

CONFLICT OF LAWS IN BRAZIL

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A country which, like Brazil, is an important participant in the world's commerce and is the possessor of vast undeveloped resources, inevitably, by reason of those facts, attracts the presence of large numbers of foreigners and the investment of foreign capital. Legal relations arising out of the transactions of these foreigners and of the international commercial relations of nationals of the country are necessarily largely concerned with questions of the conflict of laws; and Brazil has been impelled to endeavor, by legislation and judicial decision, to settle these difficult questions. In the following pages, the attempt will be made to present the rules adopted in Brazil in the matter of the conflict of laws.*

I. STATUS AND CAPACITY

I. Nationality, in Brazilian law, is the rule which governs status and capacity. Under the influence of the Code Napoleon, and with the support of the French and Italian treaties on civil and private international law which, in general, afford the grounds for the legal training of Brazilian judges and attorneys, the principle of *nationality* superseded the ancient principle of *domicile* and became the governing rule for *status* and *capacity*. Adopted early in the beginning of our independent national life, this rule had been imposed by the weight of the decisions of the courts before it was finally accepted by the statutory law.

Decree N. 737 of November 25th, 1850, regulating civil and commercial procedure, had already adopted the rule with respect to com-

* [Some thirty to forty years ago, Clunet's *Journal du Droit International Privé* undertook to publish articles by competent jurists on the conflict of laws in various countries of the world. The practical and scientific merits of the enterprise were acclaimed by an appreciative profession. Since then the enormous growth in international commerce and intercourse, with the resultant mobility of men, money and commodities, has given a powerful stimulus to the development of the conflict of laws, by municipal legislation and judicial decision and by international conference. Moreover, a new generation of jurists has appeared. In order to present the most recent expression of the conflict of laws in some of the principal countries of the world, the YALE LAW JOURNAL has enlisted in each of these countries the coöperation of a leading authority, who will according to a uniform plan prepare an article on the positive law of the subject in his country. This article by Dr. Rodrigo Octavio of Rio de Janeiro is the first of the series.—ED.]

mercial laws and usages. But this principle was introduced in so many different phases of legislation, that Carlos de Carvalho, in his *New Consolidation of Civil Laws*,¹ Art. 25, believed himself authorized to consider such to be the general rule.

This view has been recently confirmed by the Civil Code, promulgated in 1917, which in Art. 8 enacts that "the law of the nationality of the person shall determine his civil capacity."

However, the law of the place of *domicile*, or if the person has no domicile, then the law of the place of *residence*, will be applied, as subsidiary principles, whenever:

- (a) a person has no nationality, or
- (b) such person should be considered by two different countries as subjects of each of them, by reason of the conflict of the *jus soli* with the *jus sanguinis*.

But should Brazil be one of these countries, the Brazilian law prevails (Civil Code, Art. 9).

2. *Change of domicile* has no effect upon *status* and *capacity*. It is clear, however, that if a Brazilian citizen acquires a domicile in a foreign country where status and capacity are governed by the principle of domicile, such change affects his status and capacity in the country where the new domicile was acquired, after it has been legally established. The conflicts between the law of the nationality of a person and the law of his new domicile give rise to the most difficult problems in the sphere of the doctrines of private international law, which are not as yet settled in Brazil by law and jurisprudence. The same is not true, however, as regards *change of nationality*, which, as is generally accepted, makes the newly naturalized citizen subject in all respects to the civil law of his new country.

The Federal Constitution of Brazil in providing in Art. 69, sec. 6 that naturalization abroad is a legal way to lose Brazilian nationality, has thereby accepted the rule by which a naturalized citizen by such naturalization becomes emancipated from the authority of his country of origin. He is not, however, released from the duties contracted by him before naturalization.² Applying these principles: any question concerning status and capacity of naturalized citizens is, after such naturalization, governed by the law of their new country, without prejudicing, however, any rights vested before the naturalization, under the law of the country of origin. It is a principle well recognized by decisions of Brazilian courts that "the personal status of one who renounces his nationality and becomes a citizen of another country, is to be determined, after the date of the act, by the laws of the country

¹ Carlos de Carvalho, *Nova Consolidação das Leis Civis*.

