A new pair of glasses for conflicts of jurisdiction in Brazil: seeing the principle of proximity with Canadian lenses

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ABSTRACT

In response to a rigid and allegedly neutral private international law (PRIL), the principle of proximity has gained undeniable relevance in cross-border disputes. Accordingly, when facing an international case, rather than mechanically applying a traditional rule of PRIL, this principle has often been used to identify which law is, in fact, more connected to the dispute at hand. Beyond the realm of choice of law, proximity has also gained space on conflicts of jurisdiction, with a similar rationale, whereby a given jurisdiction is considered to be reasonable if compliant with the parameters of proximity, a trend that has been established in both domestic and international settings. Such a widespread adoption, in turn, revealed that proximity has virtues but also limitations, especially regarding uncertainty and unpredictability. Given this scenario, this Thesis investigates the status of this principle in Brazil, aiming to understand the space that it currently has in Brazilian jurisdictional matters and the functions it assumes in this context, considering that Brazil has a new and updated civil procedural code. Once identified the space and roles the proximity principle has in this new setting, this Thesis analyses how the Canadian (specifically the province of Ontario) long-lasting relation with the real and substantial connection test can contribute to how Brazilian legal actors should handle the principle of proximity when facing conflicts of jurisdiction. Ultimately, this Thesis demonstrates that, now that the proximity principle has a true openness in Brazil, there are relevant lessons to be absorbed from the Canadian experience that can serve as an ancillary tool apt to foster the potential benefits of the principle of proximity and minimize its shortcomings.

RÉSUMÉ

En réponse à un droit international privé (DIPr) rigide et prétendument neutre, le principe de proximité a acquis une pertinence indéniable dans les litiges transfrontaliers. Ainsi, face à une affaire internationale, plutôt que d'appliquer mécaniquement une règle traditionnelle du DIPr, ce principe a souvent été utilisé pour identifier quelle loi est, en fait, la plus liée au litige en cause. Au-delà du domaine du choix de la loi, la proximité a également pris de l'importance sur les conflits de juridiction, avec une logique similaire, selon laquelle une juridiction donnée est réputée raisonnable si elle respecte les paramètres de proximité, une tendance qui s'est établie tant dans les affaires nationales qu'internationales. Une telle adoption généralisée a, à son tour, révélé que la proximité a des vertus mais aussi des limites, notamment en ce qui concerne l'incertitude et l'imprévisibilité. Compte tenu de ce scénario, ce Mémoire étudie le statut de ce principe au Brésil, dans le but de comprendre sa place dans les questions juridictionnelles brésiliennes et les fonctions qu'il assume dans ce contexte, étant donné que le Brésil dispose d'un code de procédure civile nouveau et mis à jour. Une fois identifiés l'espace et les rôles du principe de proximité dans ce nouveau contexte, ce Mémoire analyse comment la relation durable du Canada (en particulier la province de l'Ontario) avec le test de lien réel et substantiel peut contribuer à la manière dont les acteurs juridiques brésiliens devraient gérer le principe de proximité face aux conflits de juridiction. En fin de compte, ce Mémoire démontre que, maintenant que le principe de proximité a une véritable ouverture au Brésil, il y a des leçons pertinentes à tirer de l'expérience canadienne qui peuvent servir d'outil auxiliaire apte à favoriser les avantages potentiels du principe de proximité et à minimiser ses lacunes.

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Ultimately, I dedicate this LLM Thesis to

My father, who was the first to shine his eyes when I decided to study Law, and whose eyes certainly still shine wherever he is.

My daughter, who has barely arrived in this world and has already perfected my vision of everything.

