Economic Analysis of Law Review

Choice of Law in International Contracts And Efficiency: Insights from the Brazilian System And Correspondent Case Law (2004-2015)

Escolha de Leis em Contratos Internacionais e Eficiência: Percepções acerca do Sistema Brasileiro e Jurisprudência Correlata (2004-2015)

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RESUMO

Quando se discute eficiência no conflito de leis envolvendo contratos internacionais, uma abordagem existente prescreve três elementos como guia: (i) autonomia das partes; (ii) alocação do ônus de prova do direito estrangeiro às partes; e (iii) proteção de certas categorias em situações de assimetria informacional. Entretanto, como essa abordagem se relaciona ao sistema brasileiro é praticamente ignorada. Assim, este artigo submete um conjunto de casos, obtido em pesquisa empírica anterior do autor, a hipotéticos elementos de eficiência no conflito de leis. Propõe-se que o sistema brasileiro reflete elementos mistos: (i) a escolha das leis é rígida, mas ela não necessariamente impacta a eficiência; (ii) o ônus da prova segue a orientação prescrita; e (iii) a potencial interpretação para proteger certas categorias (ex. consumidores) pode prejudicar o mecanismo de internalização em casos de assimetria informacional. Entretanto, quando as cortes interpretam estas regras em conjunto, a maioria das decisões resultou na aplicação eficiente da escolha de leis.

Palavras-chave: Escolha de Leis; Eficiência; Contratos Internacionais; Brasil; L.I.N.D.B.

JEL: K12; k33

ABSTRACT

While discussing efficiency in international contracts choice of law, one approach prescribes three elements as guidance: (i) party autonomy; (ii) allocation of the burden of proof of foreign law to parties; and (iii) protection of certain categories in asymmetric information situations. However, the way that the "efficient framework" relates to the Brazilian system has been practically ignored. Thus, this paper submits a set of cases, gathered from the author´s prior empirical research, to hypothetical efficient elements in choice of law. The paper suggests that the Brazilian system reflects mixed elements: (i) choice of law is rigid, but it does not necessarily impair efficiency; (ii) burden of proof follows the prescribed orientation; and (iii) the potential interpretation of protected categories (e.g. consumers) can affect the internalization device of information asymmetry. However, whereas Courts interpret these rules in tandem, most decisions resulted in efficient choice of law outcomes.

Keywords: Choice of Law; Efficiency; International Contracts; Brazil; L.I.N.D.B.

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1. 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 associated 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 relate to the contract object. The signing act of the contract can occur through electronic devices, where the place of celebration becomes fuzzy. Execution of the object can take place in a jurisdiction diverse from the jurisdiction of parties' domicile, the location of the object, and even the place of celebration (wherever defined). And, as in any other contract, parties sometimes have to resort to dispute settlement. In the international setting, more than one forum may appear as able to exercise jurisdiction, or even be preferable in accordance with parties' preferences.

International, transnational, multi-connected, multi-located, diversely or dispersedly placed are some of the labels describing these contracts. In the legal realm, they are under the study of conflict of laws, among other subjects[2].

Recently, not only already thorny questions - such as jurisdiction and the applicable law to multiconnected contracts – have been a concern, but also efficiency consideration as to choice of law. That is, whether choice of law mechanisms within a particular State or Region lead to (in)efficient outcomes. One theoretical approach prescribes three elements towards efficiency: (i) as to the choice of law, party autonomy should be the preferred rule, since contract parties are best positioned to choose; (ii) regarding burden of proof of foreign law, allocation should be on parties not courts, in order to internalize the costs of foreign law disclosure; and (iii) concerning protection of certain categories, the system should make feasible the application of domestic law (*lex fora*) in asymmetric information situations, such as in cross-borders transactions involving consumers.

However, most of the above considerations refer to the European or the US context. One would hardly find studies concerning the particularities of the Brazilian system and law and economics (L&E). Moreover, as a central piece of the choice of law system, the Introductory Law to Brazilian Legal Norms (Brazil, Decree-Law No. 4.657 [L.I.N.D.B.], 1942) is object of potential legislative revision, which prompts further analysis from different angles.

Thus, this paper inquires about the overall efficiency of the Brazilian choice of law model. It posits that, *prima facie*, it reflects mixed elements which are not necessarily inefficient.

