Code[87] do not require that the initial offer is necessarily the one to be considered under the terms of Article 9 § 2 of the Law of Introduction.

The Valladão Draft Bill deals with the substance of contractual obligations in Articles 50 through 52 and stipulates rules better able to perform their task than those now in effect.[88] Article 50, after confirming freedom of choice, limited only

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[85] 1 Valladão, *supra* note 7, at 373-374.

[86] 2 Valladão, *supra* note 7, at 188-189.

[87] Art. 1080 — An offer to contract binds the offeror, unless the contrary results from the terms thereof, the nature of the transaction, or the circumstances of the case.

Art. 1081 — An offer is no longer binding if: I — made with no time limit to a person present, it was not immediately accepted. A person is considered present if he contracts through the telephone. II — made with no time limit to an absent person, enough time shall have elapsed for the reply to have come to the knowledge of the offeror. III — made to an absent person, the reply has not been given within the given time limit. IV — prior to or simultaneous with the reply, a retraction by the offeror has come to the attention of the other party.

Art. 1082 — If the acceptance, by an unforeseen circumstance, comes to the attention of the offeror late, he shall immediately so communicate to the acceptor, under penalty of liability for damages.

Art. 1083 — Acceptance outside the time limit, with additions, restrictions or modifications, amounts to a new offer.

[88] Art. 50 — "The substance and the effects of obligations arising from declarations of volition are governed, in the absence of a stipulation to the contrary, according to the law of the place where they are contracted.

§ 1 — Stipulation of another law shall be express and shall not be enforceable if it constitutes an abuse of right (art. 11) or offends public order (arts. 12 and 79).

§ 2 — Nevertheless, obligations contracted abroad between Brazilians are presumed to be contracted under Brazilian law.

§ 3 — Contracts executed in Brazilian Consulates abroad are governed by Brazilian law.

§ 4 — If there is a conflict of laws in the conceptualization of the place of contracting, Brazilian law shall be applied if this would make the place of contracting Brazil; if the conflict is between foreign laws, the laws of the habitual residence, domicile or nationality of the declarants or that common to contracting parties, or in the absence thereof, those of the place of performance shall be applied subsidiarily; if doubt remains, the laws most favorable to the achievement of the intent of the interested parties shall govern.

§ 5 — If it is impossible to locate the contract in Brazil or abroad, the subsidiary factors enumerated in the preceding paragraph shall be applied.

§ 6 — Contracts relating to immovable property shall be subject to the law of the situs thereof."

Art. 51 — Contracts performable in Brazil are governed by Brazilian law.

Art. 52 — All aspects of execution of obligations, including the currency of payment, are governed by the law of the respective execution.

Sole paragraph. Obligations in foreign currency contracted abroad, to be enforced in Brazil, are valid.

by abuse of right and public order, fixes the law of the place where they were contracted as the element of choice for the substance and effects of voluntary obligations. The manner of performance of obligations, in turn, was left by Article 52 to the law of the place of their respective performance. The Draft Bill offers a systematic approach to arrive at the law applicable to contracts between persons not present in Brazil: If there is a conflict of laws over the conceptualization of the place of contracting, Brazilian law shall be applied if it places the contracting in Brazil. If the conflict is between foreign laws, secondary sources are to be applied, including the laws of habitual residence, domicile or nationality of the declarants, or the common one of contracting parties, and in the absence of these, the place of performance. If there still remains any doubt, the law most favorable to the achievement of the intentions of the interested parties shall govern (Art. 50 § 4). If it is impossible to locate the contract either in Brazil or abroad, the above cited considerations are to be used as secondary sources (Art. 50, § 5).

INHERITANCE (SUCCESSIONS)

The *statuta* theory of plurality in successions, propounded by former Portuguese law, continues to be applied in Brazil. In 1863, influenced by Mancini, Pimenta Bueno accepted the principle of a unified succession using the law of the nationality of the decedent, even though he added exceptions.

> All reasons, from those of philosophy and fairness to mutual convenience, dictate that the succession of foreigners must be granted to their heirs, characterized as such by the personal law of the deceased and under its terms, in the absence of some special provision in royal statutes prohibiting some particular feature thereof.... If, however, one of several heirs is a citizen of Brazil, and if the decedent had property within Brazil, then if by his personal law foreign heirs would receive more than our citizen, our local law should favor the interest of its subjects.... The rule to be followed is that the law of succession of a foreigner should receive, in the country of the location of real property, and in relation thereto, all the effects which our territorial law does not prohibit or refuse, or which are not rejected on moral grounds....

> The law of the decedent should be respected...except for specific prohibitions of the law of our territory.[89]

The majority of the drafts of a new Civil Code inclined towards simply adopting the principle of the law of nationality.[90] In 1879, Nabuco de Araújo, on the other hand, accepted the wording of Article 8 of the Italian Civil Code of 1865, in which the principle of the law of nationality appears in a universal and unitary form.[91]

Carlos de Carvalho, in the introduction to his *New Consolidation*, stated that "the case law of the Federal Supreme Court seems to have accepted the principle of the personal nature of the right of succession, or the application of the law of the nationality of the *de cujus hereditate quaeritur*. ... and in art. 31, combined with art. 25, determined that the law of nationality would govern."[92]

Beviláqua's draft adopted the pure nationality principle. Andrade Figueira's substitute proposal to the Chamber of Deputies added the unitary and universalist character of Article 8 of the Italian Civil Code. The Senate, in turn, introduced modifications according to which the succession of husbands of Brazilian women or fathers of Brazilian children should be subject to Brazilian law. Thus Article 14 of the 1916 Introduction states:

> Intestate or testamentary succession, the order of preference of the heirs, the rights of heirs and the intrinsic validity of the provisions of wills, shall be governed by the national law of the decedent, whatever be the nature of the property and the country in which the property be located, except for the provision of this Code on unclaimed inheritances in Brazil; if, however, the decedent was married to a Brazilian, or left Brazilian children, Brazilian law shall apply to the proceeding.
>
> Sole paragraph. Brazilian Consular officials may serve as public officials in the celebration and approval of the wills of Brazilians executed abroad, always respecting the provisions of this Code.