LIST OF ACRONYMS

ASADIP	American Association of Private International Law
BFC/88	Brazilian Federal Constitution of 1988
BCCP/15	Brazilian Code of Civil Procedure of 2015
BCCP/73	Brazilian Code of Civil Procedure of 1973
BCPC/90	Brazilian Consumer Protection Code of 1990
CCQ	Civil Code of Quebec of 1991
CIDIP	Inter-American Specialized Conference on Private International Law
ECJ	European Court of Justice
EU	European Union
FNC	Forum non conveniens
HCCH	Hague Conference on Private International Law
ICP	International Civil Procedure
ILNBL	Introductory Law to the Norms of Brazilian Law
IRSCJ	Internal Rules of the Superior Court of Justice
ONCA	Ontario Court of Appeal
PCF	Presumptive Connecting Factor
PRIL	Private International Law
R&E	Recognition and Enforcement
SCC	Supreme Court of Canada
STF	Supremo Tribunal Federal [Supreme Court of Brazil]
STJ	Superior Tribunal de Justiça [Superior Court of Justice of Brazil]
TJPR	Tribunal de Justiça do Paraná [Court of Appeal of Paraná]
TJRJ	Tribunal de Justiça do Rio de Janeiro [Court of Appeal of Rio de Janeiro]
TJRS	Tribunal de Justiça do Rio Grande do Sul [Court of Appeal of Rio Grande do Sul]
TJSC	Tribunal de Justiça de Santa Catarina [Court of Appeal of Santa Catarina]
TJSP	Tribunal de Justiça de São Paulo [Court of Appeal of São Paulo]
TRANSJUS	Asadip Principles on Transnational Access to Justice
UGLPIL	Uruguayan General Law of Private International Law of 2020
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America

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INTRODUCTION

Private international law (PRIL) was long centred around the multilateral methodology, whereby its main task was to neutrally identify the applicable law in cross-border disputes without touching upon the substance of the law and the outcomes a given law would concretely produce. This approach ended up resulting in a rigid and pre-defined spectrum for the solution of conflict of laws[1] – the conflict rules – based on a method that, in its classic sense, was "substance-neutral, and substance-blind."[2]

With the advent of globalization, the increase of transnational disputes and the necessity to comply with fundamental guarantees have imposed challenges on the traditional solutions of PRIL. Mainly in the United States (US), scholars started questioning the strict conflict rules, pleading for them to be less instrumental and more focused on effective justice,[3] leading the way to what came to be known as the American Revolution. This movement spread beyond the US borders, and modern legal orders became more concerned with having greater control over the connection between the dispute and the conflict rule, which, albeit neutral, had to be close.[4] As a response to this scenario, the principle of proximity, i.e., *"[le] principe qui consiste à appliquer la loi la plus proche au rapport juridique international concret*,"[5] has gained particular importance:[6] rather than mechanically applying a traditional rule of PRIL, this principle has been frequently used to identify which law is truly more connected to the dispute at hand.

Despite apparently being focused on applicable law, proximity goes beyond this dimension and encompasses conflicts of jurisdiction as well. Indeed, part of the most recent challenges in cross-border disputes is to deal with problems related to international procedure such as jurisdiction and recognition of foreign judgments,[7] thus giving prominence to the jurisdictional

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[1] Jamile Bergamaschine Mata Diz & Rodrigo Vaslin Diniz, "The Development and Application of the Theory of Better Choice of Law: A New Approach to the Application of Private International Law" (2014) 11:1 Braz J Int'l L 101 at 102.

[2] Gilles Cuniberti, *Conflict of Laws: A Comparative Approach*, 2nd ed (Cheltenham, UK: Edward Elgar Publishing, 2022) at 4.

[3] See Diego P. Fernández Arroyo, "El derecho internacional privado en el diván – Tribulaciones de un ser complejo" in Paula All et al., eds, *Derecho internacional privado y Derecho de la integración - Libro homenaje a Roberto Ruiz Díaz Labrano* (Asunción: CEDEP, 2013) 17 at 23–24 [Arroyo, "DIPr en el diván"].

[4] Fernando Pedro Meinero, "O desenvolvimento do princípio da proximidade no direito internacional privado e sua presença no Brasil" (2018) 51:2 Unicuritiba 314 at 317 [Meinero, "O desenvolvimento"].

[5] Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne: cours général de droit international privé*, Recueil des Cours, t. 251 (The Hague / Boston / London: Martinus Nijhoff, 1995) at 39.

[6] Diz & Diniz, *supra* note 1 at 103.

