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# Debtor State Law and Default: Enforcement of Foreign Loan Agreements in Brazilian Courts

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# DEBTOR STATE LAW AND DEFAULT: ENFORCEMENT OF FOREIGN LOAN AGREEMENTS IN BRAZILIAN COURTS\*

BRIAN L. ZIMBLER\*\*

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Although the Third World's enormous debt problems have generated considerable legal scholarship, most writing to date has analyzed the situation from the perspective of the legal systems of creditors.<sup>1</sup> This emphasis on creditor law has helped to maintain the impression that a tidy legal framework underlies the complex relationships between creditors and sovereign debtors in the currently ailing international financial system. On paper, intricate debt agreements have already been drafted, proofread, and signed to deal with every possible form of breach, default, or moratorium which future economic and political events may generate. Should loan agreements go unfulfilled, lawyers may apparently reach for the contracts stashed in their file drawers and set in motion the process of judgment, execution, and attachment of foreign sovereign debtor assets, effectively freezing prospects for further trade

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1. See, e.g., Reisner, *Default by Foreign Government Debtors*, 1982 U. ILL. L. REV. 1; *Restructuring of Sovereign Debt*, 23 COLUM. J. TRANSNAT'L L. (1984)(symposium); *The International Debt Crisis*, 17 N.Y.U. J. INT'L L. & POL. (1985)(symposium); Comment, *On Third World Debt*, 25 HARV. INT'L L.J. 83 (1984)[hereinafter *On Third World Debt*]. For a predominantly technical treatment of the financial and contractual issues raised by the debt crisis, see also Semkow, *Syndicating and Rescheduling International Financial Transactions: A Survey of the Legal Issues Encountered by Commercial Banks*, 18 INT'L LAW. 869 (1984). For a general survey of recent events and legal issues in the debt rescheduling area, again with exclusive treatment of creditor state law, see Focsaneanu, *Endettement Extérieur, Renégociation des Dettes, Contrôle du Crédit Transnational*, 89 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 299 (1985). Useful bibliographies of current legal writing on debt issues appear in 17 N.Y.U.J. INT'L L. & POL., *supra*, at 751-87, and 89 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, *supra*, at 299-303.

or international borrowing by the debtor in breach. Such legal action would serve as the basis for a campaign of pressure to force the recalcitrant debtor back to the bargaining table, for yet another round of discussion, agreement (based on rescheduling or other measures), and performance of obligations.

In practice, it is not clear whether such a scenario would ever require the application of legal machinery within the jurisdiction of the sovereign debtor itself. Most explanations of the legal structure surrounding debt agreements typically focus on prospects for attachment and execution within the United States and Europe, where debtor central banks presumably have foreign currency accounts, and debtor governments engage in substantial trade, send ships and planes, or hold other attachable state property.<sup>2</sup> Of course, attachment of these sovereign debtor assets abroad, let alone an attempt to attach within the sovereign's own borders, might generate a political explosion, and for this reason could be an unattractive as well as impractical option.<sup>3</sup> However, lawyers are paid to assure that proper legal mechanisms exist for enforcement of the agreements they draft, as well as to write the clauses describing performance. Attachment and execution are classic means of enforcing debt agreements. Should such means prove theoretically impossible to apply, the legal structure underlying the loan agreements in question would collapse, leaving the remaining clauses of these agreements essentially meaningless.

The "international" character of current loan agreements between sovereign states and private foreign banks adds an additional dimension to the problem. It might well occur that attachment and execution procedures to enforce particular loan agreements possess varying validity in different jurisdictions: such

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2. Philip Wood has reviewed the general steps involved, and noted the difficulties which may arise in attempts to attach sovereign debtor assets within third-state jurisdictions. See 2 P. WOOD, *LAW AND PRACTICE OF INTERNATIONAL FINANCE* § 3, at 35 (1984). For analyses of the legal problems raised by particular jurisdictions in which debtor assets might be pursued, see *Thinking the Unthinkable: Attaching a State's Assets*, 1984 INT'L FIN. L. REV. 15; *On Third World Debt*, *supra* note 1, at 110-13. For similar examples arising from the Iranian assets crisis of 1980, when the United States sought to take legal action to affect Iranian state assets deposited in third states such as Britain and France, see 1982 U. ILL. L. REV. 313-17.

3. Some writers disparage entirely the possibilities for enforcement of international loan obligations through legal measures, although the "moral" opprobrium of other states and bargaining positions of creditors may be strengthened by a court judgment. See Nichols, *The Impact of the Foreign Sovereign Immunities Act on the Enforcement of Lenders' Remedies*, 1982 U. ILL. L. REV. 251, 257 (1982).

clauses might be respected in one jurisdiction, denied application in another. This possibility has provoked considerable scholarly comment in the realm of private international bankruptcy law, and prompted attempts to effect a "unification" of international bankruptcy procedures.<sup>4</sup> However, jurisdictional problems could also affect the international "bankruptcy" of a public debtor, although political, rather than legal, mechanisms may now play the key roles in the resolution of state insolvency.<sup>5</sup>

Indeed, it is not inconceivable that foreign creditors might wish to bring legal enforcement actions within the courts of the sovereign debtor itself. As will be seen below, international loan agreements typically contain clauses addressing such enforcement.<sup>6</sup> As a practical matter, creditors might bring suit to force a debtor government's executive branch to fulfill its prior obligations, particularly when different factions within a government differ about such performance. In fact, in cases where the bulk of a debtor state's assets remain within its own borders, the possibility of domestic enforcement of loan agreements would seem both a logical and a necessary option for the protection of creditors. Should a debtor state pass new legislation to prevent debt collection actions within its courts, or should its courts simply rule against creditors in a flagrantly unfair manner, such steps might constitute a "taking" or "denial of justice" actionable under international law.<sup>7</sup> Thus the legal structure underlying the agreements would appear to remain intact.

But it may not be intact. This article will suggest that enforcement of international loan agreements may face insuperable obstacles within the legal systems of debtor states, employing the case of Brazil and its legal system as an example. Given the Brazilian civil code system and its historical ties to other Latin and European

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4. See, e.g., Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1 (1977); Nadelmann, *The Lure in 'International Bankruptcies' of Assets Located Abroad*, 3 INT'L & COMP. L.Q. 431 (1984); Note, *Section 304 of the Bankruptcy Code: Has It Fostered the Development of an 'International Bankruptcy System'?*, 22 COLUM. J. TRANSNAT'L L. 541 (1984).

5. One observer reports, for instance, that the involvement of creditor governments and international organizations in debt negotiations "allows debtors to cease viewing their debts as private contractual obligations and to begin seeing them as something subject to politics and international diplomacy." Paul Craig Roberts, cited in D. DELAMAIDE, *DEBT SHOCK* 225 (1985); see also *id.* at 224-29.

6. See *infra* Part II(E).

7. Wood ignores this possibility, and considers it futile to bring legal actions within the debtor state's home jurisdiction. See P. WOOD, *supra* note 2, § 4, at 84.

systems, it seems probable that features of Brazilian law are shared by other states, including other major sovereign debtors. The main thesis of the article is that recent international loan agreements signed between Brazil and foreign creditors may be unenforceable within Brazilian courts, despite fancy drafting exercises apparently designed to overcome potential obstacles. Agreements between international public organizations like the International Monetary Fund (IMF) and Brazil, or other sovereign debtors, are frequently quite different in nature, and hence beyond the scope of this article.<sup>8</sup>

The article will proceed as follows. Part I will review the history of the Brazilian debt crisis in brief. Part II will outline the provisions of a typical international loan agreement, noting variations which have appeared in recent agreements between foreign banks and Brazil. Part III will explain the process by which foreign default judgments against Brazilian defendants could be enforced within Brazilian courts. Part IV will review two main concepts in Brazilian law which seem likely to block recognition or enforcement of foreign default judgments within Brazil: the doctrine of "international jurisdiction," and the doctrine of "public order." Part V will suggest some consequences, both legal and practical, of the current situation, and present some tentative conclusions.

## I. FACTUAL BACKGROUND: THE BRAZILIAN DEBT CRISIS, 1982-1985

The current Brazilian debt crisis has become all-too familiar to followers of international affairs. As explained elsewhere, a series of international events which included the oil shocks of 1973 and 1978, the world recession of the late 1970's, and the rising interest rates of the 1980's combined with falling primary export prices to produce a dramatic rise in the volume of external debt owed by Third World nations.<sup>9</sup> Many observers blamed overzealous lending by private banks flush with petrodollar deposits, as well as faulty economic policy decisions by the United States and other Western governments, as having helped to create the prob-

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8. For instance, IMF agreements often are governed by general international law, rather than the law of a particular state jurisdiction. See, e.g., P. WOOD, *supra* note 2, § 1, at 44, 45.

9. IMF SURVEY, Jan. 7, 1985, at 2-3. See also *The Third World Debt Problem: Agenda for Negotiations*, Humphrey Fellows Newsletter [USIA publication](No. 4, Oct. 1984), at 13-14. For early analysis of the evolving debt situation by concerned international lawyers, see AM. Soc'y INT'L L. PROC. 56-80 (72d meeting, April 1978).

lem in the 1970's.<sup>10</sup> By early 1983, total debt of the less-developed countries stood at \$550 billion,<sup>11</sup> of which the ten largest U. S. private banks then held at risk over \$43 billion, or over 150% of these banks' total equity.<sup>12</sup> In the past three years, the numbers have not improved, posing a serious threat to the international financial system.<sup>13</sup> Brazil soon emerged as a giant among the main debtors, with a total of over \$98 billion in foreign debt as of fall 1984.<sup>14</sup> Like the other major debtors, by the early 1980's Brazil was forced to admit that it could not keep up with its mounting principal and floating-rate interest obligations. As it had in the past,<sup>15</sup> Brazil turned to the IMF for assistance, and also sought new terms from its private bank creditors.<sup>16</sup>

A first major rescheduling took place in February 1983, five months after the panic of "Black September" 1982. In that month, Brazil was unable to fund its debt from internal reserves, and was shut off from fresh international credit by nervous bankers.<sup>17</sup> Now, in a meeting between Brazilian officials, IMF representatives, and ninety percent of the country's private creditors, the Brazilian debt was rescheduled in four "projects." Under Project 1, Brazil received promises of \$4.4 billion in new 1983 loans, designed to cover

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10. See *The Costly Blunders of Central Bankers*, N.Y. Times, Feb. 27, 1983, at F3, col. 1. On the contribution to the crisis of lenders' "inadequate financing and evaluation techniques[.]" see Allan, *Credit and Security: Economic Orders and Legal Regimes*, 33 INT'L & COMP. L.Q. 22, 32-33 (1984). On the beginning of the trend toward extensive bank lending to the Third World, see M. MAYER, *THE BANKERS* 482-83 (1974). On the role of Western government policies in encouraging bank lending to developing states, see Wellons, *International Debt: The Behavior of Banks in a Politicized Environment*, 39 INT'L ORG. 441 (1985).

11. *Third World Debt Problem*, N.Y. Times, March 10, 1983, at D1, col. 3.

12. *Top Banks' Third World Loans Detailed*, N.Y. Times, March 18, 1983, at D3, col. 1.

13. The total debt of LDCs reportedly stood at over \$700 billion by 1984. Weinert, *Coping with LDC Debt*, 38 J. INT'L AFF. 1, 2 (1984). Another source estimated it at \$600 billion in May, 1984. *Capping Rates in Debt Crisis*, N.Y. Times, May 9, 1984, at D2, col. 1. On prospects for an international banking crisis in the wake of a major default, and policy prescriptions to avoid such a crisis, see generally G.G. Johnson & R.K. Abrams, *Aspects of the International Banking Safety Net* (IMF Occasional Paper No. 17, March 1983).

14. *Latin Debt: Postponing the Burden*, N.Y. Times, Sept. 23, 1984, at F9, col. 2.

15. For a review of Brazilian dealings with the IMF during the 1960s and 1970s, see IMF CONDITIONALITY ch. 13 (J. Williamson ed. 1983).

16. On the circumstances surrounding these decisions, see generally A.J. BRUM, *O BRASIL NO FMI* 46-50 (2d ed. 1984). Brazil was only one of many sovereign debtors required to restructure its foreign debt in the late 1970s and early 1980s, of course. For a review of all such major cases, see E. Brau, R.C. Williams, *Recent Multilateral Debt Restructurings with Official and Bank Creditors* (IMF Occasional Paper No. 25, Dec. 1983).

17. See Nogueira Batista Júnior, *O Reescalamento da Dívida Externa Brasileira: Evolução Recente e Perspectivas*, Oct. 1983, at 4 [memorandum for the Instituto Brasileiro de Economia, on file at Fundação Getúlio Vargas, Rio de Janeiro].

part of the loans falling due in 1983, with bank participation distributed according to exposure. Under Project 2, an additional \$4 billion in loans due in 1983 would be rescheduled, or "rolled over." Under Project 3, about \$8.8 billion in short-term credit lines, used mostly for trade, would be rolled over. Project 4 rolled over about \$10 billion of "interbank" loans, funds held by Brazilian bank branches outside the country and used for international operations.<sup>18</sup> The grant of the project rescheduling occurred only after Brazil had agreed upon the terms of a "Letter of Intent" with the IMF, under which the country agreed to an austerity plan aimed at reducing its severe economic problems.<sup>19</sup> IMF, Bank of International Settlements (BIS), and other public lending organizations also provided new credit as part of the package.<sup>20</sup> When the economic picture did not improve,<sup>21</sup> however, the terms of Projects 1-4 plus additional credits had to be renegotiated, in conjunction with two more Letters of Intent to the IMF and still more austerity measures.<sup>22</sup> New private bank loans of \$6.5 billion, the refinancing of \$5.3 billion due in 1984, a one-year reextension of short-term commercial credits to the tune of \$10.3 billion, and the maintenance for 1984 of \$6 billion in interbank credits constituted the new versions of Projects 1-4. In addition, the deal now included export bank credits of \$2.5 billion, the refinancing of \$3.8 billion in public external debt through the auspices of the "Paris Club,"<sup>23</sup>

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18. See Cláudio Ferreira da Silva & Helena T.T. Horta, *As negociações financeiras internacionais do Brasil pós-FMI* [hereinafter *As negociações*], 4 REVISTA DE ECONOMIA POLÍTICA 29-30 (1984). For an account of the negotiations leading up to the rescheduling agreements, see Brown & Wilson, *Brazil: The Restructuring that Almost Failed*, INT'L FIN. L. REV. 4-8 (Aug. 1983); see also Adam, *How They Tried to Rescue Brazil*, EUROMONEY 76-87 (Oct. 1983); D. DELAMAIDE, *supra* note 5, at 117-27.

19. A.J. BRUM, *supra* note 16, at 53-62.

20. The United States Treasury Department had agreed to provide \$1.23 billion to Brazil in late 1982 through its Exchange Stabilization Fund. Meanwhile, new BIS loans went to Brazil and Argentina in early 1983, with substantial United States participation. See Cohen, *International Debt and Linkage Strategies: Some Foreign-Policy Implications for the United States*, 39 INT'L ORG. 699, 715 & n.39 (1985).

21. On the exchange crisis of mid-1983, see 20 RELATÓRIO DO BANCO CENTRAL DO BRASIL 71 (1984). Essentially, Brazil failed to meet its IMF economic performance targets for the first trimester of 1983, causing a freeze on its expected \$411 million IMF stand-by credit; that event in turn held up the payment of \$635 million in new money slated for Brazil under Project 1. 37 CONJUNTURA ECONÔMICA 63 (July 1983).

22. See A.J. BRUM, *supra* note 16, chs. 9-11.

23. The Paris Club is an organization of creditor state governments which has met on an *ad hoc* basis since 1956 to coordinate relations between the members and debtor states experiencing payment difficulties. It deals exclusively with publicly-held foreign debts of borrowing states. See generally Rieffel, *The Paris Club, 1978-1983*, 23 COLUM. J. TRANSNAT'L L. 83 (1984); Sington, *The Most Exclusive Club in Paris*, EUROMONEY 383 (Oct. 1985).



and \$1.6 billion in new cash from the IMF.<sup>24</sup> The IMF granted Brazil additional trade financing in 1984, too.<sup>25</sup> These mammoth agreements were not signed without confusion, dissent, and frustration on the part of bankers; smaller and regional United States and European banks threatened to hold out for immediate repayment, rather than rollover of existing principal, for example.<sup>26</sup> This ploy put enormous pressure on the larger banks, for whom damages would be more serious if the small banks pushed Brazil into default. (A similar kind of problem had plagued the earlier Mexican rescheduling, although large bank and U.S. government pressure sufficed to put the small banks back into line.)<sup>27</sup>

Of course, the enormous internal economic pressures wrought by the IMF austerity plans created strong political reactions within Brazil.<sup>28</sup> The situation was made worse by the temporary nature of each rescheduling and austerity plan, with the country seemingly tottering from one crisis to the next and constantly having to return to the IMF for approval and credit.<sup>29</sup> As early as 1983, voices emerged urging a unilateral moratorium or extensive reworking of the terms of Brazil's foreign debt obligations.<sup>30</sup> Opposition to loan terms and to the austerity strategies imposed by the IMF was closely linked to larger political events within Brazil, in particular

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24. *As negociações*, *supra* note 18, at 37-38. See also *New Finance Package to Support Brazil's Adjustment Program*, IMF SURVEY 1, Oct. 10, 1983, and *Brazil Will Resume Purchases Following Agreement with Fund*, IMF SURVEY 373, 384, Dec. 5, 1983.

25. See IMF SURVEY, 150, May 21, 1984.

26. See Tinnin, *The War Among Brazil's Bankers*, FORTUNE, July 11, 1983, at 50-57.

27. See J. KRAFT, THE MEXICAN RESCUE 53 (1984). On the Mexican negotiation generally, see Castro Tapia, *Mexico's Debt Restructuring: The Evolving Solution*, 23 COLUM. J. TRANSNAT'L L. 1 (1984).

28. On political reactions to IMF plans in this period and previously, see generally MARIA HELENA MOREIRA ALVES ESTADO E OPOSIÇÃO NO BRASIL [hereinafter ALVES], (1964-1984) 300-13 (2d ed. 1984). For an example of parliamentary criticism of the handling of Brazil's debt well before the 1982-1983 crisis, see, e.g., 6 DIÁRIO DO CONGRESSO NACIONAL, ANAIS DA CÂMARA DOS DEPUTADOS 3732 (1980) (statement by Rio Grande do Sul Deputy Jorge Ueda of the PMDB, charging the military government with showing incompetent political leadership by allowing the foreign debt to increase twenty-fold in sixteen years). On the measures required by the IMF in 1983, see A.J. BRUM, *supra* note 16, at ch. 10.

29. A fifth Letter of Intent to the IMF was drawn up in early 1984. See 38 CONJUNTURA ECONÔMICA 7-8 (April 1984). Finally, to avoid repeated additional crises, in early 1985 Brazilian negotiators sought a multi-annual settlement, with reduced spreads over rescheduled amortization and extensions of up to sixteen years on debt due between 1985 and 1991. The Sarney government also decided that it would no longer solicit credit—or accept policy “advice”—from the IMF. 39 CONJUNTURA ECONÔMICA 9 (May 1985).

30. The most radical groups in Brazilian politics, such as “MR-8” (linked to terrorism in the 1970's), proposed an outright freeze on debt repayments as early as 1982. See E. CARONE, MOVIMENTO OPERÁRIO NO BRASIL (1964-1984) 127-28 (1984).

a growing discontent with twenty years of military rule. Critics had begun openly focusing on the development-oriented, distribution-skewed growth model pursued by military leaders since 1964.<sup>31</sup> Celso Furtado, a well-known critic of that model, was one of the first to point out the links between the strategy of debt-accumulating industrialization and the increasingly-dire social situation within Brazil.<sup>32</sup> In late 1982, he proposed a drastic renegotiation of the terms of Brazil's debt, with real interest rates between two and four percent.<sup>33</sup> (The real interest rates on Brazil's debt had by then reached ten percent because such rates were linked to LIBOR.)<sup>34</sup>

Other observers pointed out that the military regime had accumulated much of Brazil's now \$100 billion debt by investing in giant "Pharaoh-like" development projects, some of which never came to fruition. In particular, the military undertook thirty-three major projects at a cost of \$230 billion. It envisaged a fifteen year completion time, although many projects remained unfinished as of 1985.<sup>35</sup> For instance, only one of the Angra nuclear reactors was operating as of 1985.<sup>36</sup> Meanwhile, between 1972 and 1982, Brazil's current account deficits prevented it from covering the cost of the interest due on foreign debt, with the result that new lending was

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31. See generally ALVES, *supra* note 28, at 292-300; Lafer, *The Brazilian Political System: Trends and Perspectives*, 19 GOV'T & OPPOSITION 179, 182-83 (1984). On the nature of the military regime's development model and its consequences for Brazilian society, see ALVES, *supra*, at 74-79; C. Bastos, *O Modelo Econômico*, in O MODELO ECONÔMICO E POLÍTICO BRASILEIRO: CRISE E ALTERNATIVAS 13-39 (J. Tavares *et al.* eds. 1983); Comment, *Experimenting with Orthodox Economics in Brazil: An Analysis of the Socioeconomic Effects of Adjustment During 1982-1984*, 17 N.Y.U.J. INT'L L. & POL. 651 (1985). Although some analysts have suggested that IMF austerity programs are particularly well-suited to authoritarian regimes, a recent study paints a more complex picture. See Haggard, *The Politics of Adjustment: Lessons from the IMF's Extended Fund Facility*, 39 INT'L ORG. 505 (1985).