[2] Doctrine has been characterizing conflict of laws as an esoteric field, a dismal swamp, an area full of eccentric professor, to save the worst (Juenger, 1983) (Rühl, 2006) (Dolinger & Tiburcio, 2016). The epistemic community of the field does not even agree on the name of the discipline. Conflict of laws prevails in the Anglo-Saxon literature. Private international law triumphs in continental systems, including Brazil. As a minimum, there is some agreement about the three classical issues dealt by the discipline: (i) conflict of jurisdictions; (ii) choice of law; and (iii) recognition of foreign judgments.

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 recalls the empirical observation and the attained sample which draws from the author´s previous research[3]. Afterwards, I submit the sampled cases to the hypothetical efficient model. As I will show, (i) the Brazilian choice of law rule (L.I.N.D.B article 9) is rigid (*lex loci celebrationis*), but its nature, *per se*, does not necessarily impair efficiency; (ii) the Brazilian burden of proof rule (L.I.N.D.B article 14) follows the prescribed orientation; (iii) an extensive interpretation of protected categories can frustrate the internalization device envisaged by the Brazilian rule (L.I.N.D.B article 17). However, whereas Courts interpret these rules in tandem, most cases led to the application of "whatever provided by contracts". Thus, in most decisions Courts reinforced the initial *ex-ante* agreement regarding choice of law and provided and efficient outcome.

2. 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 laws is mainly based on L.I.N.D.B, previously known as the Introductory Law to the Civil Code (L.I.C.C., in the Portuguese acronym). Recently, legislation changed the statute name from L.I.C.C. to L.I.N.D.B, as pointed out, with no substantive material change. The system interacts with other relevant statutes such as the Brazilian Code of Civil Procedure (Brazil, Law No. 13.105 [N.C.P.C.], 2015), regional treaties dealing with private international law, the Brazilian Code of Consumers' Protection (Brazil, Law No. 8.078 [C.D.C.], 1990), and the Brazilian Constitution (Brazil, Brazilian Constitution [C.F.], 1988).

L.I.N.D.B articles 9, 14, and 17 lay down important rules as to: (i) the choice of laws 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 laws in contracts, article 9 affords that:

> *To classify and regulate obligations, the law of the country of its constitution shall be applied.*[4]

[3] 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 State Courts of Appeal. Authors have been publishing the results since 2014. In one of them (Ribeiro & Lupi, 2014), we investigated whether Brazilian Courts applied foreign law in private international law cases.

[4] Two other provisions complement *caput* of L.I.N.D.B 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, L.I.N.D.B article 9 § 1 deals with formal contractual issues and § 2 relates to contracts between absent parties. This paper focus, however, is on the main provision of article 9 (the *caput, or chapeau*).

Doctrine assesses L.I.N.D.B article 9 as an expression of the *lex loci celebrationis* (law of the place of celebration) rule category. The determination of the exact place of the obligation celebration is crucial, since it will lead to 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 a plain reading of L.I.N.D.B article 9; especially, while considering that its latter version (1916) explicitly referred to the possibility of agreement between parties (Araujo, 2016, pp. 192-195) (Rodas, 2002, pp. 43-63). On the contrary, others attack a literal reading of the provision, highlighting that it could not trump a higher autonomy of the parties principle (Dolinger, Brazil, 2011, pp. 238-240) (Dolinger, 2007, pp. 457-461) (Valladão, 1980, pp. 366-370).

In turn, regarding the proof of foreign law, L.I.N.D.B 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 should be read together with the C.P.C. article 376, wherein:

> *The party who alleges municipal, state, foreign or customary law should prove its content and effect, whether this is determined by the judge.*[5]

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 (PHB v. Pirassununga, 2008) (Jam v. Autodesk, 2012).

Doctrine suggests the need of additional clarification. 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 (Convencion sobre Derecho Internacional Privado, 1928), the Inter American Convention of Proof and Information of Foreign Law (1979), and the Las Leñas Protocol (2002), though all within regional scopes, provide guidance, absent precise rules. The Bustamante Code points out ways to prove foreign law: affidavit from two active lawyers from foreign jurisdiction or judges' diplomatic requirement on the meaning of foreign law (Araujo, 2004, pp. 236-420). 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, pp. 376-383).

[5] The provision is the same as the old C.P.C. Article. 337.

