Abstract: In a previous paper concerning the application of foreign law by Brazilian Courts of Appeal in contracts case (2004-2013) interesting observations came out. Despite being just a handful of cases, when foreign law came up as the applicable law, the Courts hardly applied it. The observation inspired this author to expand the sample and to inquiry about the overall efficiency of the Brazilian choice of law system (conflictual justice). One theoretical approach prescribes three elements as part of an efficient model: (i) as to the choice of law, party autonomy should be the preferred rule (parties are best positioned to choose); (ii) regarding burden of proof of foreign law, allocation should be on parties not courts (internalization of the cost of foreign law disclosure); and (iii) concerning protection of certain categories, such as consumers, the system should provide the possibility of applying domestic law in asymmetric information situations. In Brazil, the Introductory Law to the Brazilian Rules (LINDB) is the main statute orienting the system. After analyzing the system, I propose that it reflects mixed elements and it may be a second-best. To assure the soundness of this hypothesis, the paper unfolds as follows. After the introduction, the second section reviews the Brazilian system of contracts choice of law. The third section describes the empirical observation and the attained sample of eighteen cases. Afterwards, I submit the sampled cases to the hypothetical efficient model. As I will show, (i) the Brazilian rule (LINDB article 9) to choice of law is rigid (*lex loci celebrationis*) but it does not necessarily impair efficiency; (ii) the Brazilian rule of burden of proof (LINDB article 14) follows the prescribed orientation; (iii) the extensive interpretation of protected categories can aggravate the internalization device envisaged by the Brazilian rule (LINDB article 17). However, whereas Courts interpret these rules together, most cases led to the application of whatever provided by contracts, which reinforces the initial *ex-ante* agreement regarding choice of law (second-best).

Keywords: Choice of Law; Private International Law; Contracts; Brazilian System.

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I. Introduction

Is the Brazilian choice of law system concerning contracts efficient? The question, object of this paper, has to be split and contextualized.

In a globalized and interconnected world, as vastly documented by literature, private cases connected to different jurisdictions are on the rise. Think about contracts. The array of connections is manifold. It can refer to the different domiciles of parties in an international transaction. A third jurisdiction, besides the parties’ domicile, can partially hold the contract object. The signing of the contractual act can occur through electronic devices, where the place of celebration becomes fuzzy. Execution of the object can happen in a jurisdiction diverse from the jurisdiction of parties’ domicile, the location of the object, and the place of celebration (wherever defined). And as in any other contract, parties sometimes have to resort to dispute settlement to come to grips with rights and obligations. Once brought to a certain jurisdiction, what is the applicable law to the multiconnected contracts?

*International, Transnational, Multiconnected, plurilocated, diversely or dispersely placed* are some of the labels describing these contracts. In the legal realm, among other subjects, they are under the study of conflict of laws. Authors have been characterizing conflict of law as an esoteric field, a dismal swamp, an area full of eccentric professor, to save the worst (Juenger, 1983; Ruhl, 2006; Dolinger & Tiburcio).\(^2\) As a minimum, there is some agreement about the three classical issues dealt by the discipline: (i) jurisdiction; (ii) choice of law; and (iii) recognition of foreign judgments.

This paper deals with choice of law and the correspondent Brazilian system and case law. Taking in consideration a previous paper, I investigated the application of foreign law by Brazilian Courts of Appeal in contracts case (2004-2013). Interesting figures came out. Despite being just a handful of cases, when foreign law came up as the applicable law, the Courts hardly applied it. The application was, most of the times, a byname for the presumption of regularity and legality of acts celebrated abroad and/or the rebuttal of the application of domestic law.

\(^2\) They do not even enter a slightest agreement to the name of the discipline. Conflict of law prevails in the anglo-saxon literature and private international law triumphs in continental system, including Brazil.
The observation inspired this author to expand the sample and to inquiry about the overall efficiency of the Brazilian choice of law system (conflictual justice). One theoretical approach prescribes three elements towards efficiency: (i) as to the choice of law, party autonomy should be the preferred rule (parties are best positioned to choose); (ii) regarding burden of proof of foreign law, allocation should be on parties not courts (internalization of the cost of foreign law disclosure); and (iii) concerning protection of certain categories, the system should make possible the application of domestic law in asymmetric information situations, such as in cross-borders transactions involving consumers.