² Decree N. 6948, May 18th, 1908, art. 3.

of adoption."³ The case where one seeks to change his domicile or his nationality for the purpose of evading some provision of the domestic laws, must, however, be considered. In such instance, if the *fraus legis* is followed by re-acquisition of the first domicile or nationality, the acts done in accordance with the laws of the temporary domicile or nationality will be regarded as having no legal effect, should they be in conflict with the imperative law of the first domicile or nationality.

II. THE FORM OF LEGAL ACTS

(1) In Brazil *locus regit actum* is the legal rule to be applied to the form of legal acts. Art. 11, of the Introduction to the Civil Code, expressly declares that the "extrinsic form of public or private acts is to be governed by the law of the place in which they are done"; this principle being already established in the Old Ordinances of the Kingdom (*Ordenações do Reino*) decreed by Phillip II, in 1603, for the use of Portugal and its possessions.

(2) The terms of this legal rule seem to give it a mandatory character; and such is the opinion expressed by Professor Merea, of Coimbra University,⁴ in his commentaries to the Civil Code. Clovis Bevilacqua, however, the author of the Code, maintains that the rule must be considered as optional.⁵ Nor do other text-writers who have written commentaries on the Code, by any means establish the mandatory character of the rule.⁶

Decree N. 737 of 1850 provides that all legal acts performed in foreign countries in accordance with their respective laws shall be entitled to full faith and credit.

III. PROPERTY

Brazilian law has not accepted the rule established in Art. 3, item 2 of the Code Napoleon, which is based on the classical theory of status and which subjects immovable property to the territorial law and movable property to the personal law. The old maxim *mobilia sequuntur personam* does not therefore hold good in Brazil, where property of any nature is governed by the *lex rei sitae*.⁷

The general application of this rule must be construed as relating to the property *uti singulis*; because, as will be shown, property *uti universitatis* may be governed by the personal law of the owner.

³ Lafayette, *Projecto de Código de Direito Internacional Privado*, Art. 14.

⁴ *Código Civil Brasileiro anotado*, Lisboa, 1917.

⁵ *Commentaries*, 127.

⁶ Spencer Vampré, João Luiz Alves, Eduardo Espinola.

⁷ Civil Code, Introduction, Art. 10.

Such general rule being established, there are, however, certain distinctions to be noted.

1. *Immovables*

(a) The *lex rei sitae* is applicable to immovable property situated in Brazil. Real property located in foreign countries, as far as Brazilian law is concerned, is also governed by the *lex rei sitae*, if considered *uti singulis*.

(b) As regards immovable property, the *lex rei sitae* does not govern capacity. Capacity acquired according to the personal law of the actor will be considered as good with respect to immovable property located in Brazil. For instance: Brazilian law requires the wife's consent in order that real estate may be sold; however, real estate located in Brazil and owned by an Italian subject may be sold, by means of a deed made in Brazil, by the husband alone, no matter whether the wife has agreed to it or not, since the husband's capacity is to be determined by the Italian law.⁸

(c) The *lex rei sitae* is also applied in Brazil to the formal execution of deeds relative to immovable property. Such instruments are to be governed by the Brazilian law.⁹

In accordance with this imperative enactment, a deed relating to immovable property located in Brazil, or to mortgages of the same, made in foreign countries, must necessarily be ratified in the Brazilian language, by another deed made before a notary public; all formalities prescribed by the Brazilian law being complied with. The *lex rei sitae* in this case excludes the maxim *locus regit actum*.