32. See Furtado, *La Dette Extérieure Brésilienne*, in NOTES ET ÉTUDES DOCUMENTAIRES 115-35 (Nov. 1982).

33. *Id.* at 134-35.

34. Nogueira Batista Júnior, *A dívida é política* [hereinafter *A dívida*], HABITAÇÃO E POUPANÇA 23, 27 (July 1984). The rates are currently "15-17[%]" by one estimate. See de F. Forbes, *How Not to Do It, or the Brazilian Renegotiation Affair*, 38 J. INT'L AFF. 81, 84 (1984).

35. A.J. BRUM, *supra* note 16, at 43. The projects included the gigantic, multinational Itaipú hydroelectric complex at Iguazu Falls in the state of Rio Grande do Sul, ten nuclear reactors to be built with West German technology, the Rio de Janeiro and São Paulo subway systems, the Açominas and Tubarão steel factories, suburb remodeling in the northeastern city of Recife, and similar "infrastructure" items. Ferreira, *A Dívida Externa Brasileira No Contexto da Crise Mundial: Uma Visão Não-Ortodoxa*, II POLÍTICA E ESTRATÉGIA 393, 394-95 (July-Sept. 1984).

36. See, e.g., Cristina Lobo, *US \$4 bilhões e Nenhum Quilowatt [\$4 billion and not a kilowatt]*, *Jornal do Brasil*, July 28, 1985, at 24, col. 4.

undertaken each year simply to pay interest.<sup>37</sup> In the face of this situation, Furtado and other noted Brazilian economists called for a drastic renegotiation of terms. As things stood, they argued, Brazil's debt "could not be paid," even with the sacrifice of working classes under current austerity plans.<sup>38</sup> Longer terms and lower interest rates, allowing Brazil to resume economic growth and solve its balance of payments problems, were the preferred solution.<sup>39</sup> It was also suggested that Brazil break away from IMF guardianship,<sup>40</sup> limit future debt payments to a percentage of the annual national trade surplus,<sup>41</sup> or even suspend payments immediately.<sup>42</sup> At least one commentator suggested that, barring economic blockades or other retaliatory actions by creditor states, adoption of a moratorium by Brazil would only suspend import and export credits, plus long-term finance capital, but would not freeze all foreign trade. Up to two-thirds of Brazilian export trade, and a substantial portion of imports, would continue to flow.<sup>43</sup> Other observers also examined the possibility of a debtors' cartel,<sup>44</sup> although some warned against the difficulty of mounting and maintaining international cartels, and suggested that the costs of participation for Bra-

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37. CARTA ECONÔMICA 1-2 (Oct. 1984)[publication of Banco Boavista S.A., Rio de Janeiro, edited by former Central Bank president Antonio Carlos Lemgruber].

38. *A dívida*, *supra* note 34, at 27. Furtado has insisted that the effects of debt terms on the Brazilian public be explicitly considered in future negotiations. See C. FURTADO, *NÃO A RECESSÃO E AO DESEMPREGO* 16-21 (5th ed. 1983).

39. See generally *As negociações*, *supra* note 18, at 25-43.

40. Furtado, *Rescuing Brazil, Reversing Recession*, 6 *THIRD WORLD Q.* 604, 606 (July, 1984). Indeed, even some business leaders admitted that a full break with the IMF could be desirable. See *Empresários, volver!*, *SENHOR* 58, 59-60 (March 27, 1985)(interview with well-known industrialist Cláudio Bardella). On the flaws of the IMF's austerity approach as a prescription for solving Brazil's economic problems, see *Problemas do Programa de Ajustamento Econômico do FMI*, CARTA ECONÔMICA 1-4 (June, 1984). Cf. *Is the IMF's Medicine Too Strong?*, *INSTITUTIONAL INVESTOR* 136 (Sept. 1984)(reviewing constraints on IMF policy success in five other debtor states).

41. Correa da Costa [Brazilian ambassador to the United States], *Defuse World Debt*, *N.Y. Times*, April 12, 1984, at A27, col. 1; *BUSINESS LATIN AMERICA*, 243 (1984); and Furtado, *Time to Accomodate Debtor Nations*, *N.Y. Times*, April 22, 1984, at F3, col. 1. The concept attracted considerably more attention after Peruvian President Alan Garcia announced in July, 1985, that his country would limit future debt payments to 10% of export revenues, although he later appeared to retract this statement. See VEJA, at 56-57 (Aug. 7, 1985).

42. Fernandes, *A Ilegitimidade da Dívida Externa do Brasil e do III Mundo*, *REVISTA BRASILEIRA DE POLÍTICA INTERNACIONAL* 61, 73 (1984). Other, less radical observers have suggested that the current situation is close to a tacit "consensual moratorium[.]" and might as well be openly recognized as such. de F. Forbes, *supra* note 34, at 89.

43. Barros de Castro, *A Viabilidade do Moratória Unilateral*, *REVISTA DO PMDB* 23, 27-30 (Dec. 1983).

44. See C. FURTADO, *A NOVA DEPENDÊNCIA* 73-76 (3d ed. 1982).

zil would be greater than imagined.<sup>45</sup>

International observers concurred with Brazilian critics. They stressed the dire social consequences of the mounting debt,<sup>46</sup> and the long-term dimension of the problem.<sup>47</sup> Some considered alternatives to IMF austerity programs,<sup>48</sup> including possible moratoria,<sup>49</sup> while all stressed the need for growth by debtors as the only long-term solution.<sup>50</sup> Changes in the rescheduling process were also urged to make management of the debt problem smoother.<sup>51</sup> Radical moves for a moratorium or other joint action on the part of debtors did not materialize, however,<sup>52</sup> despite a meeting in 1985 in which Cuban officials urged the formation of a debtors' cartel and full renunciation of the debt.<sup>53</sup> In the fall of 1985, the Reagan administration appeared to make a policy shift favorable to debtors, including encouragement of growth rather than simple austerity, and easier repayment terms. It pledged to pursue this shift by using its influence within the IMF, the World Bank, and other international organizations.<sup>54</sup> Private banks criticized the shift,

45. Alkimar R. Moura, *Renegociação: panacéia ou buraco negro?*, 3 REVISTA DE ECONOMIA POLÍTICA 105, 110-11 (Jan.-March, 1983).

46. See Roett, *Democracy and Debt in South America: A Continent's Dilemma*, 62 FOREIGN AFF. 695 (1984).

47. See, e.g., Meissner, *Debt: Reform Without Governments*, FOREIGN POL'Y 81, 81 ("The reschedulings of 1982 and 1983 have pushed the wave of debt into the future, and the crest is getting higher."). Meissner proposes a "Global Reserve Bank" as an institutional mechanism which might alleviate the crisis. *Id.* at 90-93.

48. Bienen & Gersovitz, *I.M.F. Medicine*, N.Y. Times, April 3, 1984, at A31, col. 2. Lowering the interest rates charged to debtors was an obvious alternative, one which even the United States Federal Reserve Board endorsed and tried to persuade major creditor banks to adopt. Bennett, *Cap Sought On Foreign Loan Rate*, N.Y. Times, Feb. 7, 1984, at D1, col. 6.

49. See A. KALETSKY, *THE COSTS OF DEFAULT* (1985). Kaletsky argues that default could be a feasible and even beneficial step in an overall strategy designed to pressure creditors to revise the repayment terms for the Third World's debt. For a review of his argument, see Branford, *Os Benefícios de uma "Moratória Conciliatória"*, SENHOR 74-77 (March 27, 1985).

50. Silk, *Ending Latin Debt Crisis*, N.Y. Times, May 2, 1984, at D2, col. 1.

51. Some observers have proposed the creation of formal international mechanisms to replace the current *ad hoc* practices employed in reschedulings. See Comment, *On Third World Debt*, *supra* note 1, at 135-40; IMF SURVEY, Nov. 26, 1984, at 365 (review of comments by Paul Suratgar in *DEFAULT AND RESCHEDULING: CORPORATE AND SOVEREIGN BORROWERS IN DIFFICULTY* (P. Suratgar ed. 1984)).

52. See Roett, *Latin America's Response to the Debt Crisis*, 7 THIRD WORLD Q. 227 (1985)(leaders of major debtors have called for political talks with creditor states, but have not threatened moratoria).

53. On the Cuban meeting, see, e.g., *Tribuna de Imprensa*, July 18, 1985, at 9, col. 9.

54. See *US Said to Urge More Assistance for Third World*, N.Y. Times, Oct. 6, 1985, at 1, col. 6; *US May Back Higher Lending By World Bank*, N.Y. Times, Oct. 7, 1985, at 1, col. 5; *Latin Debt Plan Is Assessed*, Oct. 7, 1985, at D1, col. 3. In early 1986, U.S. Treasury

however.<sup>55</sup>

Within Brazil, interestingly, some critics focused on the legal substance of the loan agreements signed by the military government, as well as on their economic significance.<sup>56</sup> Celso Furtado was one of the first to charge that the 1983 rescheduling agreement had put up Brazilian embassies and consulates abroad as collateral, constituting a direct affront to national sovereignty.<sup>57</sup> Though inaccurate, this charge shares the flavor of other "legal" complaints made by critics. The choice of a New York forum, New York law, and other details of the contract were labelled as renunciation of Brazilian sovereignty both by Furtado<sup>58</sup> and by others. Indeed, opposition Senate leader Humberto Lucena gave a rip-roaring speech in June 1983 in the Senate chambers, attacking both Planning Minister Delfim Netto and the military government for agreeing to clauses which amounted to an "affront on national sovereignty," as well as being of dubious constitutional and legal status.<sup>59</sup> As we shall see below, at least one party actually brought a civil action to enjoin the agreements on similar grounds,<sup>60</sup> although the attempt proved unsuccessful.

## II. LEGAL BACKGROUND: STRUCTURE OF DEBT AGREEMENTS WITH BRAZIL

The general purpose of international loan agreements, and in particular of their clauses concerning execution and judgment after default, is to assure the possibility that creditors may secure judgment in a familiar and perhaps hospitable forum, under conditions of maximum certainty. Ideally, of course, such clauses will never have to be activated. Financial law expert Philip Wood has pointed out that "conciliation," rather than a "flurry of writs," is usually the best response to debtor difficulties.<sup>61</sup> But these are matters more for bankers than for their lawyers. If the legal documentation

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Secretary James Baker formalized the "shift" by proposing \$29 billion in additional public and private credits. See *Guinea-Pigs for the Baker Plan*, *EUROMONEY*, 42, 45 (March 1986).

55. See *Banking Opposition to Debt Plan Seen*, *N.Y. Times*, Oct. 3, 1985, at D6, col. 5.

56. See, e.g., *Humilhados e Ofendidos*, *SENHOR*, Aug. 10, 1983, at 26-28.

57. C. FURTADO, *supra* note 38, at 51-52.

58. *Id.*

59. The speech is fully reproduced in *AFRONTA A SOBERANIA NACIONAL* (1983)[PMDB publication providing the text of Sen. Lucena's speech in the Brazilian Senate on June 7, 1983].

60. See *infra* Part IV(C).

61. P. Wood, *supra* note 2, § 3, at 4.

supporting a given loan is to be of any value, it must provide for prompt and certain remedies in case of default, even though "except where the lender's position is seen as hopeless, the power to obtain judgment is viewed predominantly as a measure to set aright the inequality of bargaining power which generally exists in favor of an insolvent debtor and to improve the chances that default negotiations will be taken seriously."<sup>62</sup>

In short, the details of execution require careful attention, if only because of their tactical usefulness. The main categories of clauses dealing with attachment and judgments, along with variations thereof in recent Brazilian agreements, are reviewed below.

### A. *Loan Provisions*

Although not formally part of the "execution" framework of loan agreements, the technical loan portions of such agreements may have relevance to challenges to execution. Innumerable forms for international loan agreements with sovereigns, whether "new money," rollover, rescheduling, or restructuring,<sup>63</sup> have emerged in recent years.<sup>64</sup> Generally, creditors treat sovereign debtors like any other debtor. The sovereign undertakes specific obligations, either as an initial obligor, or as a guarantor, to repay creditors under a fixed schedule and usually in foreign currency (*i.e.*, not currency under the debtor's own control).<sup>65</sup> The sovereign unconditionally guarantees repayment,<sup>66</sup> promising that failure to repay will consti-

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62. *Id.* Another writer characterizes the purpose of default provisions as "getting the attention" of the borrower and forcing him to negotiate and restructure. Ryan, *Defaults and Remedies Under International Bank Loan Agreements with Foreign Sovereign Borrowers—A New York Lawyer's Perspective*, 1 U. ILL. L. REV. 90 (1982).

63. On the differences between "new money" loans, restructurings, and other categories, see Mudge, ch. 10, at 85-87, in *DEFAULT AND RESCHEDULING: CORPORATE AND SOVEREIGN BORROWERS IN DIFFICULTY*, *supra* note 51.

64. On possible forms for restructuring agreements, see *id.* at ch. 10. In the Brazilian case, as we shall see, local practices and concepts may be more important than international practice. For a review of Brazilian law and procedures regarding foreign loans generally, see de Noronha Goyos Jr., *Empréstimos Externos: Tipos, Regime e Tributação* in *ESTUDOS JURÍDICOS SOBRE INVESTIMENTO INTERNACIONAL* 47-57 (A. Xavier & I. Gandra de Silva Martina eds. 1980); Skola, *Foreign Loans in Brazil: Theory and Practice*, 15 INT'L LAW. 73 (1981).

65. On the types of debt covered by such obligations, see Mudge, *supra* note 63, at 88-89. See also Venkatachari, *The Eurocurrency Loan*, in *SOVEREIGN BORROWERS* 80-86 (L. Kalderen *et al.* eds. 1984).

66. "Unconditionally" may not mean the sovereign waives all defenses, however, prompting additional contract clauses reciting full waivers of possible forum, immunity, and other claims. See *infra* Part II, subparts B-E.

tute an "event of default" giving rise to additional penalties or, in all likelihood, a right on the part of creditors to demand immediate acceleration of all payments (interest due to date and full principal) owed under the agreement.<sup>67</sup> Aside from actual default on payments due, a number of other occurrences may also constitute "events of default."<sup>68</sup> These include, sovereign failure to abide by IMF conditionality agreements, or a failure to meet minimum standards of economic performance judged essential to its long-term economic health. The sovereign entity signing the agreement will usually be the executive branch of the state in question, or the Central Bank. Otherwise, the obligor or borrower may well be a private or quasi-public, and the executive or Central Bank may merely sign as ultimate guarantor of the loan.<sup>69</sup>

The 1983 and 1984 restructuring agreements between Brazil and the hundreds of creditors who participated bore a distinctive and complex character. A major innovation was the splitting of the agreement into four "projects," each handled by a different lead creditor,<sup>70</sup> and the institution of the "Deposit Facility Agreement" (DFA) which emerged from Project 2. Essentially, this was a rollover mechanism under which individual Brazilian debtors deposited cruzeiros with the Central Bank, to accounts established for participating creditors, in amounts equal to the dollar equivalents of interest and principal owed by the debtors under pre-existing loans. Thus the original debts were "paid," albeit in cruzeiros. The creditors then reloaned the cruzeiros deposited in their Central Bank accounts either to the same debtors as before or to new debtors. In short, a "novation" of the existing debt occurred.<sup>71</sup> The scheme had the advantages of preserving the nature of credit markets within Brazil, meeting Brazilian technical requirements, and preserving the legal obligations and relationships established by the original loan agreements now "novated."<sup>72</sup> Of course, the main point of the mechanism was to allow the Central Bank, rather than individual Brazilian debtors, to assume the foreign currency obli-

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67. See Venkatachari, *supra* note 65, at 98.

68. For a discussion of what constitutes an "event of default" under typical agreements, see Ryan, *supra* note 62, at 90-100. See also Youard, *Events of Default*, in *SOVEREIGN BORROWERS* (L. Kalderen et. al. eds. 1984).

69. Whether a state or branches thereof sign agreements may have sovereign immunity implications. See 2 G. DELAUME, *TRANSNATIONAL CONTRACTS*, ch. 11, at 7-23 (1985).

70. Brown & Wilson, *supra* note 18, at 6-7.

71. *Id.* at 7.

72. Conversation with Antonio Mendes, Sept. 1985.

gations contained in the original loan agreements. Thus the DFA converted the individual lending risks previously assumed by private bank creditors into "country risk."<sup>73</sup>

### B. *Governing Law and Forum Selection*

Most international loan agreements involving sovereign debtors indicate the law of a state in which major creditors are domiciled as governing, and the situs of this state as the proper forum for litigation arising from any dispute between parties.<sup>74</sup> Usually, the state or states chosen are identical for governing law and forum: in some major recent agreements, the law applicable has typically been that of New York state, or of Britain.<sup>75</sup> The forum chosen is frequently "the state courts of New York, United States federal courts sitting in New York City, or the High Court of Justice in London."<sup>76</sup> Sometimes, but not always, the courts of the debtor state are also indicated as competent to hear actions arising

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73. In other words, the repayment of the foreign currency loans now depends on how well Brazil performs in activities which earn such foreign currency. Such country risk may be difficult to evaluate, posing special problems for creditors. See, e.g., P.J. NAGY, *COUNTRY RISK: HOW TO ASSESS, QUANTIFY AND MONITOR IT* (1984). It should be noted that Brazil adopted drastic monetary and economic reforms in February 1986—including deindexation and the adoption of a new currency, the cruzeiro—which have proved generally successful. See *Brazil Faces up to Inflation*, *Financial Times*, March 3, 1986, at 1.

74. Siddiqui, *SOVEREIGN BORROWERS*, *supra* note 65, at 52-54.

75. For agreements applying New York law, see, e.g., Model Restructure Agreement, Among Mexican Public Sector Obligors, and the United Mexican States as Guarantor and Banco de Mexico and The Servicing Banks and The Closing Agent and The Banks [Mexico, 1983, hereinafter Mexican Restructuring Agreement]; Short Term Facilities Agreement [Yugoslavia, 1983, hereinafter Yugoslavian Facilities Agreement]; Credit Agreement Between Banco Central de La Republica Argentina, and Republic of Argentina, and The Banks and Others [Argentina, 1982, hereinafter Argentine Credit Agreement], and Refinancing Credit Agreement, Among Republic of Zaire, and The Servicing Bank [Zaire, 1980, hereinafter Zaire Refinancing Credit Agreement].

For agreements applying British law, see, e.g., Debt Deferral and Restructuring Agreement Between The Polish People's Republic, Bank Hadlowy W. Warszawie S.A., Certain Debtors, The International Agent, The National Agents, The Currency Agents, The Syndicate Agents, and Certain Creditors [Poland, 1982, hereinafter Polish Debt Agreement]; and Refinancing Agreement Between The Democratic Republic of the Sudan, Bank of Sudan, Certain Financial Institutions, and the Servicing Institution [Sudan, 1981, hereinafter Sudanese Refinancing Agreement]. For an account of events surrounding the Polish Debt Agreement, see Lee, *Rescheduling of Polish Debt for 1982 to Western Banks*, 21 *COLUM. J. TRANSNAT'L L.* 389 (1983).

76. See, e.g., Polish Debt Agreement, *supra* note 75, at 66, art. 62; Zaire Refinancing Credit Agreement, *supra* note 75, at 12-5, § 12.07(a) (granting these courts "non-exclusive" jurisdiction); Credit Agreement Between The Republic of Peru and The Banks and The Agent [Peru, 1983, hereinafter Peruvian Credit Agreement], at 94-95, § 13.07(a); and Sudanese Refinancing Agreement, *supra* note 75, at 32, § 54.



from the agreement.<sup>77</sup> The choice of New York or British law and jurisdictions should not be surprising, since most major creditors are frequently New York or London-based banks, and are anxious to anchor the agreements within a known system of law and familiar forum.<sup>78</sup> Even for non-U.S. or non-British creditors, it is generally agreed that creditors prefer a system of law and forum "external" to that of the debtor, to maximize the certainty of the outcome of eventual litigation.<sup>79</sup> Absent explicit stipulations of law and forum, of course, the selection of these matters by particular courts would remain in doubt, since such selection is not clearly delineated either under the rules of some potential jurisdictions or under "private international law."<sup>80</sup>

In the case of the 1983 and 1984 agreements signed by Brazil, creditor law and forums continued to predominate. (Here and for the remainder of this article, analysis will focus on provisions of the 1983 DFA. This document has been chosen as representative of the various agreements signed during the period under examination.) For instance, the DFA includes the following clause: "This Agreement . . . shall be governed by, and construed in accordance with, the laws of the State of New York, United States."<sup>81</sup> Further, it contains forum provisions both for general reasons of strategy and because, since New York law governs, specific language is necessary to counteract possible claims of *forum non conveniens* and the like.<sup>82</sup> Thus,

The Central Bank hereby irrevocably submits to the jurisdiction of any New York State or Federal court sitting in New York City and the High Court of Justice in London in any action or proceeding arising out of or relating to this Agreement. . . , and the Central Bank hereby irrevocably agrees that all claims [may be heard in such courts]. . . The Central Bank hereby irrevoca-

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77. For clauses explicitly granting non-exclusive jurisdiction to the courts of the debtor state, see, e.g., Mexican Restructuring Agreement, *supra* note 75, at 13-4, § 13.08(a) (Mexican federal district courts); Argentine Credit Agreement, *supra* note 75, at 51-52, § 10.08(a); and Yugoslavian Facilities Agreement, *supra* note 75, at 56, § 14.08(a).