In this Article, the influence of the unitary theory of Savigny can be noted in the phrase "whatever be the nature of the property", and the universalism of Mancini can be noted in the following phrase, "and the country in which the property be located." The Brazilian system thus wound up as follows: the appropriate law to govern succession is the national law of the decedent, unless he

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[89] Pimenta Bueno, *supra* note 14, at 76-79.

[90] Felício dos Santos, art. 21 ; Coelho Rodrigues, art. 21; Beviláqua, art. 38 of the Introduction.

[91] *See* his art. 39 (although with exceptions) §§ 1 and 2.

[92] Art. 25 — "The status and civil capacity of foreigners resident in Brazil are governed by the laws of the nation to which they belong.

Art. 31 — Intestate and testamentary succession are governed by the law that governs the status and civil capacity of the foreigner, whatever the nature of his property, provided that strictly mandatory laws shall be observed when based upon reasons of public order when they make prohibitions or regulate the organization of land ownership, or deal with questions of morals.

Sole paragraph. The Brazilian heir is guaranteed the right to prefer that his share be governed by the terms of Brazilian law."

was married to a Brazilian or had Brazilian children, in which case Brazilian law governs.

The present Article 10 of the 1942 Law of Introduction retained the principles of universal and unitary succession, and confirmed the principle of domicile rather than nationality.

> Succession by death or by absence is governed by the law of the country in which the deceased or departed was domiciled, whatever be the nature or the location of the property involved.
>
> § 1 — The order of inheritance of the assets of foreigners situated in Brazil shall be governed by Brazilian law, in benefit of the Brazilian spouse and children of the couple, unless the law of the domicile is more favorable to them.
>
> § 2 — The law of the domicile of an heir or legatee governs his capacity to inherit.

The idea of granting protection to Brazilian spouses and heirs in inheritance has its roots in the consular compacts celebrated during the days of the Empire. The last part of Article 14 of the 1916 Introduction and the first § 1 of Article 10 of the 1942 Law of Introduction both adopted it. Beginning in 1934, this principle was constitutionalized. In the 1988 Constitution, it appears in Article 5(XXXI):

> Inheritance of foreigners' assets located in the Country shall be governed by Brazilian law, for the benefit of the Brazilian spouse or children, whenever the personal law of the deceased is not more favorable to them.

Machado Villela considered the influence of the nationality of the wife and children as a censurable illogic. It diverted Brazilian law from both the line of perfection traced by the Italian school and prior Brazilian law as set out by the doctrine and case law.[93]

Haroldo Valladão criticized the unitary and universal criterion, stating that it is only possible when there is reciprocity, that is between States that adopt the same principle for the same subject matter. The principle does not function in practice, especially because of the exceptions: the more favorable treatment given Brazilian spouses and children over the property of foreigners located in Brazil, the special treatment of Brazilian children and spouses in the marital regime of separate property, unclaimed inheritances left in Brazil, etc. He emphasizes that, in practice, not only do attorneys proceed to open proceedings in each State where there are assets, but people also leave several wills. In his Bill, he abandoned unitary and universal succession. Even though he preferred the criterion of complete plurality, he restricted it to immovable property.[94]

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[93] Machado Villela, *supra* note 25, at 145.

[94] Art. 63 — "Intestate or testamentary succession is governed under the law of the domicile of the decedent on the date of death.

§ 1 — As to real property, succession is governed by the law of the place of its location on the date of death."

III. THE MAJOR PRINCIPLES

RENVOI

Former statutory Portuguese law had no rule on renvoi. Following suit, Brazilian statutory law prior to 1917, as well as the Introduction to the Civil Code of that same year, also made no provision for renvoi. However, during that period the doctrine, followed closely by case law, concerned themselves with the question.

João Carlos de Carvalho provided in line 1 of Art. 25 of his *Consolidation of Civil Laws* that "foreign provisions of civil law shall prevail, even though their conflict of law provisions be contrary to this rule."

For Clóvis Beviláqua, "if the question cannot yet be considered settled, the strongest arguments, both from logic and doctrine, as well as authority and law, give eminent support to the theory of renvoi."[95] Eduardo Espínola accepted only one level of renvoi.[96] Lafayette Pereira[97] and Francisco Morato[98] were also favorable to renvoi.

Haroldo Valladão, in a thesis dated 1929, announced that he favored permitting renvoi at both first and second levels. His arguments were criticized by Oscar Tenório and Amílcar de Castro[99] who did not accept renvoi. In his cited thesis, Valladão mentions three decisions in which the Supreme Court of the State of São Paulo accepted the principle of renvoi.

The first decision dealt with the succession of an Uruguayan citizen, the son of Italian citizens, who died in Italy, where he had transferred his residence after having lived in São Paulo. The lower court applied the decedent's national law, that is, substantive Uruguayan law. The heir appealed, requesting application of the Italian substantive provision that favored her. The State Supreme Court reversed the decision, holding that in cases of conflicting nationality, the law of the domicile should be applied, according to Article 9 of the 1916 Introduction. Thus, without perceiving it, the State Supreme Court accepted second-level renvoi.[100]

In the second case, the lower court denied homologation to a separation by mutual consent of an Argentine husband and a Russian wife on the grounds that the national law of the husband did not permit such a form of separation. The State Supreme Court granted the appeal, accepting the renvoi to the substantive law of the domicile (Brazil) called for by Argentine conflict of laws rules.[101]

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[95] Beviláqua, *supra* note 39, at 146.

[96] 1 *Sistema do Direito Civil Brasileiro* 203 (Litho-Typ. e Encadernação Reis & C.: Bahia 1908).