After analyzing the Brazilian system and eighteen related cases, I propose that it reflects mixed elements and it may be a second-best. To assure the soundness of this hypothesis, the paper unfolds as follows.

After the introduction, the second section reviews the Brazilian system of contract’s choice of law. The third section describes the empirical observation and the attained sample. Afterwards, I submit the sampled cases to the hypothetical efficient model. As I will show, (i) Brazilian rule (LINDB article 9) to choice of law is rigid (*lex loci celebrationis*) but it does not necessarily impair efficiency; (ii) Brazilian rule of burden of proof (LINDB article 14) follows the prescribed orientation; (iii) the extensive interpretation of protected categories can frustrate the internalization device envisaged by the Brazilian rule (LINDB article 17). However, whereas Courts interpret these rules in tandem, most cases led to the application of “whatever provided by contracts”, which reinforces the initial *ex-ante* agreement regarding choice of law (second-best).

II. An overview of the Brazilian System of Contracts’ Choice of Law: the connecting Rule, its Application and the Public Order Exception

The Brazilian system of conflict of law is mainly based in Decree-Law n. 4.657/1942, previously known as the Introductory Law to the Civil Code (LICC, in the Portuguese acronym).³ Recently, LICC has been labelled Introductory Law to the Brazilian Norms

³ Introductory Law to the Civil Code (LICC). Lei No. 3.071, de 01 de janeiro de 1916, D.O.U. de 05.01.1916 (only the introduction)(Brazil).
(LINDB, in the Portuguese acronym).\(^4\) The system interacts with other relevant statutes such as the Brazilian Code of Civil Procedure (CPC)\(^5\), regional treaties dealing with private international law and, under some circumstances, consumer (Brazilian Code of Consumers’ Protection – CDC)\(^6\) and constitutional law.

LINDB articles 9, 14, and 17 lay down important rules as to: (i) the choice of law rule itself; (ii) the proof – and the burden of proof - of foreign law; and (iii) possible exceptions to the application of foreign law.

As to choice of law in contracts, article 9 affords that:

*To classify and rule obligations, the law of its constitution should be applied.*\(^7\)

Doctrine assesses article 9 as an expression of a *lex loci celebrationis* type rule. The place of celebration is crucial because it commands the application of the law of that forum. However, the extension which the rule coexists with party autonomy is firmly disputed. Literally, one would not extract room for party autonomy from LINDB article 9, especially while considering that its latter version expressly referred to the possibility of agreement of parties (Araújo, 2004, 326-30; Rodas, 2002, 43-63). On the contrary, others attack a literal reading of the provision and highlight that it could not trump a higher principle of party autonomy (Dolinger, 2007, 457-61; Valladão, 1980, 366-70). Courts diverge on their understanding.

Regarding the proof of foreign law, LINDB article 14 layouts that:

*Whether the judge does not know foreign law, he/she can demand proof of its text and effect from the alleging party.*

The provision is read together with the CPC wherein:

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\(^4\) Introductory Law to the Brazilian Rules (LINDB). Decreto-Lei No. 4.657, de 04 de setembro de 1942, D.O.U. de 09.09.1942. (Brazil).


\(^6\) Código de Defesa do Consumidor - C.D.C. (CODE OF CONSUMER PROTECTION).

\(^7\) Two other provisions complement *caput* of LINDB article 9. Paragraph 1 posits that: “whether the obligation should be executed in Brazil and depends of an essential form, it will be observed with the admission of peculiarities of foreign law in respect of extrinsic requirements of the act.” Paragraph 2 states that “the contract obligation is considered constituted in the place of residence of the proponent.” In general, paragraph 1 deals with formal contractual issues and paragraph 2 relates to contracts between absent parties. This paper’s focus, however, is about the main provision of article 9 (the *caput*).
Based on a continental system, the principle of *iura novit curia* is usually mentioned to suggest that the “judge knows the law”. Thus, foreign and customary law - for our purposes - would not depend on proof by parties, unless demanded by the judge (STJ, REsp 857.614/SP).

Doctrine notes that additional clarification is needed. How should foreign law be proven? Who bears the burden? Do courts get to know foreign law and, whether needed, determine parties to prove it? Or just the opposite?