[7] Arroyo, "DIPr en el diván", *supra* note 3 at 25.

dimension of PRIL,[8] which – like in matters of applicable law – should also seek the realization of material justice.[9] In consequence, the connection between the forum, the case and the parties is today one of the central preoccupations of PRIL, giving a crucial role to the principle of proximity in jurisdictional matters. Accordingly, "the reasonableness of a forum of international judicial competence rests, to a large extent, on compliance with the principle of proximity."[10] The growing adoption of the principle of proximity, however, revealed that it has limitations, especially regarding predictability. Due to its nature of legal principle[11] and, thus, its inherent vagueness, scholars have voiced that such a large room for discretion impacts the certainty of international relations and disputes.

Given this scenario, where the principle of proximity has been a fundamental part of PRIL but also proven to be flawed and to raise valid concerns, in this Thesis, I research this principle focusing on two main questions. First, I investigate the status of this principle in Brazil. The moment for this study is particularly well-timed since Brazil has a new code of civil procedure that has been considered a turning point with respect to procedural issues in cross-border disputes – jurisdiction among them. Therefore, this work aims to first understand which room the proximity principle currently has in Brazilian jurisdictional matters and the functions it assumes in this new context.

Once identified the space and roles the proximity principle has in Brazil, I move forward to the second question that has driven this Thesis. I investigate whether the Canadian experience with the principle of proximity can contribute to understanding whether and how it might be used in Brazilian jurisdictional matters. In essence, I analyze whether there are lessons that Brazil could learn from the Canadian (Ontario law) experience when adopting the principle of proximity in the Brazilian legal order. As such, this research was considerably exploratory because until deeply

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[8] Diego P. Fernández Arroyo, *Derecho internacional privado: una mirada actual sobre sus elementos esenciales* (Córdoba: Advocatus, 1998) at 91–92 [Arroyo, "Una mirada"].

[9] 'Material justice' alludes to the process of *materialization* of PRIL, which repeals the concept of a purely formalistic, neutral and instrumental legal field, aiming instead at a private international law that takes into account concrete criteria of justice and the complete solution of cross-border disputes. *Ibid* at 124–126. Material justice is concerned, therefore, not only with accessing jurisdiction but also with making it effective, not only where the decision is rendered but also in all other places where it must produce effects. Luciane Klein Vieira & Renata Alvares Gaspar, "*Forum shopping* e *Forum non conveniens* nos Estados Parte do Mercosul: estado da arte e sua consonância com os Princípios ASADIP sobre Acesso Transnacional à Justiça (TRANSJUS)" in Inez Lopes et al, orgs, *Litígios Civis Transnacionais no Espaço Iberoamericano,* 1ed (São Paulo: Tirant Lo Blanch, 2021) 43 at 63.

[10] Arroyo, "Una mirada", *supra* note 8 at 94 [footnote omitted] [translated by author].

[11] See Diz & Diniz, *supra* note 1 at 103–105.

studying and comparing proximity in both legal systems, there was no certainty of whether any lesson would be extracted – which, in a way, would *per se* be an answer, i.e., 'no lessons can be learned from this comparison'.

There were, however, some strong indicia that Canada was a promising country to look at. The choice of Canada, therefore, was not random. For decades, Canadian legal actors (i.e., scholars, courts, lawmakers and lawyers alike) have dealt with the so-called 'real and substantial connection test' in cross-border disputes, extensively discussing proximity and jurisdiction throughout the years. There is a vast and rich collection of materials, case law and data on the subject, offering several resources to learn about the proximity principle. In this Thesis, I narrow the study to the province of Ontario because it has been the source of several leading cases dealing with the real and substantial connection. Since it has not thus far enacted or adopted specific legislation on jurisdiction, jurisdictional matters in the province are still based on that case law.