[97] 1 *Pareceres* 124 (1902).

[98] 81 *RT* 12-19 (1932).

[99] Cf. J. R. Franco da Fonseca, *Contra a Renúncia e a Devolução* 137-138 (Max Limonad: São Paulo 1967).

[100] 36 *RT* 404.

[101] 61 *RT* 499.

In the third cited case, the State Supreme Court confirmed a separation by mutual consent of an American husband (Alabama) and his Brazilian wife, holding that the law of Alabama, which called for the application of the law of the domicile, should prevail.[102]

During the 1930s, the trend of the cases was still unchanged. In 1931, the Supreme Court of the State of São Paulo, by majority vote, accepted the devolution that Prussian law, which as the law of the nationality of the parties was selected by Brazilian choice of law rules, made to Brazilian law, the law of the place of the marriage. The headnote, written by Judge Achilles Ribeiro, the Reporter, stated: "[I]f the Prussian Code orders personal legal relationships to be governed by the law of domicile, Brazilian law should be applied to govern the effects of a marriage between Prussians, celebrated in Blumenau, Santa Catarina, where they were domiciled."[103]

In 1931, the Supreme Court of the State of São Paulo decided an appeal concerning the amicable separation of a Syrian husband and his Argentine wife, applying Brazilian law of the domicile. The Reporter, Judge Theodomiro Dias, said in his opinion: "Far from constituting an attack upon Brazilian sovereignty, the adoption of the principle of renvoi or devolution implies homage to this sovereignty, where Brazilian law itself, in a certain set of circumstances, accepts a foreign notion, and makes it an integral part of Brazilian legislation."[104]

The Federal Supreme Court has also been favorable to renvoi, as the following two cases show. In the first, the court of first instance confirmed a petition for amicable separation between a Brazilian husband and his wife, a U.S. citizen from Massachusetts, which only admitted divorce for cause, because of the renvoi made by United States law to the law of the domicile, that is, substantive Brazilian law. The Supreme Court, in Civil Appeal No. 6.716, in an opinion rendered by Justice Plínio Casado dated December 27, 1937, upheld the lower court decision. In the second case, the court of the first instance granted a legal separation by mutual consent to a Brazilian husband and a Paraguayan wife. The Federal Supreme Court upheld this decision on appeal, with the Reporter, Justice Eduardo Espínola explaining his vote in these terms:

> ...Whereas the law to be applied in Brazil refers us to the national law of the Paraguayan wife, the law to be applied in Paraguay orders the law of the domicile to be applied, which in this case is Brazilian law. Thus, the question of renvoi or devolution arises. *A propos*, we have had occasion to write: We agree with Anzilotti's opinion that the question must be considered under two aspects: *de lege ferenda*, having in mind the principles of private international law, and *de lege lata*, considering a particular legislative system. As to the first aspect: the prestige of private international law has led to permitting, alongside rules that fix the jurisdiction of the law of the territory for certain relationships, rules that establish the normal jurisdiction

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[102] 64 *RT* 236; 69 *RT* 117.

[103] 83 *RT* 122.

[104] 116 *RT* 685.

of foreign law. In this latter case, the choice of law rule considers that, as the legislator determined, the law of the State to which the foreigner belongs is what best corresponds to the principles of justice, except when it is contrary to international public order, as seen from the law of the State applying the foreign law. Therefore, the territorial law suppresses its expansionary force, so that foreign law shall apply. But if the legal system to which the foreigner is bound recognizes that territorial law should judge the case, and if the national law of the foreigner deems it more appropriate to apply domiciliary law to its own citizens living abroad, then there is no reason for the domestic law of that other State to limit its field of application and fail to include the foreigner, notwithstanding the determination of his native law. It does not follow from this that domestic territorial law is applied to a foreigner, in obedience to a provision of his own law, contrary to a conflict of law rule of the territory. What we have is this: by virtue of the rule of application, domestic law no longer governs the foreigner, by presupposing that his national law was the fairest for the case; but where the legislator of the State of origin of the foreigner, which is the most appropriate to judge which is the best substantive law to be applied, has come out in favor of the territorial law, there is no reason to diminish the mandatory force of the latter; the conflict of law rule disappears and domestic territorial law reacquires all its natural flexibility. In our view, in theory, renvoi should only be allowed from the national law, or that of the domicile, to the *lex fori*. As to our legislative system, we feel that the Civil Code is not averse to such a conclusion.[105]

Renvoi was prohibited by the entry into force of Article 16 of the 1942 Law of Introduction to the Civil Code. This Article is a literal translation of Article 30 of the "Provisions on the Law in General" of the Italian Civil Code of 1942: "When, by the terms of the preceding articles, foreign law should be applied, the provisions of such law itself are applied without taking into account any renvoi made by it to another law."

A substantial number of Brazilian legal scholars disapproved of the innovation. For Clóvis Beviláqua, the Article "amputates the foreign law that national law orders applied."[106] Luiz Gallotti considers that "in territorial conflicts between rules of private international law, devolution should be applied in cases of negative conflict, even when the renvoi is to a law other than of the *lex fori*."[107] Serpa Lopes takes the position that "the question of renvoi...should not have been eliminated in the radical form of the words of Article 16 ... ."[108] The greatest defender of renvoi among us, however, was Haroldo Valladão. Article 77 of his Draft Bill of a General Law permitted renvoi at the first and second levels, restricting it only if it did not remit to Brazilian law or any other law which would,

[105] Civil Appeal No. 6.742 of 1937, *Archivo Judiciário* 249 (May 20, 1938).

[106] Beviláqua, *supra* note 39, at 146.

[107] "Conflitos, no espaço, entre normas de Direito Internacional Privado," 99 *Revista Forense* 563 (1944).

