The Controversy Surrounding Article 9 of the Law That Defines How Brazilian Laws Are Applied

The Difficult Path to Reform of Private International Law Legislation in Brazil

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Abstract

This study aims to demonstrate that the legislative reform of Private International Law is one of the most complex subjects to be understood in terms of the Law in Brazil. With this objective, the point of reference of this study will be the controversy, which involves willingness as a connecting element, and is also known as the controversy around Article 9 of LINDB. By analyzing willingness as a connecting element within Brazilian legislation, a general panorama of the aforementioned Law is developed, as well as the debate of a doctrine nature about willingness as a connecting element and its insertion in the legal system in effect in Brazil. Finally, the difficulties encountered considering Brazil's position towards international treaties and conventions, as well as the many attempts to reform Private International Law legislation will be analyzed.

Keywords: willingness, connecting element, controversy, Brazil.

A. Introduction[1]

On 30 December 2010 Act no. 12,376 was ratified, changing the content of Executive Order no. 4,657 from 1942, modifying the name of the 'Introduction to the Civil Code' legislation to 'the Law of Introduction to the clauses in Brazilian Law', something that might seem a joke, but is not. The most recent change to one of the main texts that comprises the legal basis of Private International Law (PIL) was to the content of the 1942 text, which is now over 70 years old.

Within this context of isolated and unusual legal changes, this study proposes to outline the difficulty found in Brazil to address matters related to PIL, especially from a legislative point of view.

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1 Study resulting from the activities developed by the Research Group researching regional integration, globalization and international law.

To achieve this, our starting point is the analysis of one of the most controverted and difficult issues to be studied at Brazilian legal academies: the willingness of parties as a connecting element in contractual obligations, also known as the controversy of Article 9 of 'the Law of Introduction to the clauses in Brazilian Law' *[LINDB]*.

This study starts by analyzing the historical evolution of the relevant legislation, highlighting a comparison between the systematics of 'Introduction to the Civil Code' from 1916 and the revision introduced in 1942, which is still in effect. It aims to identify the different systematics and the legislators' disposition regarding the elaboration of the main legal document that governs Brazilian PIL.

Once the historical contextualization is concluded, the next step is to analyze, considering the Brazilian doctrine, the controversy surrounding Article 9 of LINDB, seeking to present the three main existing trains of thought, as well as their main arguments and a critical view of their main weaknesses.

Once the positions regarding doctrine are presented, the next step, on a legal level, is to unveil the troubled situation in the Brazilian legal system showing the laws that directly conflict with the provisions in Article 9 of LINDB, as well as the awkward questions found in the legal systematics about the issue of willingness as a connecting element. At this level, the analysis will continue by demonstrating the issues that arise from the material point of view (such as the Consumers' Code and the Bustamante Code), and also issues originating from legal instruments (the protocol from Buenos Aires and the Arbitration Act) and how they influence the subject of this study.

The study concludes by demonstrating how complex the solution to the controversy of Article 9 of LINDB is. It also highlights the difficulties in the upper legislating bodies to carry out reform of PIL legislation. The difficulty involving the adaptation of existing legislation to the new realities that arise from internationalization, which is increasingly present in Brazil's day-to-day, are also discussed.

It is important to highlight that this is not an exhaustive study, but it aims to demonstrate, through this existing complex matter, the difficulties faced to undertake legislative reform in Brazil. Therefore, there is a preference to turn to legal articles instead of exhaustively exposing doctrine about reform. To facilitate, all the legislation referred to in this study is available at the Executive Department's official site, accessible online at <www4.planalto.gov.br/legislacao>.

B. The Unexpected Transition from the 'Introduction to Civil Code' of 1916 to 'the Law of Introduction to the Clauses in the Brazilian Law'

PIL legislation dates back to the first Brazilian commercial legislation from the 19th century. It reproduces the criterion of the Portuguese Statutes, of Regulation 737 from 1850, to maintain the principle of *locus regit actum* for matters related to facts occurring abroad and nationality as the criterion for state and

capacity.[2] However, it was after the 1916 Civil Code enactment that, in the upper legislating body, PIL was tied to the introductory rules of the new civil code.[3]

This introductory chapter, suggestively called Introduction, comprised 20 articles, not only outlining rules for the application of law,[4] but the main rules describing how the Brazilian jurist should proceed in light of the phenomenon known as extra-national fact – a subject exclusive to specialists in PIL.

In the section that refers to PIL, the chapter 'Introduction' maintained the legal tradition initiated by Regulation 737 by indicating nationality as the main means to determine matters related to the capacity and state of people (Art. 8) and the principle of *locus regit actum* for matters related to facts that take place abroad (Arts. 11 and 12) and for real estate (Art. 10).

The Introduction from 1916 adopted a complex system with respect to its legal obligations. It initially maintained the ratified principle of *locus regit actum* (extrinsically – Article 11 – and the content and the effect of the obligation – Art. 13), but introduces a mixed system where Brazilian law was mandatory in the following cases: contracts executed in Brazil (Art. 13 I); obligations between Brazilians (Art. 13 II); when the object of the obligation was real estate (Article 13 III); and when the case was about the Brazilian mortgage regime (Art. 13 IV). In addition to these two criteria, the Introduction of 1916 also accepted the use of 'will' of the parties as determination of the applicable law, as understood from the expression 'except in the case of being stated to the contrary' found in the *caput* of Article 13.