2. *Movables*

(a) The *lex rei sitae* is applicable to movable property situated in Brazil; if such property is situated in foreign countries, it shall also be held to be governed, according to the Brazilian law, by the *lex rei sitae*, if considered *uti singulis*.

(b) Movable property personal to the owner will, however, remain subject to his personal law; such as

- (1) movables which he always carries with him, and
- (2) movables to be transported to other places.¹⁰

The law also provides that whenever the situation of movable property is changed during the course of a real action dealing with that property, the latter will remain subject to the law of the place where it was situated at the beginning of the suit.¹¹

⁸ 21 *Revista de Direito*, 194. Decision of Supreme Court of S. Paulo, December 3, 1910.

⁹ Civil Code, Introduction, art. 13, sole sec. nos. 3 and 4.

¹⁰ *Ibid.* Art. 10.

¹¹ *Ibid.* Art. 10, sole sec.

(c) The rule *locus regit actum* may govern the formal execution of instruments relating to movable property, provided the *lex rei sitae* does not establish any peculiar form for such instruments, as for instance, in case of transfer of shares of stock made out to a named person.

The validity and the legal effect of the act are, however, to be determined by the laws of the situs, since Brazilian law expressly enacts that movable property is to be governed by the law of its situation.

3. Mortgages

By Brazilian law a mortgage is an act peculiar to immovable property and as such is governed by the rule applicable to immovable property.¹²

4. Executory Contracts

An executory contract for the conveyance of immovable property situated in Brazil, or in a foreign country, is

(a) as regards *capacity*, to be determined by the personal law of the contractor,

(b) as regards *form* to be governed by the Brazilian law, the maxim *locus regit actum* being with respect to acts relating to immovable property displaced by the *lex rei sitae*.

(c) as regards *substantive validity* and *effects*, to be governed by Brazilian law,¹³ this being an exception to the provision enacted in Art. 13 of the Civil Code (Introduction), which directs that the substantive validity and effects of contracts are governed by the *lex loci actus*.

(d) as regards interpretation, to be governed by Brazilian law, the law which generally governs all acts relating to immovable property.

IV. OBLIGATION

I. Contracts

(a) The *creation* of a contract is governed

(1) as regards *capacity*, by the personal law of the contracting party;

(2) as regards *form*, by the maxim *locus regit actum*, except as to obligations concerning real estate and mortgages;

(3) as regards *substantive validity*, by the *lex loci actus*,¹⁴ provided the contract does not offend the national sovereignty of Brazil, her public policy or good morals.¹⁵

The will of the parties, however, may interfere in such a case, and

¹² *Ibid.* Art. 13, sole sec. n. 4.

¹³ *Ibid.* Art. 13, sole sec.

¹⁴ Civil Code, Art. 13.

¹⁵ *Ibid.* Art. 17.

the parties' election of the law governing the *substantive validity* of the contract will be respected.

(b) The *interpretation* is determined by the *lex loci contractus*, if the parties do not clearly express their intentions, and provided the subject matter of the contract is not real estate situated in Brazil.

(c) The rule which establishes the *effects* of a contract is identical to the rule governing their substantive validity.

(d) The *assignment* of a contract is regarded as a new contract, and as to capacity, form and validity is to be governed by the rules relating to contracts in general.

(e) The rule relative to the *performance* of contracts is not directly set forth in Brazilian law, and resort must be had to the writers in order to ascertain it. Clovis Bevilacqua's *Project*, which was very complete as regards private international law, contained a paragraph which prescribed that the rule applicable to the performance of contracts is the law of the place of execution. The general opinion which prevails amongst Brazilian text-writers is in accordance with that principle.¹⁶

2. *Quasi Contracts*

No legal enactment in Brazil provides a rule for the determination of liabilities arising from *quasi contract*. And in fact, a quasi contract does not rest upon any intention of the parties, exercised to create the obligation;¹⁷ they are really no more than legal relations of different types, created with reference to different legal institutions, by the law.