[108] 3 Serpa Lopes, *supra* note 3, at 274-75.

in the last analysis, accept it.[109] Strenger agrees wholeheartedly with Valladão's position.[110]

The traditional adversaries of renvoi, Amílcar de Castro[111] and Oscar Tenório, applauded Article 16 of the 1942 Law of Introduction. The latter, in his analysis of the article in question, states: "A Brazilian judge, in applying foreign law, should keep in mind substantive foreign law, and not its conflict of laws provisions. Any renvoi made by the other law, even to the *lex fori*, is contrary to that precept."[112] In concluding his 1967 thesis, J.R. Franco da Fonseca asserted:

> ...Through their characteristic legislative technique of remanding to foreign laws, the rules of private international law give rise to a special substantive right governing facts, situations and relationships of real life abroad, for which the legislator deems it unfair or inconvenient to apply the common domestic law of the forum. In the second place, the specific political-juridical moment of collision, in international private law, is not that of the application of the rule (where the figure of the judge stands out), but rather the prior moment of valorization (where the exponential figure is the legislator). Once the rule is formulated by the legislator, one no longer speaks of concurrent forms because the option has already been exercised. There has been a definitive resolution of the alternative possibilities of concurrent rules. By permitting the feasibility of renvoi to the conflict of laws rules of another State under our conflict of laws rules, one would be accepting that the (judicial) bodies that apply the law (and also individuals to whom the law is addressed in their private legal relationships) could exercise the power of valorization, which had already been exhausted by the legislator, and could even overrule that obligatory provision and return here. Thus, our opinion is that devolution is unacceptable... .[113]

After Article 16 of the Law of Introduction took effect, Valladão refers to cases in which Brazilian courts may have continued to apply renvoi, notwithstanding its prohibition. We shall review some of these cases. In the judicial discussion of the system of marital property of a Uruguayan husband and a Brazilian woman, married in Uruguay even though they were resident in Brazil, the judge of the first instance stated:

> I understand that in the case under examination, since the defendant is a Brazilian citizen, and both spouses are resident and domiciled in Brazil, and

[109] Article 77 — In considering the foreign law deemed competent, the Brazilian judge shall consider the provisions of such law as to its respective application, including references to other laws based upon other factors, such as religion, race, origin, citizenship, place of birth, domicile, vicinage, residence, territory, etc.

Sole paragraph. The above referral shall only be excluded if it does not refer to Brazilian law or does not refer to any other law that will accept it in the end.

[110] *Direito Internacional Privado* 376 (Ed. RT: São Paulo 1986).

[111] *Supra* note 27, at 246.

[112] 1 Tenório, *supra* note 3, at 354.

[113] *Supra* note 100, at 137-38.

> have here established their first conjugal domicile, immediately after marriage, they must necessarily have chosen the system of general community property.... Besides, the case is clear that, even admitting the precept of Article 8 of the Introduction to the Brazilian Civil Code, the theory of renvoi or devolution would have to prevail, and in consequence one could not apply Uruguayan law, because this country has renounced its jurisdiction in such cases, as already set out in this decision, thus permitting the application of the law of the conjugal domicile.

The Supreme Court of the State of Rio Grande do Sul unanimously affirmed the lower court judgment. Through an extraordinary appeal the case came to the Federal Supreme Court, where Justice Cândido Motta Filho, the Reporter, issued the following opinion denying the appeal:

> I deny the appeal because the appellant bases his reasoning upon the thesis that in his case the national law of the husband should be applied. However, this thesis does not invalidate the decision in question because, even if the law of the husband were to prevail, the solution would be no different. In the case of the marriage of an Uruguayan with a citizen of another country, when domiciled abroad, Uruguayan law orders the application of the law of the conjugal domicile. That was recognized by the lower court decision, and followed by the decision that affirmed it. In reality, Uruguayan law renounces its jurisdiction, when the spouses are not both Uruguayans, and they are domiciled abroad."[114]

In this case, the prohibition of Article 16 was not even considered. Jacob Dolinger is correct, however, when he observes that the "decision ought not to be interpreted as contrary to the provisions of Article 16 of the Law of Introduction, because it dealt with a wedding celebrated before 1942, under the regime of the rule of nationality, when renvoi was generally accepted by our courts, and there was no legal prohibition against it. As the system of marital property is created at the moment of marriage, or that of the establishment of the first conjugal domicile, it may be said that the renvoi by Uruguayan law to Brazilian law occurred at that moment; and the decision, affirmed upon appeal, only recognized that the conveyance from Uruguayan law to Brazilian took place at the time when the couple became domiciled in our country, when there was no prohibition against renvoi."[115]

In the second case, a male citizen of Luxembourg married a German in 1926, when Article 8 of the 1917 Introduction was in force. Under this provision, the national law of a person determined the system of marital property, unless there was an option for Brazilian law, which in the case did not occur. Towards the end of 1940, the husband abandoned the conjugal home. Almost two decades later, the wife filed a suit seeking a legal separation and division of property. The judge of the first instance was inclined to apply the law in effect at the time of celebration of the marriage. By virtue of the above-mentioned Article 8, he was led to the national law of the spouses. Since they were of different nationality, and since

[114] R.E. No. 31.165, 1 R.T.J. 605 (1957).

[115] Dolinger, *supra* note 12, at 314.

German law indicated that the national law of the husband should be applied, there arose, necessarily, the imposition of Luxembourg law. Since this law established the application of the first conjugal domicile, the judge wound up applying the system of universal community property, set out in Article 258 of the Brazilian Civil Code.[116] The Second Civil Chamber of the Supreme Court of the State of São Paulo, on September 25, 1959, denied an appeal by majority vote, and upheld the lower court decision in its entirety. The headnote read: "The property system for a Luxembourg husband married to a German wife, at the time of the former Law of Introduction to the Civil Code, was governed by Brazilian law, since in applying such law, the acceptance of renvoi must not be refused."[117]

The same observations made by Dolinger in the prior case apply to this one. The court of first instance so stated in its decision:

> There is no reason to renew the interminable arguments on renvoi, today expressly condemned by Article 16 of Decree-Law 4657 of 1942. But at the time of the former Law of Introduction, both the doctrine and the case law plainly agreed upon the acceptance of renvoi. Since we must apply to the case the law in effect at the time of the celebration of the marriage, we cannot refuse to accept renvoi.[118]

In R.E. No. 68.157-GB, which dealt with the validity of a holographic will made by Gabriela Besanzoni Lage Lillo, even though the Supreme Court considered that the matter was one of form only and applied the rule of *locus regit actum*, Justice Luiz Gallotti, the Reporter, made the following observation: "...As to devolution, even though my favorable opinion thereof has been invoked, ... I have shown that the new Law of Introduction is averse to the theory of devolution (Art. 16). ..."[119] The headnote states *inter alia*: "Devolution. The Present Law of Introduction is averse thereto."[120]

CHARACTERIZATION

Shortly after the doctrine of characterization arose, Carlos de Carvalho stated the following rule in the *caput* and in Article 25 § 2 of his *Nova Consolidação* (New Consolidation): "Art. 25 — Civil status and capacity of foreigners resident in Brazil are governed by the laws of the nation to which they belong. § 2 — However, the nature and characterization of the legal relationships will be fixed in accordance with territorial law." Gama e Silva, analyzing the text, feels that the above-cited jurist, when speaking of *territorial law*, meant *lex fori*, and that the exception of § 2, *i.e.*, "the determination of the nature and characterization of the

[116] 292 RT 224-26 (1959).

[117] *Id.* at 223-24.

[118] *Id.* at 226.

[119] 61 R.T.J. 99, 103-4 (1972).

[120] *Id.* at 99.

legal relationship by the territorial law, was the incorporation of the system taught by Bartin, although he perhaps was ignorant of this teaching."[121]

Various drafts of the Civil Code were silent upon the subject, and the 1916 Introduction did not refer to it. In 1921, Tito Fulgêncio, dealing perfunctorily with the problem, opted for *lex fori*.[122] Four years later, Eduardo Espínola, recognizing the importance of characterization, carried out a systematic analysis of the theories of Bartin and Despagnet; however, he never demonstrated any preference for either of those systems.[123] Later, the same writer returned to the topic in more detail and concluded that under Brazilian statutory law of the time, characterization was governed by *lex fori*, because of Article 6 of the Bustamante Code, which he considered an indirect source of Brazilian law.[124]

Beviláqua treated the question only in the third edition of his Manual on Private International Law and did not treat it as very important. He concluded that "those who attribute to the law of the judge (*lex fori*) general and primary jurisdiction to determine the nature of a legal relationship are only apparently correct... *Lex fori* is a first indication, but the decisive law will be that which governs the legal relationship."[125] Pontes de Miranda considered the problem at length. He was adhered to the doctrine of Frankenstein, deeming that governing characterization by *lex fori* was easier, but not uncommonly unjust.[126]

The 1942 Law of Introduction has two characterization rules: Article 8 on property and Article 9 on obligations.[127] For Tenório, the 1942 Law of Introduction, even though it uses the verb "characterize" (*qualificar*), did not formulate rules for characterization in the strict sense of the term, but only in the area of applicable law. He goes on to state that one should not confuse a conflict of laws rule — an indication of the law to be applied from among the laws of two or more countries — with principles of characterization. He concludes that, except for the two cases in positive law, Brazilian doctrine has maintained *lex fori*.[128]

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[121] Luís Antonio Gama e Silva, "Qualificações no Direito Internacional Privado" 150 (unpublished, São Paulo 1952). Tenório disagrees. 1 Tenório *supra* at 301.

[122] *Programa do Direito Internacional Privado* 17 (Belo Horizonte 1921). In his book *Síntese de Direito Internacional Privado* 58 (Belo Horizonte 1937), the same writer maintains his preference for Bartins's test, except for property, which should be governed by the law of the location and the legal relationships in which freedom of choice should prevail.

[123] *Elementos de Direito Internacional Privado* 350- 56 (Ed. J. Ribeiro dos Santos: Rio 1925).

[124] 3 *A Lei de Introdução ao Código Civil Brasileiro Comentada* 460-76 (Freitas Bastos: Rio 1944).

[125] *Supra* note 39, at 147-48.

[126] 2 *Tratado de Direito Internacional Privado* 341-56 (José Olympio: Rio 1935).

[127] Art. 8 — To characterize property and govern the relationships concerning it, the law of the place where it is situated shall be applied.

Art. 9 — To characterize and govern obligations, the law of the country in which they are created shall be applied.

[128] 1 Tenório, *supra* note 4, at 301.

For Valladão, the 1942 Law of Introduction to the Civil Code did not follow characterization by *lex fori*, but rather opted for characterization by *lex causae*, having expressly determined that for property, characterization is governed by the law of the place where it is located (art. 8) and for obligations, by the law of the place of their creation. Nevertheless, he feels there is a contradiction in the law in that Article 16 prohibited devolution, which could mean not applying the appropriate law in its entirety. He states, finally, that he chooses not to include any rule on characterization in his Draft of a General Law, preferring to leave the subject for case-by- case determination.[129]

Dolinger believes that Articles 8 and 9 of the 1942 Law of Introduction do not mean that the law has determined that all characterizations are governed by *lex causae*. Such provisions constitute justifiable exceptions to the characterization by *lex fori*. In relation to property, even the partisans of *lex fori* admit that it is not applicable thereto. In relation to obligations, the legislative option for the application of the law of the place of the creation of the contract derives from the principle of the freedom to contract. He ends up affirming that the Law of Introduction applies to characterization *lex fori*, exceptionally favoring *lex causae* in only the two cases pointed out.[130]

Three positions staked out by Gama e Silva in a monograph on the subject in 1952 continue to be valid today. First, Brazilian jurists differ on the question of characterization. Second, despite this difference, "there is a strong tendency to adopt *lex fori*, although one also tries to take foreign law into account, by giving it the value of a primary or jurisdictional characterization...." Third, Brazilian case law does not indicate any rule by which the cases of conflict of characterization can be resolved. In connection with this last point, Gama e Silva states: "Even though the problem has arisen in many cases, it was not raised in precise terms...so that the judges decided it by the application of general principles of private international law." Immediately thereafter he added that in other judgments "the problem was resolved by simply consulting *lex fori*, without any reference to foreign law."[131]

After describing the 1931 decision of the Federal Supreme Court in Extraordinary Appeal No. 2.195, Dolinger states that the Court did not decide "between characterization under *lex fori* and *lex causae*, which is the true problem of characterization under private international law."[132]

PUBLIC ORDER

In Article 5 of his *Draft Code*, Teixeira de Freitas considered the principle of public order:

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[129] 1 Valladão, *supra* note 7, at 258- 60.

[130] Dolinger, *supra* note 12, at 326-7.

[131] Gama e Silva, *supra* note 122, at 158-59.

[132] *Supra* note 12, at 332-35.

> Foreign laws shall not be applied: §1º — when their application is in opposition to the public and criminal law of the Empire, to the State religion, to religious freedom and to good customs and mores. §2º — In cases where its application is expressly prohibited by this Code, or where it is incompatible with the spirit of the legislation of this Code. § 3º — If they are mere privileges...

Among the examples supplied by Freitas in his notes are the following: Public law would be laws on nationality and those that established law for foreigners. Under incompatible laws would be catalogued those that provided for presumptive civil death.

Pimenta Bueno, influenced by Huber and Story, ruled out the application of foreign law whenever it was "expressly prohibited, and offended the laws of the State, its institutions, its mores and the legitimate rights or interests of its subjects."[133]

Mancini influenced Nabuco, who in his Draft took the position of excluding foreign rules "contrary to the laws of public order, or to the public law of Brazil or to its prohibitory laws."[134] In his Draft, Coelho Rodrigues followed the teaching of Savigny by excluding application of "foreign laws contrary to the constitutive principles of the unity of the family and civil equality or contrary to positive, absolute federal law."[135]

Lafayette Pereira recognized the possibility of enforcing a foreign judgment in Brazil, so long as there was no "offense to the rights of national sovereignty and the existing principles of public, political, economic or religious interest." In his draft Code of Private International Law, however, he followed Freitas, although some shadings from Mancini can be detected.[136]

The draft by Felício dos Santos started the tendency to deal with international public order and domestic public order in different articles. Beviláqua did the same thing, dealing with domestic public order in Article 14 and with international public order in Articles 17 and 18. During the work of the Special Committee of the Chamber of Deputies, so as to avoid repeating the phrase public order, Azevedo Marques suggested that the texts be consolidated, which did not please Beviláqua. Nevertheless, the amendment suggested by Azevedo Marques, which closely followed the wording of Article 12 of the Italian Law of 1865, was ultimately accepted and converted into Article 17 of the 1917 Introduction.

The first statute in effect in Brazil referring to public order was Decree No. 6.982 of July 27, 1878, drafted by Lafayette Pereira, which prohibited the enforcement of a foreign judgment in Brazil:

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[133] *Supra* note 14, at 24.

[134] Art. 61.

[135] Art. 17.

[136] Art. 4, *Projeto de Código do Direito Internacional Privado 11- 14* (Imprensa Nacional 1927). See 1 Valladão *supra* note 7, at 500.

> ... if it contains a decision contrary to: § 1º National Sovereignty, as, for example, if it withdrew from Brazilians the jurisdiction of the courts of the Empire; § 2º strictly mandatory laws, based upon public order motives, such as those which prohibit the institution of mortmain corporations by heirs; § 3º laws governing the organization of land ownership, such as those which prohibit the creation of fee tail, entailed estates and perpetual inalienability; § 4º laws of morals, such as when the decision countenances polygamy, or censurable conventions.

The wording of Article 17 of the 1916 Civil Code shows how much it derives from the above Decree: "Laws, acts and judgments of other countries, as well as private dispositions and agreements, shall not be enforceable when they offend national sovereignty, the public order and good customs."

The provision presently in force — Article 17 of the Law of Introduction to the Civil Code of 1942 — is almost identical to that of its predecessor: "Laws, acts, and judgments of other countries, as well as any declarations of volition, shall not be enforceable in Brazil when they offend national sovereignty, the public order and good customs."

The dichotomy of public order, à la Esperson and Brocher, appeared in the drafts of Felício dos Santos and Beviláqua, as noted above, but were not adopted in the provisions relating to public order in the Introductions of 1916 and 1942. Brazilian legal doctrine differs on the issue. Those who have favored the dichotomy are: Rodrigo Otávio,[137] Clóvis Beviláqua,[138] Eduardo Espínola,[139] Valladão[140] and Irineu Strenger.[141] Valladão, considering it inadvisable to join such different subject matters, placed "the general principle of public order" in Article 12 of his Draft of a General Law,[142] whereas the "special principle of public order for laws, acts and judgments of other countries" appears in Article 79.[143] In the camp opposed to the dichotomy are Oscar Tenório,[144] Amílcar de Castro,[145] Gama

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[137] *Dicionário de Direito Internacional Privado* 249 (Briguiet: Rio 1933).

[138] *Supra* note 39, at 105-15.

[139] *Supra* note 124, at 339-42.

[140] 1 Valladão, *supra* note 7, at 477.

[141] *Curso de Direito Internacional Privado* 515 (Forense: Rio 1978).

[142] Art. 12 — Any declarations of volition that seek to modify the constitution of the family, or which offend national sovereignty, the public order, equity, good customs and mores, shall not be enforceable.

[143] Art. 79 — Laws, acts and decisions of another country, as well as any voluntary declarations there formulated, shall not be enforceable in Brazil whenever they offend national sovereignty, the public order, equity, good customs and mores.

Sole paragraph. For reasons of justice and equity, declarations and partial recognition of effects may be admitted, when these approximate those permitted by Brazilian law (sole paragraph of art. 39).

[144] *Lei de Introdução ao Código Civil Brasileiro* 452 (2d ed. Borsoi: Rio 1955).

[145] *Supra* note 27, at 265.

e Silva,[146] Batalha,[147] Pilla Ribeiro[148] and Dolinger. This last writer, with great lucidity, has explained:

> ...that the principle of public order has differing application at three levels, which follow an ascending order in the incidence of their application. At the first level public order functions on the domestic plane so as to guarantee the rule of determined legal provisions, preventing their application from being rejected by the will of the parties.... The second level of application of public order is more restricted: it deals with the prohibition of the application of foreign laws as indicated by choice of law rules of private international law.... And the third level of application of public order is located in the recognition of rights that have vested abroad.[149]

Decree No. 6.982 of 1878 and Article 17 of both Introductions enshrined what Valladão baptized the "Brazilian triple formula of public order: national sovereignty, public order and good customs."[150] Brazilian doctrine has considered this trilogy at length. For Valladão himself, "it is clear and has not, in practice, created any doubts." According to Valladão: "In Brazil, effect is denied to foreign law that shocks basic conceptions of the forum, or that sets up rules absolutely incompatible with the essential principles of the forum's legal rules, founded upon the concepts of justice, morals, religion, economy and even politics, which guide the respective legislation. It is an extremely fluid and relative notion, molded to each legal system at any time, and is left in the hands of the judiciary in each case."[151]

For Amílcar de Castro, however: "Article 17 of the Law of Introduction to the Civil Code...makes a purely verbal distinction, insufficient, unnecessary and inconvenient, between what is offensive to national sovereignty, to public order and to good customs, when these three offenses are in reality but sides of the same polyhedron: the social order.... It is not advisable to distinguish sectors within the social order, because the distinction can never be exhaustive...."[152] Following the same line Irineu Strenger, for whom "the mention of national sovereignty and good customs is dispensable if one takes into account the concept of public order in both the doctrine and the case law."[153]

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[146] L. A. Gama e Silva, *A Ordem Pública em Direito Internacional Privado 182* et seq (São Paulo 1944).

[147] 2 *Batalha, supra* note 5, at 439-40.

[148] Elmo Pilla Ribeiro, " O Princípio da Ordem Pública no Direito Internacional Privado" 72-73 (Porto Alegre unpublished).

[149] *Supra* note 12, at 351-52.

[150] 1 Valladão, *supra* note 7, at 490.

[151] *Id.* at 496.

[152] *Supra* note 27, at 291.

[153] *Supra* note 111, at 151.

The development of the concept of public order in Brazil may be tested in the cases decided by our highest tribunal, the Federal Supreme Court, especially as to the homologation of foreign judgments, for which it has exclusive jurisdiction.[154]

VESTED RIGHTS

Respect for vested rights is a traditional constitutional principle in Brazil. The precepts of the Imperial Constitution of 1824 and of the 1891 Constitution

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[154] Consider the following headnotes:

1. If a legally separated person had sexual relations, that would not make him an adulterer under our Civil Code. Any foreign judicial decision would be offensive to the Brazilian legal order if its basis was recognition of adultery committed by a separated person, since it is clear that such recognition would not be valid under our present legal system, since our Penal Code provides that even though a criminal suit for adultery can only be brought by the offended spouse, it cannot be brought by a separated person (Art. 240 §§ 2 and 3-I). On the other hand, since adultery by a separated person is not admitted, even as to the ex-spouse, the corollary of such a premise is that neither of the ex-spouses, because they are both bound by the separation agreement, has standing to argue in our courts, that the other committed adultery until the agreement has been rescinded. Consequently, Brazilian courts cannot ratify a foreign decision that, based upon adultery by a person separated under Brazilian law, grants to the ex-consort a contested divorce (not a consensual divorce, which would be ratified by us), since such a decision, as is easily verified, is an obvious offense to our public order.

2. Foreign judgment in which the Federal Supreme Court denied homologation.

(STF, decided Feb. 25, 1976, Special Appeal no. 2174 HL, Reporter, Justice Djaci Falcão)

"1. 1971 decision proffered in Chile that annulled the marriage of an Argentine to a Chilean, celebrated in Chile in 1945. The husband has his domicile in Brazil, and the wife is in parts unknown. The basis for the decision was the lack of jurisdiction of the official of the public registry who acted in the proceeding to qualify the prospective newlyweds. Obvious offense to Brazilian public order, which does not permit annulling marriages for such reason.

2. Brazilian private international law on the subject matter.

3. Suit to homologate denied."

(STF Special Appeal No. 2520 — CL, decided June 20, 1980, Reporter, Justice Antonio Neder)

"1. The Letter Rogatory is admissible in the "exequatur" enforcement proceeding. Discussion of the matter of public order (Law of Introduction to the Civil Code, art. 17; Internal Regulations of the STF, Arts. 211 and 219).

2. Action for damages for a tort committed in Brazil, suit proposed in another country. By reason of the principle of *lex loci delicti*, which is of public order, suit must be filed in this Country. Brazilian law on the matter.

3. Decision which revoked the "exequatur" order.

4. Regulation Appeal to the Full Supreme Court denied unanimously."

(STF decided October 9, 1980, CRA no. 3119-AT, Reporter, Justice Antonio Neder)

"Motion for Reconsideration; Letter Rogatory

A letter rogatory seeking to depose persons and collect information for discovery in a case being heard by a foreign court does not affront national sovereignty or the public order. On the other hand, in a motion to grant an exequatur order for the letter rogatory, it is not for this Court to consider the allegations, such as those made by the appellant here, of his procedural position in the litigation pending before the foreign court, or decisions which may have been reached by that court, and which, under foreign law, mean the decision was final. Motion for reconsideration denied."

(STF, decided July 1, 1986, CRA no. 4441-AT, Reporter, Justice Moreira Alves)

"Letter Rogatory. Concurrent Jurisdiction of Brazilian and Foreign Courts (Art. 88 of CPC). Breach of Contract.

A suit filed abroad for damages for breach of contract against a company domiciled in Brazil may be the object of a letter rogatory without offense to public order because it is not included within the areas of exclusive jurisdiction of Brazilian courts (art. 89 of the CPC). Rather the foreign court has concurrent jurisdiction. Motion for reconsideration denied."

(STF, CRA no. 4704-IN, decided June 23, 1988, Reporter Justice Rafael Mayer)

prohibiting the retroactivity of laws[155] were interpreted by Brazilian doctrine of the time as recognizing vested rights. The Constitution of 1934 introduced the trilogy — respect for *res judicata*, perfected legal transactions and vested rights[156] — that would be maintained intact in all subsequent Constitutions, except for that of 1937.[157]

Due to the absence of any provision in this respect in the 1937 Constitution, Article 6 of the 1942 Law of Introduction expressly permitted retroactivity.[158] The advent of the 1946 Constitution, which reestablished the principle, resulted in the amendment of Article 6 of the Law of Introduction, which now reads: "The law in force shall have immediate and general effect, provided, however, that perfected legal transactions, vested rights and *res judicata* shall be respected."

The specific principle of respect for rights acquired abroad never became part of Brazilian statutory private international law, notwithstanding the attempt by Beviláqua, whose draft Article 17 stated: "Rights vested abroad, by virtue of an act performed abroad, in accordance with foreign law, are recognized in Brazil, so long as their exercise does not imply an offense to Brazilian national sovereignty, public order and good customs." This provision was never adopted.

According to Machado Villela, even though the rule proposed by Beviláqua has disappeared, "the *principle* remained *implicitly* in the part of Article 17 that was approved in the form of the substitute submitted by Andrade Figueira, which is today Article 17 of the Introduction...[159] The wording clearly indicates that rights vested through acts performed abroad...are recognized in Brazil, so long as they do not offend the laws of international public order."[160]

Dias da Silva reminds us that although the Constitution does not differentiate between rights vested in Brazil and those of foreign origin, the latter cannot countermand Brazilian public order, nor can they have been obtained with the intent of evading Brazilian legislation. He further reminds us that the rights vested by a foreign judgment have their own system of control, namely, that of the homologation process, in which the Federal Supreme Court, without examining the merits, proceeds to examine the form of the judgment.[161] Dolinger interprets the

[155] Const. of 1824, art. 179 § 3; Const. of 1891, art. 11 § 3.

[156] Art. 113 — The Constitution guarantees Brazilians and foreigners resident in Brazil the inviolability of rights to liberty, subsistence, individual security and property, in the following terms: ... (3) the law shall not impair vested rights, perfected legal transactions and *res judicata*.

[157] Const. of 1946, art. 141 § 3; Const. of 1967, art. 150 § 3; Const. Amendment No. 1 of 1969, art. 153 § 3; Const. of 1988, art. 5 (XXXVI).

[158] Art. 6 — The law in force shall have immediate and general effect, provided, however, that in the absence of an express provision to the contrary, it shall not affect situations definitively existing, and the performance of a perfected legal transaction.

[159] As was seen in the prior item, Article 17 of the 1916 Introduction to which Machado Villela refers, is little different from the present Article 17 of the 1942 Law of Introduction.

[160] Machado Villela, *supra* note 25, at 484.

[161] Augustinho Fernandes Dias da Silva, 1 *Introdução ao Direito Internacional Privado* 130 (Freitas Bastos: Rio 1982).

word "acts" found in Article 17 of the Law of Introduction to include "acts emanating from some power constituted in a foreign country..., a governmental act or an act of some power delegated by the government..." The phrase "any declarations of volition" includes "private legal transactions created abroad." For Dolinger, respect for rights vested abroad derives from the principle of public order, which functions both in a negative way, by opposing the application of a foreign law that shocks the Brazilian legal system, and in a positive way, by commanding the acceptance of the effects of a foreign precept that has already been applied.[162]

The observations made by Valladão about application of respect for vested rights, inferred *a contrario sensu* from Article 17 of the 1942 Law of Introduction, are as follows. Its only limits are public order and fraud. Public order, in relation to rights vested abroad, functions less intensely than in the case of vesting or loss of rights. The application of the principle occurs either by the acceptance of acts performed abroad, or by the recognition of foreign judgments. In drafting Article 78 of his Bill, he made the requirement of good faith explicit, excepting only the cases of exclusive jurisdiction of Brazilian law.[163]

[162] *Supra* note 12, at 418-22.

[163] Art. 78 — Rights acquired abroad in good faith, by virtue of an act or decision there rendered, are recognized in Brazil in accordance with the foreign law in effect, unless the case is one where Brazilian courts have exclusive jurisdiction, or one of the provisos of Article 79 applies.

Art. 79 — Laws, acts and decisions of another country, as well as any unilateral declarations of volition formalized there, will not be enforced in Brazil when they offend national sovereignty, public order, equity, good customs or mores.

Sole paragraph. For reasons of equity and justice, a declaration and the recognition of partial effects approximating those permitted by Brazilian law may be admitted.

Concerning these two Articles, Dolinger has commented:

"Article 79 announces the principle of public order as a general limit on the application of foreign law, and it does not seem technically correct to us to identify the proviso of Article 78 with the rule of Article 79. One runs the risk of losing sight of the important distinction between direct and indirect application of foreign law, a distinction with which the illustrious author of the draft concurs." *Supra* note 12, at 418.