After undertaking the research to answer these two main questions, I conclude that, with the innovations introduced by the new code of civil procedure, the proximity principle has now a true openness in Brazil, and, as such, assumes different roles in its legal landscape. The use of these roles by Brazilian legal actors is, nonetheless, still very incipient and somewhat superficial, with room for improvement. The timing for deepening the knowledge and advance its application in Brazil is, therefore, particularly appropriate. I also conclude that there are indeed relevant lessons to be absorbed from the Canadian experience that can serve as an ancillary tool apt to foster the potential benefits of the principle of proximity and minimize its shortcomings. These findings are organized into 'general' and 'specific' lessons depending on their content. While the general lessons relate to the jurisdictional systems of Brazil and Canada and the proximity principle in these macro scenarios, the specific ones refer to particular aspects of the real and substantial connection test/proximity and their usefulness for Brazil. The general lessons for Brazil can be summarized as follows: a. adopting proximity as a general approach – and, therefore, as a direct rule – should be avoided as much as possible; b. all the functions of proximity should be explored since connecting factors can increase predictability only to a certain extent; and c. legal actors cannot lose sight of the correlation between jurisdiction and R&E, taking proximity into account. The specific lessons, in turn, are: a. if Brazil ever adopts *forum non conveniens* (FNC), there are important features it can learn from FNC in Canada; and b. the relevant – and maybe underrated – role that parties play in dealing with proximity in jurisdictional matters.

To carry out the research that gave life to this Thesis, I adopted four main steps, all of which are materialized in the four chapters of this work. Chapter One is entirely dedicated to the principle of proximity from a general and conceptual standpoint. In this chapter, I first track the historical trajectory of the principle of proximity and the juridical contexts in which it has emerged. This historical background helps explain the original reasoning of proximity, the responses it came to offer in different stages of the development of PRIL, and how it became a tool for addressing conflicts of jurisdiction – the field that is the focus of this Thesis. After situating proximity in jurisdictional matters, I delve into the specific roles and functions this principle assumes: inspiration for jurisdictional rules; corrective functions; and the role of proximity in the recognition and enforcement of foreign decisions. I finalize Chapter One by analyzing how the proximity principle constantly interacts with other fundamental principles of PRIL and must be cautiously coordinated with them, disallowing a 'romanticized' view of proximity as the sole saviour of all jurisdictional problems. In essence, Chapter One provides a profound grasp of the principle of proximity, which, in turn, allowed me to study it in specific jurisdictions. Brazil and Canada (Ontario) have many differences in their legal orders, and investigating proximity in these systems might have been deficient without a prior and deep understanding of the subject.

In Chapter Two, I situate the principle of proximity in the Brazilian context, aiming to answer the first research question, i.e., investigate the room that proximity has in jurisdictional matters and the functions it assumes in the current framework established by the new Brazilian Code of Civil Procedure enacted in 2015 (BCCP/15). Besides studying the specific rules set forth by the new code, this chapter also analyses the case law in jurisdictional matters to understand whether Brazilian courts are applying proximity in any manner. These steps combined provide the substrate to understand the current status of the proximity principle in Brazil and to conclude that the timing to deepen its study is particularly ripe. Legal actors should, at the very least, understand and enhance its adoption in jurisdictional matters.

Chapter Three is, in turn, entirely dedicated to Canada and its long experience with the real and substantial connection test (RSC[12]). In general, I provide a descriptive overview of the history, evolution and analysis already undertaken in Canada regarding the RSC in jurisdictional matters.

[12] The acronym 'RSC' is not necessarily common or often used in Canada's scholarly writing. Throughout my research, I came across only one similar abbreviation ("RS&C") in Vaughan Black, "Simplifying Court Jurisdiction in Canada" (2012) 8:3 Journal of Private International Law 411. Using 'RSC' in this Thesis is a matter of writing style, consistency, and intelligibility mainly to those unfamiliar with this Canadian test.

The objective of this chapter is to depict the struggles faced by Canadian legal actors when dealing with the principle of proximity as a direct rule and how the Supreme Court has reached the framework – composed of connecting factors – that governs jurisdictional conflicts in Canada since 2012. Lastly, I briefly compile some scholarly assessments to describe the effects of this jurisdictional framework in the last decade. Having this bird's eye view of the Canadian scenario offers enlightening material to extract some insights that can contribute to the Brazilian reality.