The Bustamante Code, the Inter American Convention of Proof and Information of Foreign Law, and the Las Leñas Protocol, though within a regional scope, could provide guiding sources in the lack of precise rules. The Bustamante Code, in this sense, points out ways to prove foreign law: affidavit from two active lawyers from foreign jurisdiction or judge’s diplomatic requirement about that law (Araújo, 2004, 236-40). Others go further to state that the burden of proof, the existence, content and effect of foreign law would depend on the action of judges or parties. In light of divergent perspectives, Courts’ rulings fluctuate: action dismissed for foreign law not proved as the cause of action; judgment by the most probable law in effect; judgment with the presumption that foreign law and domestic law are the same; and application, by analogy, of the closest possible law – whenever the chosen law is not found and other similar laws are easiest to find (Dolinger & Tiburcio, 2016, 376-83).

Last, but not least, article 17 asserts the general exception to choice of law. It works as an escape device:

*Foreign Laws, acts and sentences, as much as any declaration, will not have legal effect in Brazil, whenever they offend national sovereignty, public order, and good manners.*

Among the three possible exceptions, public order has been the concern of Courts and object of an immense literature. In a detailed analysis, Dolinger seems to summarize a perception that nowadays prevails: it is hard to define public order and for some it would be

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8 The provision is the same as the old CPC Art. 337.
an impossible task. Authors tried to come up with a concept and others tried to elaborate a list of public order exceptions. But once one realizes its relativism, instability and variation upon time and space, all recognize that there is no precise concept (Dolinger, 1979, p. 3). That is why, doctrine adds, constitutional interpretation (hermeneutics) can be called to orient the debate (Araújo, 2004, p. 95-111). Parsimony is also advised in the usage of the exception. In that sense, doctrine limits its deployment when foreign law really creates anomalous results, cardinal principles of a society are disrespected, people’s moral is violated or economic interests of states are impinged (Dolinger & Tiburcio, 2016, p. 486-87).

Once I offered, in a nutshell, the set of choice of law provisions, the next section presents the empirical observation from recent Brazilian case law. The result will be further interpreted in terms of law and economics.

III. Empirical Observation

A. Prior Research and Results

In a previous research project, an extensive query looked for conflict of laws cases in all Brazilian Courts of Appeal. With the expression private international law as a parameter, the attained sample comprised more than 1,000 decisions from all matters of conflict of laws. States’ Courts of Appeal from São Paulo (66%), Rio de Janeiro (9%), Minas Gerais (6%), Paraná (6%) and Rio Grande do Sul (6%) enacted most of the rulings.

Based on that sample and a predetermined period (2004-2013), 17 cases were selected as accurately encompassing choice of law issues in cross-border contracts. By accurately, the paper meant cases that the given issue appeared as observable throughout Courts’ ruling - together or not with other issues. Therefore, the analysis disregarded, for example, cases that focused only on international jurisdiction issues, but not choice of law. The figure of 17 cases is not impressive compared to the bulk of cases probably brought along ten years to Brazilian Courts of Appeal. In one way, the meager amount may be only revealing that parties did not appeal choice of law issues. But the sample is rich for analysis.

9 The Brazilian Council for Scientific Research (CNPq) funded a two-year project (#401149/2011-0) entitled “Foreigners, Choice of Law, and the Tendencies of Private International Law in Brazilian Courts”. Leading researchers were Prof. Gustavo Ribeiro (UniCEUB) and André Lupi (UniVALI). The project comprised analysis from all 27 Brazilian Courts of Appeal. Authors have been publishing the results since 2014.
In the narrowed sample, the rules of conflict suggested the application of Brazilian law (1 case), foreign law (7), and lex mercatoria (9). Among other points, the analysis highlighted the following outcome (RIBEIRO & LUPI, 2014, 103):

*Of crucial importance, in seven cases in which, as a result of choice of law, foreign law came out as the applicable law, one can observe the concerned application in four of them (57%). That is a relatively high and revealing result. However, the application of foreign law can many times be translated into the presumption of regularity and legality of the acts celebrated abroad or even the refutation of the application of the argued Brazilian law. The application, with the analysis of the specific foreign statutes could not be found (...). (emphasis added)*

Once rephrased, the remark advocates that foreign law is hardly applied, though less attention was oriented toward deviant results (43%) and cases in which customary law (non-state law) were applied without hesitation. Finally, wider consideration about the efficiency of choice of law and their structural design – in terms of economics – were simply out of the scope of the analysis. This prompted for a broadened research and new explanations, as follows.