Last, but not least, L.I.N.D.B article 17 asserts the general exception to choice of law. It works as an escape device or a way to block the application of foreign law, even when the latter comes out as the applicable one:

> *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 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, one should 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 (Araujo, 2004, pp. 95-111).

Parsimony is also advised in the usage of the exception. Doctrine advises its deployment when foreign law application creates real anomalous results, cardinal principles of a society are disrespected, people´s moral is violated, or economic interests of states are impinged (Dolinger & Tiburcio, 2016, pp. 486-487).

Once offered, in a nutshell, the set of choice of laws provisions relating to contracts in Brazil, the next section presents the empirical observation from case law. The result will be further resumed and interpreted in terms of L&E.

3. Empirical Observation

3.1. Prior Research and Results

In a previous research project (Ribeiro & Lupi, 2014), a comprehensive query looked for conflict of laws cases in all Brazilian States' Courts of Appeal. In sum, with the expression *private international law* as a parameter, the attained initial sample comprised more than 1,000 decisions (2004-2013) from all subjects of conflict of laws (e.g. contracts, family, inheritance, bonds, and intellectual property law). Once refined to 141 cases, 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 the latter sample, seventeen cases were selected as *accurately* encompassing choice of laws 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 amount of seventeen cases is not impressive compared to the bulk of cases brought along ten years of litigation. In one way, the mea-

ger amount may be only revealing that parties did not appeal choice of laws issues. But the sample is rich for analysis.

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

3.2. 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 between 2014 and 2015, from five of the most active State Courts. The sample received, nonetheless, just one extra case (Eichenberg v. Lazzeri, 2015)[6], increasing the sample to eighteen. Second, I scrutinized the respective rulings of the eighteen cases to extract objective points of control from the narrative of the facts and the reasoning of the Courts[7].

The table below depicts the new sample and the control points. Besides their formal identification in the first column, subsequent columns stand for:

- EL = Expected Law
  I considered as "expected law" the one resulting from a plain reading of L.I.N.D.B article 9. Literally, the place of celebration of the contract should command 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 case records. Moreover, these are actually proxies, since the content of "FL" or "BL" depends on whatever each system considers part of

[6] 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.

[7] This meant confirmation of previous analysis and corrections (if needed). For instance, the applied law in *Elliot v. Magatect* (2010) changed from Brazilian Law ("BL") to Foreign law ("FL").

their domestic law. For instance, whenever Brazil internalizes international law ("IL"), it becomes part of Brazilian law. I also used customary law ("CL") and the rights and obligations from the agreement of the parties ("WCP", whatever the contract provided) as relevant acronyms;

- AL = Applied Law
  I assessed "applied" taking into account observable reasoning from Courts' rulings

Case Name	EL	AL	Points of Control
(Cattalini v. Eurotainer, 2004)	FL	WCP	*Lex loci celebrationis*: New Jersey (US); Choice: New Jersey; Ruling: Recognized no party autonomy on choice of law; Not clear whether proof of foreign law was an issue; Applied whatever the contract provided.
(Eximbank v. Micam, 2006)	FL	WCP	*Lex loci celebrationis*: New York (US); Choice: New York (US); Ruling: *Lex loci celebrationis*; Parties did not prove foreign law; Applied whatever the contract provided; Rejected the application of C.D.C.
(EJF c. AGA, 2006)	BL	BL	*Lex loci celebrationis*: Brazil; Choice: NC; Ruling: *In dicta*, applied the Brazilian Civil Code and Brazilian Agency Statute.
(Ciaci v. Lubrizol, 2007)	FL	FL / WCP	*Lex loci celebrationis*: New York (US); Choice: 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 L.I.N.D.B Art. 17 (public order).
(Elliot v. Magatec, 2010)	FL	BL	*Lex loci celebrationis*: US; Choice: NC; Ruling: Parties did not prove foreign law. Preclusion; Applied BL.
(First Food v. MSC, 2011)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage clause found; Applied demurrage.
(Mar Lines v. Evergreen, 2011)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage clause found; Applied demurrage.
(Arrow v. Zurich, 2012)	FL	BL	*Lex loci celebrationis*: Miami; Choice: Warsaw Conv. (indirectly); Ruling: Applied C.D.C. and pointed out Constitutional restraints.
(Cielos del Peru v. Panalpina, 2012)	FL	BL	*Lex loci celebrationis*: US; Choice: Warsaw Conv. (indirectly); Ruling: Applied C.D.C. and pointed out Constitutional restraints.
(Adorno v. Prudence, 2012)	BL	WPC	*Lex loci celebrationis*: Brazil; Choice: NC; Ruling: Applied whatever the contract provided.