Accordingly, Chapter Four is designed for that purpose. In this final chapter, I piece together the conceptual learning obtained through Chapter One and the respective findings achieved through the Brazilian and Canadian studies undertaken in Chapters Two and Three. From this, I achieve the afore-mentioned conclusion, i.e, that there are at least[13] five lessons that Brazil can learn from the RSC experience lived in Canada/Ontario. As explained earlier, I divide this last section into two topics. First, I discuss three 'general lessons', which refer to generalized conclusions that consider the jurisdictional systems of Brazil and Canada as a whole and the proximity principle in these macro scenarios. And lastly, I conclude that there are two specific aspects of the RSC/proximity principle that can be useful for Brazil in its current situation.

To allow an in-depth analysis consistent with the objectives outlined herein, the scope of this Thesis is subject to certain limitations. Except for a brief description of the proximity principle in the realm of applicable law – for historical and contextual purposes — this research focuses on conflicts of jurisdiction and the role of proximity in these matters. Conceptually, jurisdiction refers to the power and competence of a court to adjudicate and render a judgment regarding a cross-border dispute.[14] As such – and even though there is a known debate about the proper terminology – this Thesis uses the terms international 'competence' and 'jurisdiction' interchangeably, mainly to avoid repetition of words and render the reading more fluid.

With the aim to study proximity in all aspects of jurisdiction, this work also touches upon the recognition and enforcement of foreign judgments (R&E). The intention is not to divert from the focus of this Thesis. It is, nonetheless, to stress that the decision to assert or deny jurisdiction affects the ultimate step of the international dispute, especially those that must be recognized

[13] I emphasize 'at least' because I do not intend to be exhaustive. I decided to deepen these five lessons because, besides complying with the limitations of space and time of this Thesis program, they seemed the most evident to the current reality of Brazil.

[14] Paula All, "Las normas de jurisdicción internacional en el sistema argentino de fuente interna" (2006) 4 DeCITA (Derecho del Comercio Internacional. Temas y actualidades) 422 at 422.

elsewhere. Considering that, in general, the proximity between the original court and the case can be determinant during the recognition process, it seemed accurate to include this perspective of R&E in this Thesis scope.

Regarding jurisdiction bases *per se*, additional limitations of scope were necessary given the wide range of possibilities under the jurisdictional umbrella and the ones that relate to the principle of proximity more directly. Accordingly, this work does not examine consent (and therefore forum selection clauses and submission to a court are excluded) nor issues concerning exclusive jurisdiction. Finally, this research refers only to conflicts of jurisdiction in civil and commercial matters, focusing predominantly on obligational, tort and consumer disputes.

This Thesis is largely based on doctrinal research, which can be perceived throughout the four chapters. Especially in Chapter One – which was more conceptual and general – I refer, as much as possible, to scholars from the global north (mainly North America and Europe) and the global south (primarily South America) as an attempt to grasp both approaches to jurisdiction and proximity (and not prioritize one over the other). Since Chapters Two and Three discuss judicial decisions in Brazil and Canada, respectively, this work was also partly built on case law. Moreover, studying both legal systems separately was also a choice of method as an attempt to avoid any distortions from a precocious comparative analysis of the two legal systems. Such a comparative approach is adopted only in Chapter Four. Studying a foreign legal order was a means to problematize my own legal system since it served the purpose of identifying lessons on the proximity principle that Canada/Ontario could offer to Brazil in its current context. As such, a comparative method was necessary to investigate the RSC in Canada mindful of its institutional and legal cultural contexts,[15] thus not detaching it from the Canadian macro scenario. When using the experience with the RSC to propose insights for Brazil, these systemic specificities had to be taken into account to avoid a misguided understanding of the test and allow a proper adjustment to the Brazilian reality. In addition, even though I considerably relied upon doctrinal materials to understand and describe the RSC in Canada/Ontario (which is materialized in Chapter Three), the comparative approach was indispensable to go beyond this descriptive exercise and interpret the jurisdictional framework from Ontario to find a dialogue with Brazil and its issues on jurisdiction

[15] About the need to consider the institutional and cultural context in comparative research, see John Bell, "Legal Research and the Distinctiveness of Comparative Law" in Mark van Hoecke, ed, *Methodologies of legal research: which kind of method for what kind of discipline?* (Oxford ; Portland, Or.: Hart Pub., 2011) 155 at 169–171.