While the introductory legislation from 1916 maintained the Brazilian legal tradition regarding criteria used to apply law according to nationality and territory, it also introduced the criterion involving the willingness of the parts.

However, Brazilian legislators have noticeably incorrectly regulated matters related to PIL since 1916: the so-called 'ratification' happened indirectly and not directly. Inadequate legal writing became more frequent after the 'Introduction to the Civil Code' from 1942 – which is currently in effect but with a different name.

The introduction of the 'Introduction to the Civil Code' from 1942 (LICC/42) *[LICC – acronym for Lei de Introdução ao Código Civil]* is not the result of thorough studies or legal awareness due to the legislator's need to review the 1916 Introduction, but the result of a supposedly historical necessity.

The dictatorial regime known as *Estado Novo* (New State), the deflagration of World War II and the existence of large colonies of German, Italian, and Japanese

2 A. de Castro, *Direito internacional privado* [Private international law] (5th edn), Forense, Rio de Janeiro, 2004, pp. 298-299.

3 It is common to find Law academicians that misunderstand this introductory chapter of the Civil Code from 1916 with an autonomous Law, which would be the Introduction Law from 1916. In fact, the Civil Code from 1916 followed the framework of *Code Civil des Françaises*, opting to establish an introductory chapter in its format, instead of creating an Introduction Law, as found in the German Civil Code. This mistake originates from the fact that, historically, PIL has a too succinct curriculum in Brazilian universities.

4 The assurance of the obligatory nature of the law in Brazilian territory (Art. 1), its effectiveness (Art. 2), respect to the perfect juridical act, the *res judicata* and acquired right (Art. 3) are examples of this regulation, amongst many other provisions about the dynamics of legal clauses.

immigrants in Brazil, led the Brazilian legislator to believe that there was an urgent need to reformat the criteria for the application of foreign law, especially because of Brazil's position in favouring the then allied powers. This would avoid descendants from the Axis countries taking advantage of the 'weaknesses' of the Brazilian legal system.

This historical need led to LICC/42, which, from a quick glimpse, can be noted to be nothing more than a draft that only became law due to the total lack of interest and knowledge of the Brazilian legislator around PIL.

This characteristic of LICC/42 becomes evident when the nationality principle, applied for matters related to the state and capacity of persons, ruptures and the principle of domicile takes over (Art. 7 *caput* LICC/42), maintaining the principle of territory for all other matters, and in particular, questions of obligation (Art. 9 LICC/42).

The law of 1942 put aside nationality and willingness as means to apply foreign law in Brazil, meaning that this law purely makes Brazil even more isolated from the global context. This issue was highlighted in a criticism made by Haroldo Valladão:

> The new Introduction Law from 1942, art. 9, did not refer to the autonomy of 'will'. This expression prohibited under Brazilian dictatorship, and *which also explained the lack of contract jurisdiction or election* in the Civil Procedure code, from 1939 to 1940, enacted in the same environment.
>
> However, an essential principle, such as autonomy, cannot vanish like this, due to omission.[5]

It is also relevant to mention in this historical study that it is from the 'Introduction to the Civil Code' of 1942 that one of the most challenging issues, regarding the application of foreign law with respect to contractual obligations, begins. As will be shown, the text of Article 9 from LICC/42 suppresses the expression 'except in the case of being stated to the contrary' from Article 13 from the 1916 Introduction.

In the period from 1942 until 2013, LICC/42 undergoes some slight alterations to include some of the larger scale alterations that would occur in the Brazilian law (especially related to divorce and succession), keeping these alterations clear from performing any changes to provisions relating to international affairs.[6]

Thus, it is unsurprising that Brazilian legislators wasted their time to change (incorrectly) only the name of the Law of Introduction, which from the Civil Code, became 'the Law of Introduction to the clauses in Brazilian Law' *[LINDB]*.

5 H. Valladao, *Direito internacional privado: introdução e parte geral* [Private international law: introduction and general section], Vol. 1, Freitas Bastos, Rio de Janeiro, 1968, p. 371.

6 A classic example of the lack of revision is the text of the subsection I, Art. 15 from LICC/42, which still refers to the Brazilian Federal Supreme Court the competence to enact foreign sentences, when, in fact, the Constitutional Amendment no. 45 had changed this competence to the hands of the Brazilian Federal Court of Appeals (Art. 105, I Federal Constitution of the Republic of Brazil).

C. The Controversy Around Article 9 from LINDB, the Brazilian Doctrine

The question whether to accept, or not, 'will' as a connecting element in contractual obligations within the Brazilian legal system is the most complex and one of the oldest found in legal studies in Brazil.