(Rioja v. MSC, 2012)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage clause found; Applied demurrage.
(Magistral v. Sud Vapores, 2013)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage provided in the bill of lading; Applied demurrage.
(Plus Cargo v. Zaat, 2013)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage clause found; Applied demurrage.
(Sud Vapores v. Nildefox, 2013)	NC	CL	*Lex loci celebrationis*: NC; Choice of Law: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage provided in the bill of lading; Applied demurrage.
(MSC v. Rioja, 2013)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage provided in the bill of lading and arrival notice; Applied demurrage.
(Polico v. Libra, 2013)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage provided in the bill of lading and devolution term. No need of translation; Applied demurrage.
(MSC v. VCDS, 2013)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC; Ruling: Maritime transports are under private int ´ l law rules that privilege customary law and demurrage provided in the bill of lading and arrival notice; Applied demurrage.
(Eichenberg v. Lazzeri, 2015)	NC	CL	*Lex loci celebrationis*: NC; Choice: NC. Ruling: Incoterms are part of customary law and FCA clause found in the commercial invoices; Applied FCA.

Considering the new classification, as previously noted, "expected" and "applied law" are in close match in five cases: *Cattalini v. Eurotainer*; *Eximbank v. Micam*, *EJF c. AGA e outros*; *Ciaci v. Lubrizol*; and *Adorno v. Prudence*. These cases reveal fruitful insights, since they do not represent substantive (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, one would find "dysfunctional" results in three cases: *Elliot v. Magatec*, *Arrow v. Zurich*, and *Cielos del Peru v. Panalpina*, i.e., foreign law would be expected to be applied, but Brazilian law came out as the applicable one. Finally, in ten cases Courts "smoothly" applied customary law, 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.

4. Choice of Laws And Efficiency

4.1. Economic Prescription

The dialectic between the application of domestic or foreign law in choice of laws seems to offer much room to L&E investigation. An immediate thought resembles a Coasean dilemma in efficiently allocating rights between the cattle-raiser and the farmer (Coase, 1960, pp. 4-8). 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; i.e. the efficiency resulting from the application of domestic or foreign law. The focus of efficiency over the dynamic of conflict of laws, irrespectively of the material content of these rules (material or substantive justice), is labelled "conflicts justice" in the literature[8].

Authors (Jürgen Basedow, 2006) (Rühl, 2006, p. 802) (Kono, 2014, pp. 13-14) remark the field as incipient and concentrated on a handful of L&E scholars. Currently it is, in Brazil, practically inexistent[9].

In one of these models, from a normative perspective, an efficient approach assumes a benevolent and well-informed legislator in terms of global efficient design. This entity should apply clear choice of laws rules – not general standards[10] – and be open towards the application of foreign law among jurisdictions (Rühl, 2006, p. 803; 841).

In cross-border contracts, more specifically, an efficient framework would embrace *party autonomy* as the main criteria for maximized welfare results. Rühl, while analyzing contemporary convergence between the North American and the European choice of laws' models, explains the reliability of the hypothesis. That is to say, the existence of 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. Finding a better tailored law to their needs, choosing an established body of case law, or selecting a neutral law would be some of the reasons for parties to choose. Traditional welfare economics also delimitates party autonomy in case of market failures – e.g. negative externalities and information asymmetry (Rühl, 2007, pp. 31-34) (O'Hara & Ribstein, 2000, pp. 1184; 1197-1199).

