

Institute for Research on Internet and Society

Jurisdiction and conflicts of law in the digital age

**Regulatory framework
of internet regulation**

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How to reference this paper

ANTUNES, Laila Damascena et al. Jurisdição e conflitos de lei na era digital: quadro político-normativo de regulação na internet. Instituto de Referência em Internet e Sociedade: Belo Horizonte, 2017. Disponível em: <http://bit.ly/2DUZ2zz>. Access in: DD mmm. YYYY

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1. Initial Remarks¹

As of 2016, over 3 billion people, almost half of the world population, had some kind of access to internet, which nowadays is considered an important tool to day-to-day life.² The number of connections is increasing in the last years with people getting access to 2G, 3G, 4G and broadband connections.

This technology also affects legal relations in a transnational way. It has been raising the number of transnational litigations related to the internet, which brings new challenges for the Law, mainly the International Private Law. This field of Law studies matters of applicable jurisdiction, choice of law, and recognition and enforceability of foreign judgments. In a scenario where citizens gets more and more connected, those challenges can not be ignored.

This paper aims to identify existing policy and normative frameworks for the determination of applicable jurisdiction and choice of law regarding private litigation on the internet. The laws of Europe and parts of the Americas will be analyzed. By means of an analytical methodology, the substantive and procedural law applicable to litigations involving the internet will be examined. With specific regard to **International Private Law**, our analysis focus on matters related to **jurisdiction** (which courts to petition on?) and **applicable law** (which law to apply on legal relationships that are pluriconnected?), and therefore reserving recognition and enforcement of foreign judgments to another issue of this study.

What are the possible outcomes of this research? First, we will explore the current legal systems within their traditions and constraints, in order to verify how private international law can relate to events and social facts on the internet which have transnational repercussions. Secondly, we intend to identify existing rules to promote suggestions in order to reconcile the current mechanisms offered by private international law with the new internet context, particularly with regard to forms of *digital due process* in private cross-border litigation. For the purposes of this work, “**digital due process**” comprises a number of transformations of the legal rules to guarantee due legal process in adjudication of conflicts originated in electronic communications and information systems.³

Another central concept to the development of this article is the **transnationality of litigation** phenomenon. The internet is a platform for transactions that are not strictly bounded by state borders. Research on these topics is still being developed, and there are still little scientific literature available. But it is necessary to stress that studies on “due transnational process” are essential to the advancement of legal studies on the internet.

The research developed here also launches the discussion on the potential de-

1 Research work developed under the coordination of Fabrício B. Pasquot Polido and Lucas Costa dos Anjos, from the Institute for Research on Internet and Society - IRIS; and the Group of International Studies on Internet, Innovation and Intellectual Property (Grupo de Estudos Internacionais de Internet, Inovação e Propriedade Intelectual) - GNet, from the Universidade Federal de Minas Gerais. Research assistants Laila Damascena Antunes, Matheus Rosa, Bruno de Oliveira Biazatti, Pedro Vilela e Odélio Porto have contributed to this work.

2 INTERNATIONAL TELECOMMUNICATION UNION. ITU ICT Facts and Figures 2016. p. 4. Available in: <<https://goo.gl/qLnY-Ae>>. Accessed in : 01/11/2017.

3 It should be stressed that this is not a concept with a single definition, which is why it can still be better conceptualized in a formative article.

velopment of an **Index for the Degree of Transnationality in Internet Litigations**, which would facilitate the identification of contentious profiles, the incidence of disputes in the networks and the main characteristics of the legal relationships underlying litigation submitted to courts, specialized or not⁴. In the Brazilian context, this concern is especially relevant. It should be noted that the whole topic being addressed here is in rapid development, which is why there are few works dedicated to its comprehension. However, it is defensible that the analysis on the data of transnational litigation can lead to a better understanding of its nature and regulatory challenges, as well as of its social and economic effects.

2. Internet: New Challenges for Law

During the 1960s, the United States' Government, looking for decentralizing the storage of military information, in order to protect them from possible Soviet attacks, developed a system known as ARPANET (*Advanced Research Projects Agency Network*).⁵ In the United Kingdom, British scientists developed a virtual commercial network, known as the *National Physical Laboratory Network* (NPL), which aimed to switch packets of data so that they could be transported faster. And, in France, engineers developed a scientific network called CYCLADES, whose function was to establish direct connections within the country.⁶

ARPANET, CYCLADES e NPL are considered computer networks that preceded the internet. In the 1970, these networks started to be developed, whether by their countries' defense branches, whether by scientists in universities throughout the world. In two decades, it became the virtual network as we know it.

From the 1990's the internet had begun to be a reality for thousands of people and companies around the world. Despite being formerly used as a means of communication between college professors, the internet currently presents numerous applications, such as access to information, e-commerce, education, entertainment and work. Responsible also for generating jobs and fostering the growth of countries and regions, the internet presents numerous challenges to various branches of the law, such as commercial, taxes, civil and labor law. Legal relations based on the internet among individuals, companies, civil society organizations and States raise questions which cannot be solved by traditional legal concepts like sovereignty and territory. Goods, services, technologies and information cross borders by the simple articulation between connection, transmission and reception of data - acts that are now common in the international life of a person in the digital age.

An internet application, like a social network website, may have its head office in California, store data in Finland and have users from all around the world. Still, for example, in case of a Brazilian user who was aggrieved for acts carried out or occurred within this social network, can he resort to courts of his country to file a claim for damages? Or will he have to appeal to the courts of the country where the provider of the social net-

4 This study does not focus on the analysis of products and services associated with out-of-court dispute settlement mechanisms from the internet through recourse to arbitration, mediation or conciliation and experts committee, such as might suggest, for example, the activities of the The WIPO Arbitration and Mediation Center. However, they must be considered for the purpose of determining possible analytical variables for an index measuring the "Degree of Transnationality in Internet Litigations"

5 GUZMAN, Julio Cesar Lopez. Jurisdiccion Personal en la Internet: Aplicacion de la teoria de los contactos mínimos a la Internet. *Revista de Derecho Puertorriqueno*, v. 37, p. 483, 1998. Available in: <<https://goo.gl/JbmM6L>>. Accessed in: 01/12/2017.

6 Kurzgesagt - In a Nutshell. Who Invented the Internet? And Why? Youtube. Available in: <<https://goo.gl/FbpX9Z>>. Accessed in: 19/01/2017.

work application is based? Or will he have to go to the courts in the country where the data centers are located? Defining jurisdiction to settle disputes on the internet is one of the main challenges for scholars in an area of interface between private international law and internet law.⁷

The legal tradition to determine what jurisdictional rules - as a component of international procedural law - are applicable has emphasized a geographical connection. Jurisdiction remains, after all, a central aspect of the State's sovereignty, since it consists in the power to modify, create or extinguish legal relations and obligations among persons who are in any way subject to that State.⁸

With the advent of the internet, doubts have arisen as to whether these classic features of State jurisdiction can be reconciled with the peculiarities of the internet. To determine in which country and in which court to adjudicate a particular case, it is common to analyze factors determined by the physical location of the plaintiff, defendant, property, place of service, etc.

Historically, two positions have debated upon how new boundaries (or their absence) set by the internet affects the law. On one hand, some jurists argue that a simple transposition of the legal rules for online conflicts would suffice for conflict resolution on the internet. On the other hand, there are those, who believed in the end of frontiers and in the revolution of all the pillars of society, defending that disputes coming from the internet would demand new and exclusive legal norms.⁹

Subsequently, a third position was formed, more radical than the previous two.¹⁰ According to it, the law and the state would have no role, neither influence the cyberspace, which would be regulated by the code it was programmed. For those who defend or believe in this aspect, the changes of the digital world are too fast for the Law, which should be excluded from the virtual space.