Quasi contracts may arise under the family law, in the case of guardianship, or from succession, as in the case of the regime of community of property, etc.; and the principle that seems to be the most rational is that which submits the liability arising from quasi contract to the law which creates, from the relationship incurred, the obligational bond.

Such is, in my opinion, the best solution of the case. Brazilian text-writers are, however, divided on the subject. Bevilacqua upholds the principle set forth;¹⁸ Lafayette, relying upon the contentions of Laurent,¹⁹ and Weiss,²⁰ maintained in his *Project for a Civil Code of Private International Law* that the personal law of the parties, in case they should be of the same nationality, is the rule to be followed in quasi contracts; should the parties belong to different nationalities, the law of the place where the fact occurred would prevail.²¹

¹⁶ Bevilacqua—*Direito Internacional Privado*, sec. 54; Lafayette—*Projecto deCodigo de Direito Internacional Privado*, Art. 59; Pimenta Bueno—*Direito Internacional Privado*, no. 213.

¹⁷ Bar—*International Law* (Gillespie's translation) 634.

¹⁸ *Op. cit.* sec. 56.

¹⁹ 8 *Traité*, no. 2; *Avant Projet du Code Civil Belge*, art. 17.

²⁰ *Manuel de Droit Int. Privé*, 537.

²¹ Art. 64.

3. *Torts* (Delicts)

The situation concerning *torts* (delicts) is a similar one; Brazilian law is silent as to the principle which governs liability arising from torts, and the Code's lack in this particular point is deeply felt. Bevilacqua stated in his *Project* that obligations arising from unlawful acts should be governed by the law of the place where the facts which created the obligation, occurred.²² Such is also Lafayette's opinion,²³ and that adopted by most commentators of the Code.²⁴

V. FAMILY LAW

I. *Marriage*

Marriage celebrated in Brazil is governed

(a) as regards *capacity*, by the personal law of the spouses;²⁵ but in case these should be of different nationalities, by the law of the husband, who is the head of family. The Code is not specific on this point, but this is the opinion of its commentators,²⁶ already supported by a judgment of the Federal Supreme Court.

(b) as regards *form*, by the maxim *locus regit actum*; but marriage before the consular agent of both parties, or of one of the parties, in case the other one is not a Brazilian citizen, is permitted.²⁷ The question of matrimonial impediments is not specifically covered. The former civil law of marriage²⁸ which became extinct with the enforcement of the Civil Code, provided in Art. 47, secs. 3 and 48, that in the case of marriage of foreigners celebrated in Brazil, as well as in the case of marriage of Brazilians celebrated abroad, the impediments prescribed in Brazilian law might be enforced.

This was not a sound doctrine, since the question of *impediments* does not concern the *form* but has to do with the *capacity*, and *capacity* is governed by the personal law.

By the new Code, however, this question was given its proper solution, because the personal law rules the *capacity* and the personal relations between the spouses; but this principle shall not be construed to the prejudice of the general rule relating to the public order.

²² Art. 35.

²³ Art. 62.

²⁴ Spencer Vampré, 5; Estevam de Almeida, no. XIII; Merea 14.

²⁵ Civil Code, Art. 8.

²⁶ 1 Bevilacqua, *Commentaries*, 121, no. 27; 1 Espinola, *Brief Annotations on the Civil Code*, 4; João Luis Alves, *Civil Code*, 6; Nicanor Penteado, *Reformas e Innovações*, 10.

²⁷ Decree No. 181 of 1890, art. 47, sec. 2; Consular Consolidation, Decree no. 10, 384, August 6, 1913, art. 492; Opinions of the Director General of the Foreign Office, August 31, 1908, in Rodrigo Octavio, *Direito Extranjeiro no Brasil*, note no. 197 a.

²⁸ Decree no. 181 of 1890.

An identical principle rules the marriage of Brazilian citizens celebrated abroad, as regards *form* and *capacity*.

