

## Notes

### Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way

*Brazilian conflict of laws rules prevent the parties to an international commercial contract from making a free choice of law. The choice of forum is severely limited in the Brazilian courts under the applicable rules of international jurisdiction. Brazil's rejection of party autonomy in commercial contract litigation is deeply rooted in the country's history and civil law jurisprudence. Yet the country's approach to conflict of laws also prevents Brazil from realizing its full economic potential. By forbidding choice-of-law clauses and throwing the enforceability of choice-of-forum clauses into doubt, the Brazilian conflicts rules foster legal uncertainty and generate transaction costs that must be passed on to Brazilian counterparties. This Note seeks to mitigate the commerce-chilling effect of these "Brazil costs" by providing common law lawyers with a practical guide to Brazilian conflict of laws. Brazilian statutory and decisional law will be analyzed from the perspective of a U.S. lawyer accustomed to structuring cross-border transactions under a rule of party autonomy. This Note concludes by suggesting that legal risk is best managed in commercial contracts with Brazilian parties by way of an arbitration clause, which pursuant to recently enacted arbitral legislation may now contain a choice of law and forum.*

## INTRODUCTION

Lawyers use choice-of-law and choice-of-forum clauses to limit liability, shift risk, and maximize legal certainty when contracting across borders.<sup>1</sup> The conflict of laws regimes of the United States, which generally embrace the principle of “party autonomy,” usually permit parties to select the substantive law to be applied in a particular forum to resolve prospective contract disputes.<sup>2</sup> The Brazilian conflicts rules, unlike those of the United States, do not allow parties to make a free choice of law by contract except when such choice is contained in an arbitration clause. Furthermore, although the applicable Brazilian rules authorize lawyers to choose a non-Brazilian forum, the Brazilian courts have not consistently enforced such forum selection clauses. Brazilian tribunals tend to exercise jurisdiction over international commercial contract disputes in spite of the settled expectations of the parties when public policy is deemed to require the application of Brazilian law in Brazilian courts.<sup>3</sup> The resulting legal uncertainty makes it difficult for U.S. lawyers accustomed to working within a party autonomy framework to manage risk while negotiating commercial contracts with Brazilian counterparties. Brazil’s conflicts rules have in fact forced U.S. lawyers to add a risk premium to their contracts with Brazilian parties—dubbed the “Brazil cost”—to capture the negative impact of increased transaction costs upon their client’s bottom line.<sup>4</sup> The following analysis of the enforceability of choice-

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1. According to the Uniform Commercial Code (U.C.C.):

One of the prime objectives of contract law is to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. In this way, certainty and predictability of result are most likely to be secured.

U.C.C. § 1-301 cmt. 6 (2004).

2. See generally EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 1 (3d ed. 2000). New York State’s conflict of laws rules make New York law as well as New York courts available once the value of the contract reaches a statutorily prescribed threshold. N.Y. GEN. OBLIG. LAW § 5-1401 (Consol. 2005) (allowing parties to choose New York law *ex ante* in any contract worth \$250,000 or more, subject to minor qualifications, even if no party has a reasonable relation to New York); N.Y. GEN. OBLIG. LAW § 5-1402 (Consol. 2005) (permitting any person to sue a foreign corporation, non-resident, or foreign state in New York courts under New York law on a contract worth \$1,000,000 or more without fear of dismissal for forum non conveniens provided the parties have consented to the New York forum); see also *Banco do Comércio e Indústria de São Paulo, S.A. v. Esusa Engenharia e Construções, S.A.*, 569 N.Y.S.2d 708, 708–09 (App. Div. 1991) (applying the foregoing New York conflict of laws rules to sustain personal jurisdiction against a Brazilian party that explicitly consented to New York law and the New York forum).

3. See NADIA DE ARAUJO, *DIREITO INTERNACIONAL PRIVADO: TEORIA E PRÁTICA BRASILEIRA* 312 (2003).

4. See João Grandino Rodas, *Elementos de Conexão do Direito Internacional Privado*

of-law and choice-of-forum clauses in Brazil is intended to help U.S. lawyers assess and manage legal risk more effectively while structuring cross-border transactions with their Brazilian counterparts. This Note offers a practical guide to the Brazilian conflict of laws regime as viewed from the perspective of a common law lawyer without any prior knowledge of the Brazilian legal system.

This Note begins by discussing why it is worth taking the time to learn about the “private international law” of a civil law country like Brazil, followed by an analysis of some of the reasons why lawyers from the United States have found Brazil’s conflict of laws rules difficult to understand.<sup>5</sup> Part II introduces the Brazilian legal tradition by describing the hierarchy of legal authorities and the role of the judiciary and case law in Brazil, with an emphasis on the lack of *stare decisis* and its implications for the judicial treatment of choice-of-forum clauses. Part III focuses on the provisions of Brazilian law that are most frequently interpreted and applied by Brazilian judges when striking down choice-of-law clauses and deciding whether or not to enforce the parties’ choice of forum. The Brazilian treatment of arbitration clauses, including those containing a choice of foreign law, will also be discussed. This Part concludes by offering both a normative explanation for, and a practical illustration of, the Brazilian tendency to override forum selection clauses. Part IV studies how the Brazilian conflict of laws rules operate in practice by taking up two recent appellate decisions in which two Brazilian courts analyzed similar international contracts and achieved sharply contrasting results. In one case, the court decided not to enforce the parties’ choice of forum, while party autonomy was fully respected in the other. These contrasting outcomes illustrate the sharp divisions among Brazilian judges as to the proper interpretation of the Brazilian conflict of laws rules and the policy goals that underlie them. The Note concludes with a discussion of the consensus slowly emerging from the divided Brazilian courts on the role of party autonomy in the selection of the competent court and the applicable law in commercial contract litigation and arbitration.

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*Brasileiro Relativamente às Obrigações Contratuais*, in *CONTRATOS INTERNACIONAIS* 19, 63 (João Grandino Rodas ed., 3d ed. 2002) (highlighting the chilling effect of legal uncertainty upon international commercial contracts in general and upon export contracts in particular); see also DE ARAUJO, *supra* note 3, at 324.

5. Civil law systems use the term “private international law” to refer to what common law lawyers call “conflict of laws.” See SCOLES ET AL., *supra* note 2, at 1. “Private international law” and “conflict of laws” will be used interchangeably throughout this Note.

## I. THE UNITED STATES AND BRAZIL: TRADE AND TRANSLATION

A brief survey of economic indices illustrates the importance of Brazilian trade to the United States. The United States was Brazil's number one trading partner in 2004, both in terms of imports (twenty percent) and exports (eighteen percent).<sup>6</sup> In 2004, U.S. exports to Brazil totaled \$14 billion, while Brazilian exports to the United States totaled \$20 billion.<sup>7</sup> Brazil, the largest and most populous nation in Latin America, offers U.S. investors the world's eleventh largest economy and a 2004 GDP of \$604 billion, the world's ninth largest.<sup>8</sup> The volume of U.S. trade flows with Brazil is likely to grow as Brazil's domestic economy continues to expand. In the face of such robust growth, corporate attorneys in the United States will increasingly be called upon to represent their clients in business dealings with Brazilian counterparties. Understanding some of the reasons why Brazilian legislators and courts have continued to reject party autonomy in the face of proposals for reform should help U.S. lawyers to manage risks and achieve optimal results for their clients.

The uncertainty about Brazilian conflict of laws is perpetuated by a lack of communication between the legal communities in the United States and Brazil. While many Brazilian lawyers keep a close eye on legal developments in the United States, most international lawyers in the United States remain largely ignorant of the dominant trends in Brazilian law. The primary explanation for this "one-way street" is linguistic: While U.S. practitioners familiar with the civil law tradition and accustomed to working in Latin America can readily access Spanish and French legal materials, few U.S. lawyers speak Portuguese, and it is difficult to find updated Brazilian legal materials in translation.<sup>9</sup> While a few Brazilian scholars are informing U.S. audiences about Brazilian law

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6. See CENTRAL INTELLIGENCE AGENCY WORLD FACT BOOK, <http://www.odci.gov/cia/publications/factbook/geos/br.html#Econ> (last visited Mar. 20, 2006); see also Instituto Brasileiro de Geografia e Estatística, <http://www.ibge.gov.br> (last visited Feb. 7, 2006); DURVAL DE NORONHA GOYOS, JR. ET AL., LEGAL GUIDE: BUSINESS IN BRAZIL 7 (1992).

7. Brazil-U.S. Trade Council, <http://www.brazilcouncil.org> (last visited Mar. 16, 2006). All dollar (\$) amounts used throughout this Note refer to U.S. dollars.

8. WORLD BANK GROUP, BRAZIL AT A GLANCE (2005), available at [http://devdata.worldbank.org/AAG/bra\\_aag.pdf](http://devdata.worldbank.org/AAG/bra_aag.pdf).

9. For a rare and detailed treatment of Brazilian conflict of law rules in English, see PAUL GRIFFITH GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW (Bilateral Studies in Private Int'l Law No. 9, Arthur Nussbaum ed., 1959). For a broad survey of Brazilian law in English, see generally A PANORAMA OF BRAZILIAN LAW (Jacob Dolinger & Keith S. Rosenn eds., 1992).

by publishing in U.S. law journals,<sup>10</sup> the informational asymmetry that currently typifies relations between the United States and Brazil seems unlikely to improve until more Brazilian legal materials are translated into English. This Note follows in the footsteps of the U.S. and Brazilian lawyers who have dedicated themselves to bridging this divide in the area of conflict of laws and, it is hoped, will serve as a catalyst for further translation, research, and collaboration in this and other areas of the law.

As mentioned above, some Brazilian international lawyers have a very sophisticated understanding of U.S. conflict of laws principles.<sup>11</sup> These lawyers and judges are familiar with the flexible, interest-based “reasonableness” test frequently employed by U.S. state and federal judges to determine if the forum<sup>12</sup> and the substantive law<sup>13</sup> chosen by the parties are sufficiently related to the occurrence and the parties to justify enforcement. As summarized by the leading treatise, most U.S. courts will “giv[e] effect to the parties’ own choice of the applicable law and respect the autonomy of the parties to choose the forum in which litigation arising under the contract must be brought in order to promote legal certainty and honor expectations.”<sup>14</sup> Brazilians familiar with U.S. conflict of laws

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10. See, e.g., Nadia de Araujo, *Dispute Resolution in Mercosul: The Protocol of Las Leñas and the Case Law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AM. L. REV. 25 (2001).