It is so complex and it can be unanimously affirmed that "the Brazilian doctrine, according to PIL, has presented different opinions regarding the exercise of 'will' when choosing the applicable law to legislate contractual relationships".[7]

As previously mentioned, at the creation of Article 9 of LINDB, at the time they had to revoke Article 13 from the 1916 Introduction, legislators decided to supress the expression 'except in the case of being stated to the contrary', thus eliminating any possibility to apply foreign law at the will of the parties, as can be seen in the following comparison:

Article 13 from the Introduction to the Civil Code of 1916:	Current version of 'the Law of Introduction to the clauses in Brazilian Law' 2012 (1942):
Article 13. It will regulate the law where the obligations are contracted, as well as its content and effect, 'except in the case of being stated to the contrary'. Single Paragraph. Brazilian law will always rule over: I. Contracts agreed in foreign countries that are executable in Brazil. II. Obligations contracted between Brazilians in a foreign country. III. Actions related to real estate in Brazil. IV. Actions related to the Brazilian mortgage regime.	Article 9. To qualify and rule over obligations, the law in the country where they were contracted shall be applied. Paragraph 1. If the obligation is to be executed in Brazil, and depending on necessary procedure, it will be observed once the peculiarities of the foreign law regarding extrinsic requisites of the action are accepted. Paragraph 2. Obligations resulting from a contract are considered to be constituted where the proponent lives.

From a strictly legal perspective, the system used by LINDB to qualify obligations favours territorial connecting elements: (1) the place where obligations were contracted (*caput*), (2) the place where they were executed moderated by occasional particularities found in the obligation (Para. 1), and (3) the place where the proponent lives, specifically in the case of contracts (Para. 2).

Strictly speaking, there is no margin to cogitate the use of any other connecting element in the contractual sphere that are not one of the three mentioned above. Matters start becoming complicated when the analysis goes beyond the legal point of view. When a historical analysis is initiated within the comprehensive field of obligations to which it is applied, it becomes evident that, in fact, the legislators from 1942 omitted the possibility to apply 'will' as a connecting element.

7 A.A. Boaviagem, 'A autonomia da vontade na escolha da lei aplicável à doutrina e ao direito brasileiros' [The autonomy of 'will' to choose the law applicable to Brazilian doctrine and rights], *in* J.M. Adeodato (coord.). *Anuário dos cursos de pós-graduação em Direito* [Directory of postgraduate courses in Law]. CCJ/UFPE (acronyms for Legal Sciences Centre and Federal Univerisity of Pernambuco) *[Centro de Ciências Jurídicas/Universidade Federal de Pernambuco]*, Recife, No. 12, 2002, p. 122.

Because of that, it is possible to find three trains of thought about this issue in the Brazilian doctrine: (1) that reassures the possibility of resorting to free will as a connecting element, (2) that refuses the possibility of resorting to free will as a connecting element, and (3) the one that defends a middle ground – from the ambiguous expression 'it depends'.

The train of thought that considers the possibility of resorting to the will of the parties as an element and connection is based mainly on this point in history and the Brazilian legal tradition. It highlights that Article 13 of the Introduction to the Civil Code from 1916 establishes, even if indirectly, that not only do the parties have the right to choose the law applicable to their contract, but also to resort to the interpretation of the will of the parties to determine the applicable law for the contract agreed upon by them.

Thus, the expression 'except in the case of being stated to the contrary' was considered to be the legal basis on which 'will' was ratified as a connecting element.

> When, for example: art. 13 of the Introduction to the Civil Code (Brazilian law about Private International Law) allows the parties to choose the law to discipline the content and effect of their obligations, such relevant law will be fully applied, both its facultative and mandatory provisions, as happens with any other law specified by another connecting element, such as: nationality, art. 14, succession laws, except, evidently, in the cases of abuse of rights and public order offenses.[8]

The major criticism to this train of thought is that it is pointless invoking the historical tradition of Law as it would not support the possibility of inserting a new connecting element at the same level as the ones already explicitly established in law. Also, it goes without saying that the Brazilian doctrine does not welcome this type of argument.

The second train of thought, which is the most widely accepted in Brazilian doctrine, defends that the suppression of the term 'except in the case of being stated to the contrary', found in LINDB, determined that 'will' as a connecting element shall no longer apply in the Brazilian legal system.

> Will parties to an agreement be able to choose the law applicable to international contracts within the Brazilian legal system? The answer must be 'no'. In terms of contracts, Article 9 of the Introduction to the Brazilian Civil Code of 1942, considers the place where the obligation was contracted (*lex loci celebrationis*) as the connecting element to determine the law that is applicable to international contracts agreed upon between the parties.[9]

8 Valladao, 1968, p. 368.

9 F.S.T. de Amorin, *Autonomia da vontade nos contratos eletrônicos internacionais de consumo* [The autonomy of 'will' in international electronic contracts for consumers], Masters dissertation/ PPGD (acronym for Law Postgraduation Program) *[Programa de Pós-graduação de Direito]* – UFPE *[Universidade Federal de Pernambuco]*, Recife, 2006, p. 186.

The main basis on which to refuse the parties the option to choose the applicable law, as well as resort to the will of such parties to establish which law should be applied is mainly based on the literal interpretation of Article 9 from LINDB. If the law has not prescribed the possibility, it must not be accepted.