78. Siddiqui, *supra* note 74, at 53. See also Gruson, *Governing Law Clauses In International and Interstate Loan-Agreements—New York's Approach*, 1982 U. ILL. L. REV. 207.

79. See Wood, in SOVEREIGN BORROWERS, *supra* note 65, at 124-128. See also P. Wood, *supra* note 2, § 3, at 4(1)-5.

80. Siddiqui, *supra* note 74, at 52-53. For criticism of current rules, see Baxter, *International Conflict of Laws and International Business*, 34 INT'L & COMP. L.Q. 538 (1985).

81. 1983 Deposit Facility Agreement, § 8.10 [hereinafter DFA].

82. The relevant New York rule is N.Y. CIV. PRAC. R. 327(a),(b). On *forum non conveniens* in United States federal law, see 1 G. DELAUME, TRANSNATIONAL CONTRACTS 64-79 (1985).

bly waives, to the fullest extent that it may effectively do so, the defense of an inconvenient forum.<sup>83</sup>

The latter clause is interesting both from the point of view of drafting and from the perspective of the legal rules it seems designed to counteract or respect. The language of "irrevocable" submission and waiver seems designed to satisfy the forum rules of New York law, as well as those imposed by the 1976 Foreign Sovereign Immunities Act (FSIA).<sup>84</sup> It is an open question whether the High Court of Justice would apply New York law or British law in ruling on the suitability of the submission and waiver language, especially since separate British legislation exists to govern such issues.<sup>85</sup> Further, the language of the clause seems to imply that questions about submission and waiver may remain. The words "to the fullest extent that it may effectively do so" would appear to have been added by Brazil's lawyers, but it remains unclear whether this phrase refers to the limitations of sovereign submission and waiver powers under New York or British law, as applicable, or whether it instead suggests that the Brazilian Central Bank may be somehow prevented from accepting such a clause under Brazilian law.<sup>86</sup> Of course, it remains unclear what effect foreign courts would give to Brazilian laws which limit the contractual powers of the Central Bank, as well.<sup>87</sup>

A final issue raised by the forum clause cited above is that it binds only the Central Bank, main obligor of the agreements, but does not mention the Federative Republic of Brazil, the guarantor. The distinction was apparently intentional, based on the tradi-

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83. 1983 DFA § 8.07.

84. The New York forum rules appear in N.Y. Civ. Prac. L. § 302 (courts have personal jurisdiction over persons transacting business in the state), and New York General Obligations Law 5.1402(1)(agreements by foreign states to accept New York forum, in contracts governed by New York law and involving amounts greater than \$1 million, are binding). The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976), provides that states may waive immunity from jurisdiction "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). On sovereign immunity in U.S. law, see also Nichols, *supra* note 3, at 253-60.

85. The British have the State Immunity Act of 1978, 1978 Eliz. II, ch. 33 (July 20, 1978), reprinted in 3 G. DELAUME, *TRANSNATIONAL CONTRACTS* app. I, bk. C.1, at 55-68 (1985). This Act has been the subject of extensive analysis. See Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185 (1979); Singer, *The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice*, 75 AM. J. INT'L L. 283, 296-301 (1981)(discussing the State Immunity Act).

86. The warrants, covenants and legal opinions included with the DFA indicate that the Central Bank has full powers to sign the document; this presumably means waiver powers, too. See, e.g., 1983 Deposit Facility Agreement § 4.01(b) and Exhibit D, at 2.

87. See *infra* Part IV(B)(2).

tional Brazilian notion that the state of Brazil does not submit to the jurisdiction of foreign courts for any reason, since such submission would imply a loss of sovereignty.<sup>88</sup> However, if Brazil's guaranty of a loan is considered "commercial activity" under New York law (including applicable provisions of the federal FSIA),<sup>89</sup> Brazilian domestic doctrine would not prevent United States or British courts from asserting jurisdiction. Conversely, as we shall see, the Federative Republic itself enjoys no immunity *within* its own territory, and so original actions against it might well be brought in Brazilian courts.<sup>90</sup> A host of other factors, examined below, would then come into play.<sup>91</sup>

### C. Possibility of Arbitration

Either in place of or as an alternative to traditional judicial forums, a loan agreement may provide for binding arbitration of disputes arising from it.<sup>92</sup> Arbitration is supposed to have the advantage of providing a truly "neutral" forum, rather than allowing legal and political issues—raised by submission of sovereign debtors to creditor state courts—to come to the fore.<sup>93</sup> A typical agreement provides that arbitration may result in a final decision binding on both parties, and enforceable in the courts of relevant jurisdictions.<sup>94</sup> Of course, the latter condition may also depend on the laws of the jurisdictions involved, some of which may hamper recognition and execution of arbitration awards.<sup>95</sup>

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88. P. WOOD, *supra* note 2, § 4, at 9. See also *Brazil's Restructuring: The Legal Issues*, 1983 INT'L FIN. L. REV. 5 [hereinafter *Brazil's Restructuring*]; *infra* Part IV(B)(2).

89. It appears that the borrowing of money by a state is clearly "commercial" activity under the Foreign Sovereign Immunities Act, and that this characterization may extend to other state financial activities. See 2 G. DELAUME, *TRANSNATIONAL CONTRACTS*, ch. 11, at 44-48 (1985); see also Nichols, *supra* note 3, at 255-57.

90. See *infra* notes 265-66 and accompanying text.

91. These factors are reviewed at *infra* Part IV(B).

92. Sometimes, of course, debtors or creditors resist a demand for arbitration. See Wood, in *SOVEREIGN BORROWERS*, *supra* note 65, at 127-28.

93. Some writers are skeptical of the advantages of arbitration, though. See, e.g., Ryan, *supra* note 62, at 128-31.

94. Agreements involving sovereign debtors sometimes specify that the rules of the International Center for the Settlement of Investment Disputes (ICSID) will apply. Delaume, in *DEFAULT AND RESCHEDULING*, *supra* note 63, at 97, 100-03; see also *infra* note 97.

95. Many states do not recognize foreign arbitration awards automatically, although the situation is reportedly improving. Delaume, *supra* note 51, at 101; see also Harnik, *Recognition and Enforcement of Arbitral Awards*, 31 AM. J. COMP. L. 703 (1983). On the situation in Brazil, see generally Rosenn, *Enforcement of Foreign Arbitral Awards in Brazil*, 28 AM. J. COMP. L. 498 (1980).

The 1983 DFA permits any party to the agreement to submit a dispute arising from it to binding arbitration, unless the dispute is already subject to litigation in Brazilian courts.<sup>96</sup> It also specifies that the arbitration would be conducted by a three-judge panel, in New York City, according to selected clauses of the arbitration rules established by the International Center for Settlement of Investment Disputes (ICSID).<sup>97</sup> It is apparently a recognized practice of the Federative Republic to submit to such arbitration, consistent with national notions of sovereignty,<sup>98</sup> although the application of the arbitration clauses contained in the DFA may raise other problems.<sup>99</sup>

#### D. *Waivers of Sovereign Immunity Against Execution*

Aside from the submission to jurisdiction of forum discussed above in subpart B, international loan agreements generally also include clauses reciting the agreement of the sovereign debtor to waive all defenses of "sovereign immunity" which would otherwise be available.<sup>100</sup> All of seven agreements surveyed for this article contain such "waiver of immunity" clauses.<sup>101</sup> Three, however, also contain exceptions designed either to protect public property within the jurisdiction of the debtor from attachment,<sup>102</sup> or in one case to protect property abroad used for diplomatic functions, in-

96. 1983 Deposit Facility Agreement § 8.08.

97. The Center was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966), reprinted in 4 I.L.M. 532 (1965). See Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW. 521 (1985); 2 G. DELAUME, *TRANSNATIONAL CONTRACTS*, ch. 15 (1982). See also *supra* note 94.

98. P. WOOD, *supra* note 2, § 4, at 9.

99. See *infra* Part IV(B)(3).

100. Venkatchari, *supra* note 65, at 102-03.

101. See *supra* agreements listed in notes 75-76.

102. This was the case for the Argentine Credit Agreement, *supra* note 75, and Peruvian Credit Agreement, *supra* note 76. Sections 10.08(d),(e) of the Argentine agreement waive immunity from legal process for all state assets except "property of the public domain, such as that described in articles 2337 and 234 of the Civil Code of Argentina[.]" Argentine Credit Agreement, *supra* note 75, at 53-54. The Peruvian agreement contains a number of exceptions to its waivers of immunity with respect to property. Section 9.01(i) reaffirms that article 17 of Decree Law No. 20236 prohibits use of executory procedures against the Republic of Peru within Peru. It goes on to recite that neither the Republic nor its property has any immunity from attachment or legal process under Peruvian law, *except* with respect to mining rights, property used in public service or in the public domain, and other property exempted "by present law." Peruvian Credit Agreement, *supra* note 76, at 67-68.

cluding buildings and bank accounts, from similar action.<sup>103</sup> Just as the forum clauses discussed above are designed to make explicit the legal basis for jurisdiction over a sovereign debtor in light of the FSIA or British State Immunity Act of 1978, so the general waiver of immunity clause aims to make clear that the debtor's assets have no protection from attachment and execution by a local or foreign court.<sup>104</sup>

The 1983 Brazilian debt agreements contain similar waivers of immunity for purposes of judgment, in the context of possible judicial action against the Central Bank or of an arbitral decision against the Republic. In the case of the Central Bank, the operative clause runs as follows, designed to operate in tandem with the jurisdiction waivers discussed in subpart B above:

To the extent that the Central Bank has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) with respect to itself or its property, the Central Bank hereby irrevocably waives such immunity in respect of its obligations. . .and without limiting the generality of the foregoing, consents generally for the purposes of the State Immunity Act of 1978 of the United Kingdom to the giving of any relief. . .The foregoing waiver is intended to be effective to the fullest extent now or hereafter permitted by applicable law of any jurisdiction in which any suit, action or proceeding with respect to this Agreement. . .may be commenced; *provided, however*, that such waiver of immunity from jurisdiction with respect to its property shall be effective only with respect to property which is used in commercial activities.<sup>105</sup>

This clause has three particularly interesting features. First, it repeats the submission of the sovereign to jurisdiction, like the waiver already discussed in subpart B above. Second, it extends the submission to jurisdiction to a submission to accept any relief which British or New York courts would grant, *and* to relief or judgments thereupon in "any [other] jurisdiction," meaning third-state forums in which the sovereign may have assets. In short, this

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103. The Polish Debt Agreement, *supra* note 75, waives immunity except for "ambassadorial and consular real property and buildings and the contents thereof situated outside Poland[,] and bank accounts thereof used for diplomatic functions. *Id.* § 62.05, at 66-67.

104. See generally Bouchez, *The Nature and Scope of State Immunity from Jurisdiction and Execution*, 10 *NETH. Y.B. INT'L L.* 3 (1979).

105. 1983 Deposit Facility Agreement § 8.07(c).

clause allows creditors to show that the sovereign has waived immunity not only with respect to courts of initial judgment, but also in the case of unrelated jurisdictions in which the creditors might bring suit to enforce the initial judgment. Still, Brazil's lawyers may have added the words "to the fullest extent. . . permitted by applicable law" in the hopes that third-state jurisdictions would apply their own rules regarding sovereign immunity, rather than deferring to the language of the contract on this issue. An "irrevocabl[e]" waiver drafted with United States and British notions of sovereign immunity in mind may not serve for other jurisdictions, after all.<sup>106</sup> Third, and finally, the last sentence of the clause is drafted to match the limitations of the United States FSIA, and perhaps the British State Immunity Act.<sup>107</sup> The "commercial" distinction thus is to be applied as a matter of the will of the parties, although its application will depend on New York case law regarding the definition of "commercial" property.

As for the Brazilian Federative Republic (called, in Portuguese legal terminology, the *União* or Union), the 1983 agreements included similar waivers of immunity within the arbitration framework discussed in subpart C above. The Union's obligations not to plead sovereign immunity from arbitration are set out as follows:

The decision of any such arbitral tribunal shall be final to the fullest extent permitted by law and a court judgment may be entered thereon. The Guarantor agrees that in any such arbitration it will not raise any defense which it could not raise but for the fact that it is a sovereign state, and further agrees that application may be made for judicial acceptance of such a decision and an order for enforcement to any court lawfully entitled to accept such decision and issue such order, for which purpose the Guarantor hereby waives all defenses of immunity (whether on the basis of sovereignty or otherwise).<sup>108</sup>

The Union also agrees not to raise immunity defenses in initial ac-

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106. For some different forms of waiver used in foreign legal systems, see 2 G. DELAUME, *TRANSNATIONAL CONTRACTS* ch. 11, at 54-62 (1985).

107. However, it appears that British courts will grant or deny immunity solely according to the terms of the State Immunity Act, irrespective of contract language. Clare, *Enforcement of the Arbitration Clause in Brazilian Loan Agreements*, 1982 *INT'L FIN. L. REV.*

18. For review and criticism of the "commercial activity" concept as used in the United States Foreign Sovereign Immunity Act and British State Immunity Act, see Fox, *Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity*, 34 *INT'L & COMP. L.Q.* 115 (1985).

108. 1983 Deposit Facility Agreement § 8.08(a).

tions, or in actions seeking to enforce foreign judgments against it in Brazilian courts.<sup>109</sup> Since Brazil's government has no immunity within its domestic court system, the latter provision does not seem surprising. The former citation from the DFA is more tricky. On the one hand, as we have seen, the Union was willing to submit to arbitration, but not to court action in foreign forums.<sup>110</sup> On the other hand, the clause cited just above provides for *court* action to effect "enforcement" of an arbitration decision; presumably, such a decision might affect property of the Union, and the clause thus implies that the Union agrees not to plead immunity in any such action. Thus the waiver may bind the Union to submit to foreign court jurisdiction over its property, if not itself, after all. Still, the wording of the clause in question is somewhat vague, leaving room for doubt about how a given court might actually interpret and apply its language. Arguably, the Union only agrees not to plead immunity at the moment in which "application . . . [is] made" for a court order enforcing the arbitration judgment. This would not mean that the Union could not still plead immunity for its property or itself, based on sovereignty or any other reason, in the judicial hearing reviewing and ruling on such "application" for enforcement.<sup>111</sup> Indeed, an appearance by the Union purely for the purposes of pleading immunity from a grant of application, but without submission to the jurisdiction for other purposes, would seem to remain a possibility.

### *E. Declaration of Executability in Brazilian Courts*

Aside from the covenants and clauses reviewed above, the legal enforcement machinery of international loan agreements sometimes also includes an express declaration of enforceability in the courts of the debtor state.<sup>112</sup> In view of the skepticism of some observers about the value of eventual enforcement within the debtor

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109. *Id.* § 8.08(b).

110. On the Brazilian government's lack of immunity in its domestic courts, see *supra* note 90 and accompanying text. For an account of a recent court case against the Brazilian state, see, e.g., VEJA, at 135, col. 3 (March 20, 1985)(bank sues the Union for contract breach and damages). On the Brazilian preference for submission to foreign arbitration rather than foreign courts, see *supra* notes 88, 98 and accompanying text.

111. For instance, under the British State Immunity Act it appears that Brazil's consent to enforcement of an arbitral award would have to be explicit to be binding; mere consent to arbitration would not be enough to make its assets in the United Kingdom vulnerable to attachment. See Clare, *supra* note 107, at 23.

112. See Venkatachari, *supra* note 65, at 119-20.

jurisdiction,<sup>113</sup> such a declaration may have more formal than substantive value.<sup>114</sup> On the other hand, it is always *possible* that a creditor might wish to enforce a foreign default judgment within the debtor state's jurisdiction, and there seems little reason not to preserve this possibility by an explicit clause.

The 1983 DFA contains several clauses dealing with enforcement of judgments within Brazil, although the drafted language seems to envisage that such actions would likely target the Union, rather than the Central Bank. This might make sense for two reasons. First, the Central Bank has tangible assets abroad in the form of bank accounts which are more easily identified; property of the Union abroad may be more scarce and more "sensitive" (*i.e.*, embassies). Collection against the Union might thus be better sought within Brazil. Second, there are doubts about whether the Union would be amenable to foreign enforcement of foreign arbitration judgments against it.<sup>115</sup> For these reasons, it is important to assure that at least one certain forum for judging the Union exists. According to the clause dealing with the Central Bank, any suit against the bank under the agreement may result in a final judgment "conclusive and . . . enforce[able] in other jurisdictions by suit on the judgment or in any other manner provided by law."<sup>116</sup> The words "other jurisdictions" evidently include Brazil. As for the Union, the text is much more specific: it "represents and warrants" that,

Any decision of an arbitral tribunal under and pursuant to the provisions of Section 8.08 [submitting the Union to binding arbitration] which conforms in form with Brazilian public policy and law will be enforceable in the Federal courts of Brazil without reexamination of the merits.<sup>117</sup>

As Parts III and IV show, however, the seemingly clear-cut language of this clause is actually quite problematic, since the precondition of conformance to "Brazilian public policy and law" may in fact mandate a thorough reexamination of the merits of the dispute, as required by Brazilian legal doctrine.

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113. *See, e.g., supra* notes 7, 62 and accompanying text.

114. A declaration of enforceability is functionally equivalent to a warrant or covenant, and of course remains subject to the scrutiny of the court reviewing it, like other contract clauses.

115. *See supra* text following note 110.

116. 1983 DFA § 8.07.

117. *Id.* § 4.01(k).



### III. THE ENFORCEMENT PROCESS: HOMOLOGAÇÃO AND EXECUTION OF FOREIGN JUDGMENTS IN BRAZILIAN COURTS

Let us now assume that foreign creditors decide to declare Brazil in default under the 1983 DFA, either because of Brazilian failure to meet payment schedules or after the occurrence of other "events of default." As noted, an actual default by Brazil could precipitate an international financial crisis,<sup>118</sup> and would neither be in the interests of Brazil nor of its creditors.<sup>119</sup> Still, a declaration of default and legal action pursuant to the enforcement provisions of the DFA are at least theoretically possible, particularly in the context of a campaign to bring Brazil back to the bargaining table with creditors. A sketch of the course of such legal action follows.

First, a New York court would render judgment against the Brazilian debtors under the terms of the DFA. The creditors would then move to execute that judgment against available debtor assets<sup>120</sup> within the United States,<sup>121</sup> either after attachment or based on prejudgment attachment already obtained.<sup>122</sup> Further, the creditors would probably try to win recognition of the New York judgment, and attachment and execution based upon it, in foreign countries as part of an international campaign to tie up sources of trade and finance still open to Brazil. It is not clear that such a campaign would be successful, however, both because third-state courts might find legal or political reasons to refuse to cut off Brazil from trade and finance, and because Brazil could isolate itself domestically and still survive.<sup>123</sup> Nor is it clear that such a

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118. See *supra* note 13 and accompanying text. In August, 1985, Citibank president John S. Reed stated that even the partial capitalization of interest payments owed by Brazil to creditors, resulting in a freeze on payments, say, for several years, could cause the international financial system to "explode." *Isto É*, August 14, 1985, at 71, col. 3.

119. Brazil might choose to default, in theory, if the relative costs to be incurred from the resulting crisis would bear more heavily on creditors; but this does not imply that the social, economic, and political costs to Brazil itself would not be heavy.

120. In a default on or including the cruzado-denominated aspects of the debt, individual Brazilian debtors would remain liable under the agreement, and their foreign assets would presumably be vulnerable to attachment. If the default only affected foreign currency debts, then only the Central Bank and the Union would be liable. See *supra* notes 70-72 and accompanying text.

121. A New York state or Federal court judgment, of course, would be entitled to "full faith and credit" in other states. 28 U.S.C. § 1738.

122. Prejudgment attachment raises other complex questions, especially because the Foreign Sovereign Immunities Act restricts this practice. See 28 U.S.C. § 1610(c),(d) (1976); 2 G. DELAUME, *TRANSNATIONAL CONTRACTS*, ch. 12, at 26-28 (1985)(discussing problems raised by *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (2d Cir. 1982)).

123. See, e.g., *supra* notes 2, 43 and accompanying text.

campaign would result in the satisfaction of even a substantial fraction of the debt payable under a New York judgment, since Brazilian assets overseas apparently equal only a small portion of Brazil's total foreign debt.<sup>124</sup> In short, for both strategic and financial reasons, the creditors might well have to turn to the Brazilian legal process for satisfaction. This process would involve two steps. First, the New York judgment would have to be recognized and certified as valid within Brazil through the process of *homologação*. Second, the judgment would have to be executed domestically against Brazilian debtors, a step which might well require additional procedural measures and would certainly entail the special *precatória* procedure necessary to receive payment from the Union.

#### A. *The Homologação Process*

Brazilian law has long provided a formal procedure for the recognition and certification (*homologação*) of foreign judgments within Brazil. Article 483 of the Code of Civil Procedure (CPC) states that: "Sentences pronounced by foreign tribunals will only be effective within Brazil after *homologação* by the Federal Supreme Court [*Supremo Tribunal Federal*, or STF]."<sup>125</sup> The article leaves the procedure for certification to the internal rules of the STF.<sup>126</sup> The Brazilian Constitution is the main source of the STF's power to certify foreign judgments, however.<sup>127</sup> A set of basic conditions which foreign judgments must fulfill in order to qualify for execution in Brazil is set forth by article 15 of the Introductory Law to the Civil Code (LICC). It requires that foreign judgments meet the following criteria:

- (a) the judgment shall have been rendered by a "competent judge";

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124. Noted Brazilian lawyer J.M. Pinheiro-Neto has suggested that, "Since Brazilian companies have almost no assets abroad, even though they may have accepted the jurisdiction of foreign courts, it would be impossible for the foreign lender to execute a judgment abroad. Therefore, foreign lenders would be forced to accept some form of payment which the Brazilian authorities might be prepared to allow. . . ." *Brazil's Restructuring*, *supra* note 88, at 5, col. 1.