**B. Current Research and Results**

Taking the latter results and findings as starting points, the current research proposed to develop and enhance the empirical observation. First, a new query searched for the same pattern of cases decided on years 2014 and 2015 from five of the most active state courts. The sample received, nonetheless, just one extra case.10 Second, I scrutinized the respective rulings to extract objective points of control from the narrative of the facts and the reasoning of the Courts.11

The table below depicts the new sample (eighteen cases) within this new configuration. Besides their formal identification in the first three columns, subsequent columns stand for:

10 SP, RJ, MG, PR, and RS, as previously shown, in terms of number of cases. The searching parameter was “private international law” and “contract” resulting, respectively, in: SP (6 cases), RJ (5), MG (0), PR (9), and RS (6), though – somewhat disappoint as it can be - only one case was classified as accurately discussing the concerned issue.

11 This meant confirmation of previous analysis and corrections (if needed). For instance, the applied law in Elliot v. Magatect changed from Brazilian to Foreign law.
• **EL = Expected Law**
  
  I deemed “expected” from LINDB article 9 as the reference point of application. Literally, the place of celebration of the contract orders the applicable law. In this sense, the possible values are “FL” (foreign law), “BL” (Brazilian Law), and “NC” (not clear). The latter arises when I could not extract the *lex loci celebrationis* from the judgments. Moreover, these are actually proxies, since the content of FL or BL depends on whatever each system considers part of their law; for instance, international law (“IL”), customary law (“CL”) or even the rights and obligations from the agreement of the parties (“WCP”, whatever the contract provided);

• **AL = Applied Law**

  I estimated “applied” taking into account observable reasoning from Courts’ rulings, as well.

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Parties</th>
<th>Publ. Date</th>
<th>EL</th>
<th>AL</th>
<th>Points of Control</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sn (PR3.pdf)</td>
<td>Cattalini v. Eurotainer</td>
<td>18-May-04</td>
<td>FL</td>
<td>WCP</td>
<td><em>Lex loci celebrationis</em>: New Jersey (US); Choice of Law: New Jersey (US); Rulings: Recognized no party autonomy to choice of law; Not clear whether proof of foreign law was an issue; Applied whatever the contract provided.</td>
</tr>
<tr>
<td>328.919-8 (PR2.pdf)</td>
<td>Eximbank v. Micam</td>
<td>3-May-06</td>
<td>FL</td>
<td>WCP</td>
<td><em>Lex loci celebrationis</em>: New York (US); Choice of law: New York (US); Rulings: <em>Lex loci celebrationis</em>, Parties did not prove foreign law; Applied whatever the contract provided; Rejected the application of BCC.</td>
</tr>
<tr>
<td>533529-0/1 (SP24.pdf)</td>
<td>EJF v. AGA</td>
<td>18-Dec-06</td>
<td>BL</td>
<td>BL</td>
<td><em>Lex loci celebrationis</em>: Brazil; Choice of law: NC; Ruling: in dicta, applied Brazilian Civil Code and Agency Contract law.</td>
</tr>
<tr>
<td>7.030.387-8 (SP23.pdf)</td>
<td>Ciacci v. Lubrizol</td>
<td>18-Oct-07</td>
<td>FL</td>
<td>FL / WCP</td>
<td><em>Lex loci celebrationis</em>: New York (US); Choice of Law: New York (US); Ruling: Parties did not prove foreign law; Presumed that NY law provides the same autonomy to parts to decide termination of contract; Applied whatever the contract provided; Rejected violation of art. 17 hypotesis.</td>
</tr>
<tr>
<td>Case Number</td>
<td>Parties</td>
<td>Decision Date</td>
<td>Lex loci celebrationis</td>
<td>Choice of Law</td>
<td>Rulings</td>
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<tr>
<td>9179192-90.2007.8.26.0000 (SP16.pdf)</td>
<td>First Food v. MSC</td>
<td>7-FEB-11</td>
<td>NC</td>
<td>CL</td>
<td>Lex loci celebrationis: not clear; Choice of Law: not clear; Rulings: Maritime transports are under private int’l law rules that privilege customary law. Demurrage clause found; Applied demurrage.</td>
</tr>
<tr>
<td>0046108-07.2010.8.26.0562 (SP8.pdf)</td>
<td>La Rioja v. MSC</td>
<td>4-Jun-12</td>
<td>NC</td>
<td>CL</td>
<td>Lex loci celebrationis: not clear; Choice of Law: not clear; Rulings: Maritime transports are under private int’l law rules that privilege customary law. Demurrage clause found; Applied demurrage.</td>
</tr>
<tr>
<td>Case Number</td>
<td>Parties</td>
<td>Date</td>
<td>Jurisdiction</td>
<td>Choice of Law</td>
<td>Lex loci celebrationis</td>
</tr>
<tr>
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</tr>
<tr>
<td>0195167-23.2015.8.21.7000</td>
<td>Eichenberg v. Lazzerti</td>
<td>10-Dec-15</td>
<td>NC</td>
<td>Not Specified</td>
<td>Not Clear</td>
</tr>
</tbody>
</table>