However, this argument results in a faulty analysis of the systematics of Brazilian private law, to the extent that it presents contradictions that become evident when the analysis of 'will' as a connecting element is expanded beyond the literal interpretation of LINDB. That is, if considered from the point of view of private law as a whole, as opposed to only PIL, refusing 'will' as a connecting element becomes a plea just as weak as the acceptance of a historical argument for its approval.

In this case, the biggest issue resides in the adoption of a misguided premise that in light of legal omission due to an old statute, we become in favour of restricting one of the major aspects of personal freedom in contracts in this increasing integrated century. It should not be discarded that Brazilian courts are still attached to classic and conservative solutions with respect to the legal interpretation of Article 9 from LINDB.

> One need to be cautious when considering a clause from a law that can be applied to an international contract, as Brazilian courts have neither faced this matter directly, nor seem to have embraced the pro-autonomy theses defended by some doctrine makers. In the cases studied, it is noted that judges used the conflictual method to determine the applicable law, and the result, from the literal interpretation of art. 9, *caput*, was always either the Brazilian or the foreign law.
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> As opposed to the principle of disseminated use followed by European countries, the situation in Brazil has not yet evolved. Article 9 from the Introduction to the Civil Code *[LICC – Lei de Introdução ao Código Civil]* does not mention the principle of the autonomy of 'will' and, although many jurists are in favour of it, the principle is prohibited.[10]

The last train of thought that examines the content of Article 9 of LINDB establishes that the prohibition imposed by the article is only upon the direct application of 'will' as a connecting element. This does not stop it from being indirectly applied to the Brazilian law.

Indirect application could happen in various ways, although only relevant are those based on Brazilian law, acknowledging that their application is a consequence of the application of foreign law. The explanation is that

10 N. de Araujo, *Direito internacional privado: teoria e prática brasileira* [Private international law: Brazilian theory and practice] (2nd edn), Renovar, Rio de Janeiro, 2004, p. 329.

> [T]he autonomy of 'will' is not, strictly speaking, a connecting element of the Brazilian Private International Law, although it is recognised as long as it is permitted in the legislation of the foreign country.[11]

With respect to the form of the obligation, it is subject to a legal system that accepts the autonomy of 'will' (essential aspect of the obligation – except for Para. 1 do Article 9 da LINDB):

> The autonomy of 'will' principle rules in situations relating to matters of contractual obligations, even in an international context, an agreement of wills in which the conclusion of an agreement, the ability of the parties and the object of the contract are related to more than one legal system can be considered as an international contract.[12]

When the chosen law is the Brazilian law, it is concluded that 'will' could be a connecting element as long as it was limited to some aspects of the formation of the obligation and that it did not affect the execution (content) of the obligation – or, in the classic doctrine framework of PIL, it would only be accepted in the parts of the contract in which suppletive laws could be applied.

This is the issue with this argument. Even with developments in contractual law and the increasing consolidation of the method *depéçage* in the interpretation of international contracts, there is not a safe way that is also exempt of criticism to define what would merely be a format aspect of the contract. And even less so, criteria to define the extent to which contract formation and execution can be divided into autonomous and independent topics – as there cannot be overlap amongst them, as this would risk the penalty of rejecting 'will' as an indirect connecting element.

In summary, the three trains of thought presented here demonstrate well the doctrine situation regarding the understanding of Article 9 of LINDB. Each of them have their strengths and weaknesses, but none can consider itself more correct or coherent than another.

D. The Controversy of Article 9 of LINDB, Brazilian Legislation

In the previous topic, it was established that the major weakness in the argument that defends the restricted interpretation of Article 9 of LINDB is that, when subjected to the systematics of Brazilian private law, it presents itself as a contradiction of other legal provisions. And it is exactly in this comprehensive field of Brazilian private law that the study now presents another aspect of the controversy: another controversial aspect of the chaotic Brazilian legislation.

11 O. Tenório, *Direito internacional privado* [Private international law], (11th edn), Freitas Bastos, Rio de Janeiro, 1976, p. 395.

12 M.H. Diniz, *Lei de introdução ao código civil brasileiro interpretada* [Interpreted law of introduction to the Brazilian Civil Code], (10th edn), Saraiva, São Paulo, 2004, p. 280.

Since it is not possible to exhaustively analyze all the ruling contents of the Brazilian legal system, we highlight some legal references that cover the issue of the influence of Brazilian legislation over this controversy, amongst which stood out: the Brazilian Consumer Code *[CDC, Portuguese acronym for Código de Defesa do Consumidor]*; the fourth title of the Bustamante Code; the Arbitration Act; and the Protocol of Buenos Aires about contractual jurisdiction from 1994.

The influence of the Brazilian Consumer Code over the study of PIL can be seen in its first articles. Thus, its first article defines itself as being one that establishes public order policies. Inadvertently, opting for this classification moves the Consumer Code up to the category of public order policy, raising three challenging questions in the Brazilian legal system:

1. Which notion of public order should be understood in this legal expression (internal or international)?
2. Is it a rule that can be applied immediately or a manifestation of public order itself in the Brazilian legal system?
3. Is there a difference between rules of law that convey public order and the ones that do not?