11. See, e.g., NADIA DE ARAUJO, *CONTRATOS INTERNACIONAIS: AUTONOMIA DA VONTADE, MERCOSUL E CONVENÇÕES INTERNACIONAIS* 64–77 (3d ed. 2004) (discussing the development of U.S. conflict of laws with frequent citations to seminal U.S. decisions as well as to the First and Second Restatements of Conflict of Laws).

12. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (holding that a forum selection clause in a standardized contract that forced an unsophisticated citizen to sue Carnival Cruise Lines in a remote forum was nevertheless enforceable after engaging in “judicial scrutiny [of the clause] for fundamental fairness”).

13. The Restatement (Second) of Conflict of Laws enumerates a list of factors that should be considered by a court when identifying the law that is most significantly related to the dispute. These factors include: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation, and place of business of the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 187–88 (1971). *But see* N.Y. GEN. OBLIG. LAW §§ 5-1401, 1402 (Consol. 2005) (showing that not all U.S. jurisdictions adhere to the Restatement’s approach to the conflict of laws).

14. SCOLES ET AL., *supra* note 2, at 857. These principles are reflected in U.C.C. § 1-301 (2004), which fully embraces the principle of party autonomy for international contracts and served as the model for Article 7 of the Inter-American Convention on the Law Applicable to International Contracts, *infra* note 45, and Article 3 of the Rome Convention on the Law Applicable to Contractual Obligations, *infra* note 46. *But see* Gary D. Sesser, *Choice of Law, Forum Selection, and Arbitration Clauses in International Contracts: The Promise and the Reality, a U.S. View*, 20 INT’L BUS. LAW. 397, 400 (1992) (noting the failure of U.S. courts to uniformly adopt the Supreme Court’s choice-of-forum analysis as

know that the adoption of party autonomy in this country means that U.S. lawyers are generally free to choose the litigation forum and the law to be applied to disputes arising under the international contract *ex ante*, subject to the limitations of contract doctrines like fraud and duress, as well as to the judge's balancing of the parties' choice of law against the "fundamental policy interests" of the forum where the foreign law is to be applied.<sup>15</sup>

## II. THE CIVIL LAW TRADITION OF BRAZIL

### A. *The Constitution and the Codes*

It is impossible to analyze Brazil's treatment of choice-of-law and choice-of-forum clauses without some basic familiarity with the Brazilian legal landscape. Brazil's 1988 Constitution—a progressive document organized around an expansive hierarchy of positive fundamental human rights drafted after the fall of the military dictatorship in 1985—created a system of federalism and separation of powers that is at least superficially familiar to U.S. lawyers.<sup>16</sup> Brazil's substantive and procedural laws, however, are distinctively civilian and strongly influenced by the codes and institutions of Brazil's former colonial master Portugal, as well as by France and Germany.<sup>17</sup> A full treatment of the relationship between the Constitution and the Brazilian codes is beyond the scope of this Note, which focuses only upon the most important conflict of laws

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set forth in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

15. See SCOLES ET AL., *supra* note 2, at 876; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) (focusing on the public policy of the forum state whose law would otherwise govern the contract under § 188 when deciding whether or not to apply the parties' chosen law in the forum); see generally *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918) (Cardozo, J.) (articulating the classic public policy exception to forum selection under New York's conflict of laws rules).

16. Manoel Gonçalves Ferreira Filho, *Fundamental Aspects of the 1988 Constitution*, in A PANORAMA OF BRAZILIAN LAW, *supra* note 9, at 11. The history and evolution of Brazilian federalism is fully described in Keith S. Rosenn, *Federalism in Brazil* (Nov. 12–13, 2004) (unpublished manuscript, on file with the author).

17. See GARLAND, *supra* note 9, at 12, 15; see also José Carlos Barbosa Moreira, *Brazilian Civil Procedure: An Overview*, in A PANORAMA OF BRAZILIAN LAW, *supra* note 9, at 183, 183–86; KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 30–37 (1975); Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 512–13 (1986). Indeed, one scholar traced Brazil's conflict norms from the Portuguese colonial law all the way back to Bartolus who famously wrote on the civil law in the fourteenth century. João Grandino Rodas, *Choice of Law Rules and the Major Principles of Brazilian Private International Law*, in A PANORAMA OF BRAZILIAN LAW, *supra* note 9, at 309, 329 n.80.

provisions found in the Introductory Law to the Civil Code of 1942<sup>18</sup> and the Civil Procedure Code of 1973.<sup>19</sup> These codes, like all others in Brazil, are subordinate to the Constitution and are designed to provide the country with a “systematic and harmonious set of general principles and specific rules governing legal relations among private persons.”<sup>20</sup>

### B. *Brazilian Judges and the Role of Case Law*

Brazilian judges often refer to the writings of law professors when they confront legal questions that are not solved on the face of the code. It is difficult to apply the vague and generalized language of Brazil’s code provisions to modern legal problems without recourse to these scholarly materials. The doctrinal teachings of these scholars are at least as influential to Brazilian lawyers as persuasive case law is to the common law lawyer—perhaps even more so. In fact, Brazilian judges sometimes quote the textual interpretations of esteemed law professors verbatim to dispose of a case, at times in foreign languages and without translation.<sup>21</sup> For this reason, this Note gives due deference to the writings of influential legal scholars whose theories on Brazilian private international law are widely employed by judges when debating Brazilian conflicts norms and advancing proposals for reform.

Common law lawyers and judges often believe that their civil law counterparts use codes, and rarely case law, to make legal arguments and draw legal conclusions.<sup>22</sup> This belief is premised upon the fact that civil law countries like Brazil do not have a rule of *stare decisis*. Brazilian trial judges are technically free to decide cases without regard to the precedents set by higher courts. A plaintiff may bring a lawsuit in Brazil against a defendant regardless of how many times the relevant appellate tribunal has ruled against

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18. Decreto-Lei No. 4.657, de 4 de setembro de 1942 (Brazil). As will be discussed in greater detail below, the Introductory Law to the Civil Code was enacted in 1942 to, among other things, supply conflict of laws rules for the Civil Code of 1916. Although the Civil Code of 1916 has recently been replaced by the Civil Code of 2002, no corresponding changes have been made to the Introductory Law of 1942. Lei No. 10.406, de 10 de janeiro de 2002 (Brazil).

19. Lei No. 5.869, de 11 de janeiro de 1973 (Brazil).

20. KARST & ROSENN, *supra* note 17, at 45.

21. *See, e.g., id.* at 7–11.

22. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 170–71 (1921) (mocking the common law lawyer’s perception of the civil law system as a “judicial slot machine” in which a judge mechanically applies the self-executing code to the given facts and then simply “take[s] out the decision below”).

similar plaintiffs under identical facts. The lack of stare decisis, however difficult it may be for a common law lawyer to conceptualize, is in fact an entirely logical consequence of the Brazilian judiciary's subordinate relationship to the legislative branch. As summarized by one U.S. expert in Brazilian law, "Brazil is . . . heir to the civil law tradition in which the doctrine of separation of powers denies the judiciary the ability to make law and refuses to consider judicial decisions as binding precedents."<sup>23</sup>

While it is true that case law does not enjoy a formal position within the Brazilian legal hierarchy, it does not follow that case law is irrelevant. In fact, within the field of conflict of laws, "case law, although it does not have obligatory force . . . having value simply as doctrine, is an extremely important source of private international law, [since] legislative rules in general are sparse."<sup>24</sup> A consistent line of court decisions may be as influential as the writings of the eminent jurisconsults discussed above. But how is the Brazilian trial judge to evaluate the weight of the written opinions produced by her colleagues without the benefit of a hierarchy of decisional law? Brazil's highest constitutional court, the Supreme Federal Tribunal (STF) sought to answer this question in 1964 by developing the *súmula*, a uniquely Brazilian procedural device for harmonizing case law at the appellate level that has since been adopted by the Superior Tribunal of Justice (STJ), the highest federal court for all non-constitutional matters. The adoption of the *súmula* procedure by the STJ is significant in light of the fact that this tribunal replaced the STF as the Brazilian court of last resort for all private international law litigation in 2004.<sup>25</sup>

A *súmula* is a one-sentence summary of a Brazilian court's holding that is located in the headnotes of the court's written decision and can be used by lawyers seeking to persuade a different court to come to the same conclusion in a future case. The *súmula* can be analogized to the precise holding of a common law court decision, distilled down to its essence and cited by a common law lawyer in his briefs and legal arguments. While the holding of a common law tribunal can bind all lower courts within its jurisdiction, the Brazilian *súmula* is binding precedent only at the court that originally formulated it—no other court under the appellate tribunal's

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23. Rosenn, *supra* note 17, at 513.

24. GARLAND, *supra* note 9, at 17 n.22 (quoting AMÍLCAR DE CASTRO, DIREITO INTERNACIONAL PRIVADO 124 (1956)).

25. Nadia de Araujo & Frederico do Valle Magalhães Marques, *Recognition of Foreign Judgments in Brazil: The Experience of the Supreme Court and the Shift to the Superior Federal Court* (forthcoming 2006).

supervision can be legally compelled to defer to the tribunal's capsulized wisdom. Brazilian courts and lawyers nevertheless generally treat *súmulas* as "de facto stare decisis because taking a contrary position" to the capsulized authority drawn from the headnotes of STJ decisions, usually not more than one sentence in length, "practically guarantees a reversal."<sup>26</sup>

The quasi-precedential *súmula* can be created at the STJ by a judge who, after determining that there is a conflict between the lower court's interpretation of the law on review and the STJ's prior decisions, suspends the litigation and convinces an absolute majority of the full Court to decide upon the proper interpretation of the law.<sup>27</sup> The case is then resumed and decided by the justices under the STJ's new interpretation of the law, which is formally classified as a *súmula* and made available to all lawyers who might profitably make reference to the Court's holding in future cases. The STJ has issued more than three hundred *súmulas* and "even if they are not legally binding on other courts, they constitute the most persuasive authority one can cite to the courts."<sup>28</sup>

The STF, sitting in its previous role as the ultimate arbiter of international commercial contract litigation, generated only one *súmula* in the area of conflict of laws. The Court addressed the enforceability of forum selection clauses in *Súmula* 335, which states simply that "a contractual forum selection clause [is] valid."<sup>29</sup> Given that *Súmula* 335 is entitled to "de facto stare decisis" respect, the STF's pronouncement might have disposed of the vexing issue of the enforceability of choice-of-forum clauses in one stroke. As will be shown below, however, equitable and policy concerns have led many

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26. Rosenn, *supra* note 17, at 514. This phenomenon can be explained, at least in part, by the Brazilian judiciary's general inclination to follow the lead of the higher courts and the teachings of the jurists so as to avoid a potentially embarrassing reversal on appeal and thereby advance up the judicial hierarchy to a more coveted position. R.B SCHLESINGER ET AL., *COMPARATIVE LAW* 714–17 (6th ed. 1998).