It is common to refer to the internet as a decentralized and anonymous network, which would make the identification of users often impossible, as they are represented, for example, by internet protocol (IP) or email addresses. These logical features of the internet operation contrast with traditional methods of identification and location,

7 Alexandre Libório Dias Pereira, professor at the Law School of the Universidade de Coimbra, describes this matter: "The problem of jurisdiction on the Internet is certainly one of the most complex and delicate themes of the so-called cyber law. Indeed, the ubiquitous nature of the internet makes it difficult to determine, in practice, the connecting criteria for international jurisdiction of the courts. Because of the international dimension of e-commerce, it is appropriate to speak of the 'multi-jurisdictional' nature of the Internet, which may be associated with an idea of 'Forum Shopping' or virtual jurisdiction in cyberspace". [Our translation]. Cf. PEREIRA, Alexandre Libório Dias. A jurisdição na internet segundo o regulamento 44/2001. Boletim da Faculdade de Direito, Vol. LXXVII, Universidade de Coimbra, Coimbra, p. 639-640, 2001. Available in: <<https://goo.gl/0eTAwi>>. Accessed on: 12/13/2016.

8 MENTHE, Darrel. Jurisdiction in Cyberspace: A Theory of International Spaces, Michigan Telecommunications and Technology Law Review, vol.4, no.1, 1998, 69-103, p.71; SHAW, Malcolm. International Law, 6 ed., New York: Cambridge University Press, 2008, p.645.

9 See, for example, EASTERBROOK, Frank H. Cyberspace and the Law of the Horse. University of Chicago Legal Forum, v. 1996, p. 207-216, 1996. Available at: <<https://goo.gl/r0CtSI>>. Accessed in: 01/18/2017; LESSIG, Lawrence. The Law of the Horse: What Cyber-law Might Teach. Harvard Law Review, v. 113, n. 2, p. 501-549, 1999. Available at: <<http://www.jstor.org/stable/1342331>>. Accessed in: 01/19/2017; e JOHNSON, David R. e POST, David G. Law and Borders - The Rise of Law in Cyberspace. Stanford Law Review, v. 48, p. 1367-1402, 1996. Available at: <<https://goo.gl/714ZI9>>. Accessed in: 01/19/2017.

10 "Like the big bang, the internet has grown chaotically. Faced with a state of apparent online anarchy, technologists have claimed for themselves the sovereignty of cyberspace with promises of a communicative web free of law. The internet would be a true "electronic woodstock," in which everything would be freely shareable. The possible problems would be solved according to Clark's maxim "the response to the machine is in the machine", taking into account the security offered by cryptographic technologies. The jurists would not have a place in such a world, for lack of jurisdiction: the internet would not be governed by the law of the States but rather by the codes of the computer scientists. On the internet, there would not be a state with normalizing power, capable of imposing its laws on its subjects through its judicial institutions [our translation]. PEREIRA, Alexandre Libório Dias. A jurisdição na internet segundo o regulamento 44/2001 [Jurisdiction on the internet according to regulation 44/2001]. Boletim da Faculdade de Direito, Vol. LXXVII, Universidade de Coimbra, Coimbra, 2001, p. 643. Available at: <<https://goo.gl/K5JbPM>>. Accessed in: 12/13/2016.

such as domicile, habitual residence or even nationality. Unlike traditional forms of contracts, where parties are in a particular place, or communicating by physical mail, online transactions often do not know the identity or location of those involved. Geolocation technologies, however, decrease the influence of this difficulty of identification. With the sophistication of electronic tools, and also as a result of obligations established by local law (*lex fori*), it is possible to determine the location of a computer or server, and often even the person in charge of the internet connection. This process, however, is much more sophisticated than that available to the average user.

Moreover, the spread of the Internet is followed by the growth on both the volume of available data and the issues of secure storage, sending and retaining this data. Popularly known as big data, the vast array of data available (free, stored or exploitable through court orders) may be used as evidence in the course of transnational civil proceedings. And it also affects due process as it presents new forms of evidence to the Law. Therefore, with the technology, it becomes possible to extract information from emails, cell phone signal towers, security cameras, etc. The accessibility of this information and its validity to a lawsuit are the subject of much discussion, due to the fact that online activity integrates social norms and changes legal rules, which must be updated in order to guarantee the protection of individual and collective rights.¹¹

So far, there is no research that collects data and points out the incidence of these new technologies in cross-border internet litigation. Nor is there a database that lists the rules applicable to digital conflicts around the world. What one notices is the dispersed - and often not careful - creation of new rules applicable to online conflicts. However, it is also possible to verify the maintenance of traditional or "offline" rules, adapted to this new scenario.

With regard to jurisdiction, national and international laws use fundamental precepts and general rules to adjudicate cases involving the internet. After all, the question of jurisdiction is not new to the law, being a fundamental question in legal systems, since it establishes and delimits powers.

In addition to the competent jurisdiction, defining the law applicable to the specific case (the choice of law) also represents a challenge. In the example mentioned above, of the social network, should we consider the law of the United States, Finland, or the social network users' country? Like the problem of competent jurisdiction, defining the applicable law is not a simple task, and one must always analyze the concrete case to find a response, based on rules and principles of Private International Law.

Once the competent court and the applicable law have been established, the affected court can resolve the conflict. With a substantive *res judicata* made by a competent judge, it is necessary to have it recognized and enforced by foreign courts, which proves to be another challenge for law.¹²

The conflicts of jurisdiction and choice of law come in different forms for the jurists of each country. Private International Law does not have the role of presenting solutions for each specific case, but of guiding national courts and judges, through its

11 See: BAGBY, John W e RUHNKA, John C. Electronic Data Discovery: Integrating Due Process into Cyber Forensic Practice. *Journal of Digital Forensics, Security and Law*, v. 1, n. 1, p. 5–23, 2006. Disponível em: <<https://goo.gl/CtVJD8>>. Accessed in: 01/22/2017; FAIRFIELD, Joshua e LUNA, Erik. Digital Innocence. *Cornell Law Review*, v. 99, p. 981–1076, Jul 2014. Available at: <<https://goo.gl/V39Sk1>>. Accessed in: 01/22/2017; GARRETT, Brandon L. Big Data and Due Process. *Cornell Law Review Online*, v. 99, p. 101–110, Ago 2014. Available at: <<https://goo.gl/ZReMNS>>. Accessed in: 01/22/2017.

12 This paper will not address the issue of sentence recognition, but only questions of jurisdiction and conflict of laws.

main instruments, among them laws, treaties, doctrines, jurisprudence and soft law instruments, such as codes of conduct, guidelines and recommendations.

3. Europe

In Europe, there is an important and rich legal environment that was developed especially for the purpose of pacifying conflicts arising from digital interactions. This task was recently recognized by the European Commission as essential for the continuation and expansion of trade and economic integration, giving rise to the strategy known as the “Digital Single Market”¹³

In order to understand the European scenario, it is first necessary to analyze the role of the European Union. The European Union is responsible for integrating the continent in the physical, political and legal senses. According to the entity’s website:

The European Union is a unique economic and political union between 28 European countries that together cover much of the continent. The EU was created in the aftermath of the Second World War. The first steps were to foster economic cooperation: the idea being that countries that trade with one another become economically interdependent and so more likely to avoid conflict.¹⁴

To fulfill its main objective, which is to unite the countries of the continent, the European Union is structured from a series of normative instruments. First, there is a legal structure based on several treaties, such as the 1957 Treaty of Rome¹⁵ establishing the European Economic Community and the European Atomic Energy Community, and the 1992 Maastricht Treaty¹⁶, which implemented what is now called Treaty on European Union (TEU). The TUE, which acquired its name and status following the changes brought by the Treaty of Lisbon in 2007, has as its main objectives the creation of a single currency, the Euro, and the development of tools to establish a political union in the continent.

In addition to the objectives mentioned above, the Maastricht Treaty also has a great legal importance: to establish which are the main normative species at the European Union disposal, when they should be applied and what normative force each of them has.

Article 189 of the Treaty of Maastricht is very clear when it establishes the five main normative species of the European Union’s legal regime: (1) regulation, (2) directive, (3) decision, (4) recommendation and (5) opinion¹⁷. For this study, it is necessary

13 EUROPEAN COMMISSION. Digital Single Market. Available at: <<https://goo.gl/GX1HpK>>. Accessed on: 22/01/2017.

14 EUROPEAN UNION. The EU in brief. Available at: <<https://goo.gl/fz7U3z>>. Accessed in: 12/13/2016.

15 The EEC Treaty, signed in Rome in 1957, brings together France, Germany, Italy and the Benelux countries in a Community whose aim is integration through trade aimed to economic expansion. After the Maastricht Treaty, the EEC became the European Community, expressing the willingness of the Member States to extend Community powers to non-economic areas. EUROPEAN UNION, Treaty Establishing the European Economic Community or EEC Treaty. Available at: <<http://bit.ly/2vCC5uJ>>. Accessed in: 01/16/2017.