Taking into account the new classification, as previously noted, expectation and application somewhat match in five cases (*Cattalini v. Eurotainer, Eximbank v. Micam, EJF v. AGA, Ciacci v. Lubrizol, and Adorno v. Prudence*). Yet, they can reveal fruitful insights since they do not represent substantive (or material) application of foreign law, but application of whatsoever contained the contract or the refutation of the application of the raised Brazilian law. On the other hand, “dysfunctional” results are observed in 3 cases: *Elliot v. Magatec, Arrow v. Zurich* and *Cielos del Peru v. Panalpina*, i.e., foreign law would be expected to be applied but, for some reason, Brazilian law came out as the applicable one. Finally, in 11 cases Courts “smoothly” applied customary, barely showing hesitation.

Can one assess these outcomes in terms of efficiency? What would efficiency mean in the realm of choice of law? The following section presents one of these frameworks.

### IV. Choice of Law and Efficiency

#### A. Economic Prescription

The dialectic between the application of domestic or any foreign law in choice of law seems to offer much room to L&E investigation. An immediate impression resembles a Coasean dilemma in allocating rights to the cattle-raiser or the farmer besides possible prescriptions in terms of efficiency (Coase, 1960). The tricky aspect is that the efficiency debate rests on the choice of law between the cattle-raiser’s and the farmer’s law, regardless of the substantive content of each law. That is to say, in cross-border transactions, the
efficiency resulting from the application of domestic or foreign law irrespectively of the material content of these rules. Rühl (2006, 802) remarked a decade ago this literature as incipient and concentrated on a handful of L&E scholars. Currently it is, in Brazil, practically missing.

In one of these models, from a normative perspective, an efficient approach assumes the existent of a benevolent and well-informed legislator in terms of global efficient design. This holiness should apply rules – not standards – and be open towards the application of foreign law (Rühl, 2006, 841; cw. Kono, 2014, 409). As to cross-border contracts, more specifically, an efficient framework would adopt party autonomy as the main criteria for maximized welfare results. Rühl, while analyzing contemporary convergence between the American and the European choice of law models, explains the reliability of the hypothesis. That is to say, a traditional consensus among classical economists: individuals, as rational maximizers of their own welfare, are in the best position to decide the choice of law. Founding a better tailored law to their needs, choosing an established body of case law, selecting a neutral law would be some of the reasons. Traditional welfare economics also delimitates party autonomy founded on market failures - externalities and information asymmetry. (Rühl, 2007, 31-34).

As to externalities, courts could end bearing the costs of applying rules unknown to them. A possible way to internalize the third party effect would place the burden of foreign law proof on parties. In case of non-state law, such as lex mercatoria, just a moderate increase in litigations costs occurs since customary law is relatively easy to ascertain (Rühl, 2007, 36).

Yet, grounded on Akerlof’s views, the approach comprises market failures related to opportunistic behavior involving cross-border choice of law. Rühl splits the efficient design depending on the nature of certain categories of consumers, employees and insurance policy holders. The occasional contracting parties – of these categories - would have inferior knowledge of the applicable law and informational costs to acquire them. Coupled with the cross-border nature of the transactions, which may soften firms’ reputational costs and takes place in a less organized environment, firms could shift risks to the pointed categories (Rühl, 2007, 39). In the limit, the application of consumers’, employees’ and policyholders’ lex fori would offer a balance against opportunistic behavior. Nonetheless, one would have to exempt this functional role in transactions between
commercial parties. The underlying economic reason is that parties, in this case, are in similar position to obtain relevant information (Rühl, 2007, 40).