A single example of a negative externality[11] would be thecosts shifted to Courts in applying a legal system barely unknown to them. Even if one assumes increasing occurrence of

[8] A term used originally by Professor Korn of Columbia University (1983, p. 777); (Rühl, 2006, p. 826); (Kono, 2014, p. 69).
[9] Exceptions made to (Araujo, 2014); (Picchi, 2010).
[10] See (Kaplow, 1992); (Schäfer, 2002).
[11] Negative externalities correspond to harmful spillover effects on third parties that were not explicitly engaged in the original transaction (Cooter & Ulen, 2016, p. 39). In the context of industrial policy, pollution is the classic example.

private international law cases, it seems plausible to accept that the daily activities of Courts are concentrated on domestic law, not foreign law. A possible way to internalize the "foreign law unfamiliarity cost" would be to place the burden of foreign law proof on parties. However, in case of non-state law, such as the principles of the International Institute for the Unification of Private Law (UNIDROIT) and INCOTERMS[12], just a moderate increase in litigations costs would occur. As a body of known and written provision, they would relatively easy to ascertain (Rühl, 2007, pp. 34-36).

Rühl's efficiency remarks, drawing from Akerlof's views (1970), also comprise market failures related to opportunistic behavior involving cross-border choice of law. Rühl splits efficiency considerations based on the nature of certain categories involved on the transnational transaction, such as consumers, employees, and insurance policy holders. The key point is that the occasional contracting parties – of these categories - would have inferior knowledge of the applicable law and informational costs to acquire them. Moreover, the less organized transnational environment reduces firms' reputational costs as compared to domestic transactions. Companies would have incentives to shift undue risks to the pointed categories. Therefore, application of the *lex fori* of consumers, employees and policyholders would offer a balance against opportunistic behavior[13].

Taken together, these efficiency elements may also be object of criticism. For instance, in my view, the shifting of the burden of ascertaining foreign law to parties corresponds to a partial internalization device. One thing is the formal obtainment and translation of foreign statutes, codes, or any other legal provision – whose costs, by the way, has been continuously decreasing with web based search mechanisms. Another thing refers to the interpretation of those provisions as a whole, or as a comprehensive legal system, which turns to be a much more challenging task to Courts. Moreover, the assumption of a more chaotic transnational environment in cross-border transactions may also need calibration with the profusion of electronic feedbacks, recommendations, and evaluation mechanisms. Yet, the efficiency elements hold as a general framework. It may just require marginal enhancements.

And as the main point of this paper, how would the Brazilian system fit the overall efficiency recommendations? Does it bend towards the normative prescription?

4.2.The Brazilian Choice of Laws 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, Courts' rulings might impact efficient outcome in subtle ways. I grouped the analysis around three major concerns[14].

[12] The International Chamber of Commerce (ICC) publishes the Incoterms which are rules aiming at facilitating the conduct of global trade by uniformly defining parties' respective obligations. Their use is widespread among trade parties (International Chamber of Commerce, 2010).

[13] One exception raised by the author refers to transactions between commercial parties. The underlying economic reason is that parties, in this case, are in similar position to obtain relevant information (Rühl, 2007, pp. 39-40).

[14] Each case may contain elements of distinct concern and therefore might appear in more than one item.

4.2.1. Party Autonomy in Choice of Laws And L.I.N.D.B Article 9

If party autonomy is the preferred prescription, how does L.I.N.D.B article 9 respond? As already signaled by doctrine, the unambiguousness of L.I.N.D.B article 9 assignment is quite disputable.

Among ten out of ten analyzed cases (excluding *lex mercatoria* considerations), interpretation inclined towards the rigidness of the rule. For instance, in *Cattalini v. Eurotainer*, an action was brought about the termination of a contract and restitution of equipment (containers). Parties signed the instrument in New Jersey, which contained a clause providing the application of New Jersey´s law. Regardless of the fact that, in the case, the place of celebration and the chosen law were the same, as to party autonomy, the Court (2004, pp. 3-4) indicated that:

> *To summarize, it should be noted that as a matter of choice of law, the caput of L.I.N.D.B 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 support similar interpretation: Courts should follow the *lex celebrationis* tenet. The immediate inference would be the potential inefficient assignment of a property right (the choice of law). The rule would compel parties to face the application of a certain legal system, based on the place of celebration, regardless of their will.

Moderation, conversely, is also advised. Well informed parties about the *lex loci celebrationis* command could arrange to "travel" to the place of celebration to attract the application of 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, parties can almost instantly deliver powers of attorney to agents abroad to choose the preferred forum law.

If not digitally, would parties' representatives travel to sign the contract result in higher costs and an inefficient outcome? Not necessarily. One could imagine the situation in which the marginal benefit arising from the choice of laws related to the place of celebration would offset the marginal costs of additional travelling. And, after all, if they travelled, they deemed it worth doing it. Otherwise they would not have bought tickets, in a hypothetical construction.

4.2.2. Burden of Proof, Externality, L.I.N.D.B Article 14 And Related Provisions

Is it plausible to assume that L.I.N.D.B Article 14 and C.P.C. Article 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 serve to detail the way to accomplish it. This systematic appears in three cases: *Ciaci v. Lubrizol*, *Elliot v. Magatec*, and *Eximbank v. Micam*.

Ciaci v. Lubrizol concerns a company 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, the US company notified the Brazilian one 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 payment of damages. The Brazilian part sued for damages, in accordance with Brazilian law, alleging the application of Brazilian Agency Law which provides for damages. The Court reminded that

> *It was possible to the Judge, in face of L.I.C.C. [L.I.N.D.B] article 14 to demand from the alleging party the proof and force of foreign law (...) [I]f the appellant looked for a more accurate analysis, he/she should have filed the foreign law text.*

Elliot v. Magatec involves, as well, an international commercial agency contract in which both the burden of proof and the details of proceedings came 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 as facts; (ii) alternatively, whether the Court did 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, in accordance with the judgment.

On appeal, the Court (2010, p. 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 (e.g. calculation of 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, p. 7).*

Thus, L.I.N.D.B 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 one 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 (in the absence of negative externalities). 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 Brazilian law application from the records). In this specific case, one could point an inefficient allocation derived from L.I.N.D.B article 14 failure to induce parties' disclosure of foreign law. And the point seems to be again the separation of efficiency on different angles in multi-connected transactions; i.e. efficiency as a matter of choice of law (conflicts justice) and efficiency as a broader consideration involving the *ex-post* application of substantive law (material justice). The internalization device purported in L.I.N.D.B article 14 deals with the former.

Another intermediate and reveling result refers to the burden of customary law proof. To be sure, a group of ten cases delivered comparable reasoning about the determination to pay *demurrage*[15] on contracts of maritime transport. Moreover, they affirmed, with slight variations[16], that:

> *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.*

One cannot find in those 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. In *Eichenberg v. Lazzeri* (2015), the plaintiff (Eichenberg), a transporter commissioner, sues to collect from a Brazilian affiliated company of an agriculture importer (Lazzeri) established in Italy. The parties signed a transport contract and the commercial invoice contained the FCA Incoterm[17].

The Court reminded the legal nature of Incoterms as part of a new *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 *lex mercatoria* is in tension with rules of the domestic legal system. In the pre-

[15] Demurrage has originated in English maritime law and has a technical meaning. As Schofield (2000, p. 2) suggests it means "an agreed amount payable to the owner in respect of delay to the vessel beyond the laytime, for which the owner is not responsible."

[16] In some extension, it has to do with judgments by the same Trial Court and Reporter.

[17] FCA stands for "Free Carrier" (International Chamber of Commerce, 2010, p. 23).

sented 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. By definition, customary law (l*ex mercatoria*, Incoterms etc.) represents the consolidation of consistent and frequent conduct. At some point, legal systems, principles, and case law may evolve into customary law. If this dynamic is taken for granted, it is also credible to assume that they are part of the law of different jurisdictions. Information deficit fades away to both parties and Courts.

4.2.3. Information Asymmetry Between Parties, Externality, And L.I.N.D.B Article 17

The last element to assess is the public order (L.I.N.D.B art. 17) scape device. Can one demonstrate that L.I.N.D.B 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 L.I.N.D.B 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 articulated for the application of domestic law; i.e. the C.D.C.

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 C.D.C. 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; and (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 L.I.N.D.B article 17 - confirming the prevalence of C.D.C. 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 C.D.C.. The provider insisted on the opposite interpretation. The Court, on appeal, summarized one interpretation of Brazilian Superior Courts in the way that C.D.C. prevails over Warsaw Convention, regardless of the place of the celebration of the contract. The rapporteur also reminded about C.F. Article 5-XXXII 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 (Rühl, 2007, p. 40).

The heart of the problem, however, seems to rest 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. To the extent that this interpretation will considerably widen the category of consumers, L.I.N.D.B article 17 can negatively impact efficiency in choice of law.

5. Conclusion

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

Drawing from a specific framework that interprets choice of laws mechanisms in terms of L&E, I suggested that: (i) the Brazilian choice of law prevailing rule (L.I.N.D.B article 9) does not *prima facie* reflect an efficient *ex-ante* allocation. 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 disclosing foreign law to parties; and (iii) L.I.N.D.B 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 C.D.C. and Brazilian Courts) can fetter an efficient allocation.

Overall, the Brazilian choice of law system is hybrid. 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 or led to "conflicts injustice", which is just one aspect of the efficiency debate.

At the end, even if the bulk of analyzed cases are not impressive, the paper looked for the furtherance of L&E reasoning in a "forgotten" L&E field in Brazil.

6. References

ACUERDO de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa entre Los Estados Partes del Mercosur y la República de Bolivia y la República de Chile, *Las Leñas Protocol*. (2002). Buenos Aires: Jul. 05, 2002. Retrieved from http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=cfjZC68DQ+1s2on0ZZw8aQ==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=

ADORNO v. Prudence, Ap. 9272554-15.2008.8.26.0000, Tribunal de Justiça de São Paulo May 07, 2012.

AKERLOF, G. A. The Market for "Lemons": Quality Uncertainty and the Market Mechanism. *84(3) The Quartely Journal of Economics* , 1970, pp. 488-500.

ARAUJO, N. d. *Direito Internacional Privado.* Rio de Janeiro: Renovar, 2014.

ARAUJO, N. d. Uma Visão Econômica do Direito Internacional Privado: Contratos Internacionais e Autonomia da Vontade. In L. B. Timm, *Direito e Economia no Brasil* (pp. 433-444). São Paulo: Atlas, 2014.

ARAUJO, N. d. *Direito Internacional Privado.* Rio de Janeiro: Revolução e-book. 2016

ARROW, v. Zurich, Ap. 9140185-91.2007.8.26.0000, Tribunal de Justiça de São Paulo Jan. 11, 2012.

BRAZIL, Brazilian Constitution [C.F.]. 1988. Brasília: D.O.U. Oct. 05, 1988. Retrieved from http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

BRAZIL, Decree-Law No. 4.657 [L.I.N.D.B.]. 1942. Brasília: D.O.U. Sep. 09, 1942. Retrieved from http://www.planalto.gov.br/ccivil_03/decreto-lei/Del4657compilado.htm

BRAZIL, Law No. 13.105 [N.C.P.C.]. (2015). D.O.U. Mar. 16, 2015. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm

BRAZIL, Law No. 8.078 [C.D.C.]. 1990. D.O.U. Sep. 11, 1990. Retrieved from http://www.planalto.gov.br/ccivil_03/leis/L8078.htm

CATTALINI, v. Eurotainer, w/n, Tribunal de Justiça do Paraná May 18, 2004.

CIACI, v. Lubrizol, Ap 7.030.387-8 (Tribunal de Justiça de São Paulo Oct. 18, 2007).

CIELOS DEL PERU, v. Panalpina, Ap. 9153626-42.2007.8.26.0000, Tribunal de Justiça de São Paulo Apr. 26, 2012.

COASE, R. (1960, Oct.). The Problem of Social Cost. *(3) The Journal of Law and Economics*, pp. 1-44.

CONVENCION sobre Derecho Internacional Privado, B. 1928. Retrieved from http://www.oas.org/juridico/english/sigs/a-31.html

COOTER, R., & Ulen, T. *Law and Economics (6th ed).* Boston: Addison-Wesley, 2016.

DOLINGER, J. *Evolução da Ordem Pública no Direito Internacional Privado.* Rio de Janeiro: Universitária, 1979.

DOLINGER, J. *Direito Internacional Privado.* Rio de Janeiro: Renovar, 2007.

DOLINGER, J. Brazil. In B. Verschraegen, & R. Blanpain, *The International Encyclopaedia of Private International Law*. Alphen aan den Rijn: Wolters Kluwer, 2011, p. 17-392

DOLINGER, J., & Tiburcio, C. *Direito Internacional Privado.* Rio de Janeiro: Gen/Forense, 2016.

EICHENBERG v. Lazzeri, Ap. 0195167-23.2015.8.21.7000, Tribunal de Justiça do Rio Grande do Sul Dec. 10, 2015.

EJF c. AGA, Ap. 533529-0/1, Tribunal de Justiça de São Paulo Dec. 18, 2006.