16 The Treaty on European Union (TEU) was a new stage in European integration, as it allowed the launching of political integration. This Treaty created a European Union based on three pillars: the European Communities, the Common Foreign and Security Policy (CFSP) and police and judicial cooperation in criminal matters (JHA). It has also established European citizenship, strengthened the powers of the European Parliament and created Economic and Monetary Union (EMU). In addition, the EEC has become the European Community (EC). EUROPEAN UNION, Maastricht Treaty on European Union. Available at: <<http://bit.ly/1SRei3n>>. Accessed on: 01/16/2017.

17 “Article 189: In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall

to analyze Regulation 1215 of 2012 (the Brussels I Recast Regulation), approved by the Council of the European Union and the European Parliament, which is essential for the understanding of *digital due process* in the continent.

Regulation 1215/2012 was approved with the aim of modernizing the provisions of Regulation 44/2001 (Brussels I). The latter was considered satisfactory, but the European Union felt that it would be desirable to revise it in order to clarify the rules governing jurisdiction and recognition of decisions, to promote the free movement of decisions, and to continue to strengthen access to justice. The Regulation was important as it laid a solid foundation for the development of private international law in Europe.

Regulation 1215 of 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has amended the provisions of Regulation 44/2001, to updating them and making private international litigation in Europe more stable and reliable, with regard to cross-border disputes. It is important to note that, according to Article 1 of this Regulation¹⁸, it does not apply to fiscal, customs and administrative matters. The Regulation will only apply to establish the jurisdiction applicable in disputes involving civil and commercial matters.

a. Conflicts of jurisdiction

Article 4, of Regulation nº 1215 of 2012, establishes that the Member State where the defendant is domiciled is generally the competent jurisdiction to settle disputes involving civil and commercial matters.¹⁹

[...] the rules of jurisdiction are based on the principle of forum defensoris. That is to say, the European Regulation assigns, as a general rule, jurisdiction to the courts of the State where the defendant is domiciled, irrespective of his nationality (Article 2) [authors' translation].²⁰

With regard to the handling of internet litigation, it must be established which is the domicile of a digital service provider so that it can be sued in court. It is not always easy to determine its domicile. Imagine a company active in the online sales segment, based in France with servers in Spain, but which faces complaints from a German customer about shipping time and conformity of the goods transacted. Where is this company domiciled?

leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force." Treaty on European Union. p. 75-76. Available at: <<https://goo.gl/amyDIJ>>. Accessed on 12/20/2016.

18 "Article 1: 1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)." Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p. 1–32. Available at: <<http://bit.ly/2uCU07m>>. Accessed in: 01/25/2017.

19 "Article 4: 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State." Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p. 1–32. Available at: <<http://bit.ly/2uCU07m>>. Accessed in: 01/25/2017.

20 In Portuguese: [...] as regras de competência assentam no princípio do forum defensoris. Isto é, o Regulamento Europeu atribui, como regra geral, competência judiciária aos tribunais do Estado de domicílio do réu, independentemente da sua nacionalidade (art. 2.º). PEREIRA, Alexandre Libório Dias. A jurisdição na internet segundo o Regulamento 44/2001 [Jurisdiction on the Internet under Regulation 44/2001]. Boletim da Faculdade de Direito, Vol. LXXVII, Universidade de Coimbra, Coimbra, p. 644, 2001. Available at: <<https://goo.gl/0eTAwi>>. Accessed in: 12/13/2016.

The European Directive on Electronic Commerce (2000/31 / EC) determines the place of establishment of a company providing services online as the one in which it carries out its economic activity²¹. If economic activity is provided from different locations, one must define which is the center of service provision. However, the Directive only sets goals to be achieved, leaving it to each Member State to choose the best means. Therefore, each member of the European Union can define internally how it will apply the directive.

In general, the determination of competent jurisdiction obeys the principle of *forum defensoris*. However, there are exceptions to this rule, laid down in Articles 7 to 25 of the Brussels I Regulation. These are: special competencies, competence in matters of insurance, competence in matters relating to consumer contracts, competence in individual contracts of employment, and extension of competence.

For purposes of analysis of this theme, only **special competencies** will be addressed, since they have an essential connection with internet litigation. The other competencies, although of considerable importance, are not relevant for this study.

Besides the principle of *forum defensoris*, Regulation n° 1215/2012 establishes, in its article 7(1), that the defendant may be sued in the place where a certain obligation was or should be fulfilled.²²

In order to be sued in a State other than the one in which he or she is located, it is necessary to be stated in the contract that any disputes will be resolved in the country where the contract has been concluded. It is important to note that this special competence applies to contracts regarding the sale of goods and services.

In addition, Article 7(2) of the Regulation establishes that, in disputes of a non contractual nature, the claim must be resolved in the place where the harmful event occurs²³. Situations of sales of goods or provision of services are commonplace on the internet, making these rules essential in the resolution of jurisdictional issues.

b. Applicable Law

Once it has been defined which jurisdiction to resolve a conflict, it is necessary to establish the applicable law for the solution of a specific case. To that end, Regulations

21 “Whereas: [...] (19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.” Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’). OJ L 178, 17.7.2000, p. 1–16. Available at: <<http://bit.ly/2v3SITm>> . Accessed in: 12/13/2016.

22 “A person domiciled in a Member State may be sued in another Member State: (1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered; - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided; (c) if point (b) does not apply then point (a) applies;”. Regulation (EU) N° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p. 1–32. Available at: <<http://bit.ly/2uCU07m>>. Accessed in: 12/13/2016.

23 “Article 7 - A person domiciled in a Member State may be sued in another Member State: [...] (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;”. Regulation (EU) N° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p. 1–32. Available at: <<http://bit.ly/2uCU07m>>. Accessed in: 12/13/2016.

593 of 2008²⁴ and 864 of 2007²⁵, known respectively by Regulations Rome I and II, are relevant. Like the Brussels I Regulation, the Rome I and Rome II Regulations deal only with civil and commercial matters and are not applied to fiscal, customs and administrative matters or other matter of a public nature.

Regulation 593 of 2008 deals with contractual obligations and guarantees the principle of freedom of choice of applicable law. Article 3(1) provides that the contract shall be governed by the law chosen by the parties²⁶. In Article 3(2), it is stipulated that, at any time, the parties may change the law chosen for the contract, if there is a common agreement.²⁷

If there is no choice of law in the contract, article 4(1), subitems “a” and “b” establishes that, in contracts for the sale of goods and/or services, the applied law shall be of the country where is the domicile of the seller and/or the service provider.

The Rome II Regulation deals with non-contractual obligations and establishes that the law applicable to non-contractual obligations will be that of the country where the damage occurs.²⁸ However, as provided in Article 4(2), if the parties have domicile in the same country, the applicable law will be of the place where they have domicile.²⁹

Following this understanding, the Portuguese jurist Alexandre Libório Pereira argues for the interpretation of Rome I and II Regulations to the internet conflicts. The author, discussing the relationship between substantive law and both regulations, believes that Rome I and Rome II should be applied in accordance with the Portuguese legal system.

When the conflict in the digital sphere deals with the matters contained in Regulations I and II, the Portuguese Court should follow the rules of these. However, there may be conflicts in the virtual space that do not have a direct connection with said regulations. In such situations, the judge can not interpret the law based on Rome I or Rome II.

Regarding the location of the damage, Alexandre Libório Pereira argues that there will be “the application of the law of the country where the damage occurs (*lex loci*

24 Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177, 4.7.2008, p. 6–16. Available at: <<http://bit.ly/2vPJSX7>>. Accessed in: 12/13/2016.

25 Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). OJ L 199, 31.7.2007, p. 40–49. Available at: <<http://bit.ly/2uF9aZa>>. Accessed in: 12/13/2016.