2. *Effect of marriage upon property of husband and wife*

Marriage may be celebrated with or without a contract.

(a) *Marriage contracts.*

There are no special rules in Brazil governing the validity of marriage contracts, as regards *capacity* and *substantive validity*; the personal law of the spouses, or of the husband, if they are not of the same nationality, will be applied.

With respect to the form, however, Brazilian law provides that the contract must be made *solemnly*, before a notary public, and prior to the celebration of the marriage.²⁹ Such contract may not be changed during the marriage. The contracts of marriage generally relate to economic relations. However, in case the parties thereto be foreigners, they may stipulate the law which they elect to govern the marriage relations and may declare the place of the conjugal domicile, a circumstance which may become of great importance regarding the personal effects of the marriage.

Brazilian law³⁰ provides that the law of the nationality of the person governs the personal relations of the spouses and the régime of the property of husband and wife, the option in favor of the Brazilian law being lawful in reference to such régime. This option must be exercised in expressed terms; the contract is the regular form for expressing it.³¹

(b) *No Marriage contract.*

(1 and 2) If the marriage is celebrated without contract, its effect upon immovable and movable property owned by the spouses at the time of the marriage or acquired by them subsequently to the marriage, is to submit it to the law of the spouses, or to the law of the husband, if they happen to be of different nationalities.

The same rule will be observed by the Brazilian courts, if the marriage is celebrated abroad.

If the spouses are Brazilian, or only the husband is Brazilian, in the absence of any contract, all property of the spouses will be held by them under a régime of complete community.³²

(3) *Change of domicile or nationality* has no effect upon rights definitively acquired according with the former law, with respect to the property of husband and wife. Such being the case, a contract

²⁹ Civil Code, Art. 256.

³⁰ *Ibid.* Art. 8, Introduction.

³¹ Bevilacqua, *Commentaries* 122, n. 23; João Luiz Alves, *Civil Code*, 6; Nicanor Penteadó, *Reformas e Inovações feitas no Código Civil*, 10 and 11 sec. 16; 1 Espinola, *Brief Annotations*, 41.

³² Civil Code, Art. 258.

of marriage or even the legal situation of the property as established by the law of the domicile or nationality of the spouses at the time of the marriage, will not be affected by a change of domicile or nationality. The new civil law of the spouses must be only resorted to in order to determine the new relations appearing after the change, and to rule, of course, their subsequent capacity, even as regards immovable property.

In case of simple change of domicile, the submission of the personal relations to the law of the new domicile is a much controverted question from a theoretical standpoint. Brazilian law is silent on the point.

3. *Divorce and Separation*

(a) As the principle of indissolubility of marriage is considered in Brazilian law as one of public order, it has been held that Brazilian courts have no jurisdiction to grant divorces, no matter whether one or both of the parties are aliens.

Brazilian law only knows the divorce *quoad thorum and cohabitationem*, termed in our legal terminology *desquite*;³³ this remedy may be granted by the Brazilian courts in favor of aliens, provided their personal law, or the personal law of the husband, authorizes it.

(b) In granting a separation (*desquite*) in favor of aliens, Brazilian courts will consider the grounds as determined by the law of the parties, provided these are likewise valid grounds according to Brazilian law, since in such case the personal law of the parties and the principle of public order as construed by the *lex fori* must be combined.³⁴

(c) Brazilian courts will recognize a divorce pronounced by foreign courts if both parties should be aliens. If one of them is Brazilian the foreign judgment will only be considered with reference to its effect upon the property and economic relations of the spouses.

As regards personal relations the foreign judgment will not bind the Brazilian party, who may not contract a new marriage. This has been the opinion sustained by the Federal Supreme Court in a few cases.³⁵

An alien, legally divorced abroad, may contract a new marriage in Brazil, even with a Brazilian. Such will be the effect of the legal situation created in the foreign country.³⁶

Of course Brazilian courts will not recognize a divorce in a foreign

³³ *Ibid.* Art. 315, n. III.