The answer to the first question is a challenge because of the lack of legal or authentic interpretation by the Brazilian law, subjecting the usage of the expression 'public order' to the general issue of public order, especially with respect to its meaning – it becomes subject to study of cases of Jurisprudence or the opinion of the Brazilian doctrine.

Not even the arguments, presented by the authors of the bill of the Consumer Code, can be used as a solution, as they define public order as a characteristic of irrevocability:

> [I]t is important to stress that the rules established then have the nature of *public order and social interest*, which is the equivalent to saying that they are irrevocable due to the will of the persons interested in a certain consumption relationship.[13]

The comment made by the authors of the bill raises a suspicion that they used the procedural concept of internal public order, as well as separating imperative and suppletive laws, leading us to consider that by adopting the expression 'public order' the authors wanted to confer the nature of a law that can be immediately applied to the Consumer Code – which leads us to the second question.

To what type of legal relationship, specifically, would the application of the Consumer Code be limited when considered as a law that can be applied immediately under the terms of PIL? One of the prerequisites when conceiving a law as one that can be applied immediately is exactly the definition of the area in which it will be applied. The situation becomes even more complicated when we realize

13 Grinover *et al.*, *Código brasileiro de defesa do consumidor: comentado pelos autores do anteprojeto* [Brazilian Consumer Code: commented by the authors of the bill] (8th edn), Forense Universitária, Rio de Janeiro, 2004, p. 24.

that the Consumer Code is a combination of different legal provisions applied in many areas of both private and public law.

One of the possible answers to this second question would be the following: the application of the Consumer Code would be aimed at consumption relationships – which is a superficial response, as the criterion to determine what is a consumption relationship is as undefined as the concept of public order, summarizing the question of being aware of the need for rules of law to express their imperative nature as legislators did in the Consumer Code.

It also becomes evident that the legislators of the Consumer Code ignored the implications that this law would have upon the areas covered by PIL, given the complexity that the concept of public order presents to the study around exclusion of the application of foreign law.

When analyzing issues that conflict with LINDB, particularly Article 9, it should be noted that consumer legislation defines distinct criteria from those established in the introductory law: a variation is noted in the interpretation of the place where a contractual obligation is formed. In the case of LINDB, the criterion would be the place where the proponent lives, whereas according to consumer legislation, it would entail a "pure and simple waiver of the benefit given by the law of consumer residence, which the contemporary legal practice grants to consumers in general, at an international level".[14]

Even if the imperative theory of law is considered, the *lex loci celebrationis* principle from Article 9 of LINDB could not be applied due to the imperative nature of the Consumer Code, the *lex fori* principle would always prevail.

> When we consider our hypothetical situation, which is minimum performance by a foreign supplier in Brazil, we take into account a common experience, which is the supply of products or offer of a service that, *in fact*, takes place at the consumer's home, through modern technological tools. Within this context, the concept of *distance contracting*, through instrumental means, such as catalogues, teleshopping, telesales, and, especially, the Internet (through email addresses or online connection) ends up reaching 'passive' consumers, who, based in Brazil and without leaving the country, become targets of offers advertised by suppliers established abroad.
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> It is based on these special circumstances that (a) the principles used to determine the applicable law common to other contracts, particularly that set out in Article 9, paragraph 2, from the Introductory Law to the Civil Code *[LICC]*, must not be applied to contracts concluded like the aforementioned, as they would be contradicted by their own interpretation; (b) under a second perspective, the rejection to the conflict rule, contained in Article 9, paragraph 2, of LICC, shall be due to the prevalence, in this case, of Brazilian imperative rules.[15]

14 C.D.T.G. Cruz, *Contratos internacionais de consumo: lei aplicáve* [International contracts involving consumption: applicable law], Forense, Rio de Janeiro, 2006, p. 103.

15 *Ibid.*, p. 136.

Thus, as well as the issue of 'will' as a connecting element inherent to Article 9 of LINDB, the Consumer Code adds, to the same issue, the multiplicity of legal criteria that, in certain occasions, conflict with what is set out in LINDB.

Continuing with the issue of Brazilian legislation, the next statute that deserves to be highlighted is the Bustamante Code, one of the rarest pieces of legislation regarding PIL ratified by Brazil – Executive Order no. 18,871, 13 August 1929 – and, even more incredible, still in effect.

The Bustamante Code was an attempt to establish a uniform code about PIL for American countries and, despite this effort, its inclusion, since its insertion in the Brazilian law, has given rise to a problem with its relationship with the Introductory Law from 1916 and, later with the Introductory Law from 1942, the current LINDB.

By analyzing LINDB and the Bustamante Code, it can be noted that their relationship directly conflicts, as the Code, unlike LINDB, maintains a tradition to keep matters related to the state and a persons' capacity tied to nationality.