and proximity. As Bell accurately states "[t]he comparatist has to interpret the systems to enable a dialogue between them."[16]

CHAPTER ONE: THE ROLE OF THE PRINCIPLE OF PROXIMITY IN CONFLICTS OF JURISDICTIONS

1.1 A Historical Overview of the Principle of Proximity: From Choice-of-Law to Jurisdiction

This first section of Chapter One describes the historical trajectory of the principle of proximity and the contexts in which it has emerged. Hence, although this Thesis focuses on jurisdiction, our journey begins in the field of choice of law (section 1.1.1), which was the primary concern of PRIL for a long time. Understanding the principle of proximity in this first context will be crucial to understanding its original reasoning and how it has been a foundational part of PRIL. Section 1.1.2, in turn, discusses how the paradigm of PRIL has been rethought to bring its jurisdictional dimension into a central role and, more specifically, how cooperation on conflicts of jurisdiction has also become a cornerstone of PRIL. Section 1.1.3 concludes this piece by situating the principle of proximity in this new paradigm, exploring the general role that proximity is called to play in jurisdictional matters.

1.1.1 The Principle of Proximity in the Realm of Choice of Law

Although one cannot disregard the entire history of PRIL,[17] it was in the XIX century that the subject gained its determining and classic characteristics.[18] By proposing the multilateral methodology, Karl Friedrich Savigny divided the trajectory of PRIL into 'before' and 'after' and introduced to the world the neutral conflict rule, which, to this day, "*sans doute celle qui correspond le mieux à la spécificité du droit international privé*."[19]

These conflict rules are considered neutral because, rather than imposing one specific law to regulate an international relationship, they indicate which legal system (national or

[16] *Ibid* [Bell] at 176.
[17] For a deep dive into the history of PRIL, see Max Gutzwiller, *Le développement historique du droit international privé*, Recueil des cours de l'Académie de Droit International, v. 29, 1929. For a more concise overview, see André de Carvalho Ramos, *Curso de direito internacional privado*, 1st ed (São Paulo: Saraiva Educação, 2018) at 27–35.
[18] Jayme, *supra* note 5 at 40.
[19] Hélène Gaudemet-Tallon, *Le pluralisme en droit international privé: richesses et faiblesses (Le funambule et l'arc-en-ciel)*, Recueil des cours de l'Académie de Droit International de La Haye, t. 312 (Leiden/Boston: Martinus Nijhoff, 2006) at 174.

international) applies to that multiconnected situation.[20] The legal system designated will be the one that directly regulates the case, solving the potential conflict between legal orders and making prevail the most appropriate one for that dispute,[21] instead of privileging the law of the forum over foreign laws.[22] The applicable law is established without considering the content of the law[23] and disregards – in general – the results this application will yield.[24] To reach this formula, Savigny proposed that "the proper law of each legal relationship is to be found by disclosing its seat (…),"[25] using geographical criteria ('connecting factors') to link the legal relation to a given legal order.[26] The legal relationship is thus "the starting point of the reasoning"[27] since identifying to which legal category the relation belongs (such as 'obligational matter', 'matrimonial regime') is a decisive step to indicating its seat.[28] This rationalization, easily identifiable and accepted by different states, facilitated Savigny's seat theory to expand worldwide,[29] and, to this day, "most States approach the issue of choice of law through the same methodology."[30]

Such a widespread application, however, unveiled certain consequences. By applying the conflictual method, the field of PRIL segregated itself from the specificities of the case.[31] The attempt to be neutral ended up imposing a mechanical application of the rule, framing PRIL as a localizing discipline detached from the discussion of justice proper to substantive law.[32] These consequences did not go unnoticed and became harshly criticized, especially by the United States of America (US). That was largely because the First Conflicts Restatement of 1933 in the US was composed of pre-established and rigid conflict rules, with no room for exceptions,[33] presenting "a typically *Savignian* structure."[34] According to Symeonides, "because these rules were poorly