Taken together, how would the Brazilian system fit the model? Does it lean towards the normative prescription?

B. The Brazilian Choice of Law System in the Real World

The Brazilian system would at first glance, bear some of the requirements prescribed in terms of a theoretical efficient model. In the real world, though, Brazilian courts might impact efficient outcome in subtle ways. I grouped the analysis around three major concerns.12

1. Party Autonomy in Choice of Law and LINDB Article 9

Assuming that party autonomy is the preferred prescription, how does article 9 respond? As already signaled by doctrine, the unambiguousness of LINDB article 9 assignment is quite disputable.

Among 10 out of 10 analyzed cases (excluding lex mercatoria cases), interpretation inclined towards the rigidity of the rule. For instance, in Cattalini v. Eurotainer, an action was brought about the termination of a contract and restitution of equipment (containers). The contract was signed in New Jersey and contained a clause providing the application of New Jersey law. As to party autonomy, the Court (2004, 3-4) indicated that:

To summarize, it should be noted that as a matter of choice of law, the caput of LINDB article 9 does not contemplate, in domestic law, party autonomy as a connecting point, which turns impossible that parties freely stipulate the applicable law between the international contract celebrated by them.

Other cases, although indirectly, support the same interpretation. The immediate inference would be an inefficient assignment of a property right (choice of law).

Moderation, conversely, is also plausible. Well informed parties about the lex loci celebrationis could arrange to “travel” to the place of celebration to attract the application of

12 Single cases could contain elements of each concern and therefore can appear in more than one block.
the chosen law. This is even more realistic in a digital world. Travelling and presence between parties can be in the form of a video conference. Alternatively, a party can instantly deliver powers of attorney to agents abroad.

If not digital, physical travelling accepts that parties can bear higher costs. Still, one could ask whether the additional travelling cost would supplant the marginal benefit coming from the choice of law arrangement. The theoretical prediction would say that if they travelled they deemed it worthwhile, otherwise they would not have “bought” tickets.

2. **Burden of Proof, externality, LINDB Article 14 and related provisions**

Is it plausible to assume that LINDB art. 14 and CPC art. 376 represent internalization devices towards the externality of foreign law application (sided to Courts)? As suggested, once read together, the likely interpretation purports allocation of the burden of proof to parties. The Bustamante Code and other regional Treaties serves to detail the way to accomplish it. This logic appears in three cases (*Ciaci v. Lubrizol*, *Elliot v. Magatec*, and *Eximbank v. Micam*).

*Ciaci v. Lubrizol* concerns a firm established in Brazil (Ciaci), and Lubrizol, domiciled in the US, which signed in the US, in 1971, a commercial agency agreement of lubricants. At some point, Lubrizol notified CIACI about the termination of the contract. A provision of the contract provided that the contract should be interpreted in accordance with New York law which would lead to no damages payment. CIACI sued for damages, in accordance with Brazilian law, alleging the application of Brazilian Agency Law (Law n. 4.866/65) which provides for damages. The Court reminded that

> It was possible to the Judge, in face of LICC [LINDB] article 14 to demand from the alleging party the proof and force of foreign law (...) if the appellant looked for a more accurate analysis, he/she should have filed the foreign law text.

*Elliot v. Magatec* involves, as well, a plurilocal commercial agency contract in which both the burden of proof and the details of proceedings come up. The agent (Magatec) asked for damages related to product distribution expenses. Since the *lex loci celebrations* pointed to US law, the appellant argued for its application (i) as a duty of the judges, since the Brazilian system allegedly receives foreign law as a type of law and not purely facts; (ii)
alternatively, whether the Court does not know foreign law, to convert the trial into
diligences. In those proceedings, the contract parties or the diplomatic authority of the US
could aid about the content of foreign law.

On appeal, the Court (2010, 3) sustained the decision. The rapporteur confirmed that
there was no application of US law for two reasons: (i) the validity of foreign law should
have been certified by two foreign accredited attorneys in accordance with art. 409 of the
Bustamante’s Code. In the case, there was no official translation of the document in English
not even certification; (ii) the referred document was not timely filed in the proceedings.
Thus, proceedings preclusion occurred.

Finally, Eximbank v. Micam involves an importer established in Brazil (MICAM)
which signed a contract with a bank (FNBNE) established in the US. The transaction
involved the importation of industrial equipment under EXIMBANK financing. The importer
defaulted the financing, Eximbank paid the bank and sought redress against the importer.
EXIMBANK brought an action in Brazil, due to importer assets’ localization and initiated
execution proceedings. The importer raised the unfairness of contract clauses (accrued
interest) and the Court responded that, as to burden of proof:

(...) the unfairness of the clause cannot be accepted in light of Brazilian law,
but in light of the substantive law in force at the place of the celebration of the
transaction. In a glance, we verified that in any moment the violation of foreign
law has been raised. Thus, we assume that the appellants did not satisfy the
burden of alleging the occasional invalidity of the contract. Thus, it is believed
that the appellants did not fulfil the burden of alleging the occasional
irregularity in light of the substance of foreign law, which is the reason to
presume its legitimacy (2006, 7).

Thus, LINDB article 14 and related provisions can be understood as providing an
internalization mechanism. Yet, it seems plausible to wonder what happens if internalization
does not take place, i.e., if parts do not prove foreign law. Could we still talk about efficiency?

In one sense, failure of disclosing foreign law by parties resulted, in most of the
analyzed cases, in the application of whatever the contract provided. Assumedly, WCP is an
efficient allocation. On the other hand, a more distinguishable consequence takes place in
Elliot v. Magatec. At the end, as parties did not prove foreign law, the Court applied Brazilian
law (although one cannot extract the exact meaning of the application). In this sporadic case,
one could point spillover effects derived from LINDB article 14 failure to induce parties’
disclosure of foreign law. And the point seems to be a necessary separation of efficiency in multiconnected transactions; i.e. efficiency as a matter of choice of law (conflicts justice) from efficiency as a broader consideration involving the ex-post application of substantive law (material justice). The internalization device purported in LINDB article 14 deals with the former. Although not developed in this paper, this opens the room for more investigation.

Another intermediate and reveling result refers to the burden of proof of customary law. To be sure, a group of ten cases delivers comparable reasoning about the determination to apply demurrage.\(^\text{13}\)

As a common point, Courts decided that the usage and customs in international trade determine a period for the return of containers by importers (demurrage). Moreover, they affirmed, with slight variations, that:

\[
\text{It should be noted that sea transport contracts between [parties of] different countries are ruled for private international law dispositions that privilege usage and customs in light of the deficiency of uniform regulation. Demurrage charges are absolutely just since the sea carriers loses the freight as there is no utilization of available space in the ship, or for been obligation to lease another container to deliver to other exporter.}
\]

Remarkably, one cannot find in these rulings a single discussion about the place of celebration or the existence of a choice of law clause. There are only general references to private international law, bill of lading, arrival notice and demurrage contractual clauses.

The same absence happens in the last case added to the sample. \textit{Eichenberg v. Lazzeri} involves a debt collection action promoted by a transporter commissioner (Eichenberg), established in Brazil, against the Brazilian affiliated company of an agriculture importer (Lazzeri) established in Italy. The parties signed a transport contract and the commercial invoice contained an Incoterm named FCA.\(^\text{14}\)

The Court reminded the legal nature of Incoterms as part of a new \textit{lex mercatoria}. Likewise, it recognized that, although disputable among authors, the Court understood that State Courts, not only Arbitral Courts, can apply Incoterms. The rapporteur exempted situations in which \textit{lex mercatoria} is in tension with rules of the domestic legal system.

\(^\text{13}\) In international maritime transport, demurrage is a technical term meaning damages for overstaying of containers by renters in the context of international maritime transport contracts. [Source]

\(^\text{14}\) Incoterms and FCA [explain and quote]
the presented case, the Court did not find any conflict between the FCA clause and Brazilian rules (produced domestically or in force because of internalized treaties).

Does the above rationale lead to efficiency in choice of law? It may, I suggest. By definition, customary law (lex mercatoria, incoterms etc.) represent the consolidation of consistent and frequent conduct. At some point, legal systems, principles, and models may converge into customs. If this dynamic is taken for granted, it is also credible to assume that they are part of the law of different jurisdictions. To both parties and courts information deficit fades away.