With respect to obligations, there is, unsurprisingly, another conflict between these two statutes: the Bustamante Code is not opposed to the possibility of resorting to the will of the parties involved in the contracts. It does not mean that the Code has opted for 'will' as a connecting element, however it does not ignore the possibility that the will of the contracting parties has an influence on the determination of law to be applied in the contract, according to Article 184, which defines rules of contractual interpretation when implicit 'will' is present. Respect towards the will of the parties is also noted in the issue of contracts of adhesion, which, defined in Article 185 – the application of the offeror law prevails when there is no difference in explicit or implicit 'will'.

If we proceed to place the theories about this issue in a framework, it becomes evident that the Bustamante Code would more appropriately belong to the train of thought that defends the indirect application of 'will' as a connecting element, whereas LINDB belongs in the rejecting argument.

So far the controversy of Article 9 of LINDB has been explained from the material aspect view of the will of the parties and the criteria used to determine the applicable law for a certain relationship. However, it is convenient to study two legal statutes that demonstrate the issue from a practical perspective, being, the issue of choosing jurisdiction, another expression of 'will' as a connecting element.

From a practical view, the priority must be to highlight the Protocol of Buenos Aires (PBA) about international jurisdiction with respect to contracts – Executive Order no. 2,095 from 1996. This is the result of the commitment between South-American countries to implement an integration process similar to the European Union, the first step being the creation of an economic block with the countries from the southern cone, known as MERCOSUL.

This protocol is an international treaty between Brazil, Paraguay, Uruguay, and Argentina, and it aims to ensure more security and freedom in legal procedures regarding international contracts involving national companies from these countries.

This legal statute not only permits the contracting parties to freely choose the jurisdiction that they wish to be subject to in order to resolve unexpected contractual issues (Article 4 from the protocol), but also that the parties will have the right to resort to arbitrators.

If on the one hand LINDB rejects the material aspect of the fact that the parties are not allowed to choose the Law, the instrumental view places the debate on a different level, as complicated as the first, which is that of the rules regarding jurisdiction from the Brazilian Civil Code, explained previously.

According to the Brazilian Code of Civil Procedure (Act no. 5,869 from 11 January 1973), there is no acknowledgment of pendency originating from proceedings in progress in other countries (Article 90 from the Code of Civil Procedure). The PBA is practically unknown in the Brazilian legal practice, which can be easily explained, as there are no studies about PBA at Law School, where there are at least two years of study left in the bachelor's degree of civil procedural law.

> Thus, Brazil has been disregarding the importance of the protocol on International Jurisdiction in Contracts elaborated in Buenos Aires. If the provisions of international rulings incorporated to internal legislation are not complied with, it is equivalent to not enforce the need to provide legal security to the private sector of the member States, guaranteeing fair solutions and international harmony regarding legal decisions. Likewise, it disregards the proposal to adopt common rules about international jurisdiction in contractual matters, with the aim to promote the development of economic relations between the private sectors of the member States; in short, it has a negative effect on the integration process.[16]

If on one hand the PBA, international act ratified by Brazil, is completely ignored, the Arbitration Act (Act no. 9,307, from 23 September 1996) has been breaking barriers and, slowly, inserting the debate about the instrumental aspect of Article 9 of LINDB into Brazilian legal study and practice.

Arbitration has never been a relevant topic in the Brazilian legal practice as the current procedural legislation establishes a series of barriers, both internationally and nationally, which ends up withdrawing the main appeal to arbitrators: promptness.

Internationally, the main barrier is the likelihood that the confirmation of the foreign arbitral award has to be extensively defended, a requirement that becomes a common process when brought into the Brazilian Judiciary. Internally, the need to resort to the Judiciary to execute the arbitral award incurs the same problem. Because of an allegedly extensive defence, what should be a simple executory proceeding is more similar to an ordinary proceeding.

16 F.D. Borge, 'Protocolo de Buenos Aires e cláusula de eleição de foro' [Protocol of Buenos Aires and the jurisdiction election clause], *Jus Navigandi*, Vol. 15, No. 2400, 2010, Retrieved on 12 January 2013 from <http://jus.com.br/revista/texto/14248>.

It is also important to register that the Consumer Code defines the arbitration clause as an abusive clause (Art. 51 from the Consumer Code), but this awkward topic deviates from the objective of this study.

In our study, the Arbitration Act directly agrees with the prevision found in LINDB, as the possibility the parties have to choose the rules to be applied in the arbitration process is explicitly and clearly ratified in its second article. Such choice does not only limit the way that the arbitration will take place (Law, equity or parties' criteria), but also the rules of law that must be applied in the arbitral procedure.

> Our Arbitration Act completely protects the autonomy of 'will' of the parties, with respect to their choice regarding the applicable law, in the case the contract has a committing clause subjecting potential litigation to arbitration. Likewise, the Arbitration Act also permits that the parties choose the location where the arbitration will take place, that is, where potential controversies originated from the contract will be settled.
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> It is important to mention that the Brazilian Judicial Department is responding positively to arbitration, extinguishing proceedings of which merit was not assessed when one of the parties contacts the Judiciary, despite having accepted the insertion of committing clause in the contract, subjecting potential litigations to arbitration. This fact became a concrete reality, especially after the Arbitration Act was declared constitutional by the Brazilian Federal Supreme Court in 2001.[17]

In summary, it appears that if the institution of arbitration manages to consolidate itself within the Brazilian legal mentality, 'will' as a connecting element might also become widely accepted or, at worst, be once again indirectly incorporated as in the 1916 Introduction.