26 “Article 3 - Freedom of choice - 1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.”. Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177, 4.7.2008, p. 6–16. Available at: <<http://bit.ly/2vPJSX7>>. Accessed in: 12/13/2016.

27 “Article 3 - Freedom of choice - [...] 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.”. Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177, 4.7.2008, p. 6–16. Available at: <<http://bit.ly/2vPJSX7>>. Accessed in: 01/09/2017.

28 “CHAPTER II - TORTS/DELICTS - Article 4 - General rule - 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”. Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). OJ L 199, 31.7.2007, p. 40–49. Available at: <<http://bit.ly/2uF9aZa>>. Accessed in: 01/09/2017.

29 “CHAPTER II - TORTS/DELICTS - Article 4 - General rule - [...] 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.”. Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). OJ L 199, 31.7.2007, p. 40–49. Available at: <<http://bit.ly/2uF9aZa>>. Accessed in: 01/09/2017.

damni”), referring to both the causal event and the damage.”³⁰

4. United States of America

In the United States of America there is no central initiative regarding online conflicts, and the matter is dispersed in judicial decisions forming precedents. Because of its federalist form, in the US each state has the independence to organize its courts and legislate in certain matters, especially in civil and commercial matters.

With a greater level of independence than the one verified in Brazil, the federal states in the United States have the authority to dictate their own laws of internal organization. Each state, therefore, relies on its rules of jurisdiction and establishes general rules of jurisdiction, including special rules of jurisdiction over non-residents (called “long-arm statutes”). However, some general rules remain at the federal level and must be respected by the states. Notably, the US Constitution states some of the commandments, including the 14th Amendment, which sets up the principle of due process and the protection of the law to those under the jurisdiction of the United States, also understood as a right not to be tried by illegitimate authorities.³¹

a. Conflicts of jurisdiction

Being a common law system, US law develops mainly through jurisprudence. In other words, judicial decisions form precedents and guide the application and interpretation of the law for similar cases in the future. A jurisprudential principle most commonly employed in the legal systems with an Anglo-American tradition, if compared to Brazil, is the so-called *forum non conveniens*, which establishes that a court may refuse to exercise jurisdiction over an suit according to a discretionary analysis, in order to avoid an inefficient or unjust solution to the litigation, to the detriment of the judgment by another court that would be considered more convenient for the resolution of the dispute.³²

Recurringly, in the US legal debate there are references to a jurisdiction related to a person (*in personam jurisdiction*), which opposes, as a rule of jurisdiction, to a choice of jurisdiction related to the place where the thing/property is located (*in rem jurisdiction*)³³. In a case where is utilized the in personam jurisdiction the courts apply the Supreme Court’s “minimum contacts” test, which was developed in the *International Shoe Co v State of Washington* case, in 1945.³⁴

This test aims to ensure that a demand will not be filed in a place where the

30 “a aplicação da lei do país onde o dano ocorre (lex loci damni), referindo-se tanto ao evento causal como ao dano”. PEREIRA, Alexandre Libório Dias. O tribunal competente em casos da internet segundo o acórdão “e-date advertising” do Tribunal de Justiça da União Europeia [The competent court in Internet cases according to the e-date advertising judgment of the Court of Justice of the European Union - authors’ translation]. Revista Jurídica Portuguesa. N.º.: 16. 2014. p: 18. Available at: <<https://goo.gl/PHH7uS>>. Accessed in: 06/11/2016.

31 Fourteenth Amendment (Amendment XIV), 1868. Ver STEIN, Allan R. Personal Jurisdiction and the Internet: Seeing Due Process through the Lens of Regulatory Precision. Northwestern University Law Review, v. 98, p. 413-415, 2004. Available at: <<https://goo.gl/2L97Aq>>. Accessed in: 19/01/2017.

32 In Brazil, there is a more active understanding of the Judiciary, which is based on art. 5, XXXV of the Federal Constitution, which stipulates that “the law shall not exclude from the appreciation of the judiciary injury or threat to law” [“a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito”]. See ARAUJO, Nadia De. Direito Internacional Privado: Teoria e Prática Brasileira [Private International Law: Brazilian Theory and Practice]. 6ª ed. atual. e amp. Porto Alegre: Revolução eBook, 2016, p. 118-119.

33 JIMÉNEZ, William Guillermo. Rules for Offline and Online in Determining Internet Jurisdiction: Global Overview and Colombian cases. International Law, Revista Colombiana de Derecho Internacional, n. 26, p. 21-22. Available at: <<https://goo.gl/HaXDjH>>. Accessed in: 12/20/2016.

34 US Supreme Court. *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945). Available at: <<https://goo.gl/QbXpyB>>. Accessed in 20/12/2016.

defendant has no bond or contact, it is, then, essential to ensure due process. Having verified that there is contact, a court then proceed to the subsequent analysis stage, to find out its type, following the gradation defined in the *Hanson v Denckla* case of 1958. According to this case, it must be observed whether or not the activities were “purposefully direct” to a certain forum, for “purposefully avail” of negotiating in a certain place, until the commercial delivery of products (“stream of commerce”) to the place.³⁵

We must pay attention to the emerging cases concerning interactions in cyberspace, like the two important precedents *Calder v Jones* and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* In *Calder v Jones*, the Supreme Court established another understanding for the definition of personal jurisdiction, determining a distinct rule of “minimum contacts.”³⁶ In this case, it was observed the place where the repercussion of a newspaper article was felt, since it had been published in the state of Florida, but referred to a resident of California, state in which the newspaper had been distributed and in whose Courts the lawsuit was filed.³⁷ Although it preceded online disputes dating back to 1984, this case is used by US courts to settle internet disputes, applying the test from where the effects were ultimately felt (“effects test”).

In the *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* case there was a discussion on trademark rights.³⁸ The case became a benchmark because it have inaugurated a model to define jurisdiction over emerging litigation on the internet, which is known as a ‘sliding scale’. It identifies a spectrum of commercial interactivity and exchange of information, and the establishment of jurisdiction by domestic courts is directly proportional to the nature and quality of the commercial activity conducted via the internet by the defendant. At one end of the scale, there is an element of active negotiating behavior, according to which the part that comes in contact and carries out business in a certain place through a website (systematic contacts with forum). At the other extreme, there is more passive behavior, characterized when only the information is accessible in an electronic address.

Nonetheless, some studies point to the insufficiency of the rules designed by the *Zippo* and *Calder* precedents, in order to deal with cross-border Internet litigation. This is because, analyzing the jurisprudence of the courts, it is perceived that the rule of *Zippo* is applied more frequently, since the rule of effects based on *Calder* is understood as more subjective.³⁹ It is possible to observe, also, that the courts resist to adopt the “sliding scale” (active-passive posture). This scenario suggests that rules created for cases involving technologies may not be more effective than the old rules of “offline” cases; or that there would be a need to develop new rules on applicable law, more consistent and effective.⁴⁰

In addition to jurisprudential development, the topic is addressed by private self-regulation in the United States, resulting in sectoral practices and the creation of a several regulatory micro-systems. One of the main initiatives is the *Digital Due Process*⁴¹

35 Supreme Court. *Hanson v. Denckla*, 357 U.S. 235 (1958). Available at: <<https://goo.gl/dbkgBV>>. Accessed in: 01/03/2017.

36 Supreme Court. *Calder v. Jones*, 465 U.S. 783 (1984). Available at: <<https://goo.gl/xeV5l7>>. Accessed in: 01/03/2017.

37 Idem.

38 Suprema Corte. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Available at: <<https://goo.gl/CjccVJ>>. Accessed in: 12/18/2016.

39 JIMÉNEZ, William Guillermo. Rules for Offline and Online in Determining Internet Jurisdiction: Global Overview and Colombian cases. *International Law, Revista Colombiana de Derecho Internacional*, n. 26, p. 31. Available at: <<https://goo.gl/HaXDjH>>. Accessed in: 20/18/2016.

40 GEIST, Michael. Is There a There There: Toward Greater Certainty for Internet Jurisdiction. In: *Berkeley Technology Law Journal*, v. 16, n. 3, p. 60, 2001. Available at: <<https://goo.gl/ExeEby>>. Accessed in: 20/12/2016.