125. Art. 483 CPC. 2 A. DE PAULA, *CÓDIGO DE PROCESSO CIVIL ANOTADO* 438-40 (1976).

126. *Id.*

127. Art. 119(l)(g) of the *Constituição da República Federativa do Brasil*, as amended by Constitutional Amendment No. 1 of Oct. 17, 1969 (Constitution of the Federative Republic of Brazil) [hereinafter *Const.*], grants the STF this authority.

(b) the parties shall have been legally served a summons or shown in default of appearance after such service;

(c) the judgment shall be complete and all steps necessary for its execution in the place of judgment shall have been taken;

(d) the judgment shall have been translated by an authorized interpreter;

(e) the judgment shall have been certified by the STF.<sup>128</sup>

The last requirement does not apply when the foreign judgment concerns the legal status of an individual, according to the article.<sup>129</sup>

In summary, then, foreign judgments may only be executed within Brazil after they meet the requirements of article 15 of the LICC, including certification by the STF. The STF has promulgated a series of Internal Rules (IR) affirming this structure: Article 215 of the IR essentially repeats article 483 of the CPC, although the language of article 215 states that the President of the STF, alone, may also certify foreign judgments.<sup>130</sup> This possibility has been criticized and now seems largely ignored.<sup>131</sup> Article 217 of the IR repeats the requirements of article 15 of the LICC, adding the condition that the foreign judgment be authenticated by a Brazilian consul.<sup>132</sup> This additional condition also appears in article 791 of the CPC.<sup>133</sup> The Internal Rules of the STF also contain a series of procedural and substantive rules governing the process of certification. After one party has requested certification of a foreign decision, in a *pedido de homologação*, the opposing party has up to fifteen days to submit a petition in response. The proponent then has five days to rebut the response, after which ten additional days are granted for the *Procurador-Geral da República* to advise

128. Art. 15, *Lei da Introdução do Código Civil* (LICC), Decree-Law 4657, Sept. 4, 1942; reprinted in *CÓDIGO CIVIL IX-XIV* (N. Garcia da Silva, 6th ed. 1985).

129. Art. 15(e), main paragraph, LICC. The constitutionality of this provision is extremely doubtful, and numerous divorce decisions (which clearly ruled upon the status of individuals) have been held to require certification anyway. See Cruz, *Brazil*, in *INTERNATIONAL COOPERATION IN CIVIL AND COMMERCIAL PROCEDURE—AMERICAN CONTINENT* 54-56 (L. Kos-Rabcewicz-Zubkowski ed. 1975).

130. The article states that foreign decisions require the prior certification of the STF, "or of its President." (emphasis added.) 37 *LEX: JURISPRUDÊNCIA DO SUPREMO TRIBUNAL FEDERAL* 46 (1982) [hereinafter *LEX*].

131. See J. CARLOS BARBOSA MOREIRA, 5 *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 106-08 (4th ed. 1981) [hereinafter *COMENTÁRIOS AO CPC*].

132. Art. 217(IV), IR, *LEX*, *supra* note 130, at 46.

133. Art. 791(IV), CPC 9 O. DE ANDRADE, *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 35 (1946).

the court of any comments of interest to the Brazilian state.<sup>134</sup> Following this process, the court may act on the request. The STF certifies foreign judgments by issuing a special writ (*carta de sentença*): the judgment in question then has the status of *título executivo*, making it immediately executable by any federal court.<sup>135</sup>

In theory, the above framework for *homologação* is purely procedural, constituting a relatively minimal inquiry into the nature of the foreign decision.<sup>136</sup> As Oscar Tenório, a noted Brazilian authority on private international law, put it, Brazil, like Italy and some other systems, "does not enter into an evaluation of the merits of the judgment; it only evaluates whether determined legal requirements have been fulfilled."<sup>137</sup> Indeed, another commentator suggests that introduction into the certification process of argument "on the merits" of the foreign decision would be improper:

A challenge may only deal with the authenticity of the documents required, that is, with the sentence itself and the papers which prove its proper presentation to a Brazilian consulate, along with other related documents included therewith; with the correct interpretation and reach of the sentence to be certified; and, finally, with the possible failure to observe all requirements imposed by Brazilian law . . . . Any other subjects would be irrelevant and should not be brought into consideration.<sup>138</sup>

Of course, what is an "on the merits" reexamination of the foreign judgment and what is a purely procedural review may be matters open to considerable controversy. More critical observers of the certification process have pointed out that issues of merit inevitably enter into the procedural process outlined above, although they may remain at the "margins of the debate."<sup>139</sup> Beyond this point, three further doubts have been raised to cloud the neu-

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134. See S. SAHIONE FADEL, 2 CÓDIGO DE PROCESSO CIVIL COMENTADO 71-72 (4th ed. 1982)[hereinafter CPC COMENTADO].

135. See COMENTÁRIOS AO CPC, *supra* note 131, at 119-21; Const., art. 125(X). On *títulos executivos*, see arts. 584 and 585 CPC (creating and governing them); 8 A. DE CASTRO, COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 49-56 (1974); see also 2 A. CARLOS COSTA E SILVA, TRATADO DO PROCESSO DE EXECUÇÃO 75-91 (1976)(review of law governing *títulos extrajudiciais*).

136. See Dolinger, *Brazilian Confirmation of Foreign Judgments*, 19 INT'L LAW. 853, 854 (1985).

137. 2 O. TENÓRIO, DIREITO INTERNACIONAL PRIVADO 376-77 (9th ed. 1968).

138. CPC COMENTADO, *supra* note 134, at 72.

139. COMENTÁRIOS AO CPC, *supra* note 131, at 102; see generally *id.* at 101-03.

tral appearance of the certification procedure. First, "the correct interpretation and reach" of the foreign judgment will have to be decided by Brazilian judges, *i.e.*, by the STF during certification and by the federal judges who later execute the judgment. Analysis of foreign decisions by judges of a different legal system may be problematic, as well.<sup>140</sup> Second, the "failure to observe all requirements imposed by Brazilian law" is a potential Pandora's box, as Part IV illustrates: this phrase seems to point to the possibility that all sorts of requirements outside the statutory clauses creating the certification process—*i.e.*, CPC 483 and 791, LICC 15, and the relevant IR of the STF—may be applied by Brazilian judges in their certification and execution activities. For example, there remains considerable doubt about whether the criteria set forth in LICC 15—"competent judge," "legal summons," and the like—are to be evaluated according to Brazilian standards, or according to the legal standards of the foreign jurisdiction issuing the sentence.<sup>141</sup> If foreign law is applied, the problem of Brazilian judges interpreting foreign law will remain; if Brazilian law is applied, the outcomes of the process may be different. Further, other aspects of the Brazilian legal system may also block certification or execution of the foreign judgment.<sup>142</sup> (For instance, articles 786 and 788 of the former CPC limited the effects which could be granted within Brazil to foreign bankruptcy judgments, although these provisions have now been omitted.)<sup>143</sup> Third, it has been suggested that the request for certification should be treated as a separate legal action (*ação*) in Brazilian law, and therefore be subject to a host of possible objections which may relate to the merits of the foreign judgment, such as lack of standing of the party seeking certification, failure to state a valid claim in the foreign action resulting in judgment, and the like.<sup>144</sup>

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140. For example, on problems raised by interpretation of U.S. law in French and German courts, see Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach*, 12 HARV. INT'L L.J. 1, 11-17 (1971).

141. See, *e.g.*, *infra* notes 183-89 and accompanying text.

142. See *infra* Part IV(B).

143. See arts. 786 and 788 of the 1939 CPC (Decree-Law 1608 of Sept. 18, 1939), now revoked, in COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL, 22-25, 29-30 (1946). See also T. DE MIRANDA VALVERDE, 3 COMENTÁRIOS À LEI DE FALÊNCIAS 165-66 (3d ed.) (discussing arts. 786 and 788 of 1939 CPC); Decree-Law No. 236, Feb. 2, 1938, in 1 LEIS DO BRASIL 68 (1938) [hereinafter LB] (restricting foreign currency payments to cover foreign debts, discussed *infra* at note 173 and text accompanying); and O. TENÓRIO, *supra* note 137, at 381. Cf. arts. 164 and 165 of the former *Lei de Falências*, Decree-Law No. 5746, Dec. 9, 1929, which was revoked by Decree-Law No. 7661, June 21, 1945.

144. COMENTÁRIOS AO CPC, *supra* note 131, at 103-06, 107-08.

*B. Execution of Judgments Against Brazilian Public Debtors*

Once a foreign judgment against Brazilian debtors is certified by the STF, it may be enforced within Brazil through the traditional process of attachment (*penhora*) and execution, as occurs in domestic bankruptcies and defaults.<sup>145</sup> In a default on a complex arrangement such as the 1983 DFA, however, some special issues might be raised. We have seen that the DFA divided outstanding loan obligations of all participating Brazilian debtors into two categories: cruzeiro debts to be paid by individual companies and entities in local currency within Brazil, and the dollar-denominated equivalents of these debts to be paid in foreign currency by the Central Bank, according to a fixed schedule. The latter obligations, the only ones of real importance to foreign creditors, were guaranteed by the Union. In a default, it must now be remembered, either one or both of two kinds of breaches could occur. In the first type of breach some or all of individual Brazilian debtors might default on the cruzeiro (or now, cruzado)-denominated debts they were supposed to repay into foreign creditors' accounts with the Central Bank. An individual debtor might fail to pay on schedule if it was experiencing domestic difficulties, for example. Of course, since the Brazilian government could simply print new cruzados and provide them on behalf of the troubled debtor, this first scenario would not need to result in an actual breach by the individual debtor. Moreover, while such cruzado-denominated loans between individual debtors and foreign creditors continue to exist for formal purposes, their breach alone would not trigger an overall default under the DFA. Only a default by the Central Bank and Union on *foreign* currency debts would lead to general default. In the second type of breach the Central Bank and the Union, its guarantor, might fail to pay foreign currency debts to creditors as provided, leading to default under the terms of the DFA.

Assuming that either the first or the second type of breach occurred, we might well envisage creditors undertaking attempts at attachment and execution to enforce domestic or foreign judgments against breaching debtors. In the first instance, the cruzado-denominated debts in question would probably have been loaned

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145. On the usual domestic process of attachment and execution, see, e.g., J. ANTÔNIO DE CASTRO, EXECUÇÃO NO CPC 179-268 (1978)(reviewing basic steps from attachment to auction of property to payment of creditors).

pursuant to the "internal relending" options established by the DFA, as described above. The loan agreements permitting such loans would undoubtedly have been domestic agreements under Brazilian law, and enforceable in Brazilian courts. Thus, creditors might sue individual breaching debtors in Brazil, seeking cruzado-denominated judgments, either to win cruzados for their own internal use within Brazil or simply to ensure proper performance of the domestic agreements. Debtor-defendants might include public or quasi-public entities.<sup>146</sup> In the second instance, of course, the agreement in question is the DFA, whose force and relevance is the subject of this Article. For the purposes of this section, it suffices to point out that creditors would be suing the Central Bank and the Union.

It is the "public" nature of the debtors involved, in either the first or the second type of breach, which might raise special obstacles to the usual process of attachment and execution. Article 67 of the Brazilian Civil Code (CC) declares all public property (*bens públicos*) "inalienable," unless the law prescribes otherwise.<sup>147</sup> Many other legal systems share this principle, of course.<sup>148</sup> In Brazil, the inalienability of public property means that it is *exempt* from attachment or other legal process.<sup>149</sup> What constitutes public property, however, is a complex matter: at a minimum, public lands, waterways, roadways, public buildings, and similar items qualify.<sup>150</sup> So do other "material or non-material things, including funds, belonging to public legal entities, which perform public objectives and are subjected to the special legal regime of public law . . . ."<sup>151</sup> This definition should allow one to determine which of the debtors hypothesized under either type of breach above would remain susceptible to attachment and execution, and which would be immune.

At a minimum, it seems clear that the Union, the legal embod-

146. See *supra* text accompanying notes 70 and 71. At this domestic level, an estimated 80% of the Brazilian debt is accounted for by public entities.

147. Art. 67 CC. See *CÓDIGO CIVIL*, *supra* note 128, at 15.

148. In the state of Tennessee, for instance, property "held in furtherance of government activities" is considered "largely inalienable." Recent Development, *Municipal Corporations — Alienability of Property*. . ., 47 TENN. L. REV. 872, 874 & n.8 (1980).

149. See A. DE OLIVEIRA MARINHO AND Z. LARA FILHO, *PROGRAMA DE DIREITO ADMINISTRATIVO* 221 (3d ed. 1985).

150. See generally 1 C. MÁRIO DA SILVA PEREIRA, *INSTITUI*. (5th ed. 1976). See also J. CRETTELLA JÚNIOR, *DOS BENS PÚBLICOS NO DIREITO BRASILEIRO* 227-30 (1969)(reviewing categories of public property in Brazilian law).

151. J. CRETTELLA JÚNIOR, *BENS PÚBLICOS* 16 (2d ed. 1975).

iment of the Brazilian state, is an inherently "public" entity and is therefore immune.<sup>152</sup> Beyond this, however, analysis of the status of other individual debtors requires a review of the doctrinal difference between "public" and "private" law in Brazil, and the relationships between these two systems and public and private entities.<sup>153</sup> Essentially, a number of legal entities in Brazil have some "public" aspect, either because they serve public goals or because the state exercises some control or ownership functions within them. *Autarquias*, for example, are entities entirely owned and controlled by the Union, fulfilling functions solely related to public administration.<sup>154</sup> They are created by the state without other participation, and act within the realm of "public" law.<sup>155</sup> The Central Bank is such a public entity, and hence is also immune from attachment and other process; as a practical matter, of course, this distinction has little significance for purposes of the DFA and similar agreements, because the Union has explicitly guaranteed the Central Bank's obligations.

Deciding which categories other individual debtors fall into is still more complicated. Under Brazilian law, three other types of legal entities may include state participation. First, "public enterprises" (*empresas públicas*) are entities whose capital is entirely held by the Union, but which are created under the regime of "private" law and may participate in ordinary commerce.<sup>156</sup> Second, "mixed capital companies" (*sociedades de economia mista*) are entities in which the Union holds a majority of ownership; they are also created under private law.<sup>157</sup> Third, all other entities are

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152. Thus, the *precatória* process for paying valid claims against the Union, see Const., art. 117, which replaces the *penhora* process used against private debtors. See R. TEIXEIRA BRANCATO, *INSTITUIÇÕES DE DIREITO PÚBLICO E DE DIREITO PRIVADO* 110 (4th ed. 1979) [hereinafter *INSTITUIÇÕES*].

153. For a general review of the domain of public law, which includes administrative law and rules governing public entities, see *INSTITUIÇÕES*, *supra* note 152, at 39-48. On private law, see *id.* at 121-22.

154. C. ANTÔNIO BANDEIRA DE MELLO, *NATUREZA E REGIME JURÍDICO DAS AUTARQUIAS* 1-13, 226 (1966). The statutory definition of *autarquia* appears in Decree-Law No. 200, Feb. 25, 1967, art. 5(1), in 1 LB 240 (1967).

155. C. ANTÔNIO BANDEIRA DE MELLO, *supra*, at 226, 229-34.

156. *Id.* at 334. I. TENÓRIO, *MANUAL DE DIREITO CONSTITUCIONAL ECONÔMICO* 34 (1983). For the statutory basis of this definition, see Decree-Law No. 200, Feb. 25, 1967, art. 5(II), 1 LB 240 (1967), revised by Decree-Law 900, Sept. 29, 1969, 5 LB 238 (1969). Originally, art. 5(II) of Decree-Law 200, *supra*, stated that public enterprises had to be engaged in activity of an "entrepreneurial nature" (*natureza empresarial*). Since 1969, however, this clause has been revised to allow public enterprises to engage in any "economic activity." 5 LB 236 (1969).

157. I. TENÓRIO, *supra* note 156, at 35-36. The statutory definition appears in Decree-



classed as ordinary corporations with other names, with varying degrees of government participation having no effect on the classification (*sociedades comerciais, sociedades anônimas, etc.*). Interestingly, it appears that none of these types of entities are "public property" for legal purposes, and hence immune from attachment, because all three are considered organized under "private" law.<sup>158</sup> For instance, *sociedades de economia mista* are considered private, according to one source, because they associate the state with private capital, under mixed direction, in pursuit of commercial ends.<sup>159</sup>

Most observers agree that Brazilian legal doctrine is unclear and confusing in the realm of public/private distinctions, however, leaving the probable immunity from attachment of certain debtors in doubt.<sup>160</sup> One writer has commented upon the artificiality of the division between *autarquias* and "public enterprises." For instance, companies like Petrobrás, though traditionally considered *empresas públicas*, have many characteristics of *autarquias*: Petrobrás is the state oil company, remains under strict state control, and performs duties of major national importance. Its aspects of a "private" nature—private law charter and private ownership of a minority of total shares—are arguably dwarfed in importance by its public side.<sup>161</sup> Similarly, an analysis of the Companhia Siderúrgica Nacional (CSN), a major steel producer created in 1941 with substantial private participation, has questioned that entity's proper status. Though traditionally seen as a "mixed capital company" because of its private law charter and share makeup, CSN might more usefully be classed as a "public enterprise" because extensive state intervention in the steel market has put the

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Law No. 200, *supra* art. 5(III), 1 LB 241 (1967), revised by Decree-Law No. 900, *supra*, 5 LB 238 (1969). In the case of mixed capital companies, the 1967 law stated that they had to engage in activity of a "commercial nature" (*natureza mercantil*); the 1969 law changed that to any "economic activity," as it had for public enterprises. See *supra* note 156.

158. Only *autarquias* are organized under public law, despite the implication to the contrary in art. 163(2) of the 1967 Brazilian Constitution, which appears to be in error. C. ANTÔNIO BANDEIRA DE MELLO, *supra* note 154, at 235-36. Indeed, the special status of *autarquias* is recognized by the STF, which has ruled that they have immunity from all taxes under art. 31(V) of the Constitution. *Súmula* [ruling] 73 of the STF, in R. ROSAS, DIREITO SUMULAR 36-37 (2d ed. 1981).

159. C. ANTÔNIO BANDEIRA DE MELLO, *supra* note 154, at 334.

160. See L. VALLE FIGUEIREDO, EMPRESAS PÚBLICAS E SOCIEDADES DE ECONOMIA MISTA 18-26 (1978). On characteristics which generally divide the public from the private, see *id.* at 24.

161. C. ANTÔNIO BANDEIRA DE MELLO, *supra* note 154, at 235.

company, in effect, under total state control.<sup>162</sup> Similar arguments could equally be made about scores of other companies, given the history of widespread government interference in numerous economic sectors in Brazil.<sup>163</sup>

To the extent that "public" and "private" classifications may be trusted in the first type of breach discussed above (default on a cruzado-denominated obligation), creditors might successfully seek attachment and execution against the assets of public and private legal entities of all types, but not against the Union or the Central Bank. Further, other official government agencies or *autarquias* (like the Central Bank) would be similarly immune. "Public enterprises" and *autarquias* have traditionally accepted responsibility for their own debts and obligations within Brazil, and the Union has made up any shortfalls when resources of these entities proved insufficient, but this does not mean that their assets could be attached in court.<sup>164</sup> As for the second type of breach discussed above (default on foreign currency obligations, as under the DFA), creditors could not attach assets of the Union or the Central Bank in pursuit of remedies. The existence of such immunity is subtly noted at one point in the DFA,<sup>165</sup> and underscored more openly in language stating that Brazilian enforcement of judgments under the DFA shall be subject to article 67 of the CC.<sup>166</sup>

All of this does not mean that creditors are without means of obtaining satisfaction from "immune" public debtors under the procedures established by Brazilian law. Indeed, the special, constitutionally-created *precatória* process exists specifically to reimburse claimants to whom the government is held to owe money. Extracting payment from the Union would not be a simple matter, however. Article 117 of the Brazilian Constitution establishes formal steps for payment of valid claims or debts from the public

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162. J. SERPA DE SANTA MARIA, *SOCIEDADES DE ECONOMIA MISTA E EMPRESAS PÚBLICAS* 341-43 (1979).

163. On the extent of government intervention in the Brazilian economy, see, e.g., Faucher, *Industrial Policy in a Dependent State: The Case of Brazil*, 7 *LATIN AM. PERSP.* 3, 12-18 (1980)(Brazilian state sector expands to compensate for private sector's economic deficiencies); Fox, *Has Brazil Moved Toward State Capitalism?*, 7 *LATIN AM. PERSP.* 64, 69-76 (1980); L.C. BRESSER PEREIRA, *ECONOMIA BRASILEIRA: UMA INTRODUÇÃO CRÍTICA* 51-61 (1982)(increasing state capitalism and "technobureaucratic capitalism" in Brazil).

164. See C. ANTÔNIO BANDEIRA DE MELLO, *supra* note 154, at 466-67.

165. Because § 8.07(c) waives immunity "to the fullest extent . . . permitted by applicable law of [the] jurisdiction. . . ." See *supra* notes 105-06 and accompanying text.