[20] *Ibid*.
[21] Ramos, *supra* note 17 at 151; 152.
[22] Gaudemet-Tallon, *supra* note 19 at 175.
[23] *Ibid* at 180.
[24] Ramos, *supra* note 17 at 154.
[25] Jacob Dolinger, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts*, Collected Courses of the Hague Academy of International Law, Volume 238 at 278 [Dolinger, "Evolution of Principles"].
[26] Cuniberti, *supra* note 2 at 2.
[27] *Ibid* at 3.
[28] Ramos, *supra* note 17 at 154.
[29] *Ibid* at 155. The author also explains that the European imperialism of the XIX century helped to consolidate the theory.
[30] Cuniberti, *supra* note 2 at 1.
[31] Ramos, *supra* note 17 at 155.
[32] *Ibid*.
[33] Symeon C. Symeonides, "Codification and flexibility in private international law" in *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé* (Dordrecht: Springer, 2012) 167 at 190.
[34] Meinero, "O desenvolvimento", *supra* note 4 at 322.

conceived and inflexible, judges began deviating from them through several escape devices, such as by manipulating the localization of connecting factors, the characterization of the cause of action or the substance versus procedure dichotomy, misusing the *ordre public* exception, and resorting to *renvoi*."[35] This growing disagreement from the 1st Restatement led to the 'American Revolution'.

Among the main criticisms, Cavers argued that the First Restatement offered a blind and mechanical solution to the conflicts of laws as if denying the courts the possibility to consider the outcomes of each applicable law.[36] The correct approach would, therefore, focus on the material rules applicable to the specific dispute,[37] reason why the scholar proposed 'principles of preference' to serve as guides for the courts rather than strict rules.[38] Currie, in turn, tackled the traditional methodology through a perspective of governmental interest, proposing "to resolve conflict cases by looking at the policies underlying the potentially applicable laws"[39] since only one state might have a real interest in applying its law.[40] In the realm of case law, the ground-breaking decision was *Babcock v Jackson* rendered in a tort dispute involving a car accident in Canada. The Court of Appeals of New York expressly challenged the traditional method[41] and ultimately decided to apply the law of the forum instead of following the conflict rule *lex loci delicti* that would lead to the law of Ontario.[42] It considered that the closer contacts and interests were connected to New York,[43] as well as the fact that the New York law stipulated indemnity for gratuitous victims while the Ontario law did not.[44] *Babcock* influenced the Second Restatement of Conflict of Laws (1971), which enshrined the 'most significant relationship' and 'government

[35] Symeonides, *supra* note 33 at 190.
[36] Meinero, "O desenvolvimento", *supra* note 4 at 322.
[37] *Ibid*.
[38] Dolinger, "Evolution of Principles", *supra* note 25 at 457. Dolinger proffers an interesting analysis of how Caver's principles of preference relate to other principles – proximity and protection among them (*ibid* at 457–462).
[39] Cuniberti, *supra* note 2 at 32.
[40] *Ibid*.
[41] The court posed the following question: "Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?" *Babcock v Jackson*, 12 NY (2d) 473 at 478 (1963) [*Babcock*] [emphasis in the original] [footnote omitted]. It is noteworthy that this decision was particularly pioneering in torts, but it explicitly referred to the previous case *Auten v Auten*, which was the watershed in the realm of contracts. In *Auten*, the court grounded its decision on the 'center of gravity' idea instead of resorting to the previously set rigid contract rules. See *Babcock* at 479.
[42] Dolinger, "Evolution of Principles", *supra* note 25 at 463.
[43] *Ibid*.
[44] Jayme, *supra* note 5 at 45.

interest' approaches.[45] Thus, at least in the areas of tort and contracts,[46] the American Revolution brought about the following transformations: (i) the replacement of hard-and-fast rules by open-ended approaches; (ii) a shift of focus from territorial factors to state interests/policies; and (iii) a change of method from choosing a jurisdiction in a content-blind manner to selecting a law due to its preferable substance.[47]

These criticisms and changes reverberated outside the US. Although some academics question the *direct* influence of the American Revolution in Europe,[48] it did lead European scholars to rethink and reconsider the traditional method adopted until then.[49] In this process, the principle of proximity was one of the main responses: "*En réponse au reproche d'abstraction adressé à l'école savignienne, spécialement, mais non exclusivement, par les Américains, l'époque contemporaine a vu se développer, principