UniCEUB
ISSN 2237-1036

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

Private International Law chronicles

Crônicas de direito internacional privado

Nadia de Araujo

Marcelo De Nardi

Inez Lopes

Fabrício Polido (org.)

VOLUME 16 • N. 1 • 2019
ARBITRAGEM E DIREITO INTERNACIONAL

Sumário

I. Crônicas do Direito Internacional 1

Mapeamento e comparação de acordos de proteção de investimentos internacionais na América Latina e Central 1990 a 2018 3

Anderson Fonseca Machado (organizador), Letícia Braga Carvalho Kataoka (organizadora), Ana Terra Teles de Meneses, André Leão, Andrea Luísa de Oliveira, Edilson Enedino das Chagas, Henrique Haruki Arake Cavalcante, Mariana Rezende Maranhão da Costa, Rafael Freitas Machado, Vitor Levi, Wilson Sampaio Sahade Filho

Private International Law chronicles 19

Nadia de Araujo, Marcelo De Nardi, Inez Lopes e Fabrício Polido (org.)

I International acts 19

II CASE LAW 28

II. Dossiê Especial: Arbitragem e Direito Internacional 35

El rol de las instituciones arbitrales en el desarrollo del arbitraje internacional 37

Ivette Esis

Revisitando a aversão brasileira à cláusula investidor-Estado: capitalismo de Estado e treaty-shopping 54

Marcelo Simões dos Reis e Gustavo Ferreira Ribeiro

Arbitral interpretation of investment treaties: problems and remedies for the debate on "legitimacy" 74

Santiago Díaz-Cediel

Arbitragem Internacional sob Anexo VII da Convenção das Nações Unidas sobre o Direito do Mar e as Controvérsias Mistas: Análise de Casos Recentes 90

Alexandre Pereira da Silva

Arbitragem de investimentos e o meio ambiente: reflexões sobre o caso Ethyl Corporation v. Canadá 106

Patrícia Maria da Silva Gomes

Homologação de sentença arbitral estrangeira anulada na origem: o caso EDF International S/A 116
Patrícia Maria da Silva Gomes

II. Artigos sobre outros temas 129

International Constitutional Court: Rise and Fall of an International Debate 131
Arthur Roberto Capella Giannattasio, Taina Ometto Bezerra, Elizabeth Bannwart, Débora Drezza, Jessica Buchler, Giovanna Martins e Breno Oliveira

International Constitutional Court: Rise and Fall of an International Debate 148
Janaína Gomes Garcia de Moraes e Patricio Alvarado

Investigação histórica do conteúdo da concepção de Trabalho Decente no âmbito da OIT e uma análise de sua justiciabilidade 166
Silvio Beltramelli Neto e Julia de Carvalho Voltani

O diálogo entre fontes normativas e o controle de convencionalidade: entre o livre comércio e o desenvolvimento econômico e sustentável 187
Eduardo Biacchi Gomes e Julia Colle Marinozzi

O direito internacional do desenvolvimento e suas raízes imperialistas no contexto do pluralismo normativo: por um paradigma libertário e não (neo)liberal 201
Lucas Silva de Souza e Jânia Maria Lopes Saldanha

Entre o escudo e a espada: caracterizando o Land grabbing como crime contra a humanidade 224
Rodolfo Soares Ribeiro Lopes

Descolonialismo e o Direito Internacional Privado na América Latina: desvendando novos paradigmas 241
Eduardo Biacchi Gomes e Luis Alexandre Carta Winter

Criminalização de imigrantes ilegais na União Europeia: novos paradigmas com base no caso Celaj 253
Felipe Augusto Lopes Carvalho

O caso Intel: o impacto na evolução da teoria dos efeitos no direito da concorrência da União Europeia.....270

Augusto Jaeger Junior e Mariana Sebalhos Jorge

The duty of care of parent companies: a tool for establishing a transnational environmental civil liability 289

Mathilde Hautereau Boutonnet

doi: 10.5102/rdi.v16i1.6069

Private International Law chronicles

Crônicas de direito internacional privado

Nadia de Araujo*
Marcelo De Nardi**
Inez Lopes***
Fabrício Polido (org.)****

I International acts

Chronicle 1 The Hague Conference´s Judgments Project: highlights of the text and advantages for Latin America

1.1 Introduction

The key to international commerce efficiency lies in the element of trust. Trust between parties that invest in international business relations, and trust between States that hold legal systems that may need to settle disputes arising from a contract gone sour.

In addition to disputes of a commercial nature, courts often hear tort cases, and proceedings may become complex if evidence shall be collected and damages assessed in another jurisdiction. Moreover, the fact that the State rendering the judgment will not be the one that enforces it adds another layer of difficulty to attain an useful outcome from the litigation.

When a party seeks the judiciary in order to solve a dispute connected only to a particular State, the question of which judge within the forum will adjudicate the case poses no dilemma. In that case, the local procedural rules easily provide an answer, as well as to all questions pertaining to the specificities of the proceedings. However, when a case is connected to more than one State, *complication* holds precedence, starting from the identification of the court where the prospective plaintiff may bring the suit. If not provided for in an agreement, one needs to tread carefully for selecting (or shopping, may be said) a forum. Many *fora* may be available to adjudicate the case, but determining which one is better equipped under the plaintiff's view to successfully conduct proceedings demands an in-depth assessment, one that parties are not always financially and timely prepared to conduct.

As a result, the court that adjudicates a cross-border case is frequently not able to enforce its own judgment. Since the defendant's assets may be located in another jurisdiction and if so, the plaintiff's success depends on whether the enforcement forum is receptive to foreign judgments. Further-

* Nadia de Araujo is Professor of Private Internacional Law, PUC-Rio, PhD in International Law, USP, Master of Comparative Law, GWU. Email: nadia@nadiadearaujo.com

** Marcelo De Nardi is Professor of International Relations, UNISINOS PhD in Law, UFGRS. Email: de.nardi.marcelo@gmail.com

*** Professor of Public and Private International Law, Faculty of Law, University of Brasilia (UnB). Coordinator of Private International Law, International Trade and Human Rights Research Group. Former General Coordinator of International Legal Cooperation in Civil Matters of the Department of Recovery Assets and International Legal Cooperation (DRCI) - Ministry of Justice. Email: inezlopes05@gmail.com

**** Professor of Private International Law, International Intellectual Property Law and Comparative Law at the University of Minas Gerais – UFMG. Doctor in International Law, University of São Paulo- USP. Visiting scholar at Kent Law School/UK and Humboldt University of Berlin (2018-2019). Member of the American Association of Private International Law and Brazilian PIL Watch Group. Scientific Advisor of the Institute for Research on Internet & Society – IRIS. Email: fpolido@gmail.com

more, along the proceedings the adjudicating judge may demand evidence that shall be collected abroad. The outcome of the proceedings itself will then depend on an active cooperation between authorities from different countries.

Plaintiffs, defendants and courts worldwide continuously struggle with the adversities of international civil litigation, and Latin America is no different, despite regional integration and cultural similarities. For that very reason, the movement towards the development of international agreements for the bilateral, regional or multilateral international judicial cooperation (IJC), which started in the late XIX century, shows no sign of abating.

IJC embraces two very different fields of cooperation. The first one involves inter-State assistance along proceedings to perform certain judicial acts, such as service of process or taking of evidence. The second field, known as post-trial assistance, addresses the recognition and enforcement of foreign judgments. This paper focuses on the latter[1].

Enforcing a judgment abroad may prove to be too strenuous of a task, the costs of which may exceed the very indemnification amount that the plaintiff seeks to enforce in the first place. In addition, the shortcomings of cross-border enforcement are detrimental to the development of international commerce itself, as many business players perceive an international business relation – relying as they do on its lack of legal certainty – as a sure way of evading the fulfilment of their obligations. Further, adopting IJC rules for the recognition and enforcement of foreign judgments may put us all in the right track towards access to justice and cost--efficient and risk-free (at least from a legal perspective) transnational relations.