41 For more info: *Digital Due Process*. Available at: <<https://goo.gl/VmwqHk>>. Accessed in: 01/14/2017.

coalition, which brings together think tanks, specialists and large companies seeking to reform the *Electronic Communications Privacy Act* (ECPA), the main law regulating aspects of electronic privacy in the country, in force since 1986. It also contains rules on interception of communications.⁴² The initiative has companies such as Apple, Facebook and Google, and aims to influence, through regulated lobbying, the US Congress to update the ECPA, which they deem to be out of date in face of the new technologies.

Currently, the United States Congress is discussing the proposal of the “Email Privacy Act”, demanded by civil society organizations and experts as an important advance to ensure the security of electronic communications.⁴³ However, the proposal does not find a friendly political environment for the approval, and lawmakers have dealt with the issue with slowness.

b. Applicable Law

From online transactions, a wide variety of conflicts might arise, such as: defamation, consumer rights, intellectual property and others. In face of the recurring reality in which involved parts are located in different jurisdictions, the matter of how to achieve a resolution to a legal conflict born on or related to the internet frequently comes up. After the determination of which is the competent jurisdiction the next step is to initiate the choice of law which will be applicable to the legal conflict resolution.

In the United States, like in Europe, two main doctrines prevail: that of free choice and that of absence of choice of law.⁴⁴ As regards the applicable law to contractual obligations,, the party autonomy is the principle which guarantees the freedom of choice of law , In the European Union there are clear rules for choice of law, established by the Rome I Regulation, different from the United States where there is not a systematic law on this subject.

In the United States, there is no uniform code to rule over the matter across the entire country, therefore which state uses its own jurisprudence and The Second Restatement, a non-binding document which is used by some of them as a hard law.⁴⁵ *The Second Restatement* establishes that the law chosen by the parties will rule over the contract. However, this freedom of choice can be limited if the law chosen is not strongly related to the legal relationship or if it is against a fundamental ro state rule.⁴⁶ There is, therefore, a conditioning element between the contract and the applicable law.⁴⁷

A similar provision is also found on the *Uniform Commercial Code* (UCC), a codification of commercial laws adopted by states,⁴⁸ which foresees the power of the parties

42 Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (Oct. 21, 1986).

43 Email Privacy Act. Available at: <<https://goo.gl/EZh1Gy>>. Accessed in: 01/13/2017.

44 WANG, Faye Fangfei. *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China*. Cambridge: Cambridge University Press, 2010. p. 123-124.

45 Restatements are compilations produced by a private and independent organization, The American Law Institute, which aims to guide courts about the subject: “[...]clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.” AMERICAN LAW INSTITUTE. Frequently Asked Questions. Available at: <<https://goo.gl/OfBpyj>>. Access in: 01/19/2017.

46 “(a) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or (b) Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.” AMERICAN LAW INSTITUTE. Restatement (Second) of Conflict of Laws. 1971, § 187 (1) (2). Available at: <<https://goo.gl/iKAZCE>>. Access 15/01/2017.

47 ZIEGLER, Tamas Dezso. Choice-of-Law in the Internet Age – US and European Rules. *Acta Juridica Hungarica - Hungarian Journal of Legal Studies*, v. 53, n. 3, p. 196, 2012. Available at: <<https://goo.gl/ogbk16>>. Access 13/01/2017.

48 Created by the National Conference of Commissioners on Uniform State Laws and by the American Law Institute, the UCC does

to choose the law applicable to the contract - in a general manner, since there are no specific rules for electronic transactions.⁴⁹

There are also special rules for transactions such as purchase and licensing of software in the *Uniform Information Transaction Act* (UCITA).⁵⁰ Even if only adopted by two American states, UCITA establishes the choice of law for those kinds of contracts, with reservations regarding consumer protection.⁵¹ Upon the silence of the parties, some rules fill in for the absence of choice of law. For the UCC, the most significant relationship to the contract is the one chosen. The *Restatement Second of Conflict of Laws*, in turn, rules that the absence of choice leads to the application of local law when the location of establishment and execution of the contract are the same.⁵²

5. Latin America

Latin America's legal tradition has been strongly inspired by Europe. Choice of forum and connection rules in Latin American countries greatly resemble those of European countries, in contrast with the North American tradition. However, the degree of codification is not like that seen in the European Union, with the subject still in development and with several gaps found, in need of updating.

5.1. Brazil

Brazil currently goes through an important process of updating of its legislation to better face challenges brought forth by new technologies and digital interactions. With power concentrated in the hands of the Federal Union, the federated states retain little legislative competence and the central rules are applied across the entirety of the national territory. The Union and the National Congress can, therefore, be considered the main actors in the creation of Private International Law rules.

a. Conflicts of jurisdiction

The new Civil Procedure Code of 2015 establishes, in its articles 21 to 23, the competence of the Brazilian State to adjudicate conflicts in civil procedures (broadly considered). On Title II, "On the limits of national jurisdiction and international cooperation", rules of concurrent and exclusive competence are established on Articles 21, 22 and 23.⁵³ On the first two articles, the efficacy of foreign decisions is recognized in Brazil. The same can't be said for exclusive competence cases, in which the Brazilian justice is the sole competent entity to recognize the action. In the following article, the subject of international cooperation is dealt with by the code as:

"[...] a formal way of requiring a different country some legal, investigative or administrative measure neces-

not have legal status, but was received by states and territories and widely incorporated by case law.

49 AMERICAN LAW INSTITUTE; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS. *Uniform Commercial Code*, 2011, § 1-301. Available at: <<https://goo.gl/3eoQRB>>. Access 15/01/2017.

50 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS. *Uniform Information Transaction Act*, 1999. Available at: <<https://goo.gl/V87LCI>>. Access 15/01/2017.

51 *Idem*, § 109.

52 AMERICAN LAW INSTITUTE. *Restatement (Second) of Conflict of Laws*. 1971, § 187 (1) (2). Available at: <<https://goo.gl/iKA-ZCE>>. Access 15/01/2017.

53

sary for the ongoing case. The effectiveness of justice, in a scenario of growing relations between nations and peoples, either in commercial matters, as well as in migratory or informational ones, demands a significantly more proactive and collaborative State.⁵⁴

The guiding principles for legal international cooperation are as follows: respect to due process of law, equality of treatment between nationals and foreigners, establishment of a central authority for exchange of information, and the 'spontaneity in the exchange of information to foreign authorities'.⁵⁵ The advances in technology make such operations easier. However, despite the implementation of electronic process on the Superior Court of Justice (in Portuguese, "Superior Tribunal de Justiça - STJ"), it can be noted that the traditional means (communications through physical mail) are still used, since paper copies must be delivered to the tribunal, with certified translation, in what concerns procedures of rogatory letters to be sent to other countries. Still, there are mechanisms to ease requests for cooperation through electronic forms on the Ministry of Justice's website, allowing for the submission of the request straight to the Ministry.⁵⁶

In the context of cooperation on criminal matters, the Hemispheric Network of Information Exchange for Mutual Legal Assistance in Criminal Matters and Extradition,⁵⁷ created by the Organization of American States (OAS), has a:

[...] mechanism of safe e-mail, based on the Groove Virtual Office, which allows for the exchange of documents and the sharing of work spaces destined to the joint development of matters of common interest.⁵⁸

The *Groove* software also integrates Argentina, the Bahamas, Brazil, Colombia, El Salvador, Spain, Mexico and the Dominican Republic on the pilot program of the Hemispheric Network of Cooperation in Matters of Family and Childhood. A safe platform for the exchange of information was also created by the Network of Asset Recovery of the GAFISUD (Group of Finance Action of South America against Money Laundry and Terrorism Financing).⁵⁹ Several other cooperation networks of which Brazil is a part of also have their own information systems with databases on legal systems, with the goal of establishing mutual cooperation and facilitating support between competent authorities.⁶⁰

Some of these networks also act in civil matters, such as the Ibero-American

54 MINISTÉRIO DA JUSTIÇA E CIDADANIA. *Cooperação Jurídica Internacional* [authors' translation]. Available at: <<https://goo.gl/J9adu6>>. Accessed on: 18/01/2017.