³⁴ Bevilacqua, *International Private Law*, sec. 45; Judgment of the Federal Judge of Rio de Janeiro, *Diario Oficial* ("Official Gazette"), June 1, 1918.

³⁵ Judgment of Aug. 16, 1913, 4 *Revista Juridica*, 301; Judgment of Nov. 4, 1916, 8 *Revista Juridica*, 134; Judgment of Aug. 17, 1917, 9 *Revista Juridica*, 127.

³⁶ Judgment of the Court of Pará, 98 O Direito 604; Judgment of the First Magistrate of Peace of Rio de Janeiro, 5 *Revista Juridica*, 165.

country on the application of a Brazilian husband, inasmuch as this judgment would not only be contrary to the Brazilian law, but also to the principle of private international law which makes the marriage subject to the personal law of the husband. However, some judgments have been granted by the French Courts, decreeing the divorce of spouses, where the husband was a Brazilian, on the ground that the wife had not acquired the Brazilian nationality by the marriage, being a French woman domiciled in France.³⁷

In order that a foreign judgment may be enforced in Brazil, it must, in general, be homologated by the Federal Supreme Court. This homologation is not, however, necessary to establish the legal status of the parties.

4. *Legitimacy and Legitimation*

(a) The legitimacy of children may be effected by the father

- (1) at the moment of birth
- (2) by a public deed
- (3) by wills.³⁸

Illegitimate children, under determined circumstances, may also acquire their legitimacy by means of a suit against their parents.³⁹

The legitimation arises only through subsequent marriage.⁴⁰

As to aliens in Brazil, the personal law of the parties will govern legitimacy and legitimation. There is not, however, any legal rule governing the subject, if the father and the child should be of different nationalities. It is a matter to be settled by the writers. The theoretical opinion which is followed in Brazil is not by any means sound.

(b) Brazilian courts will recognize a legitimacy acquired by acts done in foreign countries according to the personal law of the parties. The children will enjoy all rights with respect to immovable and movable property situated in Brazil, which may be granted to them by their personal law. In Brazil the legitimation through subsequent marriage grants to the children the same rights which they would have had if they had been born legitimate.⁴¹

5. *Adoption*

There is no definite rule in Brazil as regards adoption when either the adoptive parent or the child is an alien. Lafayette⁴² and Bevilacqua⁴³ have maintained, following the general prevailing opinion of

³⁷ I *Questions Pratiques de Droit Int. Privé*, 321.

³⁸ Civil Code, Art. 357.

³⁹ *Ibid.* Art. 363.

⁴⁰ *Ibid.* Art. 353.

⁴¹ *Ibid.* Art. 352.

⁴² *Project*, Art. 39.

⁴³ *International Private Law*, sec. 47.

the writers, that the capacity to adopt or to be adopted, and the effects of the adoption, will be ruled, respectively, by the personal law of the adoptive parent and of the child.

(b) Adoption proceedings which have taken place in foreign countries will be recognized in Brazil as legal acts performed abroad. The rights of children adopted in foreign countries to immovable or movable property situated in Brazil will be determined by the law under whose authority the adoption has taken place.

6. *Parental Power*

(a) The power of foreign parents with respect either to the person of the child or to the rights of the parents to his immovable or movable property situated in Brazil or in a foreign country, is not governed in Brazil by any specific legal rule.

If the parents and children are of the same nationality, these relations are governed by their personal law, as generally provided for in Art. 8 of the Introduction to the Civil Code.

(b) But in case there is a diversity of nationality, resort must be had to the writers. It is my opinion that all such relations must be governed by the personal law of the children in connection with the *lex loci*, in order to prevent the exercise of parental rights which offend the principles of public order, morality or good customs.⁴⁴

7. *Guardianship*

(a) Brazilian courts will appoint a guardian for children of foreign parentage living in Brazil, if they have not a guardian legally appointed abroad. This duty of the Brazilian courts arises from common jurisdiction over the matter to provide for the protection and defence of the person and property of the orphan.