1.2 The Judgments Project of the Hague Conference

The Hague Conference on Private International Law, known by the acronym "HCCH", began its work in 1893, focusing on the uniformization of PIL rules through multilateral treaties addressing specific issues on civil and family law[2]. After becoming an international organization in the 1950's, the HCCH invested progressively on IJC. Since then, there has been a tremendous increase in HCCH's codification activity, influenced greatly by the organization's new reach: from a modest start with 16 members in the fifties, HCCH grew to 35 in 1990, then to 47 in 2000 and now reaches the impressive number of 83 members[3].

HCCH's statutory mission is to work towards the progressive unification of private international law rules. It does so by setting internationally-agreed approaches to issues such as jurisdiction of courts and recognition and enforcement of foreign judgments, HCCH aims at building strong foundations upon which individuals and companies can expand their activities.

Out of the many projects under discussion at HCCH, the Judgments Project is among the most relevant ones. This project, which dates back to the end of the XX Century, aims at minimizing the existing legal barriers for the international circulation of judgments. The ultimate goal is to mitigate uncertainty in international private relations, by ensuring that judgments rendered in a given country are enforceable where judgments creditors need them to be. Accordingly, the creation of a reliable legal environment will encourage parties to comply with the rules of law and act in good faith in their contractual or non-contractual relations.

To this date, it took to the Special Commission for the Judgments Project set up by HCCH's Council on General Affairs and Policy four meetings to build a

[1] For a comprehensive introduction to international cooperation, see MCLEAN, David. *International co-operation in civil and criminal matters*. Oxford: Oxford University Press, 2002.

[2] For a brief history of The Hague Conference see, VAN LOON, Hans. *The Global Horizon of Private International Law*. The Hague: Martinus Nijhoff, 2015. (Collected Courses of the Hague Academy of International Law, 380). Between 1893 and 1904, four diplomatic conferences were held at the Hague, concluding seven multilateral treaties. These early conventions were largely based on the nationality principle, which later became its Achilles heel (VAN LOON, Hans. *The Global Horizon of Private International Law*. The Hague: Martinus Nijhoff, 2015. p. 28. It was only after WWII that the world became more aware that international co-operation was essential and HCCH was established as an intergovernmental organization. Today, HCCH has 83 Members, 82 States and 1 Regional Economic Integration Organization (the EU), and a more globalized outlook. With the adoption of the 1956 Hague Convention on Child support, the HCCH has embraced the concept of habitual residence – *in lieu* of the nationality principle - as its main PIL connecting factor.

[3] See VAN LOON, Hans. *The Global Horizon of Private International Law*. The Hague: Martinus Nijhoff, 2015. Recueil des Cours, v. 380, p. 44. 82 States and one regional economic integration organization. For more details see https://www.hcch.net/en/states/hcch-members.

draft convention providing common grounds for recognition and enforcement of foreign judgments on civil and commercial matters[4]. In fact, the Special Commission took up on the work developed in the course of four years by a Working Group comprised of specialists in the field. After the 4th meeting, in May 2018, the Special Commission considered that the work on the draft convention was completed and recommended to the Council on General Affairs and Policy to convene a Diplomatic Session, pre-scheduled for June 2019[5].

To achieve its goal of establishing a facilitated system for the circulation of foreign judgments, the Judgments Project thrives to settle specific standards for the requested State, the one where recognition and enforcement are sought, to decide whether jurisdiction over a case was exercised both legitimately and reasonably. Thus, these parameters serve only to enable recognition and enforcement of a judgment in a jurisdiction other than its jurisdiction of origin, and they do not purport to change States' domestic rules on jurisdiction.

In many countries throughout the globe a foreign judgment may only be recognized and enforced if the court where recognition and enforcement are sought finds that the court of origin has factual connection to adjudicate the case[6]. Hence, it is left to the Special Commission to determine - when possible - which of these genuine ties are generally agreed-upon among HCCH's member States.

a) The preliminary draft Convention

The preliminary draft Convention on the recognition and enforcement of judgments in civil and commercial matters of May 2018 will be submitted to HCCH's Council on General Affairs and Policy in March 2019. Under this general proposal, the convention shall take the form of a binding document: This means that, if adopted by the Diplomatic Conference proposed to convene in mid-2019, the convention will then become part of the domestic legislation of each State that ratify it. On the other hand, the document, for the current trend, will not be restricted to HCCH's members.

As the envisaged adoption of the project succeed the convention's entry into force would mean a major achievement of HCCH's longstanding quest for harmonizing PIL and, more importantly, for harmonizing IJC rules in the field of post-trial assistance. Such a harmonization, however, would be limited to the criteria for recognition and enforcement of foreign judgments as described above. It will not, however, establish standard direct bases of jurisdiction.

The new convention will add to the now in force Convention on Choice of Court Agreements[7], its "sister convention". Further, HCCH intends for it to be used in coordination with the other conventions sponsored by the organization, such as the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, currently in force in 40 countries.

HCCH is confident that this new convention will help to prevent duplicate procedures in different states, reducing litigation expenses and transaction costs. Furthermore, it will also promote greater predictability about the circulation of judgments, assisting the parties in their commercial decisions and reducing costs associated with risk management.

b) Indirect bases for recognition and enforcement

The establishment of generally agreed-upon bases

[4] The meetings of June 2016, February 2017, November 2017 and May 2018 had more than 150 participants of 53 States and 16 international organizations and NGOs, among which ASADIP.

[5] For more information on the work carried out by the Working Group and on the Judgments Project in general, see <https://www.hcch.net/en/projects/legislative-projects/judgments>, access in: 12 Jul. 2018.

[6] For instance, see the parallel drawn by Paul Beaumont between the issue of recognition of foreign judgments and Brexit: "The decision of a majority of the UK to vote to leave the European Union on Thursday 23 June 2016 means that in the not too distant future the UK will not be a Member State of the European Union. This is likely to have the consequence that once the UK has left the Union it will not apply the Brussels I Regulation or the Lugano Convention to provide for recognition and enforcement of judgments from courts in the EU and in the Lugano Contracting States and vice versa. Clearly the Brussels I Regulation will not apply to a State outside the EU – apart from transitional arrangements for cases already in the pipeline at the time of the UK exit from the EU – and the Lugano Convention is not likely to be a model acceptable to a newly liberated UK…. It may very well be the case that the future Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, alongside the 2005 Convention, will be the best basis for ensuring appropriate recognition and enforcement of judgments from UK courts in other States in the EU and the current Lugano Contracting States and vice versa." (BEAUMONT, Paul. *Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law:* reflections in the context of the Judgments Project?. CPIL _WP_, 2016. p. 4)

[7] For more information and status table of the Choice of Court Convention, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=98, access 4 Jun. 2018.

for the indirect control of foreign jurisdiction[8] has been the driving force behind the Judgments Project. These bases should enable courts seized to recognize a foreign judgment to assess the grounds on which the courts of origin adjudicated the case, without offending that States' sovereignty.

The Special Commission was able to advance negotiations by limiting the indirect bases of jurisdiction list to very precise provisions, to which the majority of the States seemed to converge about[9]. These provisions relate to reasonable connections between the case and the court of origin, enabling the judgment to be eligible for recognition and enforcement in other States. The absence of those requirements, in turn, would allow such States to refuse recognition or enforcement of foreign judgments.

The draft convention lists well-known connection factors between the case and courts of origin, such as[10]:

(i) The court of origin should be where the natural person who is the judgment debtor has habitual residence[11];

(ii) The court of origin should be where the defendant maintained a branch, agency, or other establishment[12];

(iii) The court of origin should be the parties' choice of forum[13];

(iv) The court of origin should be from the place where performance of the contractual obligation should take place[14];

(iv) The court of origin should be from the place where the act or omission directly caused a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property happened[15].

The provision for indirect bases of jurisdiction is the most extensive and complex limb of the draft convention. Thus, the absence of harmonized international criteria to define basis of jurisdiction made the task of negotiating the convention's list thereof all the more difficult.

b) Exclusive bases for recognition and enforcement and grounds for refusal

Article 6 of the draft Convention provides for the States' Party obligation to only recognize and enforce foreign judgments originating from States Party directly connected to those particular situations: intellectual property subject to registration, and immovable property. As a corollary to that premise follows that States Party will have the obligation to refuse recognition and enforcement where a judgment concerning such subject matters do not come from a Court referred to in that provision. A closer reading of this provision reveals that it translates a harmonization of PIL rules on jurisdiction: States that accede to the future convention will agree that for the matters dealt with in Article 6 the only acceptable bases for jurisdiction are those declared there.