27. Rosenn, *supra* note 17, at 513 (discussing the procedure used by the STF to create a *súmula*). The STJ's *súmula* procedures are similar to those of the STF; for more information, see STJ Internal Court Rules art. 122, available at <http://www.stj.gov.br/regimento/doc.jsp?livre=s%FAMula&&b=REGI&p=true&t=&l=100&i=11> (last visited Feb. 28, 2006).

28. Rosenn, *supra* note 17, at 514.

29. T.J.R.S., Ap. No. 595095886, Relator: Ari Franco, 08.08.57, R.T.J. 3/137 (Brazil) ("É válida a cláusula de eleição do foro para os processos oriundos de contrato."). The "relator" referred to in this and all subsequent citations to Brazilian case law is the name of the judge to whom the case was assigned. Reference will be made to both federal and state appellate court decisions without distinction. All translations from Portuguese made by the author unless otherwise noted. The original Portuguese is included in some instances to provide the reader with additional context and information.

courts to strike down forum selection clauses in spite of *Súmula* 335, sometimes without referring to the existence of the STF precedent at all. The lower courts' tendency to disregard the STF's instructions underscores the degree of division in this area of the law. It is doubtful that the STJ will be able to use the *súmula* procedure to harmonize the Brazilian treatment of forum selection clauses any more effectively than did the STF. Consequently, the transfer of private international law jurisdiction from the STF to the STJ is unlikely to change the status quo: U.S. lawyers must continue to negotiate choice-of-forum clauses with Brazilian counterparties without clear guidelines as to the enforceability of such clauses in the Brazilian courts.<sup>30</sup> Common law lawyers should not assume, however, that the Brazilian judiciary is as concerned with consistency, predictability, and efficiency as are the courts of the United States. As will be shown below, the STJ has proclaimed that justice, not efficiency, should be the normative touchstone for the courts of Brazil.

### III. BRAZILIAN CONFLICT OF LAWS

#### A. *The Introductory Law to the Civil Code and the Civil Procedure Code*

With this basic understanding of the Brazilian legal landscape firmly in place, it is now possible to introduce the reader to the key conflict of laws provisions. We will begin by discussing the overarching conflict of laws framework in Brazil. Article 9 of the Introductory Law to the Civil Code<sup>31</sup> (Introductory Law) controls the choice-of-law analysis in Brazil. Article 9 forecloses any possibility of party autonomy by denying the parties the right to make a free choice of law on the face of their international commercial contract. Yet Article 9 does grant the parties a limited degree of freedom to choose a foreign law based upon their physical location at either the moment in which the contract was perfected or at the time that the offer was made:

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30. *Cf.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In that case, the United States Supreme Court held as a matter of federal common law that, at least in admiralty cases, U.S. state and federal courts must enforce a forum selection clause unless the protesting party can show that enforcement would be "unreasonable." *Accord* *Carnival Cruise Lines, Inc. v. Shute*, 449 U.S. 585 (1991).

31. Decreto-Lei No. 4.657, de 4 de setembro de 1942 (Brazil).

Article 9: [When the parties to the contract are in the same physical location,] [c]ontractual obligations shall be governed by the law of the country where the contract was perfected.<sup>32</sup>

§2: [When the offeror and the offeree are in different physical locations at the time of the offer], [t]he contract is governed by [the law] of the jurisdiction in which the offer was made.<sup>33</sup>

The enforceability of a choice-of-forum clause is governed by both the Introductory Law and the Civil Procedure Code.<sup>34</sup> Specifically, Article 12 of the Introductory Law and Articles 88 and 111 of the Civil Procedure Code permit the Brazilian courts to enforce a choice-of-forum clause pointing away from Brazil whenever the country's jurisdiction is deemed to be "concurrent" rather than "mandatory."<sup>35</sup> Article 12 of the Introductory Law states, in relevant part, that, "Brazilian courts have concurrent jurisdiction when the defendant is domiciled in Brazil or when the contract is to be performed in Brazil."<sup>36</sup> Article 88 of Brazil's Civil Procedure Code restates this definition of concurrent jurisdiction while Article 111 of the Civil Procedure Code explicitly provides, in relevant part, for the enforceability of forum selection clauses in Brazil:

Article 88: The Brazilian judiciary has concurrent jurisdiction to hear cases when:

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32. Article 9 of Decreto-Lei No. 4.657 reads: "Art. 9—Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que constituírem." *Id.* A contract is perfected, according to João Grandino Rodas, wherever the voluntary obligation is incurred. Rodas, *supra* note 4, at 57. Note also that the parties' individual capacities to contract are always governed by the law of their domicile pursuant to Article 7 of the Introductory Law. Decreto-Lei No. 4.657, de 4 de setembro de 1942 (Brazil).

33. Article 2 reads: "§2—A obrigação resultante do contrato reputa-se constituída no lugar em que residir o proponente." Decreto-Lei No. 4.657, de 4 de setembro de 1942 (Brazil). The legal domicile of the offeror is irrelevant. Rodas, *supra* note 4, at 58.

34. Lei No. 5.869, de 11 de janeiro de 1973 (Brazil).

35. It is worth noting that Brazilians draw a formal distinction between "jurisdiction" and "competence." For example, a Brazilian judge has unlimited *jurisdição* over any case brought to his courtroom, yet his practical ability or *competência* to decide the case is limited by geography (venue), subject matter (federal or state, criminal or civil), legal characteristics of the parties (federal or state agents), as well as by principles of sovereignty and the Brazilian Constitution. For simplicity, the more familiar word "jurisdiction" will be used in lieu of "competence" throughout this Note. See generally José Inácio Gonzaga Franceschini, *A Lei é o Foro de Eleição em Tema de Contratos Internacionais*, in *CONTRATOS INTERNACIONAIS*, *supra* note 4, at 66; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 (discussing these same principles in terms more familiar to a U.S. practitioner).

36. Decreto-Lei No. 4.657, de 4 de setembro de 1942 (Brazil) ("É competente a autoridade judiciária brasileira, quando for o réu domiciliado no Brasil ou aqui tiver de ser cumprida a obrigação.").

I: The defendant, whatever his nationality, is domiciled in Brazil;<sup>37</sup>

II: The obligation must be performed in Brazil;

III: The case is based on an incident that took place or arises from an action taken in Brazil.<sup>38</sup>

Article 111: [P]arties to a contract can select a non-Brazilian forum.<sup>39</sup>

It is difficult to reconcile the plain meaning of these conflicts rules with the fact that Brazilian courts historically tend to apply Brazilian law notwithstanding the intent of the parties to make a choice, however limited, of law and forum pursuant to the foregoing provisions. Some light can be shed upon this situation, which is primarily responsible for the costs mentioned above, by examining the historical, political, and social context that gave rise to the Introductory Law.

The Introductory Law's rigid emphasis on the physical location of the parties at either the time that the contract was perfected or at the time the offer was made may be rooted in Brazil's desire to "consolidate its independence in the face of the colonizing powers (Portugal and Spain) . . . [and also] to unify the country [from within]."<sup>40</sup> The statute's robust territoriality may also reflect the drafters' response to strong nationalist political impulses at a time in which Brazilian sovereignty was threatened by capital-exporting countries during World War II. This legislative history may help to

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37. According to the Article 88 of the Civil Procedure Code, a foreign legal entity is domiciled in Brazil if it has an agency, branch, or subsidiary there. Lei No. 5.869, de 11 de janeiro de 1973 (Brazil).

38. Article 88 reads:

Art. 88—É competente a autoridade judiciária brasileira quando: I—o réu, qualquer que seja sua nacionalidade, estiver domiciliado no Brasil; II—no Brasil tiver de ser cumprida a obrigação; III—a ação se originar de fato ocorrido ou de ato praticado no Brasil. Parágrafo único—Para o fim do disposto no I, reputa-se domiciliado no Brasil a pessoa jurídica estrangeira que aqui tiver agência, filial ou sucursal.

*Id.*

39. Article 111 reads:

Art. 111—A competência em razão da matéria e da hierarquia é inderrogável por convenção das partes; mas estas podem modificar a competência em razão do valor e do território, elegendo foro onde serão propostas as ações oriundas de direitos e obrigações. §1—O acordo, porém, só produz efeito, quando constar de contrato escrito e aludir expressamente a determinado negócio jurídico. §2—O foro contratual obriga os herdeiros e sucessores das partes.

*Id.*

40. Daniela Corrêa Jacques, *A adoção do Princípio da Autonomia da Vontade na Contratação Internacional pelos Países do MERCOSUL*, in *O NOVO DIREITO INTERNACIONAL: ESTUDOS EM HOMENAGEM A ERIK JAYME* 277, 285–86 (Claudia Lima Marques & Nadia de Araujo eds., 2005).

explain why the Introductory Law so explicitly forecloses the possibility of party autonomy, but it does not necessarily help us to understand why the statute has not been updated to keep pace with legal developments in the United States and Europe.