E. The Challenging Path Towards Reform: The CIDIP V (Inter-American Convention on Private International Law) and the Discarded Projects

This topic is divided into two distinct although related analyses: the first refers to the two main treaties related to 'will' as a connecting element and their acceptance in Brazil; the second refers to the projects that arose throughout the years of Brazilian legislation but, for some reason, have been discarded.

In the headquarters of international treaties and conventions there are two documents that stand out on the issue of 'will' as a connecting element, as well as a paradigm that demonstrates the difficulty encountered in Brazil in updating the legislation on PIL: (1) The United Nations' convention on purchase and sale of goods from 1980 and (2) the V Inter-American Convention on PIL (*CIDIP V*

17 P.E. Lilla, 'Autonomia da vontade nos contratos internacionais' [Autonomy of 'will' in international contracts], *Migalhas Juridicas*, Retrieved on 23 October 2008 from <http://migalhas.com.br/mostra_noticias_articuladas.aspx?cod=71902>.

[CIDIP – Portuguese acronym for Convenção Interamericana de Direito Internacional Privado]), a result of conferences carried out in the city of Mexico in 1994.

Very briefly, the United Nations Convention for the International Purchase and Sale of goods from 1980 was the result of an initiative of the United Nations Commission for International Trade Law (UNCITRAL) to harmonize and standardize the international legislation with respect to the purchase and sale of goods. This treaty can be considered one of the most successful with respect to adhesion and application in the international context – it has been signed and ratified by more than 60 countries, including Germany, China, the USA and Russia.

Even after realizing the relevance of the United Nations' Convention of international purchase and sale of goods from 1980, it took Brazil 32 years to adhere to it,[18] filling a Brazilian legal omission with the main documents related to international trade, which has only just started appearing in the Brazilian legal framework and, more modestly, as an object of study in Brazilian Law Schools.

It is evident that these 32 years of omission contributed to a real gap in the studies of Brazilian law, especially with respect to the implications of Article 6,[19] which accepts 'will' not only as a connecting element, but also allows the parties to derogate parts of the convention. In other words, if on one hand the positive aspect regarding the issue of 'will' as a connecting element (choice) does not have repercussions in the Brazilian legislation, the negative aspect (derogation) is practically unknown in both legislation and legal study.

Despite the fact this convention is in effect in Brazil, the Brazilian legislator, who follows the tradition to incorporate without adapting the internal legal system, does not promote the necessary alterations in LINDB. Thus, it can be stated that LINDB conflicts with the international provisions ratified by Brazil. In this case, specifically, the provisions that restrict the will of the parties contained in Article 9 of LINDB conflict, especially, with Articles 6 and 8 from the convention, which confer comprehensive power to the will of the parties in this type of contract for the purchase and sale of goods.

The Convention of Mexico of 1994 on the Law applicable to international contracts, one of the various conventions organized during the CIDIP V, presents a facet that became a habit in terms of incorporation of treaties by the internal Brazilian legal system.

Following the American tradition to try and standardize, harmonize and unify PIL, dating back to the first conference to codify International Law that took place in Peru in 1877, the United Nations Assembly (Organisation of American States – OAS) determined that periodic Specialised Inter-American Conventions on PIL should take place from 1971 onwards.

The result from the V convention, in Mexico City, which addressed the standardization of statutes related to the application of foreign law by the members of the convention, is especially relevant.

18 Congress Resolution 538 from 18 October 2012.

19 Text: "art. 6 The parties can exclude the application of this Convention or, according to art. 12, derogate part of its provisions or its effects".

> In the Convention on Law Applicable to International Contracts, which took place at the V Inter-American Convention on Private International Law in 1994 in the City of Mexico, the autonomy of 'will' was established with respect to the applicable law, by setting out in art. 7 that the contract is ruled over by the law chosen by the parties, including voluntary *dépeçage*. Thus, such choice can refer to the whole contract or a part of it, so that the contracting parties can choose a law to rule over a part of the contract and subject the rest of the agreement to a distinct legal system.[20]

The *CIDIP V* was signed by Brazil on 17 March 1994; however, its ratification is not mentioned anywhere.[21] This means that the Convention has not yet been incorporated into the internal Brazilian Law and, therefore, is not in effect in Brazil until it is ratified.

The issue in this context is that Article 7 from the aforementioned convention directly conflicts with the current Article 9 of LINDB. While LINDB does not limit 'will' as a connecting element, Article 7 of *CIDIP V* accepts it in a comprehensive and unrestrictive manner, as follows:

> Article 7. 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 the same.
>
> Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.[22]

It is evident that if the convention is ratified, it would end up creating a situation of antinomy within the Brazilian legal system: either the revision of LINDB or the non-application of the signed convention.

The slow ratification process can prevent antinomies originating from the omission of revisions by the legislator of PIL according to the new international guidelines. From the point of view of the internal legal process, there is a tradition to disregard projects that propose a legal reform of PIL.