55 BRAZIL. Lei nº 13.105, de 16 de março de 2015. Código de Processo Civil. D.O.U. de 17/03/2015, art. 26, I-V.

56 MINISTÉRIO DA JUSTIÇA E CIDADANIA. Formulários Online. Available at: <<https://goo.gl/8f45id>>. Access 18/01/2017.

57 The following countries are part of the network: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, United States of America, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Suriname, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay and Venezuela.

58 BRAZIL. Secretaria Nacional de Justiça. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional. Manual de cooperação jurídica internacional e recuperação de ativos: cooperação em matéria penal. 2. ed. Brasília: Ministério da Justiça, 2012, p. 72. Available at: <<https://goo.gl/zVHW12>>. Access 17/01/2017.

59 Members of the GAFISUD include: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru and Uruguay. BRAZIL. Secretaria Nacional de Justiça. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional. Manual de cooperação jurídica internacional e recuperação de ativos: cooperação em matéria penal. 2. ed. Brasília: Ministério da Justiça, 2012, p. 72. Available at: <<https://goo.gl/JoNvpm>>. Accessed on: 17/01/2017 p. 74.

60 A possible example is the International Network for Legal and Judicial Cooperation of Portuguese Language, the Ibero-American Legal Cooperation Network and the Platform of Focal Points for Asset Recovery STAR-INTERPOL. BRAZIL. Secretaria Nacional de Justiça. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional. Manual de cooperação jurídica internacional e recuperação de ativos: cooperação em matéria penal. 2. ed. Brasília: Ministério da Justiça, 2012, p. 71-75. Available at: <<https://goo.gl/JoNvpm>>. Accessed on: 17/01/2017.

Network for International Legal Cooperation (IberRede). As to the multilateral agreements, one stands out: the Protocol for Jurisdictional Assistance and Cooperation on Civil, Commercial, Labor and Administrative Matters, known as the Protocolo de Las Leñas throughout MERCOSUL,⁶¹ responsible for harmonizing bureaucratic processes in the group.⁶²

Brazil does not follow, as mentioned before, the doctrine of *forum non conveniens*, since Brazilian justice has not dedicated special attention to the issue of discretion when refusing a cause, basing itself on the access to justice established by the Federal Constitution.⁶³

Bringing forth more certainty and clarity, the new Civil Procedure Code contains provisions on choice of forum. Article 25 dictates that “[...] it does not compete to a Brazilian judiciary authority to process and judge a suit when a clause of exclusive choice of foreign forum is present on an international contract, argued by the defendant.”⁶⁴

With the Marco Civil, new rules established the nullity of contract clauses which violate the rights to privacy and freedom of expression, as well as those which, “in a standard contract, do not offer as an alternative the choice of a Brazilian forum to the resolution of conflicts born from the offer of such services in Brazil.”⁶⁵ This rule goes against the doctrine and jurisprudence developed in the country, which opts for the protection of the user in face of a lack of options.⁶⁶

Another relevant provision in the Marco Civil is that of Article 11:

[...] all operations involving the collection, storage, retention or processing of records, personal data, or communications by internet service and applications providers must comply with Brazilian law and the rights to privacy, protection of personal data, and confidentiality of private communications and records, if any of those acts occur in Brazilian territory⁶⁷

Therefore, connection and application providers are subject to Brazilian jurisdiction should they collect, store or keep data. The rule is applied even “[...] if they offer services to the Brazilian public or at least one of the members of the legal entities’ economic group has an establishment in Brazil.”⁶⁸

61 BRAZIL. Decreto nº 6.891/2009. Promulga o Acordo de Cooperação e Assistência Jurisdicional em Matéria Civil, Comercial, Trabalhista e Administrativa entre os Estados Partes do Mercosul, a República da Bolívia e a República do Chile. D.O.U. de 03/07/2009, p. 1.

62 BRAZIL. Secretaria Nacional de Justiça. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional. Manual de cooperação jurídica internacional e recuperação de ativos: cooperação em matéria civil. 4. ed. Brasília: Ministério da Justiça, 2014. Available at: <<https://goo.gl/XAsTIW>>. Access 17/01/2017; and MOREIRA, Nilton Shenon Zibetti. A cooperação jurídica internacional no protocolo de Las Leñas: a jurisdição no Mercosul. 2014. 38 f. Curso de especialização em Direito Internacional, Ambiental e Consumidor. Universidade Federal do Rio Grande do Sul, 2014. Available at: <<https://goo.gl/drE8AJ>>. Accessed on: 18/01/2017.

63 ARAUJO, Nadia De. Direito Internacional Privado: Teoria e Prática Brasileira. Porto Alegre: Revolução eBook, 2016, p. 118-119.

64 BRAZIL. Lei nº 13.105, de 16 de março de 2015. Código de Processo Civil. D.O.U. de 17/03/2015.

65 BRAZIL. Lei nº 12.965, de 23 de abril de 2014. D.O.U. de 24/04/2014, p. 1.

66 RESENDE, Tatiana Carneiro; DOS SANTOS, Yuri Alexandre; MIRANDA, Valéria de Oliveira. Internet Dispute: Forum-Selection clause and denial of justice in web-signed contracts. IRIS. Disponível em: <<https://goo.gl/MdxcyI>>. Acesso em: 16/01/2017.

67 BRAZIL. Lei nº 12.965, de 23 de abril de 2014. D.O.U. de 24/04/2014, p. 1, art. 11.

68 This rule might be highlighted, at first, for escaping the traditional conflictual method by focusing at the spatial reach and, in a way, for searching for more adequate protection through narrower links - since the service is offered to Brazilian consumers. See ARAUJO, Nadia De. Direito Internacional Privado: Teoria e Prática Brasileira. Porto Alegre: Revolução eBook, 2016, p. 33-41.

b. Applicable Law

As to connection rules, the Law of Introduction to Rules of Brazilian Law (LINDB) presents some rules, characterized “[...] by classical notions of the 19th Century, based on bilateral systems for connection rules.”⁶⁹ Previously, the only country to adopt the nationality criteria as a connection rule was Brazil. The LINDB (then named Introduction Law to the Civil Code of 1942) brought the country closer to the Latin tradition by adopting the criteria of the place of residence.⁷⁰ It is important to note that:

While the legislation remains unchanged, the changing process is happening from the outside in. During the last years, the country has ratified several Inter-American conventions and, recently, has been more active regarding the conventions originated in the Hague Conference of Private International Law.⁷¹

Besides the international conventions, a great step forward can be perceived by national doctrine, which stimulates the development of protective norms for consumers engaged in international electronic commerce. In part, this proposal can be observed in the Marco Civil, as mentioned before.⁷²

The proposals for Privacy and Data Protection regulations, currently brought together by Bill n.5.276/2016⁷³, are in process in the Brazilian Congress. Said legislative proposal is the fruit of ample popular consultation, in a similar manner to the Marco Civil da Internet, through an online platform called “Pensando o Direito” (“Thinking Law”), by the Ministry of Justice.⁷⁴ With significant inspiration from the European tradition, the bill contains several disciplinary rules derived from principles contained in the Marco Civil and would bring greater legal certainty to the virtual environment in Brazil, guaranteeing greater confidence by society and entrepreneurs as to their rights and duties in what concerns collection, storage, and treatment of personal data.

5.2. Colombia

There are no jurisdiction-determining rules specific for cases with international elements, and there is certain resistance by scholars and courts as to their updating. As to connection rules, the country holds some which deal with the subject, but there is strong criticism by scholars concerning their outdated. Regarding case law, it can be concluded that there are no significant cases involving Private International Law and the Internet, and related cases are scarce.

a. Conflicts of jurisdiction

Colombian jurisdiction rules are found in the country’s Constitution⁷⁵ and in spe-

69 ARAUJO, Nadia De. *Direito Internacional Privado: Teoria e Prática Brasileira*. Porto Alegre: Revolução eBook, 2016, p. 61.

70 *Idem*.

71 *Idem*, p. 62.