166. 1983 DFA § 8.07(c).

treasury.<sup>167</sup> Once a federal court has executed a judgment against the Union, the Union has ten days in which to seek a stay of execution (*embargo*), after which hearings may be held and a final ruling made by the court.<sup>168</sup> Thereafter, the court may order payment of the debt in question from the budget of the public treasury.<sup>169</sup> If no provision for such payment has been made in the current budget, the creditor must wait until the following year; all claims are paid in order of presentation.<sup>170</sup> Although this process seems straightforward, it may be fraught with opportunities for delay and obfuscation.<sup>171</sup>

Additional technical problems involving execution and payment would make the process still more uncertain. Three examples should suffice. First, a Brazilian court could not necessarily order the Union to pay foreign currency debts to creditors abroad. Traditionally, Brazilian law prohibited payment of foreign currency to foreign creditors in satisfaction of foreign judgments. Brazilian debtors could satisfy a foreign currency debt by paying its cruzado equivalent to the Banco do Brasil [a "mixed capital company"<sup>172</sup> in which the Brazilian Republic holds a majority interest]; Banco do Brasil would then reimburse the foreign creditor in the currency of account "within the foreign exchange possibilities of the nation."<sup>173</sup> This particular provision has recently been revoked in the case of "international" contracts, which would seem to include interna-

167. Const., art. 117. See also art. 345 of IR of the STF, LEX, *supra* note 130, at 61.

168. Art. 730 CPC. See H. THEODORO JÚNIOR, *PROCESSO DE EXECUÇÃO* 349-50 (4th ed. 1978).

169. See Const., art. 117, and art. 731 CPC; C. NEVES, *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 167 (n.d.).

170. See T. NEGRÃO, *CÓDIGO DE PROCESSO CIVIL* 246 (14th ed. 1985).

171. For example, a recent action by Grupo Coroa against the Brazilian Central Bank resulted in a judgment against the Bank, but payment seemed likely to be delayed by appeals, issues arising from the exact valuation of the damages incurred, and the "monetary correction" of those damages to account for inflation. Ultimately, though, it appeared likely that the Treasury would pick up the bill. See *Juiz condene BC a indenizar os lesados da Coroa*, *Jornal do Brasil*, May 17, 1985, at 19, col. 1.

172. See text accompanying note 157.

173. See Decree-Law No. 236, Feb. 2, 1938, I LB 68 (1938). This law also stated that foreign judgments requiring payments in foreign currency were not executable within Brazil. *Id.* Additionally, it is worth noting that in bankruptcy Brazilian debtors may still pay off foreign currency debts by depositing their cruzado equivalent with the judicial authority in charge of the bankruptcy. 2 J. DA SILVA PACHECO, *TRATADO DAS EXECUÇÕES: FALÊNCIA E CONCORDATA* § 989, at 171 (1977); art. 213 of Decree-Law 7661 (1945)[no publication in LB of 1945]. For a recent decision applying art. 213 of Decree-Law 7661, see ERE 94.203-3-RJ (Feb. 10, 1984). See also *Brazil's Restructuring: The Legal Issues*, *supra* note 88, at 5, cols. 1-2.

tional loan agreements.<sup>174</sup> However, payments to foreign creditors in foreign currency would still be barred, in any case, by recent exchange regulations such as Central Bank Resolution 851, which requires that the Brazilian Central Bank approve all foreign currency transfers.<sup>175</sup> Simply by refusing approval, the Central Bank could, and presumably would, block payment designed to satisfy a foreign judgment.<sup>176</sup>

Second, despite specific provision in the DFA, this and similar debt agreements may not be able to benefit from a special summary proceeding designed to drastically simplify execution procedures. Previously, international loan agreements often recited that they constituted *títulos executivos extrajudiciais* (TEEs), meaning that in case of default they would be enforced in a speedy, streamlined proceeding governed by articles 583-585 of the CPC.<sup>177</sup> Among other things, the procedure allowed prejudgment attachment of all debtor assets capable of satisfying the debt, although the debtor could later raise all available defenses.<sup>178</sup> The DFA specifically contained such a TEE clause, envisaging enforcement in Brazilian courts.<sup>179</sup> However, a 1984 decision of the Rio de Janeiro state Court of Appeals has recently cast doubt upon the applicability of TEE procedures to foreign debt agreements, holding that only agreements specifying Brazil as the place of payment may qualify as TEEs.<sup>180</sup>

Third, a number of other issues of a technical nature are currently subject to controversy, and could have important consequences for Brazilian enforcement of international debt agreements. The STF recently held that guarantors of Brazilian debt do

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174. Art. 2(IV), Decree-Law No. 857, Sept. 11, 1969, V LB 199-200 (1969). Article 4 of the same Decree-Law revokes Decree-Law No. 236 of Feb. 2, 1938. See also Xavier, *Validade das Cláusulas em Moeda Estrangeira nos Contratos Internos e Internacionais*, in ESTUDOS JURÍDICOS SOBRE INVESTIMENTO INTERNACIONAL, *supra* note 64, at 1-5. On the problems of interpreting the regulations involved in such matters, see *id.* at 5-19.

175. Banco Central Resolução No. 851, July 29, 1983, in 20 RELATÓRIO DO BANCO CENTRAL DO BRASIL, *supra* note 21, at 114.

176. Under the DFA, however, these possibilities are prohibited. The Central Bank covenants that it will approve foreign exchange transactions necessary for debt repayments under the agreement, 1983 DFA § 5.01(g); failure to observe this covenant would constitute an event of default, 1983 DFA § 6.01(c).

177. See *supra* citations in note 135.

178. See Mendes, *Enforcement of Loans to Brazil Put at Risk*, 1985 INT'L FIN. L. REV. 14-15.

179. 1983 DFA § 12.6.

180. The decision in question is RE 101.120. The STF refused to hear an appeal, making this decision final, on Sept. 4, 1984.

not benefit from the same protection as original debtors who enter bankruptcy proceedings, although other versions of the same argument may still be pending.<sup>181</sup> The appropriate degree of indexed monetary correction of debts due, which is important for debts incurred over a period of years, and for cruzado amounts deposited with courts in satisfaction of obligations—given Brazil's searing triple-digit inflation of recent years—is another issue currently attracting much attention and provoking litigation.<sup>182</sup>

#### IV. DOCTRINAL OBSTACLES TO RECOGNITION OR ENFORCEMENT OF FOREIGN CONTRACTS AND JUDGMENTS: INTERNATIONAL JURISDICTION AND "PUBLIC ORDER"

Once the attempt of foreign creditors to collect on Brazilian debts, public or private, has come within the reach of Brazilian courts, a host of additional legal principles may come into play. Debt disputes may enter the jurisdiction of Brazilian courts by at least three means: the request of foreign creditors for *homologação* of a foreign sentence; an initial action brought by creditors within Brazil to enforce the loan agreement on which debtors have defaulted; or a defensive action by debtors within Brazil to counteract the possible effects of foreign actions brought by creditors. In any of these cases, two important principles might lead Brazilian courts to refuse a request for certification, or refuse to enforce the loan agreements in initial domestic actions. These principles, respectively, are "international jurisdiction" and "public order." Their application and content, however, are imprecise and currently subject to considerable debate within the Brazilian legal community.

##### A. *International Jurisdiction of Brazilian Courts*

###### 1. Exclusive Jurisdiction

As previously noted, article 15(a) of the LICC requires that foreign judgments submitted for certification within Brazil be rendered by a "competent judge," meaning a judge or court of compe-

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181. See Mendes, *Guarantor Fully Liable in Brazilian Bankruptcy*, 1984 INT'L FIN. L. REV. 47-48.

182. See generally, e.g., A CESAR BURLAMAQUI E J. OLYMPIO ALVES DA SILVA, *CORREÇÃO MONETÁRIA NA FALÊNCIA* (2d ed. 1984). It must also be asked how the recent deindexation of the Brazilian economy will effect such "correction" calculations.

tent jurisdiction.<sup>183</sup> The meaning of this provision, like others of article 15 LICC, has generated considerable discussion, because the text of the article does not state whether the foreign judge must be competent according to the standards of his own jurisdiction or of Brazilian law.<sup>184</sup> Internationally-minded analysts, like Oscar Tenório<sup>185</sup> and Haroldo Valladão<sup>186</sup> (a second, similarly-respected commentator on private international law) suggest that concerns of comity and logic require one to interpret competence under the law of the foreign court.<sup>187</sup> Other commentators suggest that Brazilian law, rather than foreign law, should determine competence, because such questions are the concern of Brazilian private international law.<sup>188</sup> In the past, it has seemed unclear which is the majority and which the minority view. Currently, though, a major ruling holds that Brazilian law applies to questions of competence.<sup>189</sup> The matter is one of importance because the rules of Brazilian private international law include the concept of "exclusive international jurisdiction," under which Brazilian courts may claim exclusive jurisdiction over some matters with foreign aspects. In such cases, the jurisdiction of foreign courts over the same matter will not be recognized within Brazil, and certification of foreign judgments regarding this matter will be denied.

The concept of "exclusive" jurisdiction currently stems from article 89 of the CPC, which holds that Brazilian courts have exclusive jurisdiction, and hence must refuse to recognize that of foreign courts, over actions "concerning real property [i.e. real estate] situated in Brazil."<sup>190</sup> The question then becomes, of course, what

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183. See text accompanying note 128 *supra*.

184. See text accompanying and following note 141 *supra*.

185. O. TENÓRIO, *supra* note 137, at 378-79.

186. 3 H. VALLADÃO, *DIREITO INTERNACIONAL PRIVADO* 199-200 (1978). However, Valladão says that if the foreign rules regarding competence violate Brazilian "public order" (on this concept, see *infra* Part IV.B), they may be rejected. *Id.* at 199.

187. For a review of other analyses to the same effect, see 2 W. DE SOUZA CAMPOS BATALHA, *TRATADO DE DIREITO INTERNACIONAL PRIVADO* 440-42 (1977).

188. See Franceschini, *A Lei e O Foro de Eleição em Tema de Contratos Internacionais*, *CONTRATOS INTERNACIONAIS* 94-142 (J. Grandino Rodas ed. 1985); for a review of opinions on both sides, see *id.* at 121-23. See also W. DE SOUZA CAMPOS BATALHA, *supra* note 187, at 443-44.

189. On past doctrine, see Franceschini, *supra*, at 123. At present, Professor Dolinger reports that the 1974 STF decision in *Cesar Yazagi and Herbert S. Burr v. M. Dedini S.A. Metalurgica, et al.*, 87 *Revista Trimestral de Jurisprudência* 384 (1974) [hereinafter R.T.J.] calls for review under Brazilian law. Dolinger, *supra* note 136, at 859-61.

190. Art. 89(1) CPC, see 1 C. AGRÍCOLA BARBI, *COMENTÁRIOS AO CÓDIGO DO PROCESSO CIVIL* 389 (3d ed. 1983). Foreign judgments falling within this category will thus have "no validity" within Brazil. *Id.* at 396. See also V. GRECO FILHO, *HOMOLOGAÇÃO DE SENTENÇA*

actions concern real property situated in Brazil, and whether actions based on foreign default judgments, or requests for certification of such judgments, fall into this category. The existing doctrine regarding article 89 tells us little. Celso Agrícola Barbi suggests that any action involving rights in Brazilian-located real estate would be sufficient:

the type of action is not important, that is, it may be condemnatory, declaratory, or constitutive. What prevails is the relationship between the right alleged to exist and the real property. If this link exists, Brazilian courts have jurisdiction to the exclusion of any others.<sup>191</sup>

This interpretation coincides with the principle of territoriality, under which states have exclusive jurisdiction over property within their borders.<sup>192</sup> Vicente Greco Filho, another commentator who has written on *homologação*, appears to support this broad view.<sup>193</sup> He further suggests that jurisprudence relating to article 136 of the previous CPC may be helpful in determining the meaning of the phrase "concerning real property."<sup>194</sup>

Given this background, it seems arguable that a foreign judgment requiring transfer of rights in real estate located within Brazil, or an action seeking certification toward that end, would fall within article 89 CPC, and hence be denied certification. At least one decision of the STF lends credence to such a theory. In 1982 the STF held a West German bankruptcy judgment incapable of certification, because its effects would relate exclusively to real estate of a Brazilian debtor located within Brazil, offending article 89 CPC and other Brazilian legal provisions.<sup>195</sup> Other jurisprudence on point relates largely to inheritance and estate matters, specifically dealt with by part II of article 89 CPC, and so is less

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ESTRANGEIRA 72 & n.9 (1978).

191. BARBI, *supra* note 190, at 399.

192. *Id.* at 397; V. GRECO FILHO, *supra* note 190, at 73.

193. V. GRECO FILHO, *supra* note 190, at 73.

194. *Id.* Commentaries to article 136 of the former CPC (Decree-Law No. 1608, Sept. 18, 1939; revoked by the new CPC, Law No. 5869, Jan. 11, 1973) shed little light on this subject: they suggested merely that "actions concerning real property" may be simple or mixed (*i.e.* combined) actions, under the rule of *in rem scripta*. See, *e.g.*, 2 P. BATISTA MARTINS, *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 164-71, especially 165-70 (2d ed. 1960). See also 3 M. MARIA DE SERPA LOPES, *COMENTÁRIOS À LEI DE INTRODUÇÃO AO CÓDIGO CIVIL* 121 (2d ed. 1959); 2 P. DE MIRANDA, *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 288-89 (2d ed. 1979).

195. *Sentença Estrangeira* No. 2492, 101 R.T.J. 69-90 (July, 1982).

helpful.<sup>196</sup>

A second possible topic of "exclusive" jurisdiction is raised by cases in which the defendant in an action is domiciled within Brazil. However, this category most likely only merits "non-exclusive" jurisdiction, as suggested in subpart 2 below. Article 88 of the CPC holds that Brazilian courts have jurisdiction over all actions in which the defendant (*réu*) is domiciled in Brazil,<sup>197</sup> and further defines "domiciled" as including foreign legal entities with an agency, subsidiary, or branch in Brazil.<sup>198</sup> Article 12 of the LICC also confers jurisdiction over defendants domiciled in Brazil.<sup>199</sup> Further, article 125 of the Brazilian Constitution grants federal courts jurisdiction over "causes [of action] in which the Union, autarchic entities [*i.e.*, government agencies] or federal public enterprises are involved as . . . defendants . . ." <sup>200</sup> While the language of these clauses is not explicitly "exclusive," numerous commentators have interpreted them as having an exclusive meaning, or have analyzed earlier versions of the present clauses as having such meaning. A recent commentator of the Brazilian CC suggests that foreign judgments against persons domiciled in Brazil cannot be certified, citing a number of divorce cases as support.<sup>201</sup> Oscar Tenório concurs with this point of view.<sup>202</sup>

Similarly, one foreign author notes that article 125(1) of the Constitution has been interpreted as granting Brazilian courts exclusive jurisdiction over actions involving the Union as a party.<sup>203</sup> These claims are apparently based on some relatively old court decisions. One frequently-cited 1926 STF decision indeed held that foreign judgments against Brazilian-domiciled defendants could not receive certification because the foreign judge was "incompetent" under Brazilian law. The law of the country of *execution* was held to apply in determinations of competence, although the de-

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196. See, e.g., *Sentença Estrangeira* No. 2151, 489 R. Trib. 247 (July, 1976)(disposition of will probated in Paraguay; court denied certification of foreign judgment). On art. 89(II) CPC, see also BARBI, *supra* note 190, at 398-400.

197. Art. 88(I) CPC. See BARBI, *supra* note 190, at 392-98; Dolinger, *supra* note 136, at 857.

198. Art. 88 CPC, main paragraph.

199. Art. 12 LICC, *cited supra* note 128. See also BARBI, *supra* note 190, at 394.

200. Const., art. 125(I).

201. See 2 I. DE HUGO SILVA, *BREVES COMENTÁRIOS AO CÓDIGO CIVIL* 49-52 (1981).

202. See O. TENÓRIO, *supra* note 137, at 378-79.

203. See Samtleben, *Arbitragem no Brasil*, 77 *REVISTA DA FACULDADE DE DIREITO, UNIVERSIDADE DE SÃO PAULO* 185, 210 n.155 (1982), *citing* Rosenn, *supra* note 95, at 502 & n.14.



fendant, a Bahian trading company, had been properly cited and appeared in the French court offering the judgment, the First Civil Chamber of Le Havre, to defend its position under French law.<sup>204</sup> In the same vein, a 1942 STF decision refused to certify a Swiss divorce decree, holding that article 15 of the former LICC<sup>205</sup> prevented foreign decisions from being certified against Brazilian residents.<sup>206</sup> One of the judges even specifically stated that article 12 of the current LICC, which had just gone into effect, but did not apply to the controversy at hand, had the same meaning as the old article 15, granting Brazilian tribunals exclusive jurisdiction.<sup>207</sup> Interestingly, however, both the 1926<sup>208</sup> and 1942 decisions mention the concept of "public order" (*ordem pública*), suggesting that perhaps this latter concept, rather than that of international jurisdiction, may have been operative in the thinking of the judges. (Public order is examined in subpart B below.) In particular, it seems that the 1942 result occurred primarily because divorce was illegal in Brazil at that time, and granting domestic effect to foreign decrees would offend Brazilian morality and "national sentiments."<sup>209</sup> The jurisdiction argument may have simply constituted an additional technical wrinkle useful for judges unwilling to accept the public order analysis, but willing to go along with the overall result.

In fact, it is unclear that either article 12 of the LICC or articles 88 of the CPC are today considered to grant "exclusive" jurisdiction at all. Celso Agrícola Barbi's treatise on the CPC suggests that articles 12 LICC and 88 CPC grant only "non-exclusive" juris-

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204. 1929 D. Just. 707 (dated Feb. 9; judgment handed down Sept. 22, 1926). On decisions and practices concerning certification of foreign decisions in the period before the 1942 LICC was adopted, see generally O. DA CUNHA, *A HOMOLOGAÇÃO DA SENTENÇA ESTRANGEIRA E O DIREITO JUDICIÁRIO CIVIL BRASILEIRO* (1933).

205. The previous version of art. 15 LICC read as follows: "The law of the place in which an action is undertaken shall govern [questions of] jurisdiction, procedure, and available defenses; [however,] Brazilian tribunals shall always retain jurisdiction over complaints against persons domiciled or resident in Brazil, arising from obligations assumed in this or another country." 1 J.M. DE CARVALHO SANTOS, *CÓDIGO CIVIL BRASILEIRO INTERPRETADO* 183 (11th ed., n.d.; first ed. 1933). It is unclear how the judges in the 1942 decision could have derived *exclusive* jurisdiction from this language alone.

206. *Sentença Estrangeira* No. 1023, 148 R. Trib. 771 (March 1944)(decision handed down Sept. 30, 1942).

207. 148 R. Trib., *supra*, at 775 (opinion of Minister Waldemar Falcão).

208. See 1929 D. Just., *supra* note 204, at 707. The phrase "public order" mentioned in this decision may refer to *international* public order rather than a peculiarly Brazilian brand of public order.

209. See 148 R. Trib., *supra* note 206, at 774 (opinion of Minister Orozimbo Nonato).

diction. He calls Brazilian authority over such cases “concurrent, that is, they may also be judged by foreign tribunals.”<sup>210</sup> University of São Paulo professor Irineu Strenger contends that article 12 LICC grants Brazilian-domiciled defendant the *option* of exclusive jurisdiction, but does not apply when the defendant has waived exclusivity by willingly submitting to the foreign jurisdiction, for example.<sup>211</sup>

## 2. Non-exclusive Jurisdiction

We have already seen that article 88 CPC and 125(1) of the Constitution, along with article 12 LICC, grant Brazilian courts jurisdiction over cases involving the Union and defendants domiciled within Brazil. At a minimum, such jurisdiction may be interpreted as non-exclusive, providing Brazilian courts with competence over such matters without necessarily denying that of foreign tribunals.<sup>212</sup> Such provisions are important for their potential strategic value in any litigation battle between creditors and debtors. Let us suppose that in an international default, foreign creditors of Brazil brought an initial action in the courts of New York or London, as provided under the DFA. While that action was pending, Brazilian debtors could bring a second, contrary action within Brazil based on identical subject matter—for example, claiming that the foreign action created some contract or tort claim—or otherwise disputing the facts of performance of the loan agreements. Two issues without clear solutions are raised by this prospect. First, Brazilian jurisprudence may not require Brazilian courts to defer to the foreign action, though it began first. Second, some doubts might be raised about whether a judgment in the first, foreign action would have any effect on the second, domestic action. In fact, as discussed below, a final foreign judgment certified in Brazil probably *does* extinguish identical domestic actions. It remains true, however, that combinations of conflicting foreign and Brazilian court decisions might emerge regarding the same subject matter, with unclear ultimate consequences within Brazil and in third-state jurisdictions.

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210. BARBI, *supra* note 190, at 395.

211. Strenger, *Reconhecimento de Sentença Estrangeira de Rêu Revel Devidamente Citado*, 593 R. Trib. 62-64, especially 63, col. 2 (March 1985). Strenger also mentions “public order” as a principle potentially available to deny validity to the foreign jurisdiction. *Id.* at 63.

