# RECENT TRANSFORMATIONS OF THE BRAZILIAN STATE AND THE OBLIGATIONS' REGIME IN PRIVATE INTERNATIONAL LAW: ARE CURRENT CHANGES ENOUGH?

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## SUMMARY



## ABSTRACT

This article aims to analyse the legal treatment of the international obligations in Brazilian Private International Law, considering the existent legal and conventional framework, as well as the recent developments that have followed the transformations of the Brazilian State in recent decades.

**Keywords:** Private International Law; obligations; arbitration; treaties; party autonomy.

## RESUMO

Este artigo tem o objetivo de analisar o tratamento legal das obrigações internacionais no Direito Internacional Privado Brasileiro. Considera-se para tal, o quadro legal e de convenções existente, bem como os desenvolvimentos recentes decorrentes da transformação do Estado brasileiro nas últimas décadas.

**Palavras-Chave:** Direito Internacional Privado, Obrigações, Arbitragem, Tratados, Autonomia de Partidos.

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## INTRODUCTION: PURPOSE OF THE ARTICLE

In general, the Private International Law focuses on the govern – both of the rules and the judgement and implementing decisions – of social facts that relate to more than one human community. In Brazil, the research on this matter has been developed since the nineteenth century, when, in 1863, Jose Antonio Pimenta Bueno (1803-1878) published the first specific work on the subject entitled "Private International Law and the application of its principles with reference to the particular laws of Brazil". This work is considered pioneer in the systematic treatment of Private International Law in Brazil as an independent country[2].

Currently, the understanding of Private International Law in Brazil is going through a renewal process, motivated by the transformation experienced in recent decades in Brazil. This change is the result of several factors, among which: the intense economic liberalization, the encouragement of foreign investment in the country and the international operations of the Brazilian companies. Thus, in the nineties, the old conception of the intervening State as a direct agent that operates in an environment of protectionism and import substitution industrialization was replaced by a regulatory State that allow and encourages cross-border flows.

This transformation of the Brazilian State was reflected in the Private International Law area. From 1994 to 2002, Brazil has signed numerous treaties on Private International Law matters, as well as she resumed its participation as a member of the Hague Conference on Private International Law in 2001[3]. During this period, the country experienced a neoliberal wave of State reorganization as well a remodelling of its relationship with the foreign investors, which influenced, in the legal scope, the approval of several constitutional amendments, including, among those, the transfer to foreign entities the command of public-utilities formerly controlled by the Brazilian State. In face of those changes, International Law resumed its mandatory status in the minimum curriculum of Brazilian law schools in 1994. Also during this period the Brazilian Arbitration Act was edited in 1996 (Law n. 9.307/1996), updating this doctrine to the new capital flows of the Brazilian economy and allowing its use in disputes involving private players[4].

In view of these changes and considering that international obligations are one of the legal instruments that regulate the globalized economic operations, it is important to review the legal treatment given to this doctrine in Brazilian law. Thus, this article aims to address one of the most traditional subjects of Private International Law, which is the subject of obligations. Indeed, among the various

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[2] SALGADO, Cesar. "José Antônio Pimenta Bueno, Bandeirante do Direito Brasileiro". In: *Revista da Faculdade de Direito da Universidade de São Paulo*. V. 68, n°1, 1973, pp. 455-472. p.458.

[3] Decree n. 3.832, of 1st June 2001.

[4] For more about the sources of Private International Law, see CARVALHO RAMOS, André de. "Direito Internacional Privado e a ambição universalista" in TIBURCIO, Carmem; VASCONCELOS, Raphael e MENEZES, Wagner (organizadores). Panorama do Direito Internacional Privado Atual e outros temas contemporâneos - Festschrift ao professor Jacob Dolinger. Belo Horizonte: Arraes, 2015, pp.14-33

transnational facts that can be regulated by Private International Law, one opts to highlight those related to private commercial activities, in particular those pertaining to training and compliance of international obligations.

The options related to the subject of obligations under Private International Law reveal the conflict between the idea of greater State control and the autonomy of parties. The choice one makes in this matter is not neutral and, on the contrary, generates great impact in several areas. As an example, if a particular State chooses (by a domestic statute or by the ratification of a Private International Law treaty) to fix in abstract the rules that will govern the international obligations, its modifications will be prevented as well as the normative solution of the case will be predetermined. In this case, although the option chosen would allow a somehow specific targeting of economic activities, this greater level of interventionism could generate opposite reactions of individuals, who might begin to artificially handle some aspects of the transnational fact in question (e.g., one of the parties could artificially modify the celebration site of a contract), which could lead to a State assessment of a breach of the law and to legal uncertainty. On the other hand, if a State opts for a choice of rules that govern the obligations with greater range of freedom to the parties, this would give more flexibility for the individuals (who could choose the most appropriate rule for each situation), but thereby the State could cease to have your own domestic law governing the obligations.

## I. CHARACTERIZATION (CLASSIFICATION) AND INTRODUCTORY STATUTE TO THE NORMS OF BRAZILIAN LAW

Article 9 of the Introductory Statute to the Norms of Brazilian Law[5] regulates the obligations under Private International Law, providing for its classification (characterization) and governing rules[6].

The characterization consists on the legal classification of transnational facts, allocating such facts in legal categories, so that afterwards it is possible to identify the connecting factor applicable to the fact. It is an assignment of legal existence to the facts that matter to Private International Law and, therefore, it is a logical antecedent to the stipulation of the connecting factor and to the consequent determination of the law (domestic or foreign) that will govern the transnational fact.

To characterize a certain transnational fact, first this fact must be subsumed to a legal category; next, its connecting factor for such legal category must be determined by law or Private International Law treaty. Thus, the characterization is a previous data that conditions the determination of the connecting factor.

However, there are differences between the various legal systems regarding the characterization of a fact in a legal category. The different classification criteria

[5] The Introductory Law to the Civil Code has been recently changed by the Decree n. 12.376/2010 and it is now known as Introductory Statute to the Norms of Brazilian Law.

[6] Article 9 - In order to characterize and govern the obligations, the law of the State in which they are constituted shall apply.

among States allow a transnational fact to be inserted into two or more legal categories, creating doubt in the fixation of the connecting factor to be used in the case. In other words, the conflict of characterization arises when the same transnational fact can be classified in different categories in each legal system with which the fact is tied[7].

The case of the Maltese widow, portrayed by Bartin in the nineteenth century, is a landmark regarding the characterization conflict: the Anglo-Maltese couple Bartholdo did not celebrated an prenuptial agreement and got married in Malta (therefore, one can infer that Malta was their first matrimonial domicile and that they have adopted the community property regime). Later, they have moved to Algeria (country that, at the time, was under the French colonial legal system), where they have settled in and where the husband acquired real estate. With the husband's death (intestate), came the question of the applicable law to determine the rights of the widow regarding the special usufruct of the deceased husband's estate (there was no discussion concerning the widow right's of half of the property). According to the French Private International Law, Bartholdo's community property regime was governed by the Maltese law (the law of the first matrimonial domicile) and the succession of the real estate in Algeria was governed by the French law (the law of the country where the property is situated).

With the Widow of Malta case Bartin demonstrated the power of characterization: if the situation were considered a matter of matrimonial property regime, the law to be used would be the one of the first matrimonial domicile (the Anglo-Maltese law – the Rohan Code) and the widow would be entitled to the enjoyment of the usufruct in a quartier of the deceased's estate. On the contrary, if the situation were considered a matter of succession, the French law would be applicable because it was the law of the place of the situation of the real estate, which, at the time, did not provide for the usufruct of the quartier of the deceased's estate by the surviving spouse[8].

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[7] Kahn is know as the first jurist to point out, in an article published in 1891, about the problem of characterization in Private International Law. Later, Bartin, without unaware of this work, published a work on the topic in 1897 at the *Journal de Droit International*. Among the jurists of the common law tradition, Lorenzen is recognized as the pioneer to write on the subject. Beckett is known for being the first one to use the term classification. For more on the topic, see GAMA E SILVA, Luis Antônio. *As qualificações em Direito Internacional Privado.* Tese apresentada para o concurso de catedrático de Direito Internacional Privado da Faculdade de Direito da Universidade de São Paulo. São Paulo, 1953, pp. 07-20. See LORENZEN, Ernst G. "The Theory of Qualifications and the Conflict of Laws, 20 *Colombia Law Review* (1920), pp. 247-282. BECKETT, W. E. "The Question of Classification ("Qualification") in Private International Law", in 15 *British Yearbook of International Law* (1934), p.46.

[8] The case was settled in 1889, when the Argel Tribunal dediced that issue related to the matrimonial property regime and determined that the widow was entitled to the usufruct in a quartier of the deceased's estate. BARTIN, Etienne. "La doctrine des qualifications et ses rapports avec le caractère national du conflit des lois", in 31 *Recueil des Cours de la Académie de Droit International de la Haye* (1930), pp. 561-622, p. 570 *et seq.* See MACHADO, João Baptista. *Lições de Direito Internacional Privado.* 3ª ed., Coimbra: Almedina, 1999, p. 104.

The question evolving the approach to the characterization question was also the subject of intense discussion among jurists. Most scholars lean towards the use of the *lex fori* to classify a particular transnational fact, namely the law of the jurisdiction where the case is pending. This is the general rule of the Introductory Statute to the Norms of Brazilian Law, absent express provision to the contrary.

The use of the *lex causae*, on the other hand, is advocated by some jurists, among which were Despagnet[9] and Wolff[10]. According to the theory of the *lex causae*, the foreign law deemed applicable should govern the characterization. To Despagnet, it is illogical to use the *lex fori* to classify legal relations organized by foreign laws unknown to the jurisdiction. [11]

Cheshire and Robertson promoted a similar approach to the theory of *lex causae*. The scholars stood up for the existence of a double characterization: in the primary classification the facts must be subsumed to the general normative categories, which would be governed by the law of the jurisdiction (*lex fori*); later, in a secondary classification, the foreign law is defined and applied, following the *lex causae*. [12]

Rabel noted the failure to classify the transnational facts in institutes set out in a single legal system, whether the *lex fori* or the *lex causae*. For him, the Private International Law requires the classification to be made by means of a comparative method between the various systems, so that autonomous and universal institutes are built. [13]

Following this brief summary of the classification options, one should examine the doctrinal option adopted by Private International Law in Brazil, considering both the legal origin (Introductory Statute to the Norms of Brazilian Law) and the international origin (Treaties).

In the conventional field, the Bustamante Code provides, in Article 6, for the use of *lex fori* as a general rule of characterization, save in the cases excepted by the treaty itself. [14] As example of the application of the *lex causae* in the Bustamante

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[9] DESPAGNET, Franz. "Des conflits de lois relatifs à la qualification des rapports juridiques", in *Journal de Droit International,* 1898, p. 253. Defendendo a *lex causae* na atualidade, see ELHOUEISS, Jean-Luc. "Retour sur la qualification *lege causae* en droit international privé" in *Journal de Droit International*, n. 2, avril/juin 2005, pp. 281-313.

[10] WOLFF, Martin. *Derecho Internacional Privado*, tradução de José Rovira y Emergol, Barcelona: Labor, 1936, p.96.

[11] DESPAGNET, Franz. *Précis de Droit International Privé.* 4ª ed., Paris: Libraire de la Société du Recueil Général des Lois et des Arrêts, 1904, p. 227.

[12] For more on the common law tradition regarding the classification topic, see ROBERTSON, A.H. *Characterization in the Conflict of Laws*. Cambridge (MA): Harvard University Press, 1940. CORMACK, Joseph M., "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle" in *Southern California Law Review,* vol. XIV march, 1941 no.3, pp. 221-275. PASCAL, Robert A. "Characterization as an Approach to the Conflict of Laws", 2 *Louisiana Law Review* (1940), pp. 715-728; LORENZEN, Ernst G. "Qualification, Classification, or Characterization Problem in the Conflict of Laws" in 50 *Yale Law Journal* (1940-1941), pp. 743-761.

[13] RABEL, E. "Le problème de la qualification" *in Revue de droit international privé*, v. 28, 1933, pp. 1-62.

[14]Article 6. In all cases prescribed in the Code, each of the contracting parties shall apply its on definition

Code one could mention article 112 and 113[15], regarding the characterization of property, and article 164, concerning the classification of obligations. [16]

The characterization by foreign law is also the option under the Brazilian law for cases involving property (article 8. To classify the property and regulate the relations pertaining them, the law of the country in which they are located shall apply) and obligations (article 9. To classify and govern obligations, the law of the country in which they are constituted shall apply).

The main criticism to the *lex causae* approach is that the foreign law is only known from a connecting factor already known to the previous characterization of a transnational fact. In other words, the classification is a logical antecedent to the determination of a foreign law: if there is a foreign law the characterization has already taken place which would cause a vicious circle in the adoption of the *lex causae.* [17]

Valladão offers a counter-argument, claiming that it would be possible to do an approximate characterization by the *lex fori*, which would temporarily indicate an applicable foreign law. After, the final qualification would be made in accordance with such foreign law, with which one could fix the previous provisional qualification. [18]

To sum up, the Introductory Statute to the Norms of Brazilian Law applies, in general, the *lex fori* to determine the characterization, with two exceptions in which the *lex causae* prevails: (i) for property and (ii) obligations.[19]

## II. ARTICLE 9 OF THE INTRODUCTORY STATUTE TO THE NORMS OF BRAZILIAN LAW

Considering the obligations and contracts with extraneous elements, the applicable law shall govern in particular: (i) the interpretation of clauses related to obligations; (ii) the rights and duties of the parties; (iii) the compliance with obligations and its breach, including damages; (iv) the various ways of extinguishing obligations, including prescription and peremption; (v) the consequences of nullity or invalidity of the contract.

In Private International Law, the options for the choice of law applicable to obligations are, as follows: a) party autonomy (*choice-of-law* clause) both pointing to certain rights (domestic or foreign) or to customs and traditions of international trade

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to the institutions and juridical relations to the correspondent groups of law mentioned in article 3.

[15] Article 112. The territorial law shall always be applied to distinguish the movable and immovable property, without prejudice to third party rights. Article 113. The other classifications regarding property are also subjected to the territorial law.

[16] Article 164. The concept and classification of the obligations are subjected to the territorial law.

[17] BATALHA, Wilson de Souza Campos. *Tratado de Direito Internacional Privado.* Vol I., 2ª ed., São Paulo: RT, 1977, p. 185.

[18] VALLADÃO, Haroldo. *Direito Internacional Privado.* Vol. I. 2ª ed., Rio de Janeiro: Freitas Bastos, 1977, p. 258

[19] DOLINGER, Jacob. *Direito Internacional Privado***.** Parte Geral. 10 ed. rev. e atual. Rio de Janeiro: Forense, 2011. p. 377.

(*lex mercatoria*[20]); b) implied autonomy of will (silence of the parties), derived from the context or from the terms tied to a particular legal system; c) rigid determination expressed by law, which may be the law of the place of the celebration of the obligation or the law of the place of its execution; d) flexible expressed determination, pointing to the closest legal system to govern the legal transaction (principle of proximity or principle of the closest and most real connection).

Article 9 of the Introductory Statute to the Norms of Brazilian Law fixed the law of the place of the celebration of the obligation (*lex loci celebrationis* or *lex loci contractus*) as the connecting factor to govern the obligations, following the rigid determination expressed by law.

The Brazilian law did not follow Savigny's perspective[21], in support of the law of the place of execution of the obligation (*lex loci executionis*). For Savigny, the law of the place of the constitution of the obligation should not be considered the seat of the legal relation because it could be the result of chance, which would not occur to the place of execution of the obligation, which is the result of its essential characteristics. Savigny's view influenced article 33 of the Montevideo Civil Law Treaty of 1889 that, although not ratified by Brazil, prescribed that the law of the place of performance of the obligation shall govern its existence and validity.

Article 164 of the Bustamante Code was on the same line of article 9 of the above-mentioned Brazilian law, having determined that "the concept and classification of obligations are subordinated to the territorial law", which implies the choice of the law of the place of the constitution of the obligation.

## III. PRESCRIBED FORM OF OBLIGATIONS AND THE BRAZILIAN LAW

Article 9, paragraph 1, of the Introductory Statute to the Norms of Brazilian Law deals with the form of obligations. The above-mentioned article stipulates that if an obligation that ought to be performed in Brazil has a prescribed form, this should be observed, although the peculiarities of a foreign law regarding the extrinsic requirements of the juridical act are allowed. The prescribed form of a juridical act is the set of ceremonies required by law for the act to be considered valid and effective.

Generally, the form of any act is governed by the law of the place of its constitution, following the rule of *locus regit actum*. Thus, article 9, paragraph 1, partially exceptions this traditional rule of Private International Law to dictate that the prescribed form under Brazilian law (*lex fori*) should be observed when the obligation constituted abroad is to be performed in Brazil.

This choice of the place of execution of the obligation (*lex loci executionis*) was first used in South America, in Montevideo Civil Law Treaty of 1889, which provided, in article 32, that the law of the place where the contracts must be

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[20] STRENGER, Irineu. "La notion de *lex mercatoria* en droit du commerce international" in 227 *Recueil des Cours de la Académie de Droit International de la Haye* (1991), pp. 309-335.
[21] SAVIGNY, Friedrich Carl von. *Sistema do Direito Romano atual, vol. VIII.* Tradução de Ciro Mioranga (edição original de 1849), Ijuí: Unijuí, 2004, § 369.

performed regulates the need for writing form and the corresponding type of document.

The Introductory Statute to the Norms of Brazilian Law alleviates the option for the Brazilian law when it admits that the peculiarities of foreign law must be obeyed as the extrinsic requirements of the juridical act. In this situation, it was created an hypothesis of *depeçage*, which is the possibility of applying, at different times, more than one law to a certain transnational fact. In this case, the foreign law applies to the constitution and to the extrinsic elements of the juridical act performed abroad and the Brazilian law governs the formality when the act is to be performed in Brazil.

Previously, the old 1916 Law of Introduction to the Civil Code explicitly opted for *the actum regit locus*: article 11 prescribed that "the extrinsic form of acts, public or private, shall be governed by the law of the place in which they are practiced".

In the new wording, the juridical act must abide by both laws: the foreign law of the place of the constitution of the obligation, with special attention to the extrinsic requirements of the juridical act and the Brazilian law, regarding the prescribed form. Oscar Tenorio asserts that the prescribed form is necessary to the validity of the obligation, constituting, then, an intrinsic element without which the obligation is void[22]. Alternatively, the extrinsic requirements of the juridical act (which must meet the peculiarities of the foreign law) are those outside the legal transaction, but to it related, as referrer to the parties (capable to act), the place (appropriate) and the time (useful to the realization of the legal transaction).

In the civil area, the validity of the statement of will does not normally depend on a special form, except when the law expressly requires it (article 107 of the Brazilian Civil Code). Thus, the imposition of granting the deed to prove the efficacy of the obligation, prescribed in article 108 of the Brazilian Civil Code[23] is a traditional example of the invocation of the above-mentioned article 9, paragraph 1. Also, the breach to the prescribed form causes the nullity of the legal transaction as dictated in article 166, IV, of the Brazilian Civil Code[24].

An important question on the matters concerns the validity (or not) of a foreign formality equivalent, but not identical, to the one prescribed in the Brazilian legislation. On this issue, Guimarães Hahnemann (former Justice of the Brazilian Federal Supreme Court) supports the idea that the juridical act drawn up before a notary in the United States of America who has the power, according to the domestic

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[22] TENORIO, Oscar. *Lei de Introdução ao Código Civil Brasileiro.* 2ª ed., Borsoi: Rio de Janeiro, 1955 , p. 337.

23 Article 108. In the absence of law to the contrary, the deed is essential to the validity of the legal transactions that aim the establishment, transfer, modification or waiver of rights of real state on value higher than thirty times the highest minimum wage in the country.

[24]Article 166. It is null and void a legal transaction when: (...) IV – does not follow the form prescribed by law.

rule, to authenticate documents, although would not be the competent authority in the Brazilian legislation, must be accepted in Brazil as an equivalent of the deed.[25]

## IV. CONTRACTS BETWEEN ABSENT PEOPLE

Article 9, paragraph 2, of the Introductory Statute to the Norms of Brazilian Law provides that the obligation resultant of a contract is constituted in the place of the offeror residence. Such rule is intended to clarify the place of constitution of obligations, important key for determining the applicable law, which is, generally, the law of the place of the constitution of the obligation (article 9, heading).

In the case of contractual obligations entered into by parties present at the act, the place of constitution is the place of consent. The same rule applies to non-contractual obligations, such as those that are the result of tort, when the applicable law is the one where the damaging event took place.

A more difficult question arises when analysing the contracts between two absent people. In this case, it is considered that the obligation has been constituted at the offeror's place of residence. The general rule of article 9, paragraph 2, is similar to the one prescribed in article 435 of the Brazilian Civil Code, which states that the contract will be presumed to have been executed in the place where it was proposed. In article 9, paragraph 2, it was decided to presume the offeror's place of residence as the one of the offer.

The option chosen by the Brazilian Law regarding the contracts between absent people is poor and, in this author's opinion, disregards other possibilities for choosing the most appropriate law to particular contract as, for example, the choice of law which is closest to the legal relation or to the parties (also known as the principle of proximity or the principle of the closest and most real connection).

Dolinger declares that the 1955 Hague Convention on the Law Applicable to International Sales of Goods brought, implicitly, the search for the closest law to the legal relation. In an express way, the 1978 Hague Convention on the law applicable to the Agency established, in article 6, that "(...) where the principal or the agent has more than one business establishment, this Article refers to the establishment with which the agency relationship is most closely connected".

Within the European Union, the Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [26] provides that, "where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated, the law of that other country shall apply" (article 5.3).

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[25] See TENORIO, Oscar. *Lei de Introdução ao Código Civil Brasileiro.* 2ª ed., Borsoi: Rio de Janeiro, 1955 , p. 338.

[26] For more on the topic, see JAEGER JUNIOR, Augusto. *Europeização do direito internacional privado*. Curitiba, Juruá Editora, 2012.

Similarly, the Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) prescribe that "where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated [*lex loci delicti comissi* or the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred], the law of that other country shall apply.

These different options show the rigidity of the above-mentioned Brazilian legislation, which favours the law of the offeror's place of residence, but that leastwise has the merit of redrawing the polemic around a contract between absent people[27].

## V. OPENNESS TO INTERNATIONAL ARBITRATION

In recent decades, there has been the strengthening of the party autonomy for the govern of international agreements and other obligations. Following the wave of reorganization of the Brazilian State and its relationship with the foreign capital, several constitutional amendments were approved, what enabled the transfer of command to private foreign entities of public-utilities formerly controlled by the Brazilian State. In this political and economical context, the Arbitration Act (Law 9.307/1996) was approved, aiming to be a responsive and expeditious tool regarding dispute resolution. More recently, in 2015, it was approved the Law 13.129/2015, that alters some aspects of the Arbitration Act.

Currently, arbitration is an important dispute settlement instrument involving international contracts and obligations of high economic value. Article 1 of the above-quoted law provides that people able to enter into a contract will be able to use arbitration to settle disputes relating to property rights. The parties may freely choose the rules to be applied in the arbitration, provided that no violation to good morals and public policy. The parties are free to choose as applicable law the general principles of law, the uses and custom and international trade rules. (Article 2, paragraph 1 and 2, of the Brazilian Arbitration Act).

Therefore, according to the Brazilian Arbitration Act, the rules used to govern and interpret the contract will be determined by agreement of the parties, even if the contract is executed in Brazil, what represents a diversion of the *lex celebrations* clause of article 9 of the Introductory Statute to the Norms of Brazilian Law. Moreover, another way to get around the rigidity of the connecting factor established at the Introductory Statute to the Norms of Brazilian Law is the acceptance of arbitration in equity, at the parties' discretion (article 2 of the Law of Arbitration), in which the judge can decide according to its criterion of justice as the case may be.

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[27] TENORIO, Oscar. *Lei de Introdução ao Código Civil Brasileiro.* 2ª ed., Borsoi: Rio de Janeiro, 1955 , p. 341.

Another relevant question related to arbitration is to determine the extension of the issues that can be submitted to an arbitration (dispute settlement) procedure, because, in some cases, the matters can scape the reach of the Introductory Statute to the Norms of Brazilian Law.

Article 4, paragraph 2, of the Brazilian Arbitration Act prescribes that in adhesion contracts, arbitration can occur if the acceding part take the initiative to establish arbitration or agrees expressly with its institution, providing it in writing and signing a clause especially created for this matter. With respect to consumer disputes (even if the contract if not of adhesion), arbitration is prohibited, as it prevails the special command of the Brazilian Consumer Protection Code (Law no. 8.078/1990), by which it is null and void the clause that determines the compulsory use of arbitration in consumer disputes (Article 51, VII).

The legislator attempted to eliminate this restriction to the use of arbitration in consumer disputes in the recent reform of the Brazilian Arbitration Act (Law 13.129/2015), but the reform did not overrule the presidential veto. The vetoed text stated that: "In adhesion contracts, the arbitration clause shall be effective only if written in bold or in a separate document. In the consumer relation established through a contract of adhesion, the arbitration clause shall be effective only if the acceding part takes the initiative to establish arbitration or expressly agrees with its institution". The reasoning of the presidential veto justify its decision stating that the wording of the clause was confusing and could lead to the interpretation that the arbitration was broadly accepted in consumer relations, without making it clear that the consumer's declaration of intent should be given both at the moment of the signing of the contract and also after the possible dispute had arisen[28].

The main reason to restrict the consumer autonomy is the recognition of their vulnerability in the consumer relation. The consumer may lack technical knowledge at the time of the execution of the consumer contract needed to proper evaluate the risks of the arbitration choice for future litigation, even if the contract draw the attention to the arbitration clause. The right to material equality, then, justifies the restriction on the freedom of contract and, consequently, on the freedom to choose arbitration as the dispute settlement mechanism for the contract. It is important to point out, though, that the restriction to the resort to arbitration is not absolute, as the consumer can agree to arbitration after the dispute has arisen. Hence, the Consumer Protection Code prohibits prior adoption and compulsory arbitration provided for by the consumer contract, but do not deny the consumer the possibility of accepting the arbitration after the dispute has been constituted. [29]

On the matter, Claudia Lima Marques emphatically repudiates the compulsory use of arbitration when the consumer choses it in the moment of the execution of the contract, or, in other words, when a dispute, in the eyes of the

[28] Veto message nº 162, 26 May 2015. Available at http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Msg/VEP-162.htm, last viewed at 17 June 2015.
[29] On the topic, see Superior Court of Justice, Recurso Especial nº 1169841 / RJ, Relatora Ministra Nancy Andrighi, Data do Julgamento 06/11/2012, Data da Publicação/Fonte DJe 14/11/2012.

acceding part, has just the slightest chance of happening. According to her, in this case, the consumer suffers a great loss because the arbitration could be based on equity and consequently, be instituted outside the rules of the Consumer Protection Code. In addition, the chosen procedure could prevent the application of important protective procedural rules of the above-quoted Code, such as the shifting of the burden of proof in favour of consumers, among others consumer rights[30].

Therefore, with the exclusion of the issues that cannot be submitted to arbitration (as seen above), the application of the Introductory Statute to the Norms of Brazilian Law is avoid by the criterion of speciality, since the Brazilian Arbitration Act is considered a special and later law. From that can be inferred that indirectly in the contracts providing for arbitration, choice of law is possible.

## VI. IMPACT OF RATIFICATION OF CISG

In 2013, Brazil ratified the United Nations Convention on Contracts for the International Sale of Goods (also known as CISG), which was originally developed in 1980 within the United Nations Commission on International Trade Law (UNCITRAL) and it is in force since 1988. For Brazil, the Convention entered into force in 2014.

Brazil's hesitation to ratify the CISG is justified by the suspicion that the Convention - drawn up in a time when Brazil was not a very active player in the international trade area - would only benefit the selling party, that is to say in the Brazilian case, the foreign companies. Nowadays, however, the situation has changed and Brazilian companies try to compete with the global players, and, as a result, Brazil became the 79th country to ratify the CISG.

In addition, the CISG already has the participation of 83 states[31], which stands for approximately 90% of the world trade, and includes important Brazilian trade partners such as the USA, China and the member states of Mercosur. According to official data, about 50% of Brazil's exports are directed to China, USA, Argentina, Holland, Germany, Japan, Venezuela, Belgium and Italy, which are States Parties to the CISG. Also, more than half of Brazil's imports are from the USA, China, Argentina, Germany, Japan, Italy, France and Mexico, also parts of the CISG. Finally, 75% of Brazil's international trade is made with States signatory to the CISG[32].

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[30] MARQUES, Cláudia Lima. " É preciso manter veto à arbitragem privada de consumo", Revista Eletrônica Conjur. Available at http://www.conjur.com.br/2015-jun-09/claudia-marques-preciso-manter-veto-arbitragem-consumo, last viewed at 17 June 2015.

[31] List of the State Parties available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. Last viewed at: 16 November 2014.

[32] Presidencial Message nº 636/2010, regarding the Congress aproval of CISG. Nota Técnica nº 01, de 2009, da Secretaria Executiva da Câmara de Comércio Exterior – Secex/Camex. Available at http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=815192&filename=MSC+636/2010. Last viewed at 16 November 14.

The CISG aims to the standardization of the legal regulation of transnational facts (in this case the purchase and sale of goods) in order to increase the legal certainty for economic agents involved in the transactions as well as to reduce the so-called legal costs of the international purchase and sales. Consequently, uncertainty around the knowledge of foreign rules is eliminated.

The Convention has 101 articles divided in four parts. In general, the Convention regulates the formation of the contract (between two people present at the act of execution as well as between people who accept it by fax or e-mail) and the distribution of the obligations between the parties. On one side, the seller shall (i) transfer the property of the goods and (ii) ensure the suitability of its specifications. On the other side, the buyer shall (i) pay the price stipulated and (ii) be willing to receive the goods purchased.

Part I of the Convention deals with the sphere of application and general provisions; Part II governs the formation of the contract; Part III deals with the sales of goods as well as with the respect to the rights and obligations of the seller and the buyer; Part IV governs the final provisions, which includes the typical rules of an international convention, such as the depositary, the prohibition of prevalence over other specific international agreements, the opening for signature and ratification, as well as the rules on reservations and denounce of the Convention.

The CISG applies to international contracts of sale of goods (corporeal property), which have contracting parties in different States, or contracts in which the obligation will be fulfilled in a different State from the one where the contract was executed.

The Convention's main goal is to uniform of the (i) formation of the contract of sale and (ii) the rights and obligations of the seller and the buyer arising from such contract. The CISG excludes of its scope: (i) the validity of the contract or of any of its provisions or of any usage; (ii) the effect which the contract may have on the property in the goods sold.

From a material point of view to Private International Law, the CISG is intended to govern contracts with extraneous elements, namely ties with more than one legal system, opting for the Private International Law method of uniformity of treatment instead of the traditional conflicts method (where the statement of the applicable law is made by the connecting factors).

Contrasting with the international contracts, the national ones do not have the extraneous element and, therefore, are still governed by the domestic law of each State. Furthermore, it is relevant to note that the material scope of the Convention is limited in article 2, which expressly excludes the application of the CISG from sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity.

One may also observes that, from the spatial point of view, the CISG applies to the purchase and sale of goods between parties whose place of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State, for example, a contract executed in a State and performed in another, requiring the application of foreign law.

So even before the Brazilian ratification, the application of the CISG in cases involving the Brazilian Private International Law was possible when the application of the rule of article 9 of Introductory Statute to the Norms of Brazilian Law indicates the law of a State party to the Convention. Thus, CISG does not take into account the nationality of the parties or the civil or commercial character of parties or the contract to determine its own scope of application.

In order to fully guarantee the party autonomy regarding the application of the CISG, article 6 of the Convention prescribes that the parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

Article 7 of the Convention is worth mentioning as it relates to the interpretation of CISG. The articles provides that in interpreting the Convention, one should consider its international character and its need to promote a uniform application of its rules as well as the observance of good faith in international trade. Also, questions concerning matters governed by the Convention which are not expressly settled in it are to be resolved in conformity with the general principles on which the Convention is based or, in the absence of such principles, according with the law applicable by virtue of the rules of private international law.

That being said, it is clear that, although the majority of jurists still excludes the possibility of the parties to freely choose the law applicable to contracts in the light of the restrictive interpretation of article 9 of the Introductory Statute to the Norms of Brazilian Law, the international conventions and the Brazilian Arbitration Act share a new vision of the subject. The CISG and the supra-quoted Arbitration legislation support the freedom of choice from the parties and the *lex contractus*, with the exception of the invocation of public policy at the time of the execution of contract, if there is – in the law chosen freely – an offensive institute to the jurisdiction in question.

## VII. PARTY AUTONOMY: THE EVOLUTION IN BRAZIL

Article 13 of the 1916 Introduction to the Brazilian Civil Code governed the party autonomy and prescribed that the law that governs the obligation and its effects, unless otherwise stipulated, shall be the law of the place of the constitution of the obligations. The greatest innovation on this matter of the article 9 of the Introductory Statute to the Norms of Brazilian Law is to have eliminated the expression "otherwise stipulated".[33]

[33] Article 13: "The law that governs the obligation and its effects, unless otherwise stipulated, shall be the

Due to this writing, the 1916 Introduction to the Brazilian Civil Code allowed the parties to choose the law to govern the obligations. Clovis Bevilaqua declares that the will of the parties creates the obligations and, therefore, the choice of law in transnational relations should be free to rule on (i) the obligation and (ii) its effects. Nevertheless, the law of the place of its performance should govern the execution of the obligation. [34]

At the time, the interpretation of freedom of the parties was, nonetheless, restricted. For example, Machado Vilella argued that the party autonomy to determine the law that governs the obligations would only be accepted if the peremptory norms of the jurisdiction in question were to be respected. [35]

Similary, Espinola stated that the parties could freely choose only a foreign law to govern topics related to the aspects of the obligation that could be waived. In the case of peremptory norms, the application of the law of the place of the execution of the obligation was imposed to the parties[36].

Even Beviláqua, great supporter of the party autonomy, accepted the respect of the national legislation and to the public policy of the *lex fori* as a limit to the freedom of choice[37]. Likewise, in France, Pillet rejected the use of the freedom of the parties to choose the law in matters that were regulated in a peremptory way in the national jurisdiction, stating that it would consist of an "abusive extension" of the party autonomy. [38]

The exclusion of the words "unless otherwise agreed" in article 9 of the Introductory Statute to the Norms of Brazilian Law is the result of a worry expressed in the Forties by the former Brazilian president Getúlio Vargas. During the period of his dictatorship, the economic interventionism - led by the State - was considered essential to overcome the agricultural exporter stage of the Brazilian economy. Therefore, at the time, Brazilian authorities were afraid that the freedom to choose the applicable law of a contract would be beneficial only to the international economic players.

After 1942, with the replacement of the 1916 Introduction to the Civil Code by the 1942 Law of Introduction to the Brazilian Civil Code (now known as the Introductory Statute to the Norms of Brazilian Law), Valladão advocated for the acceptance of the party autonomy to choose the applicable law governing any topic of the obligations. To Valladão, the 1942 legislator's omission did not distort the essence of the obligations, as those are linked to the party autonomy. To exemplify,

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law of the place of the constitution of the obligations".

[34] BEVILÁQUA, Clóvis. *Princípios Elementares de Direito Internacional Privado.* 3ª ed, Rio de Janeiro: Freitas Bastos, 1938, p. 359.

[35] MACHADO VILLELA, Álvaro da Costa. *O direito internacional privado no Código Civil Brasileiro.* Coimbra: Imprensa da Universidade, 1921, p. 370 *et seq*.

[36] On the topic, see ESPÍNOLA, Eduardo. *Elementos de Direito Internacional Privado.* Rio de Janeiro: Jacintho Ribeiro dos Santos, 1925, p. 659.

[37] BEVILÁQUA, Clóvis. *Princípios Elementares de Direito Internacional Privado.* 3ª ed, Rio de Janeiro: Freitas Bastos, 1938, p. 359

[38] PILLET, Antoine. *Principes de Droit International Privé.* Paris: Pedone/Allier Frères, 1903, pp. 442-443.

he quotes that nothing could prevent the parties of "copying" the foreign law chosen, rather than simply choose, by consensus, which would be the law that would govern the legal transaction.

Moreover, on behalf of the freedom of choice, Valladão included in its draft of a Code of application of the legal norms a clause prescribing that a the law that governs the obligation and its effects, unless otherwise stipulated, shall be the law of the place of the constitution of the obligations (article 51 of the draft). To him, the phrase "unless otherwise stipulated" admitted the use of the party autonomy, which would not be valid only if it was considered an abuse of rights (article 12 of the draft) or offensive to the public policy.

## VIII. PARTIAL REPEAL OF CONNECTING FACTORS AND PARTY AUTONOMY

One question arises regarding the party autonomy and the choice of law prescribed by the domestic legal system: is it possible that the freedom granted to the parties in their interpersonal relations leads to a different choice of law than the one appointed by the Brazilian Private International Law? In other words, Article 9 of the Introductory Statute to the Norms of Brazilian Law is supplementary or it is a mandatory rule impossible to be waived by agreement of the parties? What is the role of freedom of choice in contracts of Private International Law in Brazil nowadays?

The party autonomy in Private International Law is the power that the parties of a legal transaction have to regulate the content of the relations to it related. Luigi Ferri defines private autonomy as a power, assigned by the legal system, of creation of legal standards by the parties themselves[39]. Thus, the freedom of the parties is the *self-regulation* of private interests, but not in a absolute way, as it is only legitimated if carried out according to the requirements and conditions prescribed by law[40].

In the case of transnational facts, the party autonomy derives from the Private International Law standards, which means that it is a power originated of the this national or international standards of this branch of law and, therefore, are limited by it.

Among the Private International Law Conventions that address freedom of the parties as a choice of law criterion, one could mention: the 1955 Hague Convention on the Law Applicable to International Sales of Goods (article 2); 1961 European Convention on International Commercial Arbitration (article VII.); 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (article 42); 1975 Inter-American Convention on International Commercial Arbitration (article 3.); 1980 European Convention on the Law Applicable to Contractual Obligations (article 3.); 1980 United Nations Convention

[39] FERRI, Luigi. *L'autonomia privata*. Milano: Giuffrè, 1959, p. 259.
[40] BETTI, Emílio. *Teoria geral do negócio jurídico*. Tradução de Fernando de Miranda. Coimbra: Coimbra, t.1-2, 1969.

on Contracts for the International Sale of Goods (article 6.); 1986 The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (article 7.); 1994 Inter-American Convention on the Law Applicable to International Contracts (article 7).

In its current state, Private International Law ought to be viewed in the light of human rights, and, thus, party autonomy is considered as a contractual aspect of the right to freedom[41]. Therefore, the discussion concerning the limits of freedom of choice in the field of Private International Law obligations involves the debate, on the one hand, of the freedom and equality of the parties in the formal aspect and, on the other hand, the need for State intervention to combat real asymmetries between the private agents.

Bearing that in mind, the choice of adopting or not the *lex voluntatis* in a given case implies in the position - by the legislator or the interpreter - of these two perspectives. For example, in the case of the Serbian and Brazilian loans (1929), the Permanent Court of International Justice discussed whether the contracts with extraneous elements (international contracts) were governed by Public International Law. On that occasion, the PCIJ stated that: "every contract that is not a contract between States as subjects of international law, has its foundation in national law".[42]

To date, the majority of Brazilian jurists consider that Article 9 of the Introductory Statute to the Norms of Brazilian Law is a peremptory norm, as the determination of the applicable law evolves a State option impossible to be waived by the will of the parties. To those scholars, the supra-mentioned article would be a rule of internal public policy. [43] Nadia de Araújo summarizes that perspective: "(...) The global trend of acceptance of the principle of freedom of the parties did not echoed in our legislation. It is mandatory to modify the Law of Introduction to the Brazilian Civil Code [today the Introductory Statute to the Norms of Brazilian Law] to adopt this principle".[44]

Conversely, Dolinger criticizes the position contrary to the autonomy of the parties. By sharing the same opinion of Valladão, he believed that even with the reform of the 1942 Introductory Law to the Brazilian Civil Code (eliminating the phrase "unless otherwise stipulated") would, still, have room for the parties to freely

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[41]On the topic of the human rights, see CARVALHO RAMOS, André de. *Curso de Direitos Humanos.* 2ª ed., São Paulo: Saraiva, 2015.

42 Permanent Court of International Justice, Brazilian loans, judgement of 12 July 1929, Serie A, n.o 21. Available at http://www.icj-cij.org/pcij/serie_A/A_20/64_Emprunts_Bresiliens_Arret.pdf, last viewed at 05 November 2014. See also LALIVE, Jean-Flavien. "Contrats entre États ou entreprises étatiques et personnes privées: développements récents" in *Recueil des Cours de l´Académie de Droit International de la Haye*, t. 181, 1983-III, pp. 9-283, p. 43.

[43]On the topic, see: RODAS, João Grandino. "Elementos de Conexão do Direito Internacional Privado relativamente às obrigações contratuais" in RODAS, João Grandino (coord.). *Contratos Internacionais.* 3ª ed., São Paulo: RT, 2002, pp. 19-65, p. 63. BAPTISTA, Luiz Olavo. *Dos contratos internacionais - uma visão teórica e prática.* São Paulo: Saraiva, 1994, p. 53. BASSO, Maristela. "A autonomia da vontade nos contratos internacionais do comércio" in BAPTISTA, Luiz Olavo; HUCK, Hermes Marcelo e CASELLA, Paulo Borba (orgs.). *Direito e Comércio Internacional - Tendências e Perspectivas - Estudos em homenagem ao Prof. Irineu Strenger.* São Paulo: Ltr, 1994, pp. 42-66, p. 48.