According to the general principle, the capacity to be a guardian and the rights, duties and liabilities of a guardian are to be construed in accordance with the personal law of the guardian.⁴⁵

(b) If the child is not domiciled in Brazil, and in case there is not a guardian appointed by the courts of his domicile or a person who represents the same, the custody and administration of the property will be entrusted to the Curator of absentees. Brazilian courts may not appoint a guardian, since they only possess jurisdiction over the property situated in Brazil and not over the person of the child.

(c) Brazilian courts will recognize the rights and duties of foreign guardians with respect to the person or property of the ward, provided they do not offend the legal principles of public order and good customs in force in Brazil.

⁴⁴ Bevilacqua, sec. 48.

⁴⁵ Lafayette, *Project*, Art. 43; Bevilacqua, sec. 50, I.

VI. SUCCESSION

1. *Intestate*

(a) In regard to intestate succession the same rules are applied in Brazil to immovable or movable property, whether situated in the country or in a foreign country.

(b) The personal law of the *de cuius* determines:

- (1) who acquires the property;
- (2) how it is acquired;
- (3) the acceptance and repudiation of the inheritance;
- (4) the effect of such acquisition;
- (5) the duty of collation.

Such is the rule specifically set forth in Art. 14 of the Introduction to the Civil Code.

The only exception to the general rule that applies the personal law of the *de cuius*, is in the case where no heirs exist. A vacant inheritance which occurs in Brazil is turned over to the States of Brazil, according to Brazilian law, and is not governed by the personal law of the *de cuius*.

(c) The payment of debts is governed by the law of the place where the obligation was created.

2. *Testamentary*

The above rule also governs in Brazil

- (a) the legal reserve;
- (b) wills relating to immovable and movable property, as regards
 - (1) capacity;
 - (2) substantive validity;
 - (3) interpretation;⁴⁶
 - (4) form. As concerns the form, the application of the rule

locus regit actum is optionable, and the law authorizes the making of a will before a Brazilian consul.⁴⁷

VII. PROCEDURE

1. *Jurisdiction of courts*

(a) Courts in Brazil have jurisdiction as regards subject matter, from an international point of view. The general principle which determines jurisdiction is that the suit must be brought at the domicile of the defendant (*actor sequitur forum rei*).⁴⁸

Sometimes, however, the situation of the property may establish the jurisdiction in an optional form; or with a mandatory character,

⁴⁶ Civil Code, Introduction, Art. 14.

⁴⁷ *Ibid.* Art. 14, sole sec.

⁴⁸ Consolidation of Federal Procedure, Part 3, Art. 19.

as in case of actions for the division and demarcation of immovable property.⁴⁹

According to such principles a suit may be brought in a Brazilian court, whenever the defendant has his domicile in Brazil:

- (1) regarding immovable property situated in a foreign country;
- (2) regarding the breach of a contract made in a foreign country which is neither to be performed in Brazil nor relates to property in Brazil.

Before bringing a suit in the Brazilian courts the plaintiff must ascertain whether the courts of the situation of the property or of the place where the contract was made have any exclusive jurisdiction over the matter according to their local law, since the judgment would have to be subsequently enforced abroad; it being a well-established principle that no courts will enforce foreign judgments where they deem that the case was one of their exclusive jurisdiction.

It is necessary to bear in mind that Art. 15 of the Introduction to the Civil Code provides that the *lex fori* will determine the jurisdiction, the form of proceedings and the means of defence; Brazilian courts are always granted jurisdiction over suits against a defendant domiciled or resident in Brazil, for obligations or liabilities assumed in Brazil or abroad.