Article 7 of the draft convention provides for the grounds for recognition and enforcement refusal of a foreign judgment. Those provisions stand for the allo-

[8] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Hartley and Dogauchi Report*, 2005. Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=3959. Access: 12 Jul. 2018.

[9] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Hartley and Dogauchi Report*, 2005. p. 785: "[…] it became apparent as work proceeded that it would not be possible to draw up a satisfactory text for a "mixed" convention within a reasonable period of time. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention. […]". (HARTLEY, Trevor; DOGAUCHI, Masato. *Convention of 30 June 2005 on choice of court agreements*: explanatory report. 2005. Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=3959. Access: 12 Jul. 2018).

[10] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.

[11] Article 5.1(a) of the draft Convention. (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.)

[12] Article 5.1(d) of the draft Convention. (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.)

[13] Article 5.1(g) of the draft Convention. (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.)

[14] Article 5.1(j) of the draft Convention.(HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.)

[15] Article 5.1(j) of the draft Convention. (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.)

wances for the States Party to refuse, but not for an obligation to do so, since the provisions must be read with regard to Article 16, which allows recognition and enforcement under national law standards. Accordingly, the draft convention does not innovate in this point since the grounds listed therein are very much familiar to all States; among them the public order ground[16].

1.3 What's to earn from the new convention?

Latin American countries have a longstanding tradition of international judicial cooperation. The legal framework in place for foreign judgments recognition and enforcement ensures a high level of receptiveness for foreign judgments[17]. However, judgments from Latin America are not recognized with the same responsiveness in other parts of the globe. This means that while Latin American PIL rules are an excellent tool for securing foreign judgments recognition and enforcement, this improved level of acceptance of their judgments outside the region does not comply. As it stands, judgments from Latin American countries may not be accepted in countries not parties to the CIDIP II Convention[18] or the Las Leñas Mercosul Protocol[19].

The rules on direct jurisdiction provided for in the Montevideo Treaties and in the Bustamante Code did not achieve extensive acceptance at their time. Moreover, the subsequent initiative – the CIDIP III Convention– set aside the ambition of establishing common jurisdictional rules to focus on the harmonization of indirect jurisdictional rules, the same concept embraced by HCCH for the Judgments Project. Lastly, while the CIDIP III Convention[20] did develop sophisticated IJC rules, especially in the field of post-assistance, it failed to inspire other OAS member States to resort to them.

The new convention under discussion at HCCH will hopefully allow Latin American judgments not only to find the receptivity that they now lack in a broader geographical arena, while also helping their regional rules come to light again, as they do not fall far from the HCCH model.

The future convention on recognition and enforcement of foreign judgments will ensure that judgments from Latin American countries face less opposition from other countries, especially in North America, Europe, and Asia. It will also contribute to an already sympathetic scenario to foreign decisions in Latin America. As pointed out by the Chairman of the Special Commission, Mr. David Goddard, Q.C., in his introductory remarks to the first meeting in 2016[21], the convention will serve two purposes:

(a) enhance access to justice; and

(b) facilitate cross-border trade and investment by reducing the costs and risks associated with cross-border dealings, an objective that was particularly relevant when we worked on the Choice of Court Convention, and that remains centrally relevant to what we are doing here today.

Finally, in light of his very optimistic discourse, it can be deduced, in the case of a positive outcome, that the new convention will allow parties to concentrate more on their core businesses rather than burdened with the task of enforcing a judgment on their behalf wherever they find necessary to do so.

[16] The wording of the article employs the term "manifestly" to give a greater qualification to the public order exception.

[17] Specially because there are no rules in place for indirect basis of jurisdiction as the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, that set out these bases are not into force in most of the Latin American Countries (see footnote 20).

[18] The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, entry into force on June 14, 1980, and ratified by Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. Available at: http://www.oas.org/juridico/english/treaties/b-41.html, accessed on: July 16, 2018.

[19] The Jurisdictional cooperation and assistance protocol on civil, commercial, labor and administrative matters, entry into force on March 17, 1996, and ratified by Argentina, Brazil, Paraguay and Uruguay (Mercosur member-States). Available at: http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=N3IHqzUD1Ju3ySGqV9PRew==&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8=, accessed on: July 16, 2018.

[20] The Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, entry into force on December 24, 2004, and ratified by Mexico and Uruguay. Available at: http://www.oas.org/juridico/english/treaties/b-50.html, accessed on: July 16, 2018.

[21] Record of introductory remarks of the chair of the special commission (1-9 june 2016), available only in the secure portal of HCCH's website for the time being. Mimeo with the Author.

Chronicle 2 Cross-border Maintenance: an assessment after the Hague Convention entered into force in Brazil

Inez Lopes[22]

2.1 Introduction

The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter referred to as the 2007 Hague Convention on Maintenance) and the Protocol on the Law Applicable to Maintenance have been adopted to facilitate cross-border legal cooperation to recover maintenance between creditor and debtor among States parties.

Both instruments were incorporated under Brazilian national law after the approval of Congress bypassing the Legislative Decree No. 146 of December 9, 2016. On July 17, 2017, the Brazilian Government deposited the instruments of ratification before the Dutch Ministry of Foreign Affairs. According to the Brazilian legal system on incorporation of international treaties into national legal order, these treaties entered into force on the date the Decree No. 9.176, of October 19, 2017 were officially publicized, which occurred on the following day.

The purpose of this article is to assess the effectiveness of those international treaties as instruments to foster enforcing maintenance orders abroad, on qualitative and quantitative approaches, throughout doctrine and jurisprudence analyses on this matter and besides that through data revealed by the central authority.

2.2 The 2007 Hague Convention and the cross-border maintenance obligation

The 2007 Hague Convention on Maintenance aims at ensuring an effective child support and other forms of family maintenance, facilitating the circulation of administrative or judicial decisions ordering maintenance payment. The primary focus is the protection of the child, and it is "far more inclusive in its coverage than the previous multilateral instruments"[23]. In this sense, article 2 establishes an international obligation based upon the principle of guaranteeing children the right to maintenance, regardless of the marital status of the parents.

In addition, the Convention aims at replacing the treaties concluded earlier by the States parties, both within the framework of The Hague Conference (1956, 1958 and 1973) and the United Nations Convention on the Recovery Abroad of Maintenance, adopted on June 20, 1956. It is important to emphasize that, initially, a coordination with the 1956 New York Convention[24] will exist, but as States ratify or accede to the 2007 Hague Convention on Maintenance, it will replace the previous one. This will gradually establish a single global regime for cross-border recovery of maintenance, keeping dialogues and coordination with other existing international instruments at regional level, such as the rules of the Inter-American system and of the European Union.

The 2007 Hague Convention on Maintenance regulates a general obligation limited to family relationships between parents and children. It also applies to spousal support when the application is made in conjunction with the claim for child support, as provided in article 2, paragraph 1 a) and b). However, the extension of such co-operation to maintenance claims between spouses is subject to the States who made declarations of their interest in expanding the scope of the convention. In this sense, the 2007 Hague Convention on Maintenance contains traditional rules of private international law as well as in relation to international legal and administrative cooperation[25].

In addition, the Convention gives to the central authorities a proactive role. The specific tasks listed in Article 6 are examples of their role, because if the agreement was too rigid, it could hamper their operation, given the diversity of legal and administrative systems[26]. The central authority designated by the Brazilian

[22] Professor of Public and Private International Law, Faculty of Law, University of Brasilia (UnB). Coordinator of Private International Law, International Trade and Human Rights Research Group. Former General Coordinator of International Legal Cooperation in Civil Matters of the Department of Recovery Assets and International Legal Cooperation (DRCI) - Ministry of Justice.