In fact, the Brazilian Legislature has not amended the Introductory Law since 1942, when the current Introductory Law was enacted to complement the Civil Code of 1916.<sup>41</sup> The Civil Code of 1916 was completely replaced by the New Civil Code in 2003. The anachronistic provisions of the Introductory Law, which date back to the era before widespread acceptance of party autonomy, are difficult to square with the modernization of Brazilian private law wrought by the New Civil Code. A full discussion of the substantive legal reforms enacted by the New Civil Code is beyond the scope of this Note. It is sufficient to emphasize that, as the New Civil Code does not contain any conflict of laws provisions, the Introductory Law of 1942 continues to determine when Brazilian private law applies in international commercial contract disputes. The legislature's failure to revisit the Brazilian conflict of laws rules cannot be explained away by pointing to a dearth of viable legislative alternatives. Brazilian legislators have made the conscious choice not to adopt reform proposals such as the conflict of laws statute submitted by several prominent Brazilian jurists in 1994 that would have amended Article 9 of the Introductory Law to permit party autonomy.<sup>42</sup> Model Law 4.905 provides in relevant part:

Article 11: Contractual obligations shall be governed by the law chosen by the parties. This choice may be either implicit or explicit and may be modified at any time in regard to the rights of third parties.

§1—If the parties did not make a choice of law, or if the choice is held invalid, the contract will be governed by the law of the country with the most

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41. Surprisingly, the Introductory Law of 1916, which the Brazilian legislature replaced in 1942 with the current statute, expressly *permitted* party autonomy by making the law of the place where the contract was formed mandatory “unless otherwise stipulated” by the parties. GARLAND, *supra* note 9, at 52. Nevertheless, Brazilian judges of the era before the enactment of the current Introductory Law routinely applied Brazilian law in spite of the parties' choice of a foreign body of law to govern their international contract. *Id.*

42. Rodas, *supra* note 4, at 63 (discussing the failed attempt to pass the Model Law 4.905). Professors Haroldo Valladão, Limongi Franca, João Grandino Rodas, Jacob Dolinger, and Nadia de Araujo have all lobbied the legislature unsuccessfully to modernize the Introductory Law, suggesting that the influence of Brazil's preeminent jurists does not extend beyond the judiciary and into the legislative branch of government. DE ARAUJO, *supra* note 3, at 90 n.226.

significant contacts.<sup>43</sup>

Brazilian law professors have written prodigiously and forcefully, hoping to catalyze a liberalizing conflict of laws sea change in the legislature and the courts. As these scholars' commentaries on the codes are at least as persuasive to a Brazilian judge as non-binding but well-reasoned case law is to his U.S. counterpart, it is perhaps not surprising that the outpouring of academic writings has generated a strong reform movement. As will be discussed below, some Brazilian judges are inclined to cite law professors to justify their decision to adopt party autonomy by upholding choice-of-forum clauses pointing to more liberal fora. Some professors have posited that, given the legislature's refusal to ratify Model Law 4.905<sup>44</sup> and incorporate party autonomy within the domestic legal order, the next best solution would be to replace Article 9 of the Introductory Law with Article 7 of the 1994 Inter-American Convention on the Law Applicable to International Contracts.<sup>45</sup> Such Brazilian scholars point to Italy as a case study, as that country performed successful triage on its outmoded private international law by replacing its domestic legislation with the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which embraces party autonomy.<sup>46</sup> Nevertheless, the deafening

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43. The relevant text of the Model Law can be found in DE ARAUJO, *supra* note 11, at 231–32. Article 11 of Model Law 4.905 provides:

Artigo 11—Obrigações Contratuais. As obrigações contratuais são regidas pela lei escolhida pelas partes. Essa escolha será expressa ou tácita, sendo alterável a qualquer tempo, respeitados os direitos de terceiros. §1—Caso não tenha havido escolha ou se a escolha não for eficaz, o contrato será regido pela lei do país com o qual mantenha os vínculos mais estreitos.

*Id.* at 231–32.

44. *Id.*

45. DE ARAUJO, *supra* note 3, at 326–27. Article 7 of the Inter-American Convention on the Law Applicable to International Contracts states:

The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.

Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, O.A.S.T.S. No. 78, *available at* <http://www.oas.org/juridico/english/Treaties/b-56.html> [hereinafter Mexico Convention].

46. According to Article 3 of the Rome Convention on the Law Applicable to Contractual Obligations:

A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

Rome Convention on the Law Applicable to Contractual Obligations art. 3, ¶ 1, June 19, 1980, 1980 O.J. (L 266) 1, *available at* <http://www.rome-convention.org/instruments/>

silence from the Brazilian legislature in response to this and other reform proposals offered by the Brazilian legal academy tends to support the conclusion that the 1942 Introductory Law will remain in place for some time.

As the volume of transnational commerce and international contract disputes continues to rise, the parochial treatment of choice-of-law and choice-of-forum clauses mandated by the Introductory Law and the Civil Procedure Code has challenged the deference usually accorded by Brazilian judges to the lawmaking supremacy of the legislative branch. No matter how much a Brazilian judge might prefer to apply the more flexible U.S. conflict norms, he is often required to apply the rigid, expectancy-defeating rules dictated by the Introductory Law without regard to the intent of the parties. Nor can Brazilian judges generally find refuge from the Introductory Law in more liberal multilateral instruments such as the Inter-American Conventions on Private International Law (CIDIPs) or the Mercosur protocols. Brazil's legislative and executive branches have earned a reputation for intransigence by refusing to promptly ratify and promulgate such agreements.<sup>47</sup> Even after Congress has ratified an international instrument, it remains a dead letter until the Executive decides to formally promulgate it through the requisite decree in the official journal, which can sometimes take years to accomplish.<sup>48</sup> Although there is some evidence that "Brazil is moving in the right direction"<sup>49</sup> by, for example, signing the Mexico Convention,<sup>50</sup> the

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[i\\_conv\\_orig\\_en.htm](#).

47. See DE ARAUJO, *supra* note 3, at 83–93; see also Paulo B. Casella & Nadia de Araujo, *As Convenções e seu Impacto sobre o Direito Brasileiro*, in *INTEGRAÇÃO JURÍDICA INTERAMERICANA*, 17, 17–22 (Paulo B. Casella & Nadia de Araujo eds., 1998). Compare Venezuela's 1998 Law on Private International Law, which expressly adopts the letter and spirit of the CIDIPs by permitting, for example, a Venezuelan judge to search foreign law for the most equitable result in an international controversy. *Ley de Derecho Internacional Privado*, art. 1, *Gaceta Oficial* No. 36.511, 6 de agosto de 1998, available at <http://comunidad.vlex.com/pantini/ldiprivado.html>; see also DE ARAUJO, *supra* note 3, at 89.

48. Article 84, paragraph 8, and Article 49, paragraph 1, of the 1988 Brazilian Constitution require congressional ratification and presidential promulgation of all treaties. C.F. arts. 84, ¶ 8; 49, ¶ 1 (Brazil) (Keith S. Rosenn, trans.). Note also that Brazil must still ratify and promulgate all Mercosur agreements according to its own domestic procedures before the protocols can take effect. This perpetuates uncertainty about Brazilian private international law norms, and may also be viewed as a major drawback of Mercosur's intergovernmental, rather than a supranational, framework. See generally de Araujo, *supra* note 10; see also S.T.F. Carta Rogatória 8279, Relator: Ministro Celso de Mello, 06.17.1998 (holding that the Ouro Preto Protocol on Precautionary Measures, which provided for its own integration into the Mercosur community, was not enforceable in Brazil until it passed through both stages of Brazil's constitutionally-mandated ratification and promulgation process).

49. DE ARAUJO, *supra* note 11, at 8 n.7 (describing the status of the six CIDIPs in

executive branch has not yet sent this pro-party-autonomy CIDIP to Congress for ratification. As a result, Brazil remains at the “margin of the [regional] legislative integration process.”<sup>51</sup> As will be explored below, despite the judiciary’s traditional deference to Congress, and in response to the forces pushing away from the Introductory Law and towards party autonomy, some Brazilian judges have responded to this impasse by reasoning around the statutory law to reach results more closely aligned with the conflict of laws principles of the United States.

*B. The “Choice” of Substantive Law under the Introductory Law*

As outlined above, Article 9 of the Introductory Law denies party autonomy by declaring that, “[when the parties to the contract are in the same physical location], [c]ontractual obligations shall be governed by the law of the country where the contract was formed.” Article 9 thus appears to compel the parties to an international contract to travel to a foreign country in order to choose its substantive laws. Section 2 of Article 9 introduces some flexibility to the Brazilian conflict rules by providing that a contract formed between persons in different jurisdictions is governed by the law of “the location of the offeror,” as determined by Brazilian contract law. Thus if the parties want their contract to be governed by New York law, the offeror need only make his offer to the Brazilian offeree from New York, although Brazilian law would still be used to resolve any disputes as to the existence and validity of the offer.<sup>52</sup> This provision is far-reaching and, if consistently applied by the Brazilian courts, would go a long way towards establishing party autonomy in the country. Unfortunately, the application is far from consistent.

In keeping with the Brazilian tradition, it is useful to frame the analysis of the Brazilian judiciary’s interpretation of Article 9 with the commentary of Paul Griffith Garland, a former member of

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Brazilian municipal law: three CIDIPs have entered into force while three have not).

50. See generally Mexico Convention, *supra* note 45.

51. DE ARAUJO, *supra* note 11 at 176. Note that Brazil is one of the few states in Latin America not to have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966), available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> [hereinafter ICSID Convention], and it waited until 2002 to ratify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

52. Nadia de Araujo, *Contratos Internacionais e a Jurisprudência Brasileira: Lei Aplicável, Ordem Pública e Clausula de Eleição de Foro*, in *CONTRATOS INTERNACIONAIS*, *supra* note 4, at 195, 207.

both the New York and Brazilian bars and an early critic of the statute's application in the courts of Brazil. Garland noted that if the Brazilian courts faithfully applied Article 9 § 2 of the Introductory Law, then "every contract proposed by a New Yorker to a Brazilian would be governed in all respects by New York law even though performance were to be in Brazil, which would directly reverse prior practice."<sup>53</sup> Garland also considered Article 9's mechanistic application of the law of the place where two parties in the same location actually formed the contract (the *lex loci contractus*) to be "unsatisfactory."<sup>54</sup> Garland concluded with some regret that "the [1942 Introductory Law] does not appear to have modified . . . the judicial tendency to apply Brazilian law [regardless of where the contract was formed], sometimes without even considering the choice of law possibility."<sup>55</sup>

This "homeward trend" still remains deeply entrenched in the legal fabric of Brazil, as evidenced by the fact that the legislature has not updated the 1942 Introductory Law and also by the case law illustrating the judges' propensity for applying Brazilian law in spite of the parties' efforts to make an enforceable "choice" of foreign law pursuant to Article 9.<sup>56</sup> The courts of Brazil have been particularly willing to apply Brazilian law by, among other means, simply ignoring the international aspects of the contract when the "public order" so requires.<sup>57</sup> In other words, when confronted with an

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53. GARLAND, *supra* note 9 at 54 (noting that the Brazilian legislature's "unfortunate drafting" frustrated its putative intent to "reverse the homeward trend" in private international law).

54. *Id.* at 55.

55. *Id.*

56. When available for study, the terse opinions of the Brazilian courts do not easily allow the common law lawyer to determine if the judge failed to enforce an otherwise valid choice of foreign law because of his interpretation of Article 9 of the Introductory Law or rather because of his independent decision to apply the law of the forum on normative grounds. In any event, the result is the same: the Brazilian judge tends to apply Brazilian law in spite of the parties' clear intent to the contrary. Corrêa Jacques, *supra* note 40, at 286.

57. The public order exception is the civil law analogue to the public policy exception familiar to common lawyers. By invoking this exception, Brazilian courts can trump the Introductory Law's conflict of laws analysis and apply Brazilian law whenever necessary to avoid unconstitutional or inequitable results. As is the case under U.S. law, the use of the public order exception is left entirely to the judge's discretion and thus cannot be guarded against by even the most scrupulously drafted contract. For simplicity, the term "public policy" will be used in lieu of "public order" throughout this Note. See DE ARAUJO, *supra* note 11, at 273. This is particularly likely to occur when domestic statutes "designed to protect specific sectors of the population, such as vulnerable consumers [under the Consumer Protection Code]" are available. Corrêa Jacques, *supra* note 40, at 289; see also Claudia Lima Marques, *A insuficiente proteção do consumidor nas normas de Direito Internacional Privado—Da necessidade de uma Convenção Interamericana (CIDP) sobre a lei aplicável a alguns contratos e relações de consumo*, in O NOVO DIREITO INTERNACIONAL:

otherwise valid choice of foreign law, many Brazilian judges simply ignore Article 9 of the Introductory Law and apply Brazilian law, reasoning that the normative and substantive advantages of Brazilian law outweigh the harm caused by frustrating the intent of the parties.<sup>58</sup> The prevalence of this practice today would not surprise Garland, who noted in 1959 that Brazilian judges have long shown “a tendency to apply Brazilian law when the contract is performable in Brazil . . . [and] in the presence of a provision of Brazilian law dealing with the specific problem presented, such a provision [would] be applied regardless of any attempt by the parties to stipulate another law.”<sup>59</sup> One commentator noted that this “interventionist” attitude is not only still prevalent but actually on the rise in the Brazilian courts.<sup>60</sup> The continued use of the public policy exception to override the already limited choice of foreign law makes it extremely difficult for a U.S. lawyer to manage risk and reduce Brazil costs. As this cost is usually passed on to the Brazilian party to an international commercial contract, the Introductory Law paradoxically levies a heavy tax upon the very persons that it is designed to protect.

At the same time, Brazil’s Arbitration Law<sup>61</sup> requires Brazilian courts to enforce the choice of law and arbitral forum made *ex ante* by the parties in an arbitration agreement. The Arbitration Law grants individuals the right to “freely choose the rules of law to be applied in the arbitration, provided however that they do not violate good customs or the public order.”<sup>62</sup> Brazilian courts rarely

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ESTÚDIOS EM HOMENAGEM A ERIK JAYME, *supra* note 40, at 141, 146–62 (arguing that Brazil’s tendency to apply its own Consumer Protection Code in international consumer contracts despite an otherwise valid choice of foreign law produces paradoxical results by undermining the very consumer rights the Code seeks to protect in Brazil).

58. Corrêa Jacques, *supra* note 40, at 289 (suggesting that this practice is particularly common in consumer contract disputes).

59. GARLAND, *supra* note 9, at 51.

60. Corrêa Jacques, *supra* note 40, at 289.

61. Lei No. 9.307, 23 de septiembre de 1996, D.O. 9.24.1996 (Brazil).

62. Article 2 reads:

Art. 2—A arbitragem poderá ser de direito ou de equidade, a critério das partes.  
§ 1—Poderão as partes escolher, livremente, as regras de direito que serão aplicadas na arbitragem, desde que não haja violação aos bons costumes e à ordem pública. § 2—Poderão, também, as partes convencionar que a arbitragem se realize com base nos princípios gerais de direito, nos usos e costumes e nas regras internacionais de comércio.

*Id.* A recent decision by an appellate court in São Paulo State illustrates how arbitration clauses are treated by Brazilian courts. The court unanimously held enforceable an arbitration clause designating French law as the governing law of their agency contract, reasoning that the arbitration clause was governed by a “special law”—the Brazilian Arbitration Law—which permitted party autonomy even though the Introductory Law would not. T.A.Civ.S.P. AG No. 1.111.650-0, Relator: Juiz Waldir de Souza José, 24.09.2002

invoke the public policy exception when interpreting arbitration agreements; further, they have broken from prior practice by readily enforcing foreign arbitral awards pursuant to the New York Convention.<sup>63</sup> Thus while Brazilian judges routinely enforce party autonomy in arbitration agreements, the Introductory Law compels these same judges to invalidate a choice of law whenever the parties fail to realize that Brazil's conflicts rules are far more restrictive outside of the arbitration context. This inconsistency is particularly galling for Professor Araujo, who believes that Brazil's reluctance to adopt party autonomy has:

ominous consequences for [the country's role] in cross-border transactions . . . since the contracting parties will take legal certainty, or the lack thereof, into account when they calculate their 'Brazil costs' . . . [T]he primitivism and inadequacy of Brazilian private international law make it difficult for Brazil to claim its rightful place in the global market.<sup>64</sup>

Yet a Brazilian court cannot supplant the parties' choice of law without first establishing its jurisdiction over the dispute. The following section explores how the "homeward trend" is inextricably connected to an even more pervasive trend in the Brazilian courts—the judicial override of the parties' choice of forum.

C. *The Gravitational Pull of the Brazilian Forum: A Means to an End*

The decision to exercise jurisdiction over an international contract dispute should logically be made before and completely separately from a court's choice-of-law analysis. Yet Brazilian courts often treat the two issues together. Although the relevant statutory provisions are distinct, the same territorial impulse that leads the judges to apply Brazilian law compels them to sustain jurisdiction over the case in the first instance. Indeed, it is only by exercising jurisdiction over the controversy that the Brazilian court can be certain that the parties will receive the protections afforded to them by Brazilian law.<sup>65</sup> The presumption in favor of Brazilian law

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(Brazil). For more Brazilian case law interpreting the new Arbitration Law to permit party autonomy, see Fabio Morosini, *A Arbitragem Comercial como Fator de Renovação do Direito Internacional Privado Brasileiro dos Contratos* 30–35 (2005) (unpublished manuscript, on file with the author).

63. DE ARAUJO, *supra* note 11, at 333–35.

64. DE ARAUJO, *supra* note 3, at 324.

65. Interestingly, there is little discussion in the Brazilian case law of the possibility

dictated by, or in spite of, Article 9 of the Introductory Law remains highly relevant to the choice-of-forum analysis.

The reader will recall that Article 12 of the Introductory Law and Article 88 of the Civil Procedure Code provide that the Brazilian courts have permissive or “concurrent” rather than “mandatory” jurisdiction when the defendant is domiciled in Brazil and when the contract is to be performed in Brazil. By authorizing parties to a contract to choose a non-Brazilian forum, Article 111 of the Civil Procedure Code simply provides the logical corollary to the concept of concurrent jurisdiction. Thus the Introductory Law and the Civil Procedure Code allow parties to choose a non-Brazilian forum by contract—even when the contract must be performed in Brazil—because Brazil’s jurisdiction is not deemed to be exclusive in this situation. Nevertheless, just as Brazilian judges have shown a consistent desire to apply Brazilian law, so too have they conceived of their jurisdiction as mandatory rather than discretionary when public policy so requires.

One commentator surveyed recent forum selection case law and concluded that the Brazilian courts “have yet to settle upon an answer to the question of the enforceability of forum selection clauses . . . their prima facie validity is unquestionable, but if challenged, the courts oscillate between permitting and prohibiting a choice-of-forum clause to strip Brazilian judges of their jurisdiction.”<sup>66</sup> What statutory rationale can explain this manifestation of Garland’s “homeward trend?” Brazilian judges often interpret the Introductory Law and the Civil Procedure Code as standing for the proposition that Brazil’s jurisdiction is not concurrent, but rather mandatory over the specified persons and cases, despite the force of the STF’s *Súmula* 335, which states that “a contractual forum selection clause [is] valid.” This “rebellious” tendency is predicated upon the Brazilian judge’s determination that the judge of the chosen forum would not have jurisdiction over the case according to Brazil’s—and not the foreign forum’s—conflicts rules. Upon concluding that the judgment handed down in the chosen forum could not therefore be recognized in Brazil, the

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that justice could be better served and expectancy interests better protected by enforcing a choice-of-forum clause pointing away from Brazil where local conflict of law rules might in turn call for the application of Brazilian law because of the parties’ choice of law or lack thereof. Ricardo Ramalho Almeida, *Breves Reflexões Sobre Eleição de Foro Estrangeiro e a Competência Concorrente do Judiciário Brasileiro*, in *CONTRATOS INTERNACIONAIS*, *supra* note 4, at 296, 306 n.18. Note also that Brazil has no analogue to the U.S. doctrine of forum non conveniens, meaning that Brazilian courts are unlikely to relinquish jurisdiction over a case once it is properly established. *Id.* at 305 n.16.

66. DE ARAUJO, *supra* note 11, at 298.

Brazilian judge is set free to try the case concurrently with, or in lieu of, the judge of the chosen forum.<sup>67</sup> Establishing jurisdiction by such a sleight of hand without regard to the forum selection clause enables the judge to apply either the substantive law dictated by Brazilian conflict rules or, in the alternative, a specialized Brazilian remedial statute via the public policy exception as described above.<sup>68</sup>

Until relatively recently, there was a great deal of uncertainty regarding the validity and enforceability of forum selection clauses in the state and federal courts of the United States as well. In *The Bremen v. Zapata Off-Shore Co.*, the Supreme Court rebuked the lower federal courts for refusing to allow a choice-of-forum clause to oust them of their subject matter jurisdiction.<sup>69</sup> The Court held that federal courts sitting in admiralty should afford forum selection clauses a presumption of enforceability. This presumption can only be overcome if the party challenging enforcement of the forum selection clause can impugn the validity of the clause itself or, in the alternative, show that enforcement of the clause would violate “a strong public policy” by, for example, sending the dispute to a forum in which the litigants would be denied their day in court.<sup>70</sup> Federal and state court decisions outside of the admiralty context have generally adopted the Supreme Court’s hospitable treatment of jurisdiction-ousting forum selection clauses.<sup>71</sup> Justice Burger justified his decision to hold forum selection clauses presumptively enforceable by explaining that:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . [I]n an era of expanding world trade and commerce . . . [this] doctrine [has] little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.<sup>72</sup>

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67. Almeida, *supra* note 65, at 296.

68. *Id.*

69. 407 U.S. 1, 10 (1972).

70. *Id.* at 15–17.

71. SCOLES ET AL., *supra* note 2, at 469–79.

72. *Bremen*, 407 U.S. at 9.

These sentiments contrast sharply with the reasoning of Brazilian Justice Athos Gusmão Carneiro in a case in which the STJ denied an appeal by U.S. insurance companies seeking to enforce a forum selection clause pointing back to the United States:

We believe that a judge should be more concerned about justice than about efficiency . . . efficiency should be used only to justify, and never to actually exclude Brazilian jurisdiction . . . the norms of concurrent jurisdiction in Brazil *are public law and cannot be abdicated* [by contract] since the availability of jurisdiction is an *inherent manifestation of the State's sovereignty* . . . the principle of *efficiency* is no impediment to Brazilian jurisdiction.<sup>73</sup>

The equitable results ensured by privileging the norm of justice over efficiency are attractive under nearly any conceivable legal framework. Few would quarrel with the assertion that “[t]he principle of party autonomy in conflict of laws loses its appeal . . . when it is used by a strong party to dominate a weaker party.”<sup>74</sup> The difficult questions arise only when normative justice cannot be obtained without sacrificing rules of primary private conduct designed to maximize legal certainty and efficiency by, among other means, clearly authorizing party autonomy in the negotiation of international commercial contracts. Brazil has chosen to resolve this tension by rejecting party autonomy per se, while the United States has chosen to embrace it subject only to contract doctrines like fraud and duress and limited public policy exceptions. It is worth noting that although the public policy exception undergirding the conflict of laws regime in the United States also allows U.S. courts to equitably override the parties’ choice of forum, New York case law and the Restatement (Second) of Conflict of Laws provide clear guidelines designed to cabin its use.<sup>75</sup> No such limitations on the public policy

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73. The Superior Tribunal of Justice pointed out:

Cremos que o juiz deve ter uma preocupação maior em fazer justiça, em dizer o direito, e o princípio da efetividade deve ser usado mais para justificar do que para excluir a competência . . . as normas definidoras da competência concorrente da Justiça brasileira, previstas no diploma processual civil, *são de direito público e delas não podem os interessados previamente abdicar eis que a disponibilidade da Jurisdição constitui manifestação inerente à soberania estatal*. O princípio da *efetividade* não é fator impeditivo da Jurisdição brasileira.

S.T.J., R.E. No. 251.438/RJ, Relator: Athos Gusmão Carneiro, 08.08.2000 (Brazil).

74. Lima Marques, *supra* note 57, at 191 (discussing the fact that party autonomy can easily be abused in consumer contracts characterized by disparities in bargaining power). *Accord* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

75. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 90 (1971) (“No action will be entertained on a foreign cause of action the enforcement of which is contrary to the

exception are imposed on the Brazilian judiciary.<sup>76</sup>

It should come as no surprise that Brazil, a developing country seeking to both attract and control foreign investment, should limit the parties' freedom to choose a foreign forum and law to adjudicate and govern their contracts. U.S. corporations doing business in Brazil have an obvious interest in drafting contracts that limit their liability via choice-of-forum and choice-of-law clauses pointing away from Brazil and towards the more favorable and familiar procedure and substance of the U.S. courts.<sup>77</sup> Brazil, on the other hand, has an equally compelling interest in maintaining control over powerful U.S. multinationals by forcing international contract disputes to be litigated in Brazil, so that Brazilian judges can decide for themselves what law to apply under the Introductory Law or otherwise.<sup>78</sup> This protective impulse explains the Brazilian judiciary's consistent willingness to exercise jurisdiction over an international contract dispute under Article 88 of the Civil Procedure Code.

To illustrate the implications of Brazil's treatment of choice-of-forum clauses for U.S. litigants, consider a hypothetical international commercial contract suit brought by a U.S. plaintiff against a Brazilian defendant in a New York court. Assume that the international sales contract was formed in New York while both

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strong public policy of the forum."). Upsetting the parties' expectations under this rationale is justified only if "the local policy [is] sufficiently strong to outweigh a state's natural desire to open the doors of its courts to suits involving foreign facts." *Id.* cmt. c.; *see also* Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.) (holding that New York courts should respect the choice of New York forum unless doing so would necessarily "violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonweal"); Monrad G. Paulsen & Michael I. Sovern, *Public Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969, 992-93 (1956).

76. DE ARAUJO, *supra* note 11, at 272.

77. Since an explicit choice-of-law clause would violate the Introductory Law, parties wishing to select New York law to govern their contract would have to rely on the judge's application of his jurisdiction's conflict of laws rules to determine that the desired foreign law, rather than Brazilian law, would apply. Clients with a low risk appetite would presumably require compensation in return for such legal uncertainty, thus increasing the transaction's Brazil cost and making it more expensive for Brazilian parties to contract with foreign parties.

78. As Cindy Noles notes:

Foreign enterprises seeking predictability and certainty of litigation may rely on a choice-of-law clause as a means of decreasing the risk inherent in a contract transcending national boundaries . . . [yet t]here is always a chance that the foreign court may elect not to apply the chosen law, or that it may be difficult . . . to prove the law stipulated in the contract.

Cindy Noles, *Enforcement of Forum Selection Agreements in Contracts Between Unequal Parties*, 11 GA. J. INT'L & COMP. L. 693, 698 (1981). Developed countries, however, almost always "advocate maximization of party autonomy in the choice of forum." *Id.* at 705.

parties were physically present in New York. Suppose further that, although the contract was to be performed in Brazil, it contained a choice-of-forum clause pointing to the New York courts, which presumably would be willing to enforce the forum selection clause and apply New York law pursuant to New York's conflicts rules. The U.S. plaintiff successfully established personal jurisdiction over the Brazilian defendant in the New York court, but the defendant challenged the enforceability of a forum selection clause in Brazil, rather than the chosen New York forum. The defendant is acting strategically by contesting the forum selection clause in Brazil because he knows that the Brazilian court is not required by Brazilian law to enforce the forum selection clause and is unlikely to refuse jurisdiction over the case. Because the Brazilian court has concurrent, rather than mandatory jurisdiction, under Article 12 of the Introductory Law and Article 88 of the Civil Procedure Code, and in light of the fact that Article 111 of the Civil Procedure Code merely instructs the court that the forum selection clause is potentially enforceable, the court retains discretion to decide for itself whether or not to take jurisdiction of the case. This is true notwithstanding the STF's declaration that "a contractual forum selection clause [is] valid" in *Súmula* 335 because, as we have seen, this *Súmula*'s precedential value has been severely undercut by the judiciary's willingness to invoke the public policy exception to disregard the parties' choice of forum in international disputes. Note that the result on the merits of this dispute should theoretically be the same no matter which country's court exercises jurisdiction over the case. Even if the Brazilian court declines to enforce the choice-of-forum clause, the plain language of Article 9 of the Introductory Law clearly mandates the application of New York law, the law of the place where this contract was perfected. New York law would also be applied by the New York court if the parties' choice of forum was respected in the first instance.

The U.S. plaintiff obtains a clear advantage over his Brazilian opponent by litigating under the familiar procedural rules and substantive law of the New York forum. Accordingly, should the Brazilian court conclude that the defendant cannot afford sophisticated New York counsel for its defense in the New York court, or if the judge suspects unscrupulous bargaining on the part of the U.S. plaintiff, the court may decide that public policy requires the application of Brazilian law to the dispute. This conclusion will in turn compel him to exercise his Article 88 concurrent jurisdiction in spite of the parties' fairly negotiated consent to the exclusive jurisdiction of the New York courts. This hypothetical illustrates one of the gravest effects of Brazil's conflict of law rules on cross-border

transactions. Unless the Brazilian defendant voluntarily submits to the jurisdiction of the New York courts at the time of the contract litigation, a Brazilian judge is almost certain to exercise jurisdiction over the case in spite of the conflicting intent of the parties at the time that the contract was signed.

Finally, it is worth noting that Brazilian procedural law allows a party who could otherwise invoke Brazilian jurisdiction to forfeit the protections of the Brazilian courts by suing or defending abroad and voluntarily choosing a foreign forum. As we have seen, however, from a U.S. lawyer's perspective, litigation against a Brazilian defendant in U.S. courts is a very risky proposition. For example, it might be difficult for a U.S. plaintiff to establish exclusive personal jurisdiction over a Brazilian defendant in a U.S. court. "[A] Brazilian domiciliary may challenge a foreign court's jurisdiction over him, and, if this challenge is denied, he may withdraw from the foreign litigation and renew his challenge to the jurisdiction . . . before the [STJ]."<sup>79</sup> Even if the U.S. plaintiff successfully establishes jurisdiction over the Brazilian defendant to the exclusion of the Brazilian forum and obtains a judgment against him, if the judgment assets are located in Brazil, the plaintiff must still petition the STJ for enforcement of the judgment in Brazil.<sup>80</sup> Finally, initiating a suit abroad that has yet to produce a final judgment does not bar a concurrent suit in Brazil involving the same case or controversy, meaning that a U.S. plaintiff might have to bear the costs of litigating against the same defendant in both the United States and Brazil.<sup>81</sup>

#### IV. THE APPLICATION OF BRAZILIAN CONFLICT OF LAWS RULES IN THE BRAZILIAN COURTS

##### A. *Brazil's Hostile Treatment of Forum Selection Clauses*

The expectancy-defeating result recently handed down by a Rio de Janeiro appellate court in *Sideral Trading S.A. v. Repsol YPF*

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79. Jacob Dolinger, *Brazilian International Procedural Law*, in A PANORAMA OF BRAZILIAN LAW, *supra* note 9, at 348, 368–69.

80. *See id.* at 364–67 (discussing the Brazilian public policy exception to recognition of foreign judgments). Recall that the proper venue for all petitions for, and challenges to, the enforcement of foreign judgments and arbitral awards has recently been changed from the STF to the STJ. This change of venue has not, however, generated any corresponding procedural or substantive reforms. de Araujo & Magalhães Marques, *supra* note 25.

81. *See Dolinger, supra* note 79, at 361–63 (discussing *lis pendens* and *res judicata* under Brazilian law).

*Brasil S.A.*<sup>82</sup> provides an excellent illustration of the traditional Brazilian treatment of choice-of-forum clauses. The facts of *Sideral Trading S.A.* are as follows: The Spanish firm Repsol Distribución S.A. entered into a distribution contract with Sideral Trading S.A., a Brazilian company, in Madrid. The international commercial contract called for performance in Spain, Brazil, and Paraguay. Accordingly, the agreement contained a forum selection clause specifying that all litigation arising under the contract was to be brought exclusively in the courts of Madrid, Spain.<sup>83</sup> Sideral Trading sued Repsol Distribución's Brazilian-domiciled subsidiary and subrogee, Repsol YPF Brasil S.A., in Rio de Janeiro, for reasons that are not reported in the court's terse opinion.<sup>84</sup> More important than Sideral Trading's cause of action, however, was Repsol's defense, which rested entirely on the enforceability of the choice-of-forum clause pointing back to Madrid. Repsol asked the court to enforce the parties' fairly negotiated choice of forum and dismiss the suit. Sideral Trading, no doubt aware of the Brazilian judiciary's historical reluctance to divest itself of its jurisdiction, and perhaps sensing the Rio de Janeiro court's willingness to apply specialized Brazilian oil and gas law,<sup>85</sup> challenged the validity of the forum selection clause by arguing that the Brazilian court was required to exercise jurisdiction on the basis of Article 88 of the Civil Procedure Code.<sup>86</sup> The trial court disposed of the case without reaching the merits by enforcing the forum selection clause, construing Article 88 as granting discretion to decide whether or not to exercise jurisdiction, not as an affirmative mandate to do so. Accordingly, the trial court forced Sideral Trading to litigate its dispute against Repsol in the chosen Spanish forum, where Spanish choice of law rules would determine the law to be applied.

On appeal, Sideral Trading repeated its arguments against enforcement of the forum selection clause and convinced the

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82. T.J.R.J., Ap. No. 2003.001.03058, Relator: José Carlos de Figueiredo, 07.05.2003 (Brazil).

83. The parties did not make a choice of law in the contract, presumably because such a clause would be held unenforceable by a Brazilian court pursuant to Article 9 of the Introductory Law.

84. The Brazilian courts, like those of many other civil law countries, do not publish the kind of fact-laden opinions that lawyers are accustomed to reading in the United States and other common law jurisdictions.

85. Brazil's largest oil and gas exploitation infrastructure, as well as the state-controlled petroleum company, Petrobras, are located in Rio de Janeiro State.

86. Sideral also argued that the choice-of-forum clause was unenforceable due to bad faith on the part of Repsol, which allegedly strong-armed the firm into accepting the Spanish choice of forum. This argument was rejected out-of-hand by the appellate court. T.J.R.J., Ap. No. 2003.001.03058 at 10–11.

Tribunal of Justice in Rio de Janeiro to reverse the lower court's decision. The unanimous appellate court held that the trial court's Article 88 jurisdiction "cannot be avoided by the parties as [Brazilian jurisdiction] is directly related to [Brazilian] sovereignty."<sup>87</sup> The appellant, Sideral Trading S.A., successfully established Brazilian jurisdiction under Article 88 because both parties were domiciled in Brazil and partial performance on the contract was due in Brazil. Furthermore, the appellate court decided that enforcement of the forum selection clause in this contract would be tantamount to a violation of Sideral Trading's constitutional right to "due process of law" and would violate public policy.<sup>88</sup> The court concluded that Repsol's expectation interest in the remote Spanish forum was far outweighed by Brazil's compelling state interest in resolving disputes between its own corporations in its own courts under its own substantive and procedural law. The subrogation of Repsol's Brazilian-domiciled subsidiary to the rights and obligations of the contract appeared to be a critical factor for the appellate court: "what was promised [by the Brazilian parties to each other] should be performed lest an unequivocal violation of [due process of law] be committed."<sup>89</sup> Since Repsol could not justify its insistence on the remote (and more favorable) Spanish forum to the demanding Brazilian court by anything more than the contract itself, the judge forbade Repsol from forcing Sideral Trading to bring its dispute exclusively in the Spanish court. The court explained that "a careful reading of the facts of the case" shows "the inability of the [forum selection] clause to defeat Brazilian jurisdiction in light of Article 88 of the Civil Procedure Code, and the lack of other facts to justify the exclusion of Brazilian jurisdiction."<sup>90</sup> The Tribunal of Justice concluded that since the Spanish forum chosen *ex ante* by the parties

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87. *Id.* at 1 ("Demais disso, a hipótese versada nos autos é de competência internacional concorrente do Juíz Brasileiro, não podendo ser afastada pela vontade das partes, na medida em que está diretamente relacionada como a soberania nacional.").

88. *Id.* at 3 ("[H]a que se reconhecer que a cláusula de eleição de foro não pode ser invocada pela subrogada, que é sociedade sediada no Brasil, sob pena de afronta ao princípio da proporcionalidade e ao devido processo legal . . .").

89. *Id.* at 9 ("[A]qui foi constituída a obrigação e aqui, até mesmo por razão de lógica formal, deve ser cumprido e executado o que foi comprometido, sob pena de inequívoca afronta ao princípio da efetividade do processo.").

90. The Court noted that:

Da leitura atenta dos autos, verifica-se que o presente inconformismo possui dois pontos nodais, consubstanciados, em síntese, na impossibilidade de referida cláusula derrogar a competência da Justiça Nacional, quando observados os critérios do artigo 88, do CPC e a inexistência, nos autos, de exceção de incompetência, o que impediria o conhecimento de ofício da matéria, haja vista a sua relatividade.

*Id.* at 5.

did not have exclusive jurisdiction over the dispute, Brazilian jurisdiction must lie.

Perhaps implicit in the court's decision was its conclusion that Repsol, a powerful foreign multinational, leveraged its superior bargaining power against the weaker Brazilian party. Unlike the trial court, the Tribunal of Justice seemed extremely reluctant to allow Repsol to so easily contract itself out of the Brazilian courts. The appellate court was careful to point out that it was still possible for Repsol to countersue Sideral Trading concurrently in Madrid.<sup>91</sup> Yet, as discussed above, the difficulty of convincing the STJ to enforce a Spanish judgment against Sideral Trading in Brazil would likely make this a futile waste of Repsol's resources. Furthermore, it seems likely that the Tribunal of Justice conflated the choice-of-forum and choice-of-law analysis and erroneously concluded that Spanish law, rather than Brazilian law, would necessarily be applied by the Spanish courts. In fact, Spain's choice of law rules may well have dictated that Brazilian law should govern the distribution contract, which presumably would have made enforcement of the forum selection clause more palatable for the Brazilian court. The Tribunal of Justice handed down a stinging defeat to the proponents of party autonomy in Brazil by holding that the otherwise enforceable forum selection clause conflicted with Article 88 jurisdiction in violation of Brazilian public policy.

While the Rio de Janeiro court's decision in *Sideral Trading* is representative of a dominant trend in forum selection analysis and undoubtedly persuasive authority for the trial courts in Rio de Janeiro, it is important to emphasize that not all courts would have resolved the issue against Repsol when faced with identical facts. The lack of stare decisis in Brazil means that no court—trial or appellate—is bound by prior precedent to interpret Article 88 of the Civil Procedure Code in the same manner.<sup>92</sup> An appellate court in São Paulo State, for example, interpreted Article 88 to permit the enforcement of a forum selection clause pointing to Germany on facts very similar to those involved in the *Sideral Trading* case, even though the Brazilian firm appealed to the Brazilian judiciary's strong interest in justice by arguing that a German judge could not adequately protect its interests as it was allegedly coerced by the

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91. *Id.* at 10 (“Nota-se, que se tratando de competência concorrente, os Tribunais de Madri não ficam impedidos de julgar o mesmo litígio . . .”).

92. DE ARAUJO, *supra* note 11 at 279, 283–300 (discussing several notorious examples of inconsistent treatment of forum selection clauses, including an example in which the same appellate court in Rio de Janeiro upheld a forum selection clause under one set of facts, and then subsequently struck down a clause on similar facts in another case, completely reversing its prior reasoning without distinguishing the previous decision).

stronger German party to accept the choice of the distant forum.<sup>93</sup> This court seemed heavily influenced by the fact that Article 9 of the Introductory Law would have forced the Brazilian court to apply German law to the contract dispute as the underlying agreement was perfected in Germany. Yet it is hard to understand why this should have influenced the court at all since, unlike the United States, Brazilian law does not allow judges to refuse to hear a case on a discretionary ground such as *forum non conveniens*. The court nevertheless concluded from this fact that Brazilian jurisdiction would be inappropriate in this case—providing another example of the Brazilian judiciary's failure to consistently separate the choice-of-forum from the choice-of-law analysis. Such inconsistent and analytically confusing results make it very difficult for U.S. attorneys to manage legal risk and decrease Brazil costs by keeping their clients out of Brazilian courts with choice-of-forum clauses, despite the fact that such clauses are explicitly authorized by Article 111 of the Civil Procedure Code and made presumptively enforceable by the STF's *Súmula* 335. Furthermore, even if the forum selection clause is ultimately held enforceable by the Brazilian courts, the client is forced to pay twice to reduce the risk of Brazilian litigation—once when he pays his attorneys to negotiate the choice-of-forum clause and then again when he is forced to defend the enforceability of the clause in the Brazilian courts.

*B. Choice of Law through Choice of Forum: Toward a Third Way*

In spite of the inherent uncertainty surrounding the enforceability of forum selection clauses in Brazil, drafters of international commercial contracts have sometimes used them successfully not only to contract out of the Brazilian forum, but also to make a *sub rosa* choice of law, circumventing Article 9 of the Introductory Law and its rigid insistence on either the *lex loci contractus* or the law of the jurisdiction in which the offer was made. For example, a forum selection clause pointing to New York State standing alone could be sufficient to enable the parties to an international commercial contract perfected and performed in Brazil to effectively submit to both the exclusive jurisdiction and substantive law of New York, even if the contract is scrutinized by a Brazilian court. Provided that such Brazilian court can be convinced

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93. T.A.Civ.S.P. Ap. No. 733.139-1, Relator: Juiz Cristiano Ferreira Leite, 09.12.1998 (Brazil).

to enforce the parties' choice of the New York forum, the parties can rely upon a New York judge to apply New York law as the otherwise applicable law of the forum pursuant to New York's conflicts rules in the absence of an explicit choice of law.<sup>94</sup> Recall that an *ex ante* choice of New York law by the parties would violate the Introductory Law and throw the enforceability of the choice-of-forum clause into doubt when challenged in a Brazilian court. As seen in the *Sideral Trading* case, Brazilian courts are not always willing to permit such a facile solution to the problem of party autonomy in Brazil. Nevertheless, in an exceptional opinion handed down by an appellate tribunal in the State of Rio Grande do Sul, a court enthusiastically endorsed precisely this kind of forum selection legerdemain.

The dispute in *Bank Boston v. Dyrford Investment S.A.* centered around the enforceability of a choice-of-forum clause in a contract between the Uruguayan branch of Bank Boston and Dyrford Investments, a Brazilian corporation owned by a Brazilian citizen.<sup>95</sup> Bank Boston sued Dyrford Investments for breach of contract in Uruguay, and Dyrford challenged the jurisdiction of the Uruguayan forum in a Brazilian court. The trial court struck down the forum selection clause pointing to Uruguay using the same reasoning employed by the Rio de Janeiro appellate court in *Sideral Trading*. Bank Boston appealed to the Tribunal of Justice of Rio Grande do Sul, which held for the appellants in an opinion that might be seen as pointing towards a workable compromise between the opposing sides of the Brazilian party autonomy debate.

The appellate court in Rio Grande do Sul concluded that since not all parties to the contract were Brazilian persons, there were not enough Brazilian contacts to justify disregarding the intent of the parties and allowing the Brazilian courts to exercise jurisdiction over the case. Permitting Brazilian jurisdiction to lie would do violence to the expectation interests of the parties and would create unnecessary "juridical instability" in light of the fact that Article 111 of the Civil Procedure Code allows the parties to specify a non-Brazilian forum whenever Brazilian jurisdiction is not mandatory.<sup>96</sup> The court went on to quote *Súmula* 335 in support of its decision to enforce the forum selection clause.<sup>97</sup> Of critical importance to the unanimous

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94. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1402 (Consol. 2005); SCOLES ET AL., *supra* note 2, at 872 (explaining that "[t]he legislative policy objective [behind the New York law] was to afford parties the opportunity to select a sophisticated body of commercial law and a judicial system with substantial experience . . .").

95. T.J.R.G., Ag. No. 70005228440, Relator: Juiz Augusto Coelho Brago, 08.04.2003 (Brazil).

96. *Id.* at 5.

97. The Court quoted *Súmula* 335:

court was the fact that the parties were in different places when the contract was formed. Accordingly, the court examined Article 9 § 2 of the Introductory Law and determined that the substantive law of the jurisdiction of the offeror, Bank Boston Uruguay, would govern the contract if litigation were to proceed in the Brazilian courts. The court was willing to make this conclusion because “the offeror was located in Uruguay, and despite appearances to the contrary, Dyrford Investment S.A. was not a weaker party in the contract.”<sup>98</sup>

In a concurring opinion, Mário José Gomes argued forcefully for the enforcement of forum selection clauses in this and other disputes pitting the territorial Brazilian jurisdictional rules against the party autonomy rules embraced by most of Brazil’s trading partners. Citing the commentary of a Brazilian law professor, he disabused the lower court of its erroneous conflation of the substantive choice of law and the procedural choice of forum analysis by clarifying that Brazilian judges must first conclude that they have jurisdiction to hear the case before reaching the choice of law issue.<sup>99</sup> Judge Gomes called for reform by suggesting that his colleagues in the Brazilian judiciary restrain their traditional willingness to exercise jurisdiction over international contract disputes in order to apply Brazilian law in contravention of a valid forum selection clause as exemplified by the *Sideral Trading* case:

It bears repeating that the present case presents us with both a choice-of-law and a choice-of-forum clause. Furthermore, it is always preferable to use the principle of party autonomy when determining the forum and the law to be applied to the dispute. . . . [T]hus[,] Uruguayan . . . jurisdiction should govern this suit.<sup>100</sup>

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A cláusula de eleição de foro, no direito pátrio, encontra-se em pleno vigor, eis por que o art. 111 do CPC preconiza a faculdade das partes de disporem da competência territorial para a solução de suas lides.

Assim também está cristalizado na súmula 335 do Supremo Federal Tribunal que preceitua:

É válida a clausula de eleição de foro para os processos oriundos do contrato.

*Id.* at 4.

98. *Id.* at 4 (“A obrigação foi contraída por pessoa maior e capaz, não sendo demonstrado qualquer vício de consentimento que pudesse macular o clausulado.”).

99. *Id.* at 6 (“Esta distinção [entre a cláusula de eleição da lei aplicável ao contrato e a cláusula de eleição do foro] é de suma importância, pois, conforme saliente Nadia de Araújo, apesar da influencia que uma cláusula exerce na outra, ambas não se confundem . . .”).

100. Judge Gomes stated:

Repita-se: O caso presente diz com a cláusula de lei aplicável aos contratos e também com a eleição de foro para solver as controvérsias.

E no passo, há que se prestigiar o princípio da autonomia da vontade na determinação do foro e da lei aplicável . . . [a] hipótese repita-se, é de

In other words, the court was willing to embrace party autonomy *sub rosa* by enforcing a forum selection clause pointing to a jurisdiction in which the parties might be able to choose their own law, so long as no choice of law was made on the face of the contract in violation of Article 9 of the Introductory Law. While Brazilian judges are not permitted to make binding law by way of a court decision as are their common law counterparts, the *Bank Boston* case could nevertheless serve as a persuasive model for the resolution of subsequent international commercial contract disputes in Rio Grande do Sul and throughout Brazil.

#### CONCLUSION

U.S. lawyers should not assume that a Brazilian court will enforce a choice of foreign law and forum, even when made during arm's length negotiations in strict conformity with the Introductory Law and the Civil Procedure Code, when operation of such contractual provisions would deprive a Brazilian party of his day in a Brazilian court. *Sideral Trading* illustrates how the Brazilian tribunals typically respond when asked to protect a Brazilian party from exploitation by a foreign firm that allegedly leveraged its superior bargaining power to extract consent to an unfavorable body of law applied in an inconvenient forum. Save for the limited island of party autonomy guaranteed by the Arbitration Law, the Brazilian courts have shown no inclination to change this *de facto* rule of mandatory jurisdiction over all international commercial contracts brought before them. This commitment to normative justice comes at the expense of clear rules of primary private conduct and produces Brazil costs, most of which are passed on to Brazilian parties. Brazilian firms are therefore forced to pay a heavy price for the judicial oversight of their transactions that is encouraged by the country's conflict of laws regime even if it is not actually desired by the parties to the contract. The studied refusal of Brazil's political branches to incorporate party autonomy into the country's conflicts rules suggests that Brazil must adjudge these rules to be worth the high cost of their application in transnational litigation.

Yet the *Bank Boston* court's approach to international jurisdiction and conflict of laws points to a possible compromise. By enforcing a choice-of-forum clause pointing to Uruguay, where the

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legislação e jurisdição uruguaia, sendo incompetente a justiça local para conhecer e decidir as causas que aqui tramitam.

*Id.* at 7.

Uruguayan courts would enforce their own conflict of laws rules, the court in Rio Grande do Sul opened the door for a peculiar variety of sub rosa party autonomy that might be described as a “third way” between the Introductory Law’s territorial approach to conflict of laws and the rule of party autonomy endorsed by the United States.<sup>101</sup> More important than the actual results of the *Bank Boston* case was the potential application of its reasoning to future cases. In response to the total prohibition on party autonomy established by the Introductory Law and actively enforced by most Brazilian courts, the courts of Rio Grande do Sul and other jurisdictions sympathetic to the rule of party autonomy might develop a settled, though of course non-binding, precedent for enforcing choice-of-forum clauses pointing to more liberal jurisdictions in which the contract could be governed by the parties’ choice of law. The STJ might eventually come to adopt this approach as its own when the court promulgates its first conflict of laws *súmula*, although the Brazilian courts’ sporadic deference to the STF’s *Súmula* 335 suggests that such quasi-precedent would not be widely respected by the lower courts. Brazil’s successful adoption of party autonomy in the arbitration context might nevertheless be seen as the first step toward the general enforcement of the parties’ choice of law and forum in traditional contract litigation. Given the lack of stare decisis in Brazil, such a revolution is unlikely to occur in the courts until the Brazilian Legislature explicitly embraces party autonomy by amending the Introductory Law of 1942. Until such time, U.S. attorneys must continue to rely exclusively upon arbitration clauses containing both a choice of foreign law and forum to contract out of international commercial contract litigation in the Brazilian courts under Brazilian law.

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101. DE ARAUJO, *supra* note 3, at iii.

\* Essays and Reviews Editor, *Columbia Journal of Transnational Law*. J.D. Candidate, Columbia Law School, 2006; B.A., Middlebury College, 2001. I would like to thank Professor Alejandro Garro of Columbia Law School for generously sharing his comparative law expertise with me over the course of many drafts and conversations. I am also deeply indebted to Professor Nadia de Araujo of the Pontifical Catholic University of Rio de Janeiro for teaching me about Brazilian law and inspiring me to continue where my predecessors left off. Finally, I would like to thank the many other lawyers—both U.S. and Brazilian—who took the time to read this Note and offer suggestions for its improvement. All remaining errors are my own.