(b) There are no limitations in Brazil, because of the citizenship of the parties, as to the bringing of suits. In general, the domicile of the defendant determines the jurisdiction of the court.

And so

(1 and 2) Brazilian courts have jurisdiction in a suit between a citizen and a foreigner or a foreign corporation, or between foreigners or foreign corporations, if the defendant, citizen or foreigner, is domiciled in Brazil.

A *domicile* grows out of the intent to reside permanently, as determined by continuous residence for a period longer than one year, or as determined at any time by the ownership of immovables or of industrial or commercial establishments, or by any other fact that induces the intention of residence.⁵⁰

(3) The first citation of the defendant into Brazilian courts in an action *in personam* must be made

- (a) personally,
- or if the defendant is absent by:
- (b) letter rogatory, if he is at a known place; or by
 - (c) notice of 30 days, if he is at an inaccessible or unknown place.⁵¹

⁴⁹ Decree N. 720, Sept. 5, 1890, Art. 19.

⁵⁰ Consolidation cited, Art. 20.

⁵¹ *Ibid.* Art. 48 c.

After the initial citation is regularly made the case will go on its regular course, whether the defendant defaults or is represented.

Brazilian law attaches a great deal of importance to the matter of citation in an action *in personam*, or in actions of any other nature. The legality of the citation of the defendant in pursuance of the provisions of the respective foreign law constitutes a necessary requisite for the enforcement by the Brazilian courts of a foreign judgment.⁵²

2. *Matters of procedure*

Brazilian courts regard as matters of procedure, and hence as subject to the *lex fori*, all statements directly concerning the course of the action.

Matters regarding

- (1) Prescription
- (2) Evidence (proof)
- (3) Damages
- (4) Set-off (compensation)

are considered by the Brazilian courts as substantive matters, not matters of procedure. But no legal rule in Brazil declares that such matters are subject to the *lex fori*. Once more the writers will have to settle the controversy.

With respect to *evidence* the Courts have held all proceedings relating to the admissibility of proofs and their force must be ruled by the *lex loci actus*;⁵³ as to *prescription*, the courts have decided such a matter to be subject to the law of the place where the obligation was created.⁵⁴

VIII. EFFECT OF FOREIGN JUDGMENTS

(a) Foreign judgments may be enforced by the Brazilian courts, but for such purpose the judgment must be homologated by the Federal Supreme Court.

Foreign judgments will only be homologated provided the following requisites shall be fulfilled:

- (1) they shall present all extrinsic formalities which, according to the law of the respective country, are necessary to render them capable of execution;
- (2) they must have been pronounced by a court having jurisdiction over the case, and the parties must have been duly notified, or else their non-appearance or default legally proved according to the same legislation;
- (3) they shall have become *res judicata*;

⁵² *Ibid.* Art. 8, no. 2.

⁵³ 2 *Revista Juridica*, 349.

⁵⁴ *Diario Oficial*, of January 6th, 1918.

(4) they must be duly authenticated by the Brazilian Consul;

(5) they must be accompanied by a translation into the Portuguese language made by a commercial interpreter.

However, foreign judgments will not be homologated, though the above said requisities may have been fully complied with, in case they should contain a decision contrary to the public order or to the public internal law of the Union.

(b) It is sufficient that the foreign courts have jurisdiction in accordance with the rules prescribed by the local law, provided the Brazilian courts have no jurisdiction in the case according to the Brazilian law.

(c) As soon as the foreign judgment is properly homologated by the Federal Supreme Court, it will be enforced in accordance with the Brazilian procedure.

(d) Judgments rendered by the courts of the United States will be enforced by the Brazilian courts if they comply with the conditions set forth above.

The Federal Supreme Court of Brazil has held that a foreign judgment may be homologated even though an appeal might yet be taken, provided that on the judgment, according to the law of the place where it was pronounced, a provisional execution is permitted.⁵⁵

⁵⁵ 2 *Revista Juridica*, 473.