[23] DUNCAN, William. The New Hague Child Support Convention: goals and outcomes of the negotiations. *Family Law Quarterly*, v. 43, n. 1, p. 9, 2009.

[24] Article 49.

[25] WALKER, Laura, *Maintenance and Child Support in Private International Law*, Oxford and Portland: Hart, 2015, p. 201.

[26] DUNCAN, William. The New Hague Child Support Conven-

authority is the Department of Asset Recovery and International Legal Cooperation (DRCI) of the National Secretariat of Justice (SNJ) of the Ministry of Justice.

It is important to stress that the 2007 Hague Convention on Maintenance makes the rules on the ratification and enforcement of foreign judgments clearer than the previous treaties. First, it equates the decisions or agreements rendered by administrative and judicial authorities in respect of a maintenance obligation[27]. Second, even if a foreign decision regards other rights, it is possible that it will be partially recognised and enforced, especially for child support.

In relation to access to justice, the requested State must guarantee effective access to procedures, including enforcement and appeal procedures, as well as provide free legal assistance. The Convention also grants equal treatment for foreign and domestic cases. Besides that, it guarantees no security, bond or deposit to pay of costs and expenses in proceedings.

Reservations and declarations made by Brazil

Brazil made reservations to Article 20, subparagraph 1e), and Article 30 (8) related to agreement in writing by the parties to the jurisdiction and declarations on Article 2 (3) about extending the application to other family members.

The first reservation refers to Article 30 that contains provisions on maintenance arrangement. In accordance with Article 3 e) a maintenance arrangement is twofold as an agreement in writing relating to the payment of maintenance which, firstly, has been formally drawn up or registered as an authentic instrument by a competent authority; or, secondly, has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority. Article 30(8) provides an opt-out mechanism in which Brazil reserved the right not to recognize or enforce a maintenance arrangement containing provisions regarding minors, incapacitated adults and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57 of the Convention. It means that private agreements related to cross-border maintenance will not circulate in Brazil when they involve vulnerable persons. Araújo and Vargas have pointed out that "unlike commercial matters, in which boundaries are strictly set forth in the agreement, it is not always possible to foresee if a private agreement involving a family dispute will have an impact outside the country where it was entered into force".[28]

The second reservation refers to possibility of parties to designate a court through a written agreement under Article 20(1)e). In accordance with this provision, a decision made in one Contracting State shall be recognised and enforced in other Contracting States if there has been agreement to the jurisdiction in writing by the parties, except in disputes relating to maintenance obligations in respect of children. In this sense, Brazil also reserved the right not to recognize or enforce a decision in which an agreement to the jurisdiction has been reached in writing by the parties, when the litigation involves obligations to provide maintenance for children or even if for individuals considered incapacitated adults and elderly persons. In other words, this article contains provision that takes into account party autonomy as basis for jurisdiction in maintenance, unless it is related to child support.

Furthermore, Brazil made a declaration regarding Article 2(3), in order to extend the application of the whole of the Convention, subject to reservations, to obligations to provide maintenance arising from collateral kinship, direct kinship, marriage or affinity, including, in particular, obligations concerning vulnerable persons. This declaration will apply only if another Contracting State has made the same declaration, based upon reciprocal effect. It means that Brazil must accept applications coming from a Contracting State that has made the same declaration. Nevertheless, Brazil may accept applications coming from a Contracting State that has not made such a declaration, although it is not obliged according to the convention, based upon reciprocity principle, as set forth in Civil Procedure Code in the Chapter on International Cooperation.

Bases for recognition and enforcement

Article 20 provides a basis for recognizing and enforcing a set of indirect rules of jurisdiction. According

tion: goals and outcomes of the negotiations. *Family Law Quarterly*, v. 43, n. 1, p. 10, 2009.

27 Article 19.

28 ARAÚJO, Nádia; VARGAS, Daniela T. The Cross-border Recognition and Enforcement of Private Agreements in Family Disputes on Debate at the Hague Conference on Private International Law. *In*: RODRIGUES, Jose Antonio Moreno; MARQUES, Claudia Lima. (org.). *Los servicios en el Derecho Internacional Privado.* Jornadas de la ASADIP 2014. Porto Alegre: Gráfica e Editora RJR, 2014, p. 485-506.

to the Explanatory Report, Paragraph 1 sets out the grounds of jurisdiction in a State of origin upon which a judicial or administrative decision made in that State will be recognised and enforced in the State addressed. Walker says that "each ground is alternative and that the list is closed, and there are no other grounds of jurisdiction available[29]".

These bases allow greater participation of countries with different legal systems. On the one hand, this basis of jurisdiction is not considered problematic for countries that accept party autonomy between adults in family matters; on the other hand, it authorizes the reservation by the States of this device, avoiding potential conflicts on this point. The grounds are the respondent's and creditor's habitual residence; the child's habitual residence and party autonomy.

Grounds for refusing and enforcement

The objectives of this treaty are "to recognise and enforce as many maintenance decisions as possible"[30]. Thereby, the 2007 Hague Convention on Maintenance provides a limited list of justifications for refusing recognition and enforcement.

The grounds are: if the decision is manifestly incompatible with the public policy of the State addressed; if the decision was obtained by fraud, in connection with a matter of procedure; if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted; and if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that the latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

2.3 Adjudication on maintenance and the international legal cooperation

The international legal-administrative cooperation among States has been one of the greatest advances in facilitating the exercise of rights beyond national borders. The States' commitment to guaranteeing people access to justice in other jurisdictions through international treaties is important in overcoming poor cooperation based only on reciprocity through diplomatic means.[31]

The Brazilian Civil Procedural Code (CPC) sets forth a special procedural rule for maintenance as provided in article 22, I, which grants the Brazilian judicial authority competences to proceed and judge actions related to maintenance when the creditor is domiciled or resident in Brazil. Considering conflicts of jurisdiction, Brazil does not admit international *lis pendens,* pursuant to article 24, which means that an action before a court abroad does not prevent Brazilian courts to hear the same action. Nevertheless, exceptionally, if there is a previous international agreement setting on this, it prevents the Brazilian courts to hear a case.

Notwithstanding, this CPC provision should be interpreted alongside article 22 c) of the 2007 Hague Convention, which allows States to refuse recognition and enforcement when proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were firstly instituted. However, this exception is qualified as "slightly different" to *lis pendens* rules, as pointed out by Walker[32], because the convention does not cover the *same cause of action* but merely *same purpose*. This sort of *limited lis pendens* avoids potential conflicting of judicial decisions between the countries.

2.4 Data on maintenance requests

The effectiveness of the provision of transnational maintenance is given through the circulation of claims between creditor and debtor, through recognition of foreign decisions (judicial or administrative), and consequently, the payment of maintenance by the debtor.

On one hand, the active application is the one in which the creditor is domiciled in Brazil and requests the debtor domiciled abroad to pay maintenance. According to the DRCI, the central authority, most of applications are requested on the grounds of the 2007 Hague Convention, as seen on the table below:

[29] WALKER, Laura. *Maintenance and Child Support in Private International Law*. Oxford and Portland: Hart, 2015. p. 150.

[30] BORRÁS, Alegria; DEGELING, Jennifer. *Explanatory report on the convention of 23 November 2007, on the International Recovery of Child support and Other Forms of Family Maintenance*. The Hague: Permanent Bureau of the Conference, 2009, n. 477.

[31] LOPES, Inez. Maintenance Obligations in the Brazilian Law System: a Path to Hague Convention on Maintenance Recovery and Protocol. *In*: BEAUMONT, Paul; HESS**;** WALKER, Laura; SPANCKEN, Stefanie (eds). *The Recovery of Maintenance in the EU and Worldwide*. Oxford: Hart Publishing, 2014. p. 219.

[32] WALKER, Laura. *Maintenance and Child Support in Private International Law*. Oxford and Portland: Hart, 2015, p. 161.