3. Information Asymmetry, externality, and LINDB Article 17

The last element to assess is the public order (LINDB art. 17) scape device. Can one demonstrate that LINDB article 17 internalize the asymmetric information externality rounding certain categories, such as consumers?

Two cases (*Arrow v. Zurich*, *Cielos del Peru v. Panalpina*) are closest resembles of LINDB article 17 logic. To make it clear, they do not rebut the application of *lex loci celebrationis* explicitly using the public order principle. But in essence, they reflect a pattern of reasoning in which parties celebrated contracts abroad and domestic Courts articulate for the application of CDC.

In *Arrow v. Zurich*, an insurance company sought redress against an air carrier for the loss of chemical products boarded from Miami to Rio de Janeiro. The trial judge ruled in favor of the insurer. The conflicting laws refers to the calculation of damages. The damage has restraints (caps) in accordance with the Warsaw Convention; the CDC does not. The Court of Appeals confirmed the ruling of the trial judge by its own terms. That is to say, it reproduced arguments such as: (i) the majority of the States, for their Constitutions or their Courts, have been considering the supremacy of domestic law over international law; (ii) even in one consider the Warsaw Convention as the applicable law, that convention has exceptions to the damage cap, such as gross fault, which should be recognized in the case. The Court of Appeals also added jurisprudence of the STJ – which also do not mention LINDB article 17 - confirming the prevalence of CDC vis-à-vis the Warsaw Convention.

In *Cielos del Peru v. Panalpina*, a global supply chain provider (Panalpina) contracted an air carrier (Cielo) in the US. As the merchandize was lost, the provider sued
for damages. The air carrier, in the same way, invoked the application of the Warsaw Convention and the rejection of CDC. The provider insisted in the opposite interpretation. The Court, on appeal, summarized the interpretation of Brazilian Superior Courts in the sense that CDC prevails over Warsaw Convention, regardless of the place of the celebration of the contract. The rapporteur also reminded about article 5-XXXII of the Brazilian Constitution wherein consumer protections is enshrined as an individual guarantee.

The observation could, at first, indicate that the mechanism works well because courts are efficiently internalizing the heightened information asymmetry on cross-borders transaction involving consumers. But should one consider insurance companies and global supply chain providers “consumers” in cross-border transactions? From an economic point of view, the answer is no, since parties are likely to be in similar position to collect information, or even bargain for a lower price (Ruhl, 2007, 40).

The heart of problem, however, rests on the extensive interpretation of consumers’ in the Brazilian legal system. Doctrine and Courts adopt variations of the so-called “finalistic” approach whilst defining consumers. They consider consumers any person (natural or a legal entity) presenting some sort of technical or economic vulnerability. Thus, LINDB article 17 can negatively impact efficiency in choice of law.

V. Conclusion

A previous empirical research observed the (non) application of foreign law in Brazilian Courts of Appeal in transnational cases. The research paved the way for broader considerations using law and economics. By extending the research period (2004-2015), refining the sample, and scrutinizing earlier results, I proposed to assess the Brazilian choice of law system in terms of efficiency.

Drawing from a specific framework that transposes the choice of law mechanisms into law and economics, I suggested that: (i) the Brazilian choice of law prevailing rule (LINDB article 9) does not prima facie reflects an ex-ante allocation close to the normative prescription. However, in theory, parties that have the chance to travel to the place of celebration of contract may overcome inefficiency; (ii) the Brazilian rules about burden of proof fit, in theory, a mechanism that appropriately shifts the extra costs of knowing foreign law to parties. Case law showed nonstandard variations though in many cases Courts applied
WCP as the prevailing law. A tougher and unanswered question regards the overall efficiency balance in case Courts apply unexpected laws in the absence of proof (3 cases out of 10); and (iii) LINDB art. 17 (the public order exception) may respond to information externalities. However, case law demonstrated that the enlarged interpretation of consumers (almost everyone is consumer in accordance with CDC and Courts) fetters the economic prediction.

Overall, the Brazilian choice of law system is hybrid and may fit a second-best approach in terms of conflictual justice. This means that in most of the cases expected law and applied law converged. In only three of them nonstandard results did not improve choice of law. Yet, the field must keep looking for further analysis and complements.

VI. References


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