[44] ARAUJO, Nadia de. *Direito Internacional Privado.* 5ª ed., Rio de Janeiro: Renovar, 2011, p. 388.

choose the law governing a contract. Dolinger declared that "Article 9 of 1942 Introductory Law to the Brazilian Civil Code [today the Introductory Statute to the Norms of Brazilian Law] does not impose any obstacle to the choice of another law that the *lex contractus*".[45]

Dolinger goes further and repudiates the possible use of the concept of public policy as an obstacle to the free choice of law by the parties. For him, curtailing the party autonomy on those grounds would anticipate a problem, which would only eventually exist at the time of the contract, where the public policy of a country could prevent a law of another country (freely chosen by the parties) of being applied because of its incompatibility with the domestic legal system.[46]

In the V OAS Specialized Conference on Private International Law (CIDIP - V), held in Mexico City, the Inter-American Convention on the Law Applicable to International Contracts was adopted. Although not yet ratified by Brazil, this Convention provides clues about the future development of the party autonomy in Private International Law. The Convention deals with the law applicable to international contracts, and states that a contract is international if: (i) the parties thereto have their habitual residence or establishments in different States Parties or if (ii) the contract has objective ties with more than one State Party.

Article 7 reveals the Convention's big ambition to establish that the law chosen by the parties shall govern the contract, even if it is the one of a State not Party to the Convention.

The parties' agreement on the choice of law may be (i) express or (ii) implicit[47]. Also, the choice of law may be total (referring to the entire contract) or partial (referring to a part of the contract). It is important to point out, though, that the particular election of a forum by the parties does not necessarily imply the choice of the applicable law.

In addition, according to the Convention, the parties may, at any time, agree that the contract is wholly or partially subjected to a separate law different from the one that governed the contract before (even if the original law has not been chosen by the parties). Such a change, however, cannot affect the formal validity of the original contract nor the rights of others.

Finally, in the absence of choice of law (express or implied), the Convention adopts the principle of proximity. If the parties have not chosen the applicable law, or if the choice is ineffective, the law of the State with which it maintains the closest connection will govern the contract. In order to determine the law of the State that has the closest connection to the contract, one should analyse the objective and subjective elements that relate to the contract as well as take into account the general principles of international trade law.

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[45] DOLINGER, Jacob. *Direito Internacional Privado (Parte Especial) - vol. II - Contratos e obrigações no Direito Internacional Privado.* Rio de Janeiro: Renovar, 2007, p. 458.
[46] DOLINGER, Jacob. *Direito Internacional Privado (Parte Especial) - vol. II - Contratos e obrigações no Direito Internacional Privado.* Rio de Janeiro: Renovar, 2007, pp. 466-467.
[47] The implicit choice of law is the one that appears in an evident way the conduct of the parties and the contractual terms taken as a whole.

## CONCLUSION

The current panorama of Private International Law of both domestic and international origins are different in Brazil.

In spite of the political and economical transformations that Brazil has experienced on the last few decades, the Introductory Statute to the Norms of Brazilian Law has not been updated to follow the trends of change[48]. As a result, the Brazilian Private International Law of legal origin suffers from not having its Congress passing laws on the subject[49].

In contrast, the Private International Law of international origin is booming as Brazil enters into several treaties in the various objects of Private International Law, such as the choice of law, the choice of jurisdiction and international legal cooperation.

In the current state of Private International Law, faced with the "postmodern pluralism of sources" [50], an intense *dialogue of sources* is indispensable as well as a need for an improvement in the domestic codification of subjects that were somehow forgotten (e.g. the consumer transnational facts). [51]

The two options to govern the regime of obligations in Private International Law in the classical conflicts method (the predetermination of the law and party autonomy) are not sufficient for regulating the new demands of Brazilian society. The intense increase of cross-border flows and openness of the economy demands the discussion in Brazilian Private International Law of other solutions that take into account the direct method (i.e., the regulation of the rights of tourists consumers directly provided in treaties) or other rules to establish the applicable law (such as the *principle of proximity*).

Moreover, Private International Law must be interpreted in the light of tolerance, respect for diversity and protection of the vulnerable people[52]. This subject

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[48] The desire of a new law on the topic was expressed by the full professor of Private International Law of University of São Paulo João Grandino Rodas. See RODAS, João Grandino. "Falta a lei de introdução do Código Civil". São Paulo: Gazeta Mercantil, 21 de setembro de 2001.

[49] On the evolution of the Brazilian Private International Law, see CARVALHO RAMOS, André de. "Direito Internacional Privado de matriz legal e sua evolução no Brasil" in *Revista da AJURIS* , v. 42, n. 137, Março 2015, pp. 89-113.

[50] MARQUES, Claudia Lima. "O 'diálogo das fontes' como método da nova teoria geral do direito: um tributo à Erik Jayme" in MARQUES, Cláudia Lima (coordenadora). *Diálogo das Fontes - do conflito à coordenação de normas do direito brasileiro.* São Paulo: RT, 2012, pp. 18-66, p. 21.

[51] On the consumer transnational facts topic, see MARQUES, Cláudia Lima. "The brazilian 'draft convention on cooperation in respect of the protection of tourists and visitors abroad' and The Hague Conference and the UN Word Tourism Organization's draft convention" in *Los servicios en el derecho internacional privado - Jornadas de la ASADIP 2014,* Porto Alegre, ASADIP e Editora RJR, 2014, pp. 823-848

[52] On the topic of the tolerance and protection of the vulnerable in Private International Law, see MARQUES, Cláudia Lima. "Human Rights as a Bridge between Private International Law and Public International Law: the protection of Individuals (as Consumers) in the Global Market" in ARROYO, Diego P. Fernández e Marques, C. Lima (orgs.).*Derecho internacional privado y derecho internacional*

shall seek to provide to individuals and legal entities a broad range of options both regarding the determination of the jurisdiction (e.g., forum selection clause), the dispute resolution procedure (arbitration) and the law applicable to obligations. At the same time, it is also important to analyse the possible asymmetry and vulnerability in relations between individuals, as we see, e.g, in the consumer disputes in Private International Law. [53]

The main challenge of the obligation's regime in Brazilian Private International law is to balance, on one side, the State intervention to protect the most vulnerable party and, on the other side, the freedom of the parties, while bearing in mind the maintenance of an environment of tolerance and respect of diversity in the transnational relations.

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[53] MARQUES, Cláudia Lima. "A insuficiente proteção do consumidor nas normas de Direito Internacional Privado ─ Da necessidade de uma Convenção Interamericana (CIDIP) sobre a lei aplicável a alguns contratos e relações de consumo", in MARQUES, Cláudia Lima e ARAUJO, Nadia de (orgs). *O novo direito internacional. Estudos em homenagem a Erik Jayme.* Rio de Janeiro: Renovar, 2005, pp. 141-194.

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