212. See, e.g., BARBI, *supra* note 190, at 395.

This strange outcome might be blamed on article 90 of the CPC, which states that potential claims pendent to a claim being heard in a foreign court do not necessarily have to be joined to the foreign action, as would be required for domestic actions under the rule of *litispendência*. Instead, the pendent claims may be heard separately from the foreign action, in a Brazilian court. Further, Brazilian courts may hear the same claim being adjudicated abroad, as well as claims pendent to it.<sup>213</sup> Celso Agrícola Barbi suggests that the objective of these provisions is, in fact, to preserve the widest possible jurisdiction for Brazilian courts, "since it is natural that domestic law prefer judgment by the courts of our country."<sup>214</sup> Article 90 CPC thus increases the chances that Brazilian courts will refuse to certify a foreign judgment when the "same claim" involved in the foreign case is pending within Brazil,<sup>215</sup> and that they will accept jurisdiction over claims related to pending foreign actions.<sup>216</sup>

Support for such interpretations of the jurisdictional rules, however, is mixed in Brazilian case law and doctrine. Miguel Maria de Serpa Lopes, whose treatise on the LICC stands as a classic on the subject, seems to suggest that a foreign decision which constitutes *res judicata* abroad may indeed block Brazilian jurisdiction over the same subject matter.<sup>217</sup> Current authorities tend to support this view, and a recent STF decision proclaims the "dominant opinion" to be that pending actions within Brazil do *not* prevent certification of foreign cases dealing with the same matter.<sup>218</sup> This settles, in part, the issue raised by Serpa Lopes, since foreign decisions with certification would constitute *coisa julgada* within Brazil, shutting off all future actions.<sup>219</sup> In short, there may be limits

213. Art. 90 CPC; see BARBI, *supra* note 190, at 400-01.

214. BARBI, *supra* note 190, at 401 (§ 496, par. 2).

215. *Id.* at 402 (§ 499). The text cites art. 797(6) of the Italian Civil Code as an example of a similar provision.

216. *Id.* (§ 498).

217. SERPA LOPES, *supra* note 194, at 102.

218. In this decision, the STF granted certification to an Italian divorce decree. *Sentença Estrangeira* No. 2727, 97 R.T.J. 1005 (Sept. 1981) (see opinion of Minister Xavier de Albuquerque at 1009-10).

219. The Brazilian legal concept of *coisa julgada* ("thing judged") is similar to *res judicata* as used in common law systems. See art. 467 CPC (stating that the status of *coisa julgada* is obtained when measures have been taken which "turn the judgment immutable and inamenable to further discussion, [and] no longer subject to ordinary or extraordinary appeal."); see also 2 A. DE PAULA, *CÓDIGO DE PROCESSO CIVIL ANOTADO* 399-406 (1976). On the theory and historical background of the *coisa julgada* concept, see generally C. NEVES, *COISA JULGADA CIVIL* (1971) (especially at 309-30).

to the interference value which "non-exclusive" jurisdiction may provide for tactically-minded debtors.

Conversely, the simple commencement of a foreign action probably *does not* bar an identical or similar Brazilian action, however. At least one author has argued that no such bar to domestic actions exists in Brazilian law,<sup>220</sup> basing his analysis on the work of Celso Agricola Barbi<sup>221</sup> and others.<sup>222</sup> On the other hand, both Vicente Greco Filho and Luis César Ramos Pereira have recently contended that Brazilian law should, if it does not already, accept the principle of *litispêndencia internacional* (i.e., barring local jurisdiction over matters already in foreign courts). Greco Filho points out that Brazilian domestic law includes this principle for policy reasons of efficiency and avoidance of contradictory decisions. The same reasons are equally valid in international law.<sup>223</sup> Luis César Ramos Pereira criticizes the text of article 90 CPC as an unfortunate copy of the Italian CPC,<sup>224</sup> and also notes the advantages of efficiency and certainty which a barring principle would bestow.<sup>225</sup> But these arguments alone do not make the principle part of Brazilian law. For the moment, the possibility remains that multiple actions regarding the same subject matter might appear simultaneously in Brazil and abroad.

One means of avoiding contradictory decisions, of course, would be for the foreign action to end first and receive certification in Brazil, thereby becoming *res judicata* and shutting off the unfinished Brazilian actions. Similarly, the domestic action might end first. The ensuing judgment would also be *res judicata*, and as such would block certification of a foreign judgment involving the same subject matter.<sup>226</sup> Indeed, a race between the foreign and Brazilian actions might be generated, with debtors and creditors

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220. Wilson de Souza Campos Batalha, *cited in* V. GRECO FILHO, *supra* note 190, at 76-78.

221. *See supra* notes 215, 216 and accompanying text.

222. *See, e.g.*, discussion of analysis of Georgette Nacarato Nazo, who accepts the principle that a foreign *coisa julgada* should bar a domestic action, but does not extend this power to foreign actions in progress. *Cited in* V. GRECO FILHO, *supra* note 190, at 77 & n.17.

223. *Id.* at 78. For further discussion and difficulties with this approach, *see id.* at 78-85.

224. César Ramos Pereira, *A Competência Internacional da Autoridade Judiciária Brasileira*, 586 R. Trib. 15, at 19, col. 2 (Aug. 1984).

225. *Id.* at 20.

226. Because a foreign judgment purporting to attack *coisa julgada* in Brazil cannot be certified. *See* A. FERNANDES DIAS DA SILVA, *DIREITO PROCESSUAL INTERNACIONAL* 176-77 (1971)[out of print; available at library of Ordem de Advogados do Brasil, Rio de Janeiro].

each rushing to win a judgment first in order to forestall further litigation in the opposite forum. While hypothetical, such situations illustrate the complex difficulties which attempts to enforce loan agreements might face.

### B. Public Order (*Ordem Pública*)

Article 17 of the LICC provides that “[t]he laws, official acts and judgments of another country, as well as any declarations of intent, shall have no effects in Brazil when they are offensive to national sovereignty, public order [*ordem pública*] and accepted customs.”<sup>227</sup> The meaning of this vaguely worded provision has been the subject of much discussion and analysis, but few conclusions. The European civil law concept of *ordre publique*, roughly translated as “public order” is similar, but not identical, to the United States’ “public policy,” and it remains a basic principle of many legal systems.<sup>228</sup> Generally speaking it refers to actions considered incompatible with the law of a particular state because they conflict with that state’s basic moral, legal, or political order. In the context of international loan agreements, public order might be invoked to claim that either the requested certification of a foreign judgment or the enforcement of contractual clauses would conflict with Brazilian law. In fact, the possibility that public order arguments might prevent enforcement of international loan agreements has already provoked commentary by an Argentine author.<sup>229</sup>

Years of Brazilian analysis have not honed the meaning of public order, or its application in legal proceedings, to a fine point. Still, all observers agree on the concept’s existence and potential analytic power. In 1921 the illustrious Clovis Bevilacqua, author of the Brazilian Civil Code, suggested that public order “extends itself, like a guardian, over the entire organic life of the state, and, for this reason, varies considerably in the possibilities of its being offended.”<sup>230</sup> Serpa Lopes, author of the LICC, agrees that the con-

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227. Art. 17 LICC, *supra* note 128.

228. On comparisons between European, Brazilian, and other national concepts of public order, as well as the application of “international public order,” see Soares, *A Ordem Pública Nos Contratos Internacionais*, 55 REVISTA DE DIREITO MERCANTIL 122-29 (1984).

229. See Balestra, *El Orden Publico en La Contratacion Internacional*, 55 REVISTA DE DIREITO MERCANTIL 130-34 (1984).

230. 1 CÓDIGO CIVIL DOS ESTADOS UNIDOS DO BRASIL, COMENTADO POR CLOVIS BEVILACQUA 148-49 (1921).

tent of public order may change with time, but generally acts as a "mechanism of guarantee in relation to norms which possess a substantial moral, political or *economic* value." (Emphasis added).<sup>231</sup> Oscar Tenório explains that the essence of public order is the unacceptability of foreign acts which conflict with the basic legal order of the host state: "As the legal order of each state is the expression of certain moral and political values, there is a fundamental interest in preserving [that order]."<sup>232</sup> And the 1942 STF decision cited previously contains an unusually lengthy discussion of public order, finding that ratification of a foreign divorce decree within Brazil would violate this principle, and concluding that the concept of public order

only with difficulty permits a complete formulation . . . . Everyone, however, understands and feels that it constitutes those supreme principles which form the base of the moral and legal order of each people, forming an institutional system destined to defend . . . the highest moral, political, religious and economic principles which underlie the organization of the state, within the normal equilibrium of the life of the individual and of the nation . . . .

Because the concept involves criteria which are national and contingent, historical and variable, [the French scholar] Arminjon said that its application depended on the analysis of the judge.

The judge, however, may not substitute his own ideas and inspirations for those which constitute the average sentiment of the people.<sup>233</sup>

Applications of this concept are, as Strenger points out, "rare and conflicting."<sup>234</sup> They generally involve analysis by the Brazilian judge of the foreign decision, law, or action with an eye to the Brazilian Constitution and laws, as well as a possible inquiry into the nature of the foreign law to see whether it presents any conflict with the basic legal order of Brazil.<sup>235</sup> Strenger contends that public order is indeed the operative concept in article 17 LICC, because the terms "national sovereignty" and "accepted customs" are

231. SERPA LOPES, *supra* note 194, at 300. For a review of previous conceptions of public order, see *id.* at 278-83.

232. I O. TENÓRIO, *supra* note 137, at 324.

233. 148 R. Trib., *supra* note 206, at 774.

234. I. STRENGER, CURSO DE DIREITO INTERNACIONAL PRIVADO 512 (1978).

235. *Id.* at 513.

inherently repetitive of the myriad of concepts contained within public order.<sup>236</sup> In any case, rulings applying the concept seem to involve direct conflicts between foreign law and basic Brazilian legal norms, rather than merely broad "moral, political and economic" values. The refusal to certify a Swiss divorce has been noted above.<sup>237</sup> Some authorities consider claims of foreign jurisdiction in areas coming under the exclusive "international jurisdiction" of Brazil to violate public order, aside from being regulated by the rules discussed in Part A above.<sup>238</sup> Failure to serve a proper summons on parties in a foreign jurisdiction has also been deemed to violate Brazilian public order, as well as article 15(b) LICC, and hence to bar certification of foreign judgments involving such parties.<sup>239</sup> The possibilities of application of the concept are, of course, much broader than these examples illustrate, leading one writer to comment that public order is potentially a "blank check" for judges.<sup>240</sup>

In trying to determine what aspects of international loan agreements might be struck down by Brazilian courts on grounds of public order, then, one should seek some basic conflict between portions of the agreements and principles which seem fundamental to the Brazilian legal order. A creative judge could stretch the parameters of "moral, political, and economic" values in numerous cases to deny certification of foreign decisions or enforcement of contract clauses. The next few subsections deal with some areas in which the concept of public order might arguably be applied. They are choice of law and forum; waivers of sovereign immunity; arbitration clauses; loan provisions; constitutional problems of authorization for borrowing; and general economic or political threats to sovereignty.

## 1. Governing Law and Choice of Forum

It seems likely that Brazilian courts would uphold the gov-

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236. *Id.* at 514-15. Oscar Tenório disagrees with this assertion: for him, the words "accepted customs" (*bons costumes*) have a separate meaning from "public order." See 1 O. TENÓRIO, *supra* note 137, at 337. Rosenn translates *bons costumes* as "good morals[.]" Rosenn, *supra* note 95, at 501.

237. See *supra* note 206 and accompanying text.

238. See, e.g., 3 H. VALLADÃO, *supra* note 186, at 199-200; Samtleben, *supra* note 203, at 203.

239. Samtleben, *supra* note 203, at 203; see also *Sentença Estrangeira* No. 3236, 111 R.T.J. 157, 168-69 (1985) (French court judgment).

240. A. FERNANDES DIAS DA SILVA, *supra* note 226, at 172-74.

erning law and forum choices contained in the DFA and similar agreements, as reviewed in Part I above, although the logic they would employ to reach that result may be unfamiliar to us. The primary choice of law rule in Brazilian contract law is article 9 LICC, which holds that obligations are governed by the law of the place "in which they are constituted."<sup>241</sup> According to section 2 of that article, the place of "constitut[ion]," if there is doubt, shall be the place in which the party offering to make available the contractual opportunity (offeror, or *proponente*) resides.<sup>242</sup> Article 16 LICC limits the application of article 9 to recognition of the foreign law of the state in which the obligation is constituted, but prohibits further "devolution" which might be indicated under the conflicts rules of that state. If the contract is constituted in New York, but New York courts would apply British law in construing the contract because of their own conflicts rules, the law of the contract will remain New York law as far as Brazilian courts are concerned.<sup>243</sup> With those qualifications, the choice of law of the parties will be respected by Brazilian courts as long as the jurisdiction in which the contract is "constituted" would itself respect their choice.<sup>244</sup>

The "autonomy of the parties" in Brazilian law is admittedly limited.<sup>245</sup> However, Haroldo Valladão has persuasively argued that despite the literal meaning of the codes (LICC, etc.), a correct interpretation would actually grant wider autonomy than first appears.<sup>246</sup> Prevailing foreign and international practice also favors the wider autonomy approach.<sup>247</sup>

241. Art. 9 LICC, *supra* note 128. On the history of this rule, see Grandino Rodas, *Elementos de Conexão do Direito Internacional Privado Brasileiro Relativamente às Obrigações Contratuais*, in *CONTRATOS INTERNACIONAIS 1*, *supra* note 188, at 15-19.

242. Art. 9(2) LICC, *supra*.

243. Art. 16, *id.* See also Franceschini, *supra* note 188, at 107-09.

244. See, e.g., Dolinger, *Bônus Brasileiros No Mercado Financeiro Alemão*, 244 R. For. 373, 373-75 (Jan.-March 1973); Salles, *Alguns Aspectos Jurídicos dos Contratos Internacionais de Mútuo*, 17 *REVISTA DE DIREITO MERCANTIL* 17-18 (1975); and Huck, *Contratos Internacionais de Financiamento: A Lei Aplicável*, 53 *REVISTA DE DIREITO MERCANTIL* 80 (1984). See also Grandino Rodas, *supra* note 241, at 23-34.

245. See, e.g., Franceschini, *supra* note 188, at 98, 99-101, 108-09; *Banco do Brasil S/A e outros versus Antônio Champalimaud*, 284 R. For. 157, 158, 163 (Oct.-Dec. 1983) (Portuguese law applied under art. 9 LICC, because contract signed and performed in Portugal).

246. See Valladão, *O Contrato Internacional*, 156 *ARQUIVOS DO MINISTÉRIO DA JUSTIÇA* 113, 116-18 (1980). Valladão applies identical analysis regarding selection of forum. See *id.*

247. For example, on New York law, see Gruson, *supra* note 78; see also art. 3(1) of the European Communities' 1980 Convention on the Law Applicable to Contractual Obligations, in 23 *J.O. COMM. EUR.* (No. L 266)(1980); 22 *IL.M.* 1492, 1493 (1983) (contract parties may choose governing law). For speculation about what is the "proper law" of a contract



In international loan agreements like the DFA, however, the narrow Brazilian rules would probably suffice to uphold the choice of New York law, assuming the contract in question was celebrated in New York, the creditors-offerors resided there, and New York courts themselves would uphold the choice of New York law.<sup>248</sup> Technical doubts might be raised about the meaning of *proponente* in the context of such a complex, multilateral loan agreement with hundreds of creditors, many domiciled abroad; but such technical hair-splitting would not necessarily demonstrate a sufficiently deep conflict with Brazilian norms to offend "public order." This is especially so in view of the accepted practice of public and private Brazilian entities of signing other agreements governed by New York law.<sup>249</sup> Serpa Lopes has suggested that public order is offended whenever article 9 would require application of a foreign law and "such application would have the effect of injuring the country in which it had to take place,"<sup>250</sup> but this vague assertion alone may not provide enough authority to overturn the choice of New York law, especially in view of modern trends favoring wider autonomy of the parties.

Both traditional and modern commentators agree that the choice of forum, like that of governing law, is also left to the will of the parties within the constraints imposed by Brazilian private international law, which specifically constitute rules of "public order."<sup>251</sup> These constraints are essentially the principles of "international jurisdiction" reviewed above.<sup>252</sup> Public order has also been considered to bar forum choices included in contracts of adhesion, for obvious reasons.<sup>253</sup> Some specific provisions of Brazilian law also mandate the selection of a Brazilian forum in certain cases, arguably creating additional rules of "public order." In particular, the Brazilian forum is required in administrative contracts involv-

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under United States and British law, see Kahn-Freund, *Jurisdiction Agreements: Some Reflections*, 26 INT'L & COMP. L.Q. 825 (1977).

248. See Gruson, *supra* note 78, at 208.

249. On the conflict between Brazilian practice and positive law, see generally Huck, *supra* note 244.

250. Cited in Zaragoza de Rovira, *Estudo Comparativo Sôbre Os Contratos Internacionais: Aspectos Doutrinários e Práticos*, in CONTRATOS INTERNACIONAIS 37-75, *supra* note 241, at 45-46.

251. See SERPA LOPES, *supra* note 194, at 106-12, especially 122; Wald, *Da validade das convenções sôbre foro do contrato e da aplicação da lei estrangeira às convenções celebradas no Brasil*, 345 R. Trib. 58, 59-64, (July 1964); Franceschini, *supra* note 188, at 116.

252. See *supra* subpart A.

253. See Wald, *supra* note 251, at 64.

ing the Union,<sup>254</sup> bankruptcy settlements with Brazilian debtors,<sup>255</sup> and technology transfer contracts.<sup>256</sup> At least one writer has specifically claimed that laws of technology transfer are subjects of "public order" because of their relationship to elements of national sovereignty.<sup>257</sup>

## 2. Waivers of Sovereign Immunity

A Brazilian court could well find a public order problem with the sovereign immunity provisions of international loan agreements like the DFA, given the sensitive nature of "sovereignty" issues and the uncertain state of Brazilian doctrine in this area. Professor Jacob Dolinger of the State University of Rio de Janeiro, in a full review of sovereign immunity law in Brazil,<sup>258</sup> demonstrates that Brazilian doctrine in this area is decidedly mixed. On the matter of foreign sovereign immunity before Brazilian courts, for example, the commentators range from assertions of nearly full sovereign submission to jurisdiction (based currently on article 119(1)(c) of the Constitution, which gives the STF jurisdiction over actions involving foreign states<sup>259</sup>), to distinctions between commercial and political activity,<sup>260</sup> to claims of total immunity for foreign states, even in the commercial area.<sup>261</sup>

On the reverse issue of Brazilian immunity before foreign courts, as Dolinger points out, little analysis exists.<sup>262</sup> This might lead us to extrapolate from the conflicting material on foreign state immunity in Brazil, without clear result, or to depend on the few

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254. See art. 775(1)(e), *Regulamento Geral de Contabilidade Pública*, approved by Decree No. 15783, Nov. 8, 1922, in 4 LB 180, 315 (1922).

255. See art. 7(2), *Lei de Falências* in 1 T. DE MIRANDA VALVERDE, *supra* note 143, at 80.

256. A. DE SOUZA LEÃO ANDRADE JÚNIOR, O CAPITAL ESTRANGEIRO NO SISTEMA JURÍDICO BRASILEIRO 135-36 (1979).

257. *Id.* at 136; see also Franceschini, *supra* note 188, at 111-15.

258. Dolinger, *A imunidade jurisdicional dos Estados*, 277 R. For. 53 (Jan.-March 1982).

259. See *id.* at 68 (criticizing analysis of Pontes de Miranda on this subject).

260. See *id.* at 71 (reviewing opinion of Oscar Tenório).

261. See *id.* (criticizing views of Agostinho Fernandes Dias da Silva). Interestingly, some cases have come before Brazilian courts raising the issue of whether international organizations, rather than states, have immunity from local jurisdiction. This question has clearer answers, and it appears that the STF has accepted such immunity. See Teixeira Paranhos, *A imunidade de jurisdição dos organismos internacionais na visão do STF*, 285 R. For. 529 (Jan.-March 1984).

262. *Id.* at 71.

authors who have spoken on the Brazilian immunity problem. Interestingly, their opinions assert that Brazil cannot submit to foreign forums or foreign jurisdiction without violating its own constitutional norms, and thereby presumably offending "public order." Dolinger cites both Haroldo Valladão and Pontes de Miranda for this position,<sup>263</sup> concluding that in light of their opinions the submissions to foreign court jurisdiction in recent international debt agreements are probably invalid under Brazilian law.<sup>264</sup> The logic behind this position appears similar to that applied in the area of "exclusive international jurisdiction," reviewed in Part A above. Basically, it appears that article 153(4) of the Brazilian Constitution, which guarantees redress for violations of all individual rights by government,<sup>265</sup> is only designed to guarantee that the Union must submit to actions against it within *Brazilian* courts.<sup>266</sup> Pontes de Miranda interprets this guarantee as exclusive, i.e. as limited to its express terms: "[t]here is no way that any constitutional text can be interpreted to permit the insertion in law, treaty or legal matter of the submission to jurisdiction of another state . . . ."<sup>267</sup> As to the proper legal response of Brazilian courts when such submission occurs, he concludes:

If there is or has been, in this area, application of jurisdiction over Brazil, any declarative, constitutive, condemnatory, mandatory or execution judgment proffered against Brazil, or even an action commenced abroad by the Brazilian government, is a judgment [or action] whose effectiveness shall in no manner whatsoever be applied within Brazil, nor may the STF certify it.<sup>268</sup>

Such doctrines would seem to pose a real problem for enforcement of the DFA and similar agreements. At a minimum, the submission of the Union to the jurisdiction of foreign courts for execution of any arbitration judgment against it would seem to be jeopardized. Further, there remains the key issue of whether the sovereign immunity doctrines discussed above apply only to the Union itself, or whether they extend to the Central Bank, and

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263. *Id.* at 75-77.

264. *Id.* at 79, col. 2. As noted previously in this article, submission to arbitration is apparently permitted, though.

265. Art. 153(4) reads: "[T]he law may not exclude from the purview of the Judicial Branch any violation of individual rights."