2018. Claims for maintenance. Civil. Total of Active Applications						
Month	**JAN**	**FEB**	**MAR**	**APR**	**MAY**	**JUN**
Number (%) The 2007 Hague Convention	**86** (47,25%)	**104** (45,6%)	**99** (53%)	**111** (57,2%)	**115** (39,2%)	**121** (47,5%)

On the other hand, the passive applications are the ones in which the creditor is domiciled abroad and the obligor is domiciled in Brazil. Thus, the obligee seeks an effective jurisdictional provision that makes debtor pay maintenance through cross-border legal cooperation. The table below shows the numbers of applications that the Brazilian central authority has received from abroad based upon The 2007 Hague Convention:

2018. Claims for maintenance. Civil. Total of Passive Applications						
Month	**JAN**	**FEB**	**MAR**	**APR**	**MAY**	**JUN**
Number (%) The 2007 Hague Convention	**13** (26,31%)	**30** (42,85%)	**24** (42%)	**35** (41%)	**22** (36,6%)	**38** (36,1%)

Meanwhile, even though the Superior Court of Justice (SCJ) is up to date, there are no applications for recognition of foreign judgment based on The 2007 Hague Convention. Since 2016, there are eight passive applications for recognition and enforcement of foreign judgments on the grounds of the New York Convention[33]. It is important to highlight that those cases are applications from the countries that are already part of the 2007 Hague Convention.

In order to pursue a capacity building of cross-border maintenance, the central authority, DRCI, has developed an online and interactive form[34] addressed to citizen, lawyers, judges or any interest person on these matters.

2.5 Severability and partial recognition and enforcement of foreign judgment

Under Article 21 of the 2007 Hague Convention on Maintenance, if the State addressed is unable to recognise or enforce the whole of the decision, it shall recognise or enforce any severable part of the decision which can be recognised or enforced, and partial recognition or enforcement of a decision can always be applied for.

The severable term means that the part of the decision in question is capable of standing alone[35], because a judgment on family matters may be partially recognized to guarantee the maintenance payment by the debtor. For instance, in the case HDE n. 386-FR, the Superior Court of Justice has partially recognised a foreign judgment on divorce rendered by a French Court. It could be extend to a foreign judgment to recognize child support payment only.

2.6 Data Protection

The Convention raises the concern with regard to data of a personal nature limiting the uses of personal data used during the proceedings of applications for maintenance with respect to the convention for the purposes for which they were obtained or transmitted, and concerning the information configuring the *lex fori* of the State where the data is processed. Besides, an authority is prohibited to disclose or confirm information gathered or transmitted in application of the 2007 Convention if it determines that to do so could jeopardise the health, safety or liberty of a person or a child.

2.7 iSupport

The iSupport, Electronic System of Process Management and Security, is a tool that aims to facilitate international legal and administrative cooperation to recover maintenance abroad. This governmental (e-government) platform reduce bureaucracy on paper-based traditional form of international legal cooperation and facilitates communication between the central authorities of the States through electronic environment. *iSupport* aims to make cross-border recovery faster, safer and more efficient.

Both Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation

[33] Superior Court of Justice. Number of foreign judgments on maintenance HDE000255 –PT; HDE000387 PT; HDE 000464 FR; HDE 000198 AT; HDE 000385 CH; HDE 000467 – PL; HDE 000463-PT E HDE 000196-PT.

[34] BRAZIL. Ministry of Justice. *DRCI*. Prestação de Alimentos. Available at: http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-civil/acordos-internacionais/prestacao-internacional-de-alimentos, Accessed: 12 Sep. 2018.

[35] BORRÁS, Alegria; DEGELING, Jennifer. *Explanatory report on the convention of 23 November 2007, on the International Recovery of Child support and Other Forms of Family Maintenance*. The Hague: Permanent Bureau of the Conference, 2009. p. 475.

in matters relating to maintenance obligations of the European Union and The 2007 Hague Convention are the legal sources on *iSupport*. These instruments adopt the forms technique to facilitate cooperation and provide the use of information technologies in communication between central authorities. Besides that, the instruments enable the electronic transfer of funds and their monitoring.

iSupport will help to generate statistical data to oversee the functioning of the 2007 Hague Convention, and may also instruct banks to electronically transfer funds for maintenance recovery as well as receiving and sending secure communications online.

This system facilitates international recovery of maintenance in two geographical areas: at regional level, reaching the member states of the European Union, and globally, including those who have ratified or acceded to The 2007 Hague Convention on Maintenance and countries who choose to implement *iSupport*.

2.8 Conclusions

Since The 2007 Hague Convention on Maintenance entered into force in Brazil, lawyers, judges and judicial officers are getting familiar with this new instrument for cross-border cooperation to make debtors pay maintenance to the creditors and enhance international legal cooperation among central authorities to facilitate the circulation of decisions on maintenance, including the use of technology of information society.

II CASE LAW

Chronicle 3 Jurisdiction and international legal co-operation in Internet cases: the inconsistent narratives coming from Brazilian courts

Fabrício Bertini Pasquot Polido[36]

Is international legal co-operation optional or unnecessary in transnational internet interactions? To what extent internet users information or communication data stored in a third country cannot constitute evidence to be obtained abroad in the course of civil or criminal proceedings? What are the pervasive elements of international litigation in connection with the growing powers and tasks of law enforcement authorities – LEAs- and the apparent demise of territoriality principle in transnational disputes involving internet users, companies and governments? In recent internet cases dealing with prosecution of crimes committed in Brazil, domestic courts beaconed to a very truncated approach for the private international law/internet interplay. Confronted with requests for data retention and disclosure of private communication between internet users made by LEAs (e.g. federal and state prosecutor offices) to internet companies, domestic courts have been called not only to scrutinise the admissibility and legality of such measures under Brazilian laws. They go far beyond any consistent interpretation of the Brazilian Constitution and the 2014 'Marco Civil da Internet' Act with regard to international law[37].

Unlike the indisputable relevance of the discussion on the merits of those cases for the improvement of domestic criminal prosecution schemes across the globe, the emerging case law in Brazil also brings conside-

[36] Professor of Private International Law, International Intellectual Property Law and Comparative Law at the University of Minas Gerais – UFMG. Doctor in International Law, University of São Paulo- USP. Visiting scholar at Kent Law School/UK and Humboldt University of Berlin (2018-2019). Member of the American Association of Private International Law and Brazilian PIL Watch Group. Scientific Advisor of the Institute for Research on Internet & Society – IRIS. Email: fpolido@ufmg.br.

[37] The so-called 'Marco Civil da Internet' (Law No. 12.965/2014) forms one of the most important statutory laws dealing with regulation of the use of internet in Brazil and comprises a set of principles, guarantees for users and civil liability rules to internet companies.

rable concerns to public/private international law interplay. They deal with the availability, nature and scope of international obligations and principles addressing mutual legal assistance in broader international legal co-operation frameworks based on treaties to which the country is signatory[38] and the use of like mechanisms in transnational civil litigation involving internet related disputes. A very classical question? Perhaps not. Rather, it appears to be much about the emerging trends on Internet and jurisdictional issues and pervasive governmental interests in this field. They range from the constant struggles between national law enforcement authorities (NLEAs), courts and global corporations on "data sovereignty" to concurrent interests on extraterritorial application of national laws to internet matters across the globe[39]. And more, legal community may be reviving a general incomprehension (and fallacies) behind the territoriality principle and overreaction as to the nature itself of technologies surrounding cross-border data transactions[40].

At least in separate rulings, the Brazilian High Court of Justice – STJ- decided that global internet corporations doing business in Brazil had to disclose to national authorities not only personal data, login information and access logs from internet users targeted by criminal prosecution in Brazil, but also the content of users' communication data, whether stored and allocated in Brazil or in a third country[41]. According to Art. 10 of Brazilian Marco Civil, the acquisition, maintenance and disclosure of internet connection logs and internet application access logs contemplated in the Law, personal data, and the content of private communications "shall respect the privacy, private life, honour and image of the parties directly or indirectly involved". In addition, internet application providers are requested to guard internet users` personal data, internet connection logs and internet application access logs for a period of six months, under strict confidentiality and in a controlled and secure environment[42]. The rule is designed to regulate, from the standpoint of substantive law, the operations and legal transactions dealing with maintenance and disclosure of metadata and content of communications by internet companies. At a first blush, Marco Civil's provisions have nothing to do with jurisdictional grounds or "waivers" for Brazilian authorities to set aside international legal assistance and any other procedural instruments in cross-border internet disputes. Here, there is plenty of confusion created and amplified by Brazilian courts in field of jurisdiction, law applicable and international legal co-operation.

In *Castanheira vs. Brasil 247*, STJ hold that Yahoo! do Brasil Internet Ltda., a subsidiary of Yahoo Inc. and incorporated under Brazilian laws, had the obligation to "provide the tools necessary for the disclosure of electronic communication as ordered by the appealed decision, under the legal penalties of being affected, individually or cumulatively, by sanctions of warning, administrative and judicial fines, temporary suspension of operational activities and, likewise, prohibition of the supplying internet services and internet applications in Brazil, as set forth by Art. 12 of the Marco Civil"[43]. The Court considered that jurisdiction of domestic courts would be ascertained over Yahoo Inc., based on the general jurisdiction rule established by Art.21, I, of the 2015 Code of Civil Procedure and its sole paragraph, which extends jurisdiction to a defendant being a foreign legal entity operating in Brazil through bran-

[38] Both Brazilian Codes of Criminal Procedure (1941) and Civil Procedure (2015) establish the prevalence of treaties and conventions to which Brazil is signatory to govern proceedings, jurisdiction, international legal co-operation and recognition and enforcement of foreign judgements, as set forth respectively in Arts. 1, I, 780 ff of CPP 1941, and Arts.13, 26, 860 ff of CPC 2015.

[39] Due to space constraints, this article will not deal with substantive and policy issues related to enforcement of human rights online, rule of law, due process and privacy, all of them emerging from various procedural and technical patterns on data collection, treatment and retention at transnational level.

[40] In distinct perspectives, see REIDENBERG, Joel R. Technology and Internet jurisdiction. *University of Pennsylvania Law Review*, v.153, n.6, p. 1951, 2005.; KUNER, Christopher. Data protection law and international jurisdiction on the Internet. *International Journal of Law and Information Technology*, v.18, p.176, 2010.; LA CHAPELLE, Bertrand; FEHLINGER. *Jurisdiction on the Internet*: from legal arms race to transnational cooperation. 2016. p. 10-11. Avaiable at: https://bit.ly/2uh34Li. Accessed: 26 Aug. 2018; POLIDO, Fabrício B. P. *Direito Internacional Privado nas Fronteiras do Trabalho e Tecnologias*. Rio de Janeiro: Lumen Iuris, 2018, p.86.

[41] BRAZIL. Superior Justice Tribunal. Yahoo!/Federal Prosecutor Office, *RMS n. 55.109/PR*. Rel. Judge Joel Paciornik, decision as of December 17, 2017. (case "Castanheira-Brasil 247"); BRAZIL. Superior Justice Tribunal. Facebook/Federal Prosecutor Office, *RMS 44.892/SP*, Judge Ribeiro Dantas, 5th Chamber, decision as April 5, 2016. In DJe 15.04.2016; BRAZIL. Superior Justice Tribunal. Facebook/Federal Prosecutor Office, *RMS 55.109-PR*, 5th Chamber, Opinion Judge Reynaldo Fonseca, decision as of November 7, 2017. In DJ 17,11,2017.

[42] See Art. 15 of Marco Civil. According to this provision, Internet applications providers are characterized as "legal entities providing applications in an organized, professional manner, for profit".

[43] BRAZIL. Superior Justice Tribunal. Facebook/Federal Prosecutor Office, *RMS 55.109-PR*, 5th Chamber, Opinion Judge Reynaldo Fonseca, decision as of November 7, 2017. (cit. supra note 4).

ches, agencies, subsidiaries or affiliated companies. In previous parallel cases involving Facebook Brasil and the Federal Prosecutor Office, the Court followed the same approach as in *Brasil 247*. According to STJ, the company's main submission regarding the seat and core operational activities in Brazil (e.g. provision of services related to rental of advertising spaces and advertising and sales assistance) did not exempt Facebook Brasil to provide national LEAs with the requested information (essentially, internet connection logs, application access logs and disclosure of content of communication amongst users having Facebook accounts). Likewise, the Court added, multinationals devoted to online services would often resort to the "deliberate selection of the place of incorporation and establishment of their headquarters with the specific objective of circumventing their tax obligations and judicial orders aimed at regulating the content of the material these companies convey or the secrecy of information from its users"[44]. Based on those arguments, the Court finally held: "since Facebook is established and operate in Brazil, the foreign legal entity necessarily is subject to Brazilian laws; this is why it seems unnecessary to resort to international co-operation for obtaining the data requested by the (appealed) court"[45].

Controversial issues on jurisdiction and international co-operation, such as the mutual legal assistance between Brazilian and United States authorities in internet cases, constitute a second generation of legal issues dealt by Brazilian Courts after 2010. They were amplified after the entry into force of Marco Civil da Internet in April 2015[46]. Previously, internet litigation patterns in civil and criminal matters rarely relied on the repercussions – either from theoretical, doctrinal or judicial standpoint – to public/private international law interfaces. However, the Brazilian precedents have been systematically recalled by lower courts in their decisions on data retention/interception and disclosure of private communication. In particular, the ongoing approach endorses the legality - and I would claim, "appearance of legitimacy"-, of a sort of direct collaboration between Brazilian NLEAs, courts and foreign Internet companies providing email, internet apps and cloud computing services in Brazil. Yet, what seems delicate is the negative outcomes deriving from these decisions. They underestimate the paramount relevance of jurisdictional dialogues and the need of a re-shaping of international legal co-operation standards and frameworks on global scale.

Despite of much confusion made by Brazilian courts on the fundamentals of jurisdiction and law applicable (thus, also at the core of PIL issues associated to cross-border internet litigation), the leading case points out to a decision rendered by STJ in the Criminal Inquiry 748 filed by Google in 2013[47]. In the dispute at hand, the Court ruled on grounds of the opinion issued by Judge Laurita Vaz in connection with criminal proceedings pending before the Federal District courts. Some facts and legal arguments of the case are illustrative: Google Brasil Internet Ltda., a subsidiary of the US parent company Google Inc., was requested by NLEAs to deliver sent and received messages by Brazilian users, for purpose of prosecution of crimes which were committed in Brazilian territory, and therefore, subject to Brazilian jurisdiction pursuant Brazilian Criminal laws. Google Brasil, in turn, argued that it could not comply with those orders for disclosure of communications involving the alleged criminal offenders in Brazil, since the information was stored in the United States.

Essentially, Google Brazil maintained that the provisions of the 1986 Electronic Communications Privacy Act (in particular its Sections 2701-2712) would apply to those communications through Gmail services and the

[44] See Opinion of Judge Fonseca in BRAZIL. Superior Justice Tribunal. Facebook/Federal Prosecutor Office, *RMS 55.109-PR*, 5th Chamber, Opinion Judge Reynaldo Fonseca, decision as of November 7, 2017.

[45] Id. In those cases involving Yahoo, Facebook and Google before the Brazilian STJ, companies basically claimed that the lower courts' decisions were unlawful, as they lacked legal grounds for incrimination of parties in main criminal proceedings and that the Brazilian subsidiaries, requested by local NLEAs in said proceedings, were not responsible to deliver communication data allocated overseas.

[46] Surely, the strident case *US/Microsoft Ireland,* until last April pending at the US Supreme Court, touched in similar questions, among them, the extent to which prescriptive jurisdiction of US laws would reach servers and data centres operating abroad. The enactment of the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act") in March 2018 came out with the subsequent claims made by Microsoft and other internet companies challenging the legality of federal law enforcement measures. On April 17, 2018, the US Supreme Court issued a 'per curiam' opinion holding that the case was rendered moot and vacating and remitted it back to the lower courts for the lawsuit's dismissal. See UNITED STATES. Supreme Court Of The United States. *United States, Petitioner V. Microsoft Corporation*. n. 17-2, 584 U.S. 2018. Avaiable at: https://www.supremecourt.gov/opinions/17pdf/17-2_1824.pdf.

[47] BRAZIL. Superior Justice Tribunal. Federal Prosecutor Office/Google Brasil Ltda. *Inquérito 784-DF*, Opinion of Judge Ms. Laurita Vaz, decision as of April 17, 2013. in DJe as of 28.8.2013.

authorities in Brazil should have resorted to diplomatic channels instead for obtaining the information stored in the United States, in line with the 1997 US-Brazil Mutual Legal Assistance Treaty in Criminal Matters ("US--Brazil MLAT")[48]. In addition, Google requested the STJ to grant an interim injunction for suspending criminal detention measures and fines targeting its directors and representatives in Brazil due to "reasonable doubts pertaining to the applicable proceedings, at least until the matter in dispute is adjudicated by the Court (STJ)" in related pending cases[49]. The Court then implied that Google Brazil had the obligation to deliver the stored data to domestic law enforcement authorities, even recognizing the fact that those data were not subject to Google Brasil's "immediate power". Google Brasil representatives, according to the Court, should be legally compelled to comply with any judicial order determining the disclosure of communications data. For the majority of STJ judges, the delivered data would serve as basis for evidences related to prosecution of serious crimes committed in Brazil, such as corruption, fraud in public procurement and tender bids, money laundry, administrative advocacy and influence pedding.

The opinion issued by Judge Vaz deserves attentions for two main reasons. First, it denies the foreign nature or linkage of data stored by a parent Internet company overseas to justify that no international legal co-operation or mutual legal assistance is necessary. In the case, Brazilian authorities would not need to resort to diplomatic means or central authorities even in case of an existing and binding MLAT or further bilateral/ multilateral treaty to which both requested and requesting states are signatory parties. According to Vaz, the communication data requested to Google Brazil refers to "elements of evidence produced, transmitted and received in Brazilian territory" and such evidence had "nothing to do with foreign lands, except for the fact that they are stored in the United States for corporate--strategic reasons"[50]. Secondly, the Court appears to refer to a characterization of acts of disclosure of communication data to be construed under Brazilian laws (prior, nevertheless, to the enactment of the 2014 Marco Civil). It asserted that the 'pure transfer' of data from the holding or parent company, established in a third country, to an affiliated entity in Brazil should not constitute 'per se' disclosure or breach of secrecy of private communication between internet users. In the Court's view, the act of disclosure just qualifies as such where the data has been effectively handed to national judicial authorities in Brazil[51]. With regard to the adoption of international legal co-operation related mechanisms in the course of main proceedings in Brazil, the following excerpt of Judge's Vaz opinion elucidates the Court's reluctance to resort, for instance, to letters rogatory, mutual legal assistance between central authorities or alike instruments foreseen in treaties and even by domestic laws (such as the Codes of Civil and Criminal Procedures):.

"It is worth mentioning that this company (Google Brazil) was incorporated in accordance with Brazilian laws; clearly, it must be subject to the national legislation and cannot fail to comply with a judicial request by simply invoking US laws, which are, for all of the afore mentioned, not applicable to the case. One could not admit that a company, established in the country, explores the profitable Internet-based messaging service - which is absolutely licit - but fails to comply with local laws. To refer the Brazilian Judiciary Branch to diplomatic channels to obtain data overseas is to contravene national sovereignty, thus subjecting state powers to the unacceptable attempt by the company at stake to override domestic laws by means of corporate policy stratagems, who knows for what purpose". [...] It is worth mentioning that, due to the criminal procedure that led to the writ filed before this Court, being it of criminal matter, the principle of territoriality shall prevail; Brazilian criminal laws apply to acts taking place within the national territory, as set forth by Art.5 of the Criminal Code" [52].

[48] Incorporated to Brazilian law by Executive Decree No. 3.810/2001. Full text in English is available at: https://www.state.gov/documents/organization/106962.pdf.

[49] BRAZIL. Superior Justice Tribunal. Federal Prosecutor Office/ Google Brasil Ltda. *Inquérito 784-DF*, Opinion of Judge Ms. Laurita Vaz, decision as of April 17, 2013.

[50] BRAZIL. Superior Justice Tribunal. Federal Prosecutor Office/ Google Brasil Ltda. *Inquérito 784-DF*, Opinion of Judge Ms. Laurita Vaz, decision as of April 17, 2013.

[51] As Judge Vaz mentioned, this sort of transfer of data could be seen as "interna corporis", thus taking place within the framework of business transactions and operational activities between companies belonging to the same group of companies. According to her: *"*I insist: the mere transmission of data, protected in its content, among entities belonging to the same group of enterprises, for the exclusive purpose of delivery to the competent judicial authority, in the Brazilian case, does not have the power to even scratch the sovereignty of the foreign State*"*.

[52] Freely adapted and translated from the Portuguese version of the opinion`s text.

Judge Vaz sustained further that foreign companies having affiliate or subsidiaries in Brazil are immediately subject to the jurisdiction of Brazilian courts, pursuant to Art.88, sole Paragraph, of the 1973 Code of Civil Procedure (replaced by Art.21, sole Paragraph, of the 2015 CPC). These excerpts from the ruling on *Google/ Prosecutor Office* were repeated by lower courts in cases subsequently adjudicated by STJ as to matters on data retention/ interception and disclosure of private communication between internet users, either by messaging platforms or email services provided by the major internet companies, such as Google, Microsoft, Facebook and Yahoo![53].

A case law review on the aforementioned precedents in Brazil may unfold the narratives of jurisdiction, in particular "prescriptive jurisdiction" and their interfaces to the scope of application of Marco Civil's provisions and their interpretation by domestic courts. In accordance with the conceptual frameworks provided by international law, jurisdiction defines the limits of the power of the 'sovereign' state coexisting, in particular, with further states' regulatory activities in international law. The boundaries of jurisdiction, however, may encompass three core dimensions, which are established according to a power to make and enforce laws within the territory of a particular State: prescriptive jurisdiction, adjudicatory jurisdiction and enforcement jurisdiction[54]. From a very recurrent private international law standpoint then, jurisdiction serves three distinct purposes: first, to situate the different layers of powers exercised by domestic courts in their adjudicatory tasks related to settlement of cross-border disputes and in case of internet, disputes having true transnational elements[55]; second, it copes with regulatory tasks of states to define the governing law to cases having foreign elements; and third, it deals with powers of state courts to recognize and enforce judgments. All these objectives equally help courts in clarifying the degree of complexity surrounding cross-border cases involving the Internet. Following the repercussion of *Microsoft Ireland* case, the notion of 'jurisdiction' therein adopted, and also invoked in decisions rendered by STJ, appears to refer specifically to its prescriptive feature. It concerns a state power to address issues on substantive laws governing legal relationships and transactions taking place within its territory, involving their nationals and foreign parties or even legal transactions overseas whose effects are felt by that State[56].

Why, then, the debate on Internet and jurisdiction is relevant at this stage of analysis? The cases adjudicated by Brazilian STJ on data retention and disclosure of users' communications mostly deal with issues on prescriptive jurisdiction, and not adjudicatory jurisdiction itself. Even from a dogmatic point of view, the main rule comprised by Article 11 of Marco Civil, for example, submits certain legal relationships involving legal entities and natural persons to substantive regulation provided by Brazilian law. In no way, Art. 11 refers to 'adjudicatory jurisdiction' or entails jurisdictional grounds enabling Brazilian courts to directly ascertain jurisdiction over cross-border internet disputes. In contrast, this approach would be only admissible under general or specific jurisdiction rules, such as those established by treaty and conventions to which Brazil is party and domestic procedural laws, such as the Code of Civil Procedure[57].

A further relevant aspect of the analysis proposed herein takes into account the limits of international legal

[53] See for instance: BRAZIL. Superior Justice Tribunal. Facebook/ Federal Prosecutor Office, *RMS 44.892/SP*, Judge Ribeiro Dantas, 5th Chamber, decision as April 5, 2016. In DJe 15.04.2016 ("4. Por estar instituída e em atuação no País, a pessoa jurídica multinacional submete-se, necessariamente, às leis brasileiras, motivo pelo qual se afigura desnecessária a cooperação internacional para a obtenção dos dados requisitados pelo juízo").