72 M Further details on the choice of law for the internet in Brazil might be obtained on the work “Internet and Choice of Law: Rules for connection and determining of applicable law in network interactions”, soon to be published by IRIS.

73 BRAZIL. Bill n° 5.276 de 2016 (Executive Branch). Dispõe sobre o tratamento de dados pessoais para a garantia do livre desenvolvimento da personalidade e da dignidade da pessoa natural. Available at: <<https://goo.gl/g5Pvmt>>. Accessed on: 22/12/2016.

74 MINISTÉRIO DA JUSTIÇA E CIDADANIA. Anteprojeto de Lei para a Proteção de Dados Pessoais. Available at: <<https://goo.gl/bjmp4k>>. Access 22/01/2017.

75 COLOMBIA. Constitución Política de Colombia. 1991. Available at:< <https://goo.gl/shrptN>>. Access 21/01/2017.

cific legislation⁷⁶ such as the *Código General del Proceso* (General Procedure Code, GCP).⁷⁷ The Constitution establishes, in its Article 29, the principle of due process of law as fundamental right. The GCP holds no specific rules for international jurisdiction, containing only rules for national and territorial competence, in Article 28, which are also applied in determining international competence.⁷⁸ To determine jurisdiction in civil, family, commercial and real estate matters, author Jiménez synthesizes as follows:

In contemptuous processes, the tribunal declares its competence based on the residence of the defendant; if the defendant has many residences, the plaintiff may choose the forum. If the defendant has no domicile, the tribunal declares jurisdiction on the residence of the defendant; if the defendant has no domicile or residence in the country, jurisdiction falls on the domicile of the plaintiff. In contracts, the plaintiff may choose between the place of execution or the domicile of the defendant. In cases involving damages, where the incident occurred. In cases related to goods and property, where such are located.⁷⁹

If internal competence rules attribute competence to a Colombian judge, the same occurs to a legal relation with international elements, as long as there is a point of material contact with Colombia.⁸⁰ Colombian Law, therefore, has no norms on the application of international competence rules, such as, for instance, cases of control of international competence, *lis pendens* and international connection, and clauses of forum derogation.⁸¹ The absence of such clauses, along with what is established on article 18.3 of the GCP,⁸² has led the Superior Tribunal of the Judicial District of Bogotá to deny, in several cases, contractual clauses that establish choice of forum to foreign tribunals.⁸³ There are also different rules of jurisdiction for criminal, labor, and administrative matters.⁸⁴

As to the international instruments⁸⁵ of which Colombia is a part of, and which possess provisions on international jurisdiction, these are characterized for being applied solely *inter-partes* and are circumscribed to a limited number of legal situations, barring any possible general update of Colombian rules for territorial jurisdiction.⁸⁶

76 JIMÉNEZ, William Guilherme. Rules for Offline and Online in Determining Internet Jurisdiction - Global Overview and Colombian Cases. *Revista Colombiana de Derecho Internacional*, n° 15, 2015, p. 27. Available at: <<https://goo.gl/XTxANn>>. Access: 21/01/2017.

77 COLOMBIA. *Código General del Proceso*. Lei 1564. 2012. Available at: <<https://goo.gl/yGTbHA>>. Access 21/01/2017.

78 DE LOS MOZOS, Patricia Orejudo Prieto. *El Derecho Internacional Privado Colombiano ante la Ley Modelo OHADAC de DIPr*. Anuario Español de Derecho internacional privado. XIII. 2013. p. 682. Available at: <<https://goo.gl/fX22un>>. Access 21/01/2017.

79 JIMÉNEZ, William Guilherme. Rules for Offline and Online in Determining Internet Jurisdiction - Global Overview and Colombian Cases. *Revista Colombiana de Derecho Internacional*, n° 15. 2015. p. 28. Available at: <<https://goo.gl/XTxANn>>. Access 21/01/2017.

80 LONDOÑO, Alberto Zuleta. Las cláusulas de selección de foro y selección de ley en la contratación internacional: una visión desde el derecho internacional privado colombiano. *Revista de Derecho Privado*. N° 44. Universidad de Los Andes, Colombia. 2010. p. 22.

81 DE LOS MOZOS, Patricia Orejudo Prieto. *El Derecho Internacional Privado Colombiano ante la Ley Modelo OHADAC de DIPr*. Anuario Español de Derecho internacional privado. XIII. 2013. p. 683. Available at: <<https://goo.gl/fX22un>>. Accessed on: 21/01/2017.

82 "ARTÍCULO 28. COMPETENCIA TERRITORIAL. La competencia territorial se sujeta a las siguientes reglas: [...] 3. En los procesos originados en un negocio jurídico o que involucren títulos ejecutivos es también competente el juez del lugar de cumplimiento de cualquiera de las obligaciones. La estipulación de domicilio contractual para efectos judiciales se tendrá por no escrita." COLOMBIA. *Código General del Proceso*. Lei 1564. 2012. Available at: <<https://goo.gl/yGTbHA>>. Accessed on: 21/01/2017.

83 DE LOS MOZOS, Patricia Orejudo Prieto. *El Derecho Internacional Privado Colombiano ante la Ley Modelo OHADAC de DIPr*. Anuario Español de Derecho internacional privado. XIII. 2013. p. 683. Available at: <<https://goo.gl/fX22un>>. Accessed on: 21/01/2017.

84 JIMÉNEZ, William Guilherme. Rules for Offline and Online in Determining Internet Jurisdiction - Global Overview and Colombian Cases. *Revista Colombiana de Derecho Internacional*, n° 15. 2015. p. 28. Available at: <<https://goo.gl/XTxANn>>. Accessed on: 21/01/2017.

85 "In accordance with international treaties and national laws, Colombian courts may have jurisdiction over foreign persons in specific cases, when they apply the "extraterritoriality of the law" principle in civil, labor, and criminal law." JIMÉNEZ, William Guilherme. Rules for Offline and Online in Determining Internet Jurisdiction - Global Overview and Colombian Cases. *Revista Colombiana de Derecho Internacional*, n° 15. 2015. p. 29. Available at: <<https://goo.gl/XTxANn>>. Accessed on: 21/01/2017.

86 "En efecto, sólo caso de que la cuestión litigiosa esté vinculada con al menos dos Estados contratantes, resultará de aplicación el correspondiente Tratado de Montevideo de 1889: el de Derecho civil internacional o el de Derecho comercial internacional; sólo si se trata de una situación vinculada a Colombia y Ecuador, se aplicará el Tratado sobre Derecho internacional privado entre Colombia y

Similarly to Brazil, Colombia does not have a vast case law relating Private International Law and the Internet.⁸⁷ Jiménez has researched on online jurisprudence databases of 3 superior courts (The Constitutional Court, the Supreme Court of Justice and the Council of State) and two district courts (Administrative Tribunal of Cundinamarca and the Superior Tribunal of Bogotá) using keywords such as “internet”, “Facebook”, “websites”, “social networks” and others.⁸⁸ It could only find, however, two criminal law cases which discussed difficulties of determining jurisdiction due to the internet, and in which there was a conflict of internal jurisdiction between tribunals, internet, and jurisdiction.