266. A. FERNANDES DIAS DA SILVA, *supra* note 226, at 55-56.

267. 2 P. DE MIRANDA, *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 176-77 (2d ed. 1974).

268. *Id.* at 182.

down the line to public enterprises and the like. This issue has generated little analysis to date.<sup>269</sup>

### 3. Submission to and Execution of Arbitration Agreements

Although, as we have seen, the DFA provides for arbitration between creditors and the Union in order to comply with Brazilian notions of sovereignty, the resort to arbitration may still involve some technical conflicts with Brazilian law which could threaten "public order." Brazilian law contains clear precedents recognizing the usefulness and validity of arbitration generally, both between parties within Brazil<sup>270</sup> and for the solution of international conflicts in which Brazil becomes involved.<sup>271</sup> Further, Brazil ratified the 1923 Geneva Protocol on Arbitration Clauses, binding itself to recognize foreign arbitration judgments coming within the terms of the Convention.<sup>272</sup> A reservation stated that Brazil recognized the treaty only with application to "commercial subjects," again apparently because of concerns about compromise of sovereignty.<sup>273</sup> Some observers have raised doubts about the validity of the ratification, since it was approved by executive action under President Vargas without parliamentary input,<sup>274</sup> although a majority of observers holds the 1923 treaty valid within Brazil.<sup>275</sup> Brazil, however, has not joined other major international arbitration agree-

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269. For example, if the Union itself cannot submit to foreign jurisdiction, can *autarquias* like the Central Bank do so? What about legal entities in which the Union has a 100% share? A majority share? Should immunity from foreign jurisdictions be considered equal to, or greater than, immunity from execution within Brazil? See generally *supra* notes 152-63 and accompanying text.

270. See, e.g., arts. 1037-48 CC, *CÓDIGO CIVIL*, *supra* note 128, at 184-86, and arts. 1072-1102 CPC, XI C. DO COUTO E SILVA, *COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL* 567-632 (1982).

271. Art. 7 of the Brazilian Constitution reads: "[I]nternational conflicts should be resolved by direct negotiations, *arbitration* or other peaceful means . . ." [emphasis added.]

272. See Geneva Protocol on Arbitration Clauses, *opened for signature* Sept. 24, 1923; *entry into force* July 28, 1924; *ratified by Brazil and deposited*, Feb. 5, 1932, 2 INDEX OF BRITISH TREATIES 1101-1968, at 656; 27 L.N.T.S. 158 (1923). Brazil has also ratified South American arbitration conventions, including (1) the 1929 Bustamante Code, Feb. 20, 1928, 86 L.N.T.S. 246 (1929); (2) the 1975 Panama Convention, Jan. 30, 1975; *entry into force* June 16, 1976, 1 THE INTER-AMERICAN SYSTEM Part I, 446-49 (1983), *ratified by Brazil* May 17, 1976, *id.* at 449; and (3) the 1979 Montevideo Convention, May 8, 1979; *entry into force* June 14, 1980, *id.* at 476-80; *ratified by Brazil with reservations*, *id.* at 480. See Rosenn, *supra* note 95 at 503-05.

273. Samtleben, *supra* note 203, at 186.

274. *Id.* at 186-87. Other treaties have also apparently remained of doubtful legal status for this same reason.

275. *Id.* at 187-88.

ments since 1923, including the 1965 Convention on the Settlement of Investment Disputes cited in the DFA itself.<sup>276</sup> Because the United States is not a party to the 1923 Geneva Protocol,<sup>277</sup> there are doubts about the validity of the arbitration clause in the DFA,<sup>278</sup> which provides for an international tribunal operating partly under ICSID rules and governed by New York law.<sup>279</sup> It seems generally agreed, however, that the Union may bind itself to submit to arbitration not otherwise required by treaty through express written consent.<sup>280</sup>

If arbitration envisaged by the DFA resulted in a judgment against the Union, however, the application of that judgment within Brazil would also have to survive scrutiny under "public order" and other tests reviewed herein. Foreign arbitration judgments outside the 1923 Geneva Protocol require certification before they may be enforced within Brazil, just like other foreign judgments.<sup>281</sup> The same doubts raised earlier about the certification process would be applied to the arbitration judgment.<sup>282</sup> Three issues would be raised in particular. First, foreign arbitration decisions must be ratified by the judicial authorities of the foreign jurisdiction which issued them before they may be certified by the STF.<sup>283</sup> New York, which has adopted legislation providing proce-

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276. *Id.* at 188; see also Carlos de Magalhães, *A Cláusula Arbitral nos Contratos Internacionais*, 44 *REVISTA DE DIREITO MERCANTIL* 29, 32-34 (1981); Fernando Silva Soares, *Arbitragem no Comércio Internacional*, in 156 *ARQUIVOS DO MINISTÉRIO DA JUSTIÇA* 233, 255-56 (1980)(review of major international arbitration treaties since 1923). On the convention, see *supra* note 97.

277. See the signatures of states joining the Protocol, which include Brazil but not the United States, 27 *L.N.T.S.* 158, 160-66 (1923).

278. See *supra* notes 96-97 and accompanying text.

279. Because the United States is not a party to the 1923 Protocol, and Brazil is not a party to later arbitration agreements, in disputes arising from the DFA no treaty obligations would bind either U.S. or Brazilian courts to recognize the validity of the DFA's arbitration clause. Whether such courts respected the arbitration clause would depend entirely on the domestic law of the states involved, but not on international "positive" law.

280. Franceschini, *supra* note 188, at 120.

281. See Paes de Barros Leães, *Homologação de decisão estrangeira*, 547 *R. Trib.* 254, 256-58 (May 1981); César Ramos Pereira, *A Arbitragem Comercial nos Contratos Internacionais*, 572 *R. Trib.* 26, 28-29 (June 1983), also appearing at 285 *R. For.* 526 (Jan.-March, 1984); Fernando Silva Soares, *supra* note 276, at 253. See also, e.g., *Ação Homologatória de Sentença Estrangeira* No. 2178, 91 *R.T.J.* 48 (West German judgment certified).

282. Further, as Luis César Ramos Pereira put it, the STF is "strict" in reviewing foreign arbitration judgments. In other words, their scrutiny is at least as rigorous as would be the case for a foreign court decision, and probably more so. C.R. Pereira, *A Arbitragem Comercial nos Contratos Internacionais*, 572 *R. Trib.* 26, 29 (June 1983).

283. See, e.g., *Ação Homologatória*, *supra* note 281, at 51; Samtleben, *supra* note 203, at 203.

dures for the ratification of arbitration judgments,<sup>284</sup> is the situs of the arbitration envisaged by the DFA, and would presumably ratify any decisions. But it has also been suggested that a Brazilian court could be asked to ratify an "international" arbitration judgment in the first instance, after which it could pass to the STF.<sup>285</sup> If the judgment came first to a Brazilian court, and the court refused to ratify it, certification prospects within Brazil for that judgment, even if subsequently ratified by a New York court, might be jeopardized.<sup>286</sup>

Second, because Brazilian arbitration procedures are different from those used in other countries, it is possible that the "binding" nature of the arbitration or the exclusive jurisdiction of the arbitral panel might not be recognized by Brazilian courts. Brazilian law distinguishes between an arbitration clause (*cláusula arbitral*) and an arbitration agreement (*compromisso arbitral*). The former is a contract clause allowing resort to arbitration in case of disputes; the latter, an agreement signed by the parties after a dispute has begun, in which they formally initiate the arbitration process.<sup>287</sup> When Brazilian courts have competent jurisdiction over a dispute, only the *compromisso* can extinguish such jurisdiction in favor of the arbitration panel.<sup>288</sup> Thus, assuming that creditors won a judgment in arbitration against Brazil under the terms of the DFA, but without a *compromisso*, such a judgment might be neutralized by the initiation within Brazil of a similar action on the same issues, as discussed in subpart A, above. Further, the judgment itself might not be executable in Brazil, because of public order problems. As Guido Fernando Silva Soares explains "Could, possibly, a decision rendered without a *compromisso*, but valid in the country of decision, be certified in Brazil? The author thinks not. . .since this would give to a foreign court decision greater ap-

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284. The New York arbitration statute appears at N.Y. CIV. PRAC. LAW. § 7501. On the issue of enforcement of arbitration awards by domestic courts generally, see Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784 (1981).

285. See Fernando Silva Soares, *supra* note 276, at 253-54.

286. Because, presumably, the court's reasons for refusing to certify an "international" arbitration decision in the first instance would have to be taken into account—and might even constitute *coisa julgada* (*res judicata*)—in any subsequent attempt to have the same decision certified after its approval by a foreign judicial authority.

287. See G. FERNANDO SILVA SOARES, *DAS IMUNIDADES DE JURISDIÇÃO E DE EXECUÇÃO* 26-28 (1984).

288. Fernando Silva Soares, *supra* note 276, at 238-40, especially 239. See also Huck, *Deficiências de Arbitragem Comercial Internacional*, 593 R. Trib. 26, 28 (March 1985).

plicability than domestic decisions.”<sup>289</sup> Of course, creditors could overcome this problem by requesting that Brazil sign a *compromisso* to ensure executability within its jurisdiction. But because Brazil has no obligation to do so under the agreement or applicable law, it might simply refuse, leaving the arbitration judgment without force in Brazil.

Third, because Brazilian law does not provide “specific performance” for contract clauses like the arbitration clause in the DFA, it is unlikely that a Brazilian court would order the Union to submit to arbitration even in the face of an explicit arbitration clause in an otherwise-valid contract. Arbitration clauses are considered constitutive of obligations “to do” (*obrigações de fazer*) in Brazilian contract law,<sup>290</sup> and this particular category of obligations has its own characteristics. At best, violations of obligations “to do” are only compensated by an award of damages (*perdas e danos*), but never by specific performance.<sup>291</sup> Besides, damages might be difficult to prove, and the amount provable might not correspond to the real costs of failure to obtain arbitration.<sup>292</sup> In order to remedy this problem at least one writer has suggested addition of a penalty clause (*cláusula penal*) for breach of the arbitration clause;<sup>293</sup> this might set things aright as far as Brazilian courts are concerned, but could cause problems in New York courts because of the “liquidated damages-penalty” distinction in United States contract law.<sup>294</sup> In short, the best means of resolving these difficulties remains to be found.

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289. Fernando Silva Soares, *supra* note 276, at 264.

290. G. FERNANDO SILVA SOARES, *supra* note 287, at 27. See also Câmara de Comércio Internacional, Seminário Sobre Arbitragem Comercial: Anais [proceedings of seminar on arbitration held in Rio de Janeiro, 1979] at 40 (commentary of Celso Cintra Mori, “Homologação e Execução dos Laudos Arbitrais Estrangeiros no Brasil”), 102-03 (comment by Carlos Fróes); Carlos de Magalhães, *Arbitragem Internacional Privada*, 279 R. For. 99, 100-01 (July-Sept. 1982).

291. Indeed, it seems accepted that the “specific performance” principle is anathema to Brazilian law, and would violate public order if implemented in Brazil. Only a treaty commitment might override Brazilian internal principles in mandating performance. See Franceschini, *supra* note 188, at 133-34.

292. See, e.g., Carlos de Magalhães, *supra* note 290, at 101; Samtleben, *supra* note 203, at 201.

293. Samtleben, *supra* note 203, at 201.

294. Under the Uniform Commercial Code, of course, “penal damages” are not included in awards stemming from breaches of commercial obligations. U.C.C. § 1-106 (1977). By contrast, preset “liquidated damages” are usually allowed.

#### 4. Loan Provisions

A host of technical issues relating to the financial structure of the loan agreements might also conflict with Brazilian legal principles or practices, although a detailed discussion of these is beyond the scope of this article. To the extent that technical aspects of an agreement created a "public order" conflict, they might be disregarded by Brazilian courts, leading to by-now familiar consequences: denial of certification of foreign judgments concerning the disputed loan terms, or refusal to enforce them in initial contract actions brought in Brazil. Fernando Antonio Albino de Oliveira has pointed out some of the conflicts which might arise in this area, and it is worth reviewing at least two such examples here.

First, the accelerated payment obligations generated by default might not be valid under Brazilian law, at least in the manner understood by New York law. The DFA, for example, prescribes a whole host of events of default after which the full debt would become immediately due and payable; but the Brazilian Civil Code (Oliveira does not cite, but he is probably talking about articles 762 and 954, among others) prescribes only certain instances in which accelerated payment may be demanded, and otherwise only permits the creditor to demand additional guarantees of performance. This might lead us to ask whether a Brazilian court would enforce the DFA's acceleration clause.<sup>295</sup>

Second, even if accelerated payment of debt were ordered by a Brazilian court, Central Bank regulations might still prevent the foreign currency equivalent of any cruzado-denominated debt from being transferred to the creditor, at least until the minimum term of eight years for foreign loan repayments had been reached.<sup>296</sup> Further, if the debtor paid its debt into a cruzado account at the Central Bank in favor of the creditor, who would bear the exchange risk during the period that the funds in question had to remain in Brazil?<sup>297</sup> Other problems identified by Oliveira involve the level of interest rates charged by creditors, and the promissory notes emitted in recognition thereof;<sup>298</sup> judicial interpretation of fi-

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295. Albino de Oliveira, *Transações Financeiras Internacionais*, 156 ARQUIVOS DO MINISTÉRIO DA JUSTIÇA 127, 133 (1980).

296. *Id.* at 134. *But see infra* note 176 and accompanying text.

297. *Id.*

298. *Id.* at 134-35.



nancial guarantees;<sup>299</sup> and penalty clauses and tax problems relating to interest payment.<sup>300</sup>

## 5. Constitutional Validity of the Debt Agreements

Because constitutional norms are by definition part of the core values of Brazilian society, it seems logical that agreements signed in violation of such norms would threaten the principle of public order, and hence be incapable of enforcement or certification in Brazilian courts. As reviewed elsewhere in this article,<sup>301</sup> numerous charges of unconstitutionality have been raised against the DFA and related agreements, although most appear spurious. One argument which may have more substance relates to the principle of "non-delegation," which forbids broad grants of discretionary power from the legislature to the executive (or between any branches of government) in a manner violating the separation of powers. Article 43 of the Brazilian Constitution grants to the legislature the power to contract public debts, subject only to the veto of the President.<sup>302</sup> Between 1974 and 1980, however, a series of decree-laws promulgated by the executive authorized the government to undertake a series of foreign currency loans from abroad, in ever-increasing amounts.<sup>303</sup> Although all such decree-laws were

299. *Id.* at 135-36.

300. *Id.* at 136. For additional remarks on problems raised by debt restructuring agreements within a civil law context, see also Terray, *Sovereign Restructuring Under Civil Law*, 1984 INT'L FIN. L. REV. 23.

301. See *supra* Part II.

302. Const., art. 43(11).

303. Decree-law No. 1312, Feb. 15, 1974, 1 LB 9-11 (1974), authorized up to 40 billion cruzeiros of government borrowing from foreign sources, and in foreign currencies. Art. 1(I),(II), Decree-law No. 1312, 1 LB 9 (1974). (In July, 1974, 40 billion cruzeiros equalled approximately \$5.8 billion at official exchange rates.) The authorized purposes for use of the borrowed funds included port repair, transportation system improvement, refrigerated warehouse construction, development of basic industries, agricultural education, public sanitation in urban or rural areas, and any programs "related to national security." *id.* art. 1(1). Provision of funds to cover guarantees provided by the Union to international or foreign financial entities, in connection with loans contracted for the programs listed in art. 1(1), was also included as a separate portion of total allowed borrowing. *id.* art. 1(11). Other discretion was also granted to the executive: for instance, it could now borrow abroad to finance national balance of payments deficits, up to a limit of 30% of average annual Brazilian exports over the preceding three years. *id.* art. 8.

The borrowing limits established in Decree-law No. 1312, *supra*, were progressively increased by a series of additional decree-laws. See Decree-law No. 1460, April 22, 1976, 3 LB 21 (1976)(raising overall limit by total of 43 billion cruzeiros); Decree-law No. 1562, July 19, 1977, 5 LB 6 (1977)(raising limit by 130 billion); Decree-law No. 1651, Dec. 21, 1978, 7 LB 36 (1978)(280 billion); Decree-law No. 1756, Dec. 31, 1979, 7 LB 52 (1979)(950 billion). (In

approved by legislative decrees emanating from the legislature,<sup>304</sup> they clearly originated from and were managed by the executive branch.

Ironically, the Brazilian Constitution specifically provides for legislative delegation, although this provision has not shielded the practice from criticism. Article 6 of the Constitution provides that the three branches of government shall be "independent and harmonious," and that delegation of powers between them shall be forbidden, "except for the exceptions provided in this Constitution[.]" The latter appear in articles 52 and 55. Article 52, the source of authority for all permitted legislative delegation, says that "acts within the exclusive competence of the National Congress shall not be the subject of delegation. . . ."<sup>305</sup> These words are generally interpreted to allow delegation of any other type.<sup>306</sup> Article 55(II) allows the President to promulgate decree-laws regarding "public finances," along with other matters, after which they become law either by congressional approval or after sixty days without deliberation.<sup>307</sup>

A two-step argument might be marshalled to challenge the constitutionality of the DFA and similar agreements. First, it might be claimed that the executive overstepped its own powers under article 55(II) of the Constitution in undertaking public debt obligations, and the DFA itself, substantially under its own authority and direction. This function, and the policy decisions which underlie it, should rightly have been the responsibility of Congress. Thus, both the debts underlying the DFA and the agreement itself are unenforceable. Second, the legislative decrees approving execu-

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October, 1979, 950 billion cruzeiros equalled approximately \$31.3 billion at the official free rate.)

The Central Bank's governing statute apparently empowered it to negotiate and arrange foreign loans on behalf of the Brazilian government. Art. 11(I)-(III) of Law No. 4595, Dec. 31, 1964, LEGISLAÇÃO FEDERAL 1505 (1964)(authorizing the Central Bank to act for the Union in dealings with international and foreign financial institutions, and to manage foreign exchange dealings with them or otherwise).

304. Decree-laws Nos. 1312, 1460, 1562, 1651, and 1756, cited *supra* were approved respectively by Legislative Decree No. 28, April 30, 1974, 3 LB 63 (1974); LD 50, June 2, 1976, 3 LB 52 (1976); LD 88, Sept. 23, 1977, 5 LB 20 (1977); LD 12, May 10, 1979, 3 LB 11 (1979); and LD 70, Aug. 15, 1980, 5 LB 24 (1980).

305. Const., art. 52, main paragraph; J. AFONSO DA SILVA, CURSO DE DIREITO CONSTITUCIONAL POSITIVO 74, 76 (1985).

306. L. BISPO, DIREITO CONSTITUCIONAL BRASILEIRO 128 (1981).

307. In theory, Decree-laws remain subject to the review of the judiciary, which serves as a check that their potential power is not abused. See C. RIBEIRO BASTOS, CURSO DE DIREITO CONSTITUCIONAL 166-68 (7th ed. 1984).

tive borrowing decisions prior to the DFA did not absolve the executive from the act of having exceeded its constitutional authority, because the decrees constituted an improper delegation. For one thing, undertaking debts is not mentioned as one of the explicit exceptions to article 43(II).<sup>308</sup> For another, a number of Brazilian scholars agree that the non-delegation doctrine familiar to U.S. lawyers is definitely part of Brazilian law, and that it prohibits broad grants of legislative power to other branches.<sup>309</sup> Vicente Sabino Júnior has criticized the frequent use of delegation in Brazilian government since 1967, because this violates the concept of "separation of powers" and of the three-part state.<sup>310</sup> Pinto Ferreira has pointed out the need to check increasing delegation to the executive in Latin America generally.<sup>311</sup> Pontes de Miranda has also commented on the evils of delegation, noting the historical roots of the problem in Brazil.<sup>312</sup> In line with United States administrative law concepts, he notes that illegal delegation occurs whenever the legislature allows the executive to create broad discrepancies or variations in applying legislative rules, in effect letting the executive *make* the rules rather than simply following them. As an example, he notes that authorizing the executive to emit money "when (or if) necessities require," or "when necessary for expenses not currently included in the federal budget" would constitute specific instances of prohibited legislative delegation.<sup>313</sup>

The last two examples sound very much like the broad grants of debt-contracting power made by the Brazilian legislature to the executive during the period between 1974 and 1980. Arguably, at least, by "authorizing" the executive to borrow and employ billions of dollars at a time—particularly for a variety of loosely-defined development and financial purposes outlined in the same decree-

308. The distinction between article 43(11) and article 55(11) seems clear. Art. 43(11) grants the Congress power to create "public debts" (*dívida pública*); art. 55(11) allows the President to establish decree-laws concerning "public finances [*finanças públicas*], including tax rules[.]" but only in cases of "emergency or relevant public interest[.]" Further, the President may only do so when the decree-law *does not increase overall spending* (*desde que não haja aumento de despesa*). (emphasis added). This would seem to rule out debt authorization by decree-law. However, a counter-argument might suggest that foreign borrowing does not increase *current* spending because repayment comes much later and hence is permissible.

309. On the status of legislative delegation in U.S. law, see, e.g., E. GELLHORN & B. BOYER, *ADMINISTRATIVE LAW AND PROCESS* ch. 1 (2d ed. 1981).

310. See V. SABINO JÚNIOR, *INCONSTITUCIONALIDADE DAS LEIS* 140-43 (1976).

311. 1 P. FERREIRA, *CURSO DE DIREITO CONSTITUCIONAL* 166 (3d ed. 1974).