[54] See MILLS, Alex. Rethinking Jurisdiction in International Law. *British Yearbook of International Law*, v. 84, p. 194, 2014.

[55] The expression cross-border disputes within the broader context of cross-border civil and commercial litigation is defined by the legal transactions and relationships having foreign elements/"cases having multinational impacts". Thus, for purpose of this article, as traditionally adopted in private international law, cross-border cases designates a set of facts, situations and legal relations containing foreign elements, thus linked to different legal systems. For methodological PIL issues related to cross-border internet cases, see BERTINI, Fabrício; POLIDO, Pasquot. *Direito Internacional Privado nas fronteiras do trabalho e novas tecnologias*. Rio de Janeiro: Editora Lumen Juris, 2018. p. 97.

[56] For different approaches, see WILSKE, Stephan; SCHILLER, Teresa. International jurisdiction in cyberspace. *Federal Communications Law Journal*, v. 50, 1997; PERRITT JR., Henry H. Jurisdiction and the Internet. 1999. available at: http://www.ilpf.org/confer/present99/perrittpr.htm; MILLER, Samuel F. Prescriptive Jurisdiction over Internet Activity. *Indiana Jorunal of Global Legal Studies*, v.10, p.227, 2003.

[57] See CPC, Art. 13 (ascertainment of jurisdiction in civil matters by treaty rules and domestic civil procedural rules) and Art. 21 (jurisdiction rules for international civil/commercial disputes before Brazilian Courts). For literature on international civil litigation and PIL issues in Brazil, see ARAUJO, Nadia. *Direito Internacional Privado*. 7.ed. São Paulo: RT, 2018. and POLIDO, Fabrício. Arts. 21-40. *In*: STRECK, Lenio *et al* (org.). *Comentários ao Código de Processo Civil*. 2. ed. São Paulo: Saraiva, 2017. p. 73.

co-operation patterns, such as those embedded by existing MLATs. Albeit their current failures, they still matter in cross-border cases, even where there is a growing pressure for expedited solutions for transnational criminal prosecution actions. Brazilian legal environment and practices appears to be dictated, till recently, by the massive demands of anticorruption investigations. They could not justify, however, a deleterious suppression of vital procedural steps in transnational process. It appears that domestic courts in Brazil have to engage in a different exercise and pave the way to institutional dialogues for enhancing the existing schemes and supporting the Executive Branch's mission to design solutions in international cooperation, all of them based on rule of law and international relations.

References

ARAUJO, Nadia. *Direito Internacional Privado*. 7.ed. São Paulo: RT, 2018.

ARAÚJO, Nádia; VARGAS, Daniela T. The Cross-border Recognition and Enforcement of Private Agreements in Family Disputes on Debate at the Hague Conference on Private International Law. In: RODRIGUES, Jose Antonio Moreno; MARQUES, Claudia Lima. (org.). *Los servicios en el Derecho Internacional Privado*. Jornadas de la ASADIP 2014. Porto Alegre: Gráfica e Editora RJR, 2014.

BEAUMONT, Paul. *Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law*: reflections in the context of the Judgments Project?. CPIL _WP_, 2016.

BERTINI, Fabrício; POLIDO, Pasquot. *Direito Internacional Privado nas fronteiras do trabalho e novas tecnologias*. Rio de Janeiro: Editora Lumen Juris, 2018.

BORRÁS, Alegria; DEGELING, Jennifer. *Explanatory report on the convention of 23 November 2007, on the International Recovery of Child support and Other Forms of Family Maintenance*. The Hague: Permanent Bureau of the Conference, 2009.

BRAZIL. Ministry of Justice. *DRCI*. Prestação de Alimentos. Available at: http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-civil/acordos-internacionais/prestacao-internacional-de-alimentos, Accessed: 12 Sep. 2018.

BRAZIL. Superior Justice Tribunal. Facebook/Federal Prosecutor Office, *RMS 44.892/SP*, Judge Ribeiro Dantas, 5th Chamber, decision as April 5, 2016.

BRAZIL. Superior Justice Tribunal. Facebook/Federal Prosecutor Office, *RMS 55.109-PR*, 5th Chamber, Opinion Judge Reynaldo Fonseca, decision as of November 7, 2017.

BRAZIL. Superior Justice Tribunal. Federal Prosecutor Office/Google Brasil Ltda. *Inquérito 784-DF*, Opinion of Judge Ms. Laurita Vaz, decision as of April 17, 2013.

BRAZIL. Superior Justice Tribunal. Yahoo!/Federal Prosecutor Office, *RMS n. 55.109/PR*. Rel. Judge Joel Paciornik, decision as of December 17, 2017.

DUNCAN, William. The New Hague Child Support Convention: goals and outcomes of the negotiations. *Family Law Quarterly*, v. 43, n. 1, p. 9, 2009.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *Hartley and Dogauchi Report*, 2005. Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=3959. Access: 12 Jul. 2018.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. *2018 preliminary draft Convention*. 2018. Available at: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf. Accessed: 4 Jun. 2018.

HARTLEY, Trevor; DOGAUCHI, Masato. *Convention of 30 June 2005 on choice of court agreements: explanatory report*. 2005. Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=3959. Access: 12 Jul. 2018

KUNER, Christopher. Data protection law and international jurisdiction on the Internet. *International Journal of Law and Information Technology*, v.18, p. 176, 2010.

LA CHAPELLE, Bertrand; FEHLINGER. Jurisdiction on the Internet: from legal arms race to transnational cooperation. 2016. Avaiable at: https://bit.ly/2uh34Li. Accessed: 26 Aug. 2018.

LOPES, Inez. Maintenance Obligations in the Brazilian Law System: a Path to Hague Convention on Maintenance Recovery and Protocol. In: BEAUMONT, Paul; HESS; WALKER, Laura; SPANCKEN, Stefanie (eds). *The Recovery of Maintenance in the EU and Worldwide*. Oxford: Hart Publishing, 2014.

MCLEAN, David. *International co-operation in civil and criminal matters*. Oxford: Oxford University Press, 2002.

MILLER, Samuel F. Prescriptive Jurisdiction over Internet Activity. *Indiana Jorunal of Global Legal Studies*, v.10, p.227, 2003.

MILLS, Alex. Rethinking Jurisdiction in International Law. *British Yearbook of International Law*, v. 84, p. 194, 2014.

PERRITT JR., Henry H. *Jurisdiction and the Internet*. 1999. Available at: http://www.ilpf.org/confer/present99/perrittpr.htm.

POLIDO, Fabrício B. P. *Direito Internacional Privado nas Fronteiras do Trabalho e Tecnologias*. Rio de Janeiro: Lumen Iuris, 2018.

POLIDO, Fabrício. Arts. 21-40. In: STRECK, Lenio et al (org.). *Comentários ao Código de Processo Civil*. 2. ed. São Paulo: Saraiva, 2017.

REIDENBERG, Joel R. Technology and Internet jurisdiction. *University of Pennsylvania Law Review*, v.153, n.6, p. 1951, 2005.

UNITED STATES. Supreme Court Of The United States. *United States, Petitioner V. Microsoft Corporation*. n. 17-2, 584 U.S. 2018. Avaiable at: https://www.supremecourt.gov/opinions/17pdf/17-2_1824.pdf.

VAN LOON, Hans. *The Global Horizon of Private International Law*. The Hague: Martinus Nijhoff, 2015.

WALKER, Laura. *Maintenance and Child Support in Private International Law*. Oxford and Portland: Hart, 2015.

WALKER, Laura. *Maintenance and Child Support in Private International Law*. Oxford and Portland: Hart, 2015.

WILSKE, Stephan; SCHILLER, Teresa. International jurisdiction in cyberspace. *Federal Communications Law Journal*, v. 50, 1997.

Para publicar na Revista de Direito Internacional, acesse o endereço eletrônico www.rdi.uniceub.br ou www.brazilianjournal.org.
Observe as normas de publicação, para facilitar e agilizar o trabalho de edição.