ELLIOT, v. Magatec, EmbDec Ap 0009243-68.2002.8.19.0203, Tribunal de Justiça do Rio de Janeiro Mar. 30, 2010.

EXIMBANK, v. Micam, Ap. 328.918-8, Tribunal de Justiça do Paraná May 03, 2006.

FIRST FOOD, v. MSC, Ap. 9179192-90.2007.8.26.0000, Tribunal de Justiça de São Paulo Feb. 07, 2011.

INTER AMERICAN Convention on Proof of and Information of Foreign Law, IAC Proof and Info on Foreign Law, 1979. Retrieved from http://www.oas.org/juridico/english/sigs/b-43.html

INTERNATIONAL CAMBER OF COMERCE. *INCOTERMS 2010: ICC Rules for the Use of Domestic and International Trade Terms.* Paris, 2010.

JAM, v. Autodesk, REsp No. 1.278.940, Superior Tribunal de Justiça Sep. 04, 2012.

JUENGER, F. K. *General Course on Private International Law*. Hague: Hague Academy, 1983.

JüRGEN Basedow, T. K. *An Economic Analysis of Private International Law.* Tübingen: Mohr Siebeck, 2006.

KAPLOW, L. Rules versus Standards: An Economic Analysis. *42 Duke Law Journal*, pp. 557-629, 1992.

KONO, T. *Efficiency in Private International Law.* Hague: Ail Pocket, 2014.

KORN, H. L. The Choice-of-Law Revolution: A Critique. *83(4) Columbia Law Review*, 1983, pp. 772-973.

MAGISTRAL, v. Sud Vapores, Ap. 0021659-14.2012.8.26.0562, Tribunal de Justiça de São Paulo May 08, 2013.

MAR LINES, v. Evergreen, Ap. 0014688-81.2010.8.26.0562, Tribunal de Justiça de São Paulo Oct. 18, 2011.

MSC v. Rioja, Ap. 0045644-80.2010.8.26.0562, Tribunal de Justiça de São Paulo Sep. 23, 2013.

MSC v. VCDS, Ap. 0042731-57.2012.8.26.0562, Tribunal de Justiça de São Paulo Dec. 11, 2013.

O'HARA, E. A., & Ribstein, L. E. From Politics to Efficiency in Choice of Law. *67 The University of Chicago Law Review*, 2000, pp. 1151-1232.

PHB v. Pirassununga, REsp. 857.614/SP, Superior Tribunal de Justiça Mar. 04, 2008.

PICCHI, F. A. *Contribuição à Análise Econômica do Direito Internacional Privado.* São Paulo: Master´s Thesis at USP, 2010.

PLUS CARGO, v. Zaat, 0006973-51.2011.8.26.0562, Tribunal de Justiça de São Paulo Aug. 07, 2013.

POLICO, v. Libra, Ap. 0044124-85.2010.8.26.0562, Tribunal de Justiça de São Paulo Sep. 23, 2013.

RIBEIRO, G. F., & Lupi, A. L. A aplicação do direito material estrangeiro em contratos pelos Tribunais de Justiça brasileiros: uma análise sobre dez anos de jurisprudência (2004-2013). *34(1) Nomos*, 2014, pp. 81-107.

RIOJA, v. MSC, Ap. 0046108-07.2010.8.26.0562, Tribunal de Justiça de São Paulo Jun. 04, 2012.

RODAS, J. G. *Contratos Internacionais.* São Paulo: LTR, 2002.

RüHL, G. Methods and Approaches in choice of law: an economic perspective. *24(3) Berkeley Journal of International Law*, 2006, pp. 801-841.

RüHL, G. Party Autonomy in the Private International of Contracts: Transatlantic Convergence and Economic Efficiency. *3(1) CLPE Research Paper*, 2007, 1-41.

SCHäFER, H.-B. Legal Rules and Standards. *2 German Working Papers in Law and Economics*, 2002, pp. 1-7.

SCHOFIELD, J. *Laytime and Demurrage, 4th.* London: Informa, 2000

SUD VAPORES v. Nildefox, Ap. 0005296-83.2011.8.26.0562, Tribunal de Justiça de São Paulo Sep. 23, 2013.

VALLADAO, H. *Direito Internacional Privado.* Rio de Janeiro: Freitas Bastos, 1980.