312. 1 P. DE MIRANDA, *COMENTÁRIOS À CONSTITUIÇÃO DE 1967*, 549-71 (1967).

313. *Id.* at 563-65.

laws allowing the loan, and in amounts totalling almost half the national GNP in 1984—the legislature totally abandoned its role as arbiter of public debts, thereby violating article 52 of the Constitution. Of course, the historical background and ramifications of this argument are highly complex. The all-powerful role of the military-dominated executive in Brazilian life since 1964 has attracted considerable attention and scholarship. The legitimacy of the executive branch's actions during the period in question is inevitably linked with the behavior and legitimacy of the military itself, a highly volatile political subject currently embroiled in controversy.<sup>314</sup> As a practical matter, it seems unlikely that Brazilian courts would be interested in assessing such matters in any depth. Further, challenging the constitutional validity of delegation practices and decree-laws could prompt questions about the thousands of laws passed during the years of military rule, creating an enormous crisis within the Brazilian legal system. In result, the comments made in this subsection are mostly of theoretical, rather than practical, importance.

## 6. General Threats to Sovereignty

Given the general nature of the *ordem pública* concept, it is of course simply possible that a Brazilian court might reject aspects of agreements like the DFA because of the general harm they might cause to Brazilian sovereignty, or to the social and economic welfare of the nation. It might be alleged that forcing the Brazilian government to continue honoring its debt commitments would cause mass suffering or economic disturbances; indeed, this is already the claim of numerous observers. Additionally, it might have been pointed out that Brazil's former need to obtain IMF approval in order to continue dealing with private creditors verged on abdication of sovereignty. Such claims are also more political than legal, but have become a part of the public debate on the foreign debt, and would likely find their way into any major court proceeding over debt-related issues.

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314. On the military takeover of the Brazilian executive branch after 1964, see, e.g., Soares, *Military Authoritarianism and Executive Absolutism in Brazil*, 14 *STUD. COMP. INT'L DEV.* 104 (1979); see also Zimble, *Brazil's Morning After*, *NEW LEADER*, Sept. 9, 1985, at 10-11.

*C. Some Recent Challenges to the Debt Agreements and Their Fate*

Many of the issues raised in the preceding sections have already been examined, although not conclusively settled, by legal activity during 1983 which challenged the validity of the DFA and similar agreements signed during that year.<sup>315</sup> Two main challenges resulted in detailed discussions of the legal validity of the DFA. First, in August, 1983 the Brazilian Bar Association (*Ordem de Advogados do Brasil*, or OAB) prepared a scathing attack on the legal status of the DFA, charging that the document was wholly unconstitutional, as well as "a long-winded, repetitive text, stylistically careless and often obscure."<sup>316</sup> In terms parallel to those of Senator Humberto Lucena's national Senate speech of June, 1983, an OAB brief suggested that the DFA was unconstitutional, and hence could not be signed by government officials or held to bind the federal government, because it constituted an "international agreement" requiring legislative approval under article 44(I) of the Constitution.<sup>317</sup> The brief also stated that the DFA illegally renounced possible defenses and immunities, and submitted Brazil to foreign forums and law, in violation of basic principles of sovereignty;<sup>318</sup> improperly submitted Brazil to binding arbitration, and obliged it to respect the results without a review of the merits;<sup>319</sup> established possible "accelerated payment" in an unfair manner;<sup>320</sup> provided for the execution of Brazilian assets to satisfy the debt, if necessary, in terms violative of article 67 of the CC, despite the document's citing this article;<sup>321</sup> and waived sovereign immunity defenses to a degree inconsistent with Brazilian notions of sovereignty, leaving the nation "on its knees" before the creditor banks.<sup>322</sup> The OAB brief has been criticized by numerous observers as itself carelessly drafted and vague in its legal arguments, con-

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315. These legal activities occurred both as part of the larger political campaign being conducted against the government generally and against its foreign debt policy in particular. See *supra* Part I.

316. Memorandum of Ordem dos Advogados do Brasil, Conselho Federal, Rio de Janeiro, Aug. 1, 1983 [entitled "Assunto: Acordo No.2 (Banco Central do Brasil e Agências Bancárias Estrangeiras). . .Relator: Conselheiro SÉRGIO FERRAZ."], at 6.

317. *Id.* at 7-8.

318. *Id.* at 9-16.

319. *Id.* at 16.

320. *Id.* at 16-17.

321. *Id.* at 17-18.

322. *Id.* at 18-19. The "knees" remark appears at 18.

taining more hyperbole than analysis.<sup>323</sup> It did serve, however, as the basis for a formal request by the OAB that the *Procurador-Geral da República* (equivalent to the Solicitor General in the United States) examine the constitutionality of the DFA. This request came under the OAB's right to require formal legal review of government actions, granted by article 169(l)(e) of the Constitution. In a lengthy reply in November 1983,<sup>324</sup> the *Procurador* rejected complaints of unconstitutionality, arguing that the DFA was not an "international treaty" requiring legislative approval, but simply a private financial agreement between the Brazilian government and foreign banks;<sup>325</sup> that the particular provisions of the loan agreement attacked by the OAB are both acceptable under Brazilian law and part of everyday international financial practice;<sup>326</sup> and that, potentially, attacking the DFA could invalidate the agreement, sending Brazil into default and causing a national, social and economic catastrophe far worse than the ills claimed to flow from respecting the agreement.<sup>327</sup> The *Procurador's* defense of the DFA included admissions, interestingly, that the governing law and similar clauses challenged by the OAB would have to pass "public order" tests before being applied within Brazil, in effect conceding the analysis outlined above.<sup>328</sup>

This initial unsuccessful attack on the DFA was not the end of the legal battle. Second, in August, 1983 a journalist named Hélio Fernandes Filho brought an *ação popular* ("popular action") suing the Union, the Central Bank of Brazil, officers thereof, and Citibank, N.A. as agent for the over 700 foreign banks who took part in the 1983 DFA.<sup>329</sup> The case was heard in the sixth *vara* (chamber) of the federal courts sitting in Rio de Janeiro. The *ação popular* is a form of action based on article 153, section 31 of the Brazilian Constitution, enabling any citizen to bring suit to prevent public or private acts harmful to "public property."<sup>330</sup> The key ele-

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323. Off-the-record conversations with numerous Brazilian lawyers.

324. Diário Oficial, Jan. 10, 1984, at 413-32. The entire reply has now been published as MINISTÉRIO DA FAZENDA, O BRASIL, O FMI E O "PROJETO DOIS," (1984).

325. *Id.* at 420-23.

326. *See generally id.* at 420-30. The reply cites "Luis [sic] Loss" of Harvard for the proposition that all 50 United States have separate systems of law, as part of its explanation of the validity of accepting New York law. *Id.* at 420.

327. *Id.* at 419.

328. *See, e.g., id.* at 423, paras. 268-70.

329. Action No. 5418100/83, 6th *Vara Federal*, Rio de Janeiro.

330. Art. 153 § 31 of the Constitution reads: "Any citizen shall have standing to bring a popular action which seeks to nullify acts harmful to the property of public entities."

ment in the suit is the proof that public funds or entities are endangered.<sup>331</sup> However, an additional basic requisite is that the acts complained of must be "null or voidable," which seems to mean that they must be illegal under Brazilian law.<sup>332</sup> In the action in question, the plaintiff contended that the DFA was, first, illegal and therefore "null and voidable" because its provisions could not be agreed upon by Brazilian public entities without violating Brazilian law.<sup>333</sup> In particular, the plaintiff suggested that the accord required congressional approval to be valid;<sup>334</sup> that selection of a New York or London forum and New York law violated Brazilian national sovereignty;<sup>335</sup> that the clauses waiving immunity violated national sovereignty, as did clauses relating to eventual execution,<sup>336</sup> and that the arbitration clauses posed similar problems.<sup>337</sup> Further, the plaintiff argued that the DFA would severely damage the Brazilian economy by obligating Brazil to make massive interest payments.<sup>338</sup>

In response, the defendant's lawyers first raised a number of procedural objections, including the fact that the plaintiff should have served notice upon all 700 banks, rather than merely Citibank, before commencing the action, because Citibank's status as "agent" under the DFA did not make it the legal representative of all bank signatories for the purposes of the popular action.<sup>339</sup> The defendants also argued that Brazilian courts did not have jurisdiction over Citibank, requiring annulment of the action.<sup>340</sup> Addressing the substance of the plaintiff's arguments, the defendants also made the following points, some in similar fashion to the *Procurador's* earlier analysis discussed above. First, the DFA was

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331. See, e.g., 35 PRÁTICA, PROCESSO E JURISPRUDÊNCIA: AÇÃO POPULAR 26-27 (F. de Oliveira Teixeira ed. 1979).

332. See J. AFONSO DA SILVA, AÇÃO POPULAR CONSTITUCIONAL 134-51 (1968).

333. Plaintiff's Brief in Action No. 5418100/83, *supra* note 329, cited in *Sentença* (Decision), Processo No. 5418100/83, Jan. 11, 1985, at 4.

334. *Id.* at 4.

335. *Id.* at 3.

336. *Id.*

337. *Id.* at 3-4.

338. *Id.* at 2-3.

339. Defendants' [Ernane Gálvêas, finance minister, and Carlos Langoni, Central Bank president, among others] Brief No. 2 [prepared by Arnaldo Wald *et al.*, counsel for the individual defendants; April 10, 1984] in Action No. 5418100/83, *supra* note 330, at 2-5.

340. Defendants' [Citibank, N.A.] Brief No. 1 [prepared by Francisco Pinheiro Guimarães N. *et al.*; Nov. 7, 1983] in Action No. 5418100/83, *supra* at 1-3. In essence, defense counsel argued that because the dispute concerned only obligations of Citibank branches in Brazil, the court had no jurisdiction over Citibank, N.A.

in effect a "private agreement" between Brazil and the banks, requiring no legislative approval.<sup>341</sup> Second, the clauses relating to choice of law, forum, execution, immunities, and arbitration stood in full compliance with both Brazilian law and current international financial practice.<sup>342</sup> Third, the effects of the DFA would in fact help the Brazilian economy by creating a two-and-one half year grace period, plus an extended payback period, for debts otherwise falling due in 1983.<sup>343</sup> In short, the substance of the arguments on each side in the popular action read like a replay of the earlier skirmish between the *Procurador* and the OAB.

The judge who handled the case, Augustinho Fernandes Dias da Silva, is a law professor who has written widely on issues of private international law, sovereign immunity, and the like.<sup>344</sup> He managed to dispose of the action, despite rulings against Citibank on initial procedural matters,<sup>345</sup> by accepting the defendants' first two substantive arguments. In essence, the judge held that the DFA did not constitute an "illegality," either by virtue of the behavior of government officials in signing it or because of the clauses contained therein. As a result, the requisite "null and voidable" element of any popular action had not been satisfied, and the action had to fail without further deliberation.<sup>346</sup> The judge also opined that no damage or threat to public property had been shown.<sup>347</sup> Ironically, his decision suggested that there might well be legal problems with the DFA, although they had not been brought out by the plaintiff's arguments.<sup>348</sup> In fact, the judge hinted that while a popular action might not be a suitable vehicle in which to examine such issues, a proper context for such examination would be the review of a foreign judgment proposed for execution within

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341. *Id.* at 12-13.

342. *Id.* at 14-21.

343. *Id.* at 9.

344. *See, e.g., supra* note 226, and A. FERNANDES DIAS DA SILVA, A IMUNIDADE INTERNACIONAL DE JURISDIÇÃO PERANTE O DIREITO CONSTITUCIONAL BRASILEIRO (1984)(cited by Dolinger, *supra* note 261).

345. The judge ruled that because Citibank, N.A., had its legal domicile in Brazil, it was subject to jurisdiction. *Sentença, supra* note 333, at 11-13. He also seemed to admit that perhaps the plaintiff should have served notice upon some or all of the 700 bank creditors, but declined to uphold the defendants' position on this issue by a specific ruling. *Id.* at 14-17.

346. *Id.* at 27-28.

347. *Id.* at 30-31.

348. Brazilian lawyers interviewed on an "off-the-record" basis confirmed that the plaintiff's case could have posed more technically challenging arguments. One called it a "clumsy" job.



Brazil, as provided by article 17 LICC, and discussed above.<sup>349</sup>

#### V. CONCLUSIONS: LEGAL AND PRACTICAL CONSEQUENCES OF UNENFORCEABILITY WITHIN THE COURTS OF THE DEBTOR STATE

This article has attempted to review the background and legal context of the current Brazilian debt crisis. It has gone on to suggest that while adherence to existing legal agreements between foreign creditors and Brazilian debtors might well be sought within Brazilian courts at some point after a possible default by Brazil, a number of Brazilian legal doctrines and principles could jeopardize such enforcement. The existence of such potential obstacles to domestic enforcement of Brazil's international debt obligations deserves careful attention. In summary, there are three probable obstacles to enforcement within Brazil. First, a Brazilian court might refuse to certify a foreign default judgment against Brazil, arguing that it did not meet the requirements of article 15 LICC. The most likely rationales for such a position might be that Brazilian courts had exclusive jurisdiction over the loan agreements because the actions involved "concern" property within Brazil, making the foreign courts' alleged jurisdiction invalid; that the sovereign immunity clauses of the agreements, particularly regarding submission of the Union to foreign courts in the case of arbitration judgments against it, violate "public order" and hence should not be respected; or that certain aspects of the arbitration framework or technical-financial structure established by the agreements violate "public order". Second, a Brazilian court might agree to hear an action brought by Brazilian debtors at the same time that a foreign action seeking to enforce the loan agreements, was being held, with indeterminate results and a large risk of complicating or blocking the legal validity of the eventual foreign judgment. Third, even if Brazilian courts agreed to certify and enforce a foreign judgment against their government, payment of the amounts awarded would be subject to Brazilian rules concerning execution of public assets, and would primarily take place through the lengthy and uncertain *precatória* process.

Additional possibilities, although less applicable to the debt situation analyzed herein, may provoke thought about issues likely to be raised in other international financial or commercial dealings with Brazil. For example, the possibility that a Brazilian court

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349. *Sentença*, *supra* note 333, at 29, 31.

might substitute Brazilian for New York law in construing an international contract has obvious implications for lawyers and business practitioners. So does the lack of provisions for "specific performance" of the kinds of arbitration clauses typically employed in U. S. contracts. While these aspects of the Brazilian legal system have not gone entirely unnoticed in the past, the current debt situation underscores their potential importance.

Assuming that a foreign judgment against Brazilian debtors could not be enforced within Brazilian courts, it is worth asking what other legal, as opposed to political or other, measures would be available to creditors interested in seeking redress after a default. One obvious answer is that international forums might be asked to adjudicate the dispute. Two kinds of obstacles, however, would then appear to block creditor satisfaction. First, it is not clear that international forums would have jurisdiction. The International Court of Justice (ICJ) can only hear disputes between states.<sup>350</sup> Consistent with established practice in such matters, private creditors might ask their home governments, principally the United States and Britain, to bring diplomatic claims against Brazil, asking for performance of the loan agreements and/or damages incurred because of their breach.<sup>351</sup> If Brazil declined to act on such claims, the home governments might then try to bring suit in the ICJ. However, the ICJ can only hear such cases when they complain of a "denial of justice" or violation of an international legal norm.<sup>352</sup> A "denial of justice" can only occur when, in the exhaustion of local remedies also required before bringing an international claim, loosely-defined international due process or fairness standards have been grossly violated.<sup>353</sup> It seems possible that if a Brazilian court threw out a creditors' enforcement suit on purely political grounds, without any basis in law of the kinds outlined above, a denial of justice might occur. Barring this, however, an

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350. Statute of the International Court of Justice, art. 35(1), 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179 (1945).

351. Of course, the home governments might elect to settle outstanding claims with Brazil on behalf of the complaining creditors, rather than proceed with court action. On the powers of the U.S. President to settle claims, especially as seen under the key ruling of *Dames & Moore v. Regan*, 453 U.S. 654 (1981), see *On Third World Debt*, *supra* note 1, at 124-28.

352. See 1 C.D. DE ALBUQUERQUE MELLO, *CURSO DE DIREITO INTERNACIONAL PÚBLICO* 366-67 (7th ed. 1982); 8 *DIGEST OF INTERNATIONAL LAW* 907 (M. Whiteman ed. 1967).

353. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 514-16 (2d ed. 1973). See also A.A. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* (1983).

“international wrong” violative of international norms would be needed to create ICJ jurisdiction. It is not clear that simple violations of a contract—for example, deliberate failure to perform a loan agreement—would constitute an international wrong. Jessup has suggested that contract breaches by governments are a violation of applicable municipal law, not of international law,<sup>354</sup> although other sources suggest that such breaches may be international wrongs if they are confiscatory or discriminatory in nature.<sup>355</sup> Most writings on state responsibility in international law do not deal with these specific issues,<sup>356</sup> leaving them in a cloud of doubt.

Second, even if the ICJ or another international forum did have jurisdiction over the dispute, it might not rule in the creditors' favor on key issues. Debtors could also raise unanticipated defenses and counter-arguments. For example, an international court might follow the recent trend toward “denationalizing” the contracts in question, applying general international law rather than the New York law specified in the loan agreement.<sup>357</sup> Once under international law, the status of the loan agreements might become subject to a host of uncertainties and obstacles. Current thinking about the “New International Economic Order” and the proper relationship between developed and developing countries might be invoked to assess the fairness of the loan terms set out in the contracts, as part of an argument that the harshness of the terms is invalid under general principles of equity.<sup>358</sup> Admittedly, concepts of equity in international law, particularly in the context of wealth-sharing between nations, are so vague and controversial as to prove difficult to apply in court decisions.<sup>359</sup> The level of in-

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354. 8 DIGEST OF INTERNATIONAL LAW, *supra* note 353, at 908. See also I. BROWNIE, *supra* note 353, at 530-31.

355. See 8 DIGEST OF INTERNATIONAL LAW, *supra* note 353, at 909 (*Jalapa Railroad Claim*); Harvard Draft Convention, *id.* at 909-10. See also Lipstein, *The Place of the Calvo Clause in International Law*, 22 BRIT. Y.B. INT'L L. 130, 134-35 (1945). Cf. I. BROWNIE, *supra* note 354, at 532 (*contra*), and discussing “international contract law” generally at 531-32.

356. See, e.g., ADHERBAL MEIRA MATTOS, *DIREITO INTERNACIONAL PÚBLICO* 88-92 (1980); NGUYEN QUOC DINH, *DROIT INTERNATIONAL PUBLIC* 629-47 (1975).

357. P. WOOD, *supra* note 2, § 1, at 45. See also, e.g., Recent Development, *Foreign Investment: International Chamber of Commerce Court of Arbitration*, 25 HARV. INT'L L.J. 463, 469-70 (1984) (recent use of “denationalized” contract law).

358. The concept of equity is a standard element of public international law. See 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 52-54 (3d ed. 1957).

359. For a Brazilian lawyer's view of the New International Economic Order, see generally Ituassu, *Enfoques Contemporâneos do Direito Internacional*, 1 REVISTA OAB D.F. 135,

terest rates charged in the loan agreements, compared to prevailing international custom and municipal law concepts of usury, might also be a subject for legal analysis.<sup>360</sup>

Ultimately, it appears that neither international forums nor the home forum of Brazilian debtors would provide a clear degree of redress for creditors interested in enforcing the Brazilian loan agreements. This conclusion points up the current weakness of both public and private international law as a source of support for current international financial practices. The short-term implications of this conclusion are minimal, because most bankers and lawyers involved in sovereign debt negotiations appear relatively unconcerned about the theoretical foundations of what they are doing. Defaults are hypothetical outcomes, and a major default would, it is assumed, prompt Western central banks to intervene, propping up the debtor to prevent bank failures in creditor states. Political and economic reality, rather than the force of law, are thus the ultimate line of defense for creditors.

But the long-term implications of this situation are more troubling, for three reasons. First, if the lengthy international loan agreements signed in major reschedulings are merely pieces of paper, why bother to sign them at all? Why not merely sign memoranda of understanding like those entered into between debtors and the IMF, which are frequently violated. These memoranda recognize that law is not a major factor in enforcing such agreements, and that retaliation for willful defaults would have an essentially political rather than legal character. Second, because creditor banks are typically quite fussy about having all the details of loan documentation correct in domestic situations, it seems ironic and inconsistent for them to ignore major legal loopholes, i.e. the impossibility of suing within the debtor's own jurisdiction, in some of their largest lending activities. Third, to the extent that a harmonization of legal rules and international reality is possible—by changing relevant rules and doctrines within the debtor jurisdiction, or in international law, or by rewriting international

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147 (publication of the OAB chapter in the Federal District) (1984). See also generally Friedmann, *The Relevance of International Law to the Processes of Economic and Social Development*, in 2 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* ch. 1 (R. Falk & C. Black eds. 1970). For other Third World views of the international legal system as it relates to development and related goals, see *NEW PERSPECTIVES AND CONCEPTIONS OF INTERNATIONAL LAW: AN AFRO-EUROPEAN DIALOGUE* (K. Ginther & W. Benedek eds. 1983).

360. See Gann, *Compensation Standard for Expropriation*, 23 *COLUM. J. TRANSNAT'L L.* 615, 650-51 (1985)(commenting on international norms applicable to interest rates).

loan contracts to reflect the enforcement limitations they face in various jurisdictions—such harmonization should probably be undertaken to restore the credibility and usefulness of law in the resolution of the current debt crisis. Until such steps are taken, international loan agreements with sovereign debtors like Brazil may continue to be used and observed, but they will not fully make sense.