In the *Jerónimo A. Uribe* case, the son of the President of the Republic Álvaro Uribe-Vélez denounced a group on Facebook dedicated to killing him. The criminal procedure was started in Bogotá.⁸⁹ Then, a suspect of having created the group was arrested in the city of Chía, located in a different internal jurisdiction. The defense then questioned the competence of the tribunal of Bogotá, with allegations that the illicit conduct had originated in Chía and therefore the jurisdiction should fall on the courts of that city. The Supreme Court of Justice affirmed that, due to Facebook having a global coverage, it was hard to determine the location of the illicit act. In the end, courts resorted to “offline” competence rules established by the Criminal Procedure Code, in which jurisdiction is determined by where the plaintiff initiated the procedure. Jiménez highlights that this case reveals the challenges in determining the location of an act originated on the internet.⁹⁰

In the *Centro Comercial Campanario* case, the issue adjudicated by the Supreme Court of Justice was that of deciding between the jurisdictional competence of two tribunals in Colombia in a case of criminal law regarding an illegal bank transaction.⁹¹ The first tribunal, the Court of Barranquilla, argued that it had competence because the crime had happened in its jurisdiction. The second tribunal, the District Court of Popayan, claimed competence because the domicile of the victim was located in its jurisdiction. The Superior Court decided on the competence of the Court of Popayan, favouring the location where the damage was felt. To Jiménez, the so-called effects doctrine might be useful for determining jurisdiction in cases of civil liability for damages caused through the internet, because the place where they were felt is easier to determine than where they originated.⁹²

b. Applicable Law

Connection rules for determining the applicable law are found in the Civil Code (CC) of 1873 and in the Commercial Code of 1973. In general, these rules are characterized by a legislative technique which favors Colombian law. In the Civil Code, the rules

Ecuador, hecho en Quito el 18 de junio de 19038; y, en materia de alimentos, la competencia vendrá determinada por la Convención interamericana sobre obligaciones alimentarias de 1989 [...]” DE LOS MOZOS, Patricia Orejudo Prieto. *El Derecho Internacional Privado Colombiano ante la Ley Modelo OHADAC de DIPr*. Anuario Español de Derecho internacional privado. XIII. 2013. p. 683. Available at: <<https://goo.gl/fX22un>> . Accessed on: 21/01/2017.

87 Marín Fuentes has counted 50 decisions in the Colombian Supreme Court of Justice involving Private International Law, between 1995 and 2008, of which most concern the recognition of foreign decisions. FUENTES, José Luis Marín. *Estado del Derecho Internacional Privado en Colombia y su Enseñanza*. Universidad de Antioquia. 2009. Available at: <<https://goo.gl/FQcHc7>>. Access 22/01/2017.

88 JIMÉNEZ, William Guillermo. Rules for Offline and Online in Determining Internet Jurisdiction: Global Overview and Colombian cases. *International Law, Revista Colombiana de Derecho Internacional*, n° 26, 2015, p. 50-52. Available at: <<https://goo.gl/lsp9vy>>.

Access 20 /12/2016.

89 *Idem*, p. 50.

90 *Idem*, p. 51.

91 *Idem* p. 51.

92 *Idem*, p. 52.

of connection are found in Articles 18 to 21. Article 18 affirms the territoriality principle of Colombian law in which “the law is mandatory both for nationals and foreigners residing in Colombia.”⁹³ Therefore, in principle, the application of Colombian law by state authorities prevails on private international interactions, unless international treaties or conventions suppress internal rules. Lastly, articles 19, 20 and 21 establish the extraterritoriality of Colombian law for some cases, such as those related to civil rights and obligations of Colombians residing or being domiciled in foreign territories (Personal status), real rights and regulations of the shape of public instruments.

In the Commercial Code, Article 869 confirms the territoriality principle of Article 18 of the Civil Code by affirming that contracts formed outside but executed inside of Colombia are subject to Colombian Law.⁹⁴

Some researchers of Colombian law affirm that state connection rules are lacking, especially regarding contract law.⁹⁵ For example, while it is not clear whether the Colombian legal system allows for choice of law in arbitration cases or not, case law has validated the use of UNIDROIT Principles, thus updating the legal system.⁹⁶

International instruments which establish rules of connection, despite updating national law in some cases, are not enough to promote a systemic reform,⁹⁷ similarly to what was discussed concerning rules of jurisdiction, and are also limited due to their *inter-partes* nature.⁹⁸

The Montevideo Conventions of 1889 (On Civil International Law and International Trade Law)⁹⁹ establish connection rules on its Articles 32 through 39. For cases of contract law, the applicable law is that of the place of execution (*lex loci executionis*).¹⁰⁰ Colombia is also signatory of the Vienna Convention of 1980 on International Sales of Goods¹⁰¹ and of the *Inter-American Convention on General Rules of Private International Law* of 1979.¹⁰²

6. Final considerations

Mapping the political and normative frameworks in Europe, the United States and Latin America in matters of jurisdiction and applicable law, regulating emerging private conflicts of legal interactions on the internet is not an easy task. Scarce or non-existent legislation and confusing concepts are widespread on the Private International Law of several nations’ Municipal Law. The task of the researcher, in such cases, is to bring together all the content in a single work, with the goal of facilitating the work of legal

93 Translated from “la ley es obligatoria tanto a los nacionales como a los extranjeros residentes en Colombia”. COLOMBIA. Código Civil. 1873. Available at: <<https://goo.gl/EEv0mA>>. Access 21/01/2017.

94 “ARTÍCULO 869. <EJECUCIÓN DE CONTRATOS CELEBRADOS EN EL EXTERIOR CON CUMPLIMIENTO EN COLOMBIA>. La ejecución de los contratos celebrados en el exterior que deban cumplirse en el país, se regirá por la ley colombiana.” COLOMBIA. Código de Comercio. 1971. Available at: <<https://goo.gl/EyyHWN>>. Access 21/01/2017.

95 DE LOS MOZOS, Patricia Orejudo Prieto. El Derecho Internacional Privado Colombiano ante la Ley Modelo OHADAC de DIPr. Anuario Español de Derecho internacional privado. XIII. 2013. p. 687. Available at: <<https://goo.gl/fX22un>>. Access 21/01/2017.

96 Idem.

97 Idem, p. 688.

98 Idem.

99 TRATADO DE DERECHO CIVIL INTERNACIONAL. Montevideú. 1889. Available at: <<https://goo.gl/2I8xKR>>. Access 22/01/2017.

100 DE LOS MOZOS, Patricia Orejudo Prieto. El Derecho Internacional Privado Colombiano ante la Ley Modelo OHADAC de DIPr. Anuario Español de Derecho internacional privado. XIII. 2013. p. 688.

101 UNCITRAL. United Nations Convention on Contracts for the International Sale of Goods. Viena. 1980. Available at: <<https://goo.gl/7ZmHkh>>. Access 22/01/2017.

102 ORGANIZATION OF THE AMERICAN STATES. Convención Interamericana sobre Normas Generales de Derecho Internacional Privado. 1979. Available at: <<https://goo.gl/9bm3dH>>. Access: 22/01/2017.

professionals - whether legislators, judges, lawyers, professors or students.

Europe, due to the centralization proportioned by the European Union and its pioneering initiatives, might be considered an advanced system in what pertains the resolution of conflicts on the internet. Regulation 1215/2012 - Brussels I - is responsible for offering more certainty to interactions of civil and commercial nature, especially those originated on the internet. Likewise, the work of political and legal organs of the European Union causes the continent to be constantly up to date with its legislation, treaties and conventions. In the virtual environment, in which changes occur increasingly faster, the action of Legislative and Judicial powers is essential.

Among common law systems, the United States present a significant difference to Europe in the way through which they solve conflicts originated on the internet. There is no legislation aimed at solving digital conflicts, and these are solved on a case-by-case basis based on precedents which usually have no relation to the internet. Therefore, the elaboration of laws better suited for conflicts in cyberspace are deemed necessary and would make the work of American lawyers easier and more certain.

Latin America's legal framework shows a particularly complex scenario, since only Brazil and Colombia have developed clear and publicly accessible legislation online. Countries such as Uruguay, Chile and Argentina have no codes or specific laws for the regulation of conflicts on the internet, but instead present vast general repertoire regarding International Private Law, which was not analyzed by this study. The scarce case law usually doesn't present cases involving disputes on the cyberspace with international elements, making it hard to establish how they are solved.

Besides the legislative and jurisprudential study, the elaboration of an index of conflicts is needed for the better understanding of conflicts on the cyberspace. Through a possible index of conflicts, with information on judicial disputes involving the internet, the work of the legislator becomes simpler by making it possible for one to consult which are the leading causes of conflicts on the cyberspace in order to then develop laws that will avoid them.

This study shows that the analyzed countries treat the internet as an expansion of the real world and not a new reality in need of special laws. Although the creation of specific laws with exclusive focus on the internet is a viable alternative for building legal certainty on the internet, using existing legislation to regulate virtual conflicts is also possible. In order for existing laws to regulate

interactions on the cyberspace, however, it is necessary for Law operators to understand and respect existing features exclusive to the internet, so as to not damage its proper functioning and pioneering nature.

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