The first attempt to reform legislation regarding PIL in Brazil occurred at the beginning of the 1960s, under the coordination of Prof. Haroldo Valladão. The text addressed the General Law on the Application of Rules of Law.

> On that occasion, the aforementioned professor preferred to conceive the General Law on the Application of Rules of Law as an autonomous law, com-

20 J.C.B.F. de Gouveia, 'O princípio da autonomia da vontade na arbitragem comercial internacional no MERCOSUL' [The principle of autonomy of 'will' regarding international arbitration in MERCOSUL], *in Anais do XIV Congresso do CONPEDI*, Retrieved on 19 January 2013 from <www.conpedi.org.br/manaus/arquivos/anais/XIVCongresso/074.pdf>.

21 The list of ratifications for the aforementioned convention is available online at <www.oas.org/juridico/english/sigs/b-56.html>, accessed on 19 January 2013.

22 <www.oas.org/juridico/english/treaties/b-56.html>.

> prised of 91 provisions about various legal matters. In 1970, specifically, a reviewing commission, composed of Luiz Gallotti, Oscar Tenório and Haroldo Valladão himself, approved the bill, with only a few sporadic amendments, without harming the systematic nature of the text conveyed.[23]

These works were converted into Senate bill no. 264 from 1984, and filed on 5 December 1987.[24]

A new attempt to reform legislation occurred in 1994, when the Ministry of Justice organized a commission of jurists to reform the introductory legislation from 1942.

> In 1994, a new commission of specialists, composed of Profs. João Grandino Rodas, Jacob Dolinger, Rubens Limongi França, and Inocêncio Mártires Coelho, was organised by the Ministry of Justice with the aim to elaborate proposals to reform the 'Law of Introduction to the clauses in Brazilian Law' of 1942. As a result, the commission presented the bill for the Law, divided into three fundamental chapters: rules of law in general, inter-temporal law and Private International Law. After being referred to the House of Representatives, the bill was converted into another Bill no. 4,905, from 1996, however it was removed from the agenda just before being voted upon by the House of Representatives' Commission for Constitution and Justice.[25]

It comes as no surprise that this bill was removed from the system.[26] Different from the 1984 bill, bill no. 4,905, which was restarted under the initiative of Senator Pedro Simon, was converted into Senate bill no. 269 in 2004.

The situation of Senate bill no. 269/2004 *[PLS 269/2004, acronym for projeto de lei do senado]* was not the same as bill no. 4,905 *[PL 4,905, acronym for projeto de lei]*, as the less mentioned Senate bill no. 243/2002 *[PLS 243/2002]*, which was restricted to revise LINDB in accordance with the civil code from 2002, was attached to it. Note that: bill no. 243/2002 did not add any relevant information, it was only repackaged, as verified in Article 31 from the aforementioned bill "the obligations will be qualified and governed in accordance with the law in the country where they were contracted".[27] Also note that: while Senate bill no. 269/2004 followed bill no. 4905/1995 *[PL 4905/1995]*, establishing in its Article 12 that the contractual obligations

> [A]re governed by the law selected by the parties. This selection will be expressed or tacit, and it can be altered at any time, as long as third parties' rights are respected.[28]

23 M. Basso, *Curso de direito internacional privado* [Course on Private International Law], (2nd edn), Atlas, São Paulo, 2011, p. 44.
24 <www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=30480>.
25 Basso, 2011, p. 44.
26 <www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=225255>.
27 <www.senado.gov.br/atividade/materia/getPDF.asp?t=41601&tp=1>.
28 <www6.senado.gov.br/mate-pdf/6268.pdf>.

Thus, while Senate bill no. 269/2004 seeks to adapt the Brazilian legislation to CIDIP V to incorporate the new reality regarding international trade, bill no. 243/2002 simply rewrote LINDB to exclusively conform to the 2002 Civil Code.

For good or for bad, the legislator chose to file both bills,[29] restricting the legal changes only to alter the content of the Introductory Law, as previously seen in this study.

F. Final Considerations

It is hoped that the issue of addressing the reform of PIL, which exists in the Brazilian legal system, has become evident in this brief analysis. Not surprisingly, the topic remains with the status of legal accessory in Brazilian law schools.

The unfortunate exchange of the Introduction to the Civil Code from 1916 for a law elaborated in a hurry and, may I say, the result of fears originating from World War II, initiated the problems in this legal area in Brazil.

The structure of the new law from 1942 shows a fear of conferring freedom to the parties, demonstrating the nature of the regime that ratified it. If you add to this the difficulty of the Brazilian legislative process, which is already secular, in dealing with the incorporation of international rules into its internal law, a confused system is created with regards to the regulation of PIL, from which 'will' as a connecting element is one the major examples.

To conclude, despite the fact Brazil is among the ten largest world economic powers, arising as an emerging power in the 21st century, a reasonable amount of its legal mentality is still internationally isolated. It prefers to apply obsolete national laws instead of adopting modern international legislation and, when it finally chooses the latter, it forgets to make the necessary national legal amendments.

29 The filing took place on 27 January 2011, according to the on-going process of both bills available online at <www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=52987>, accessed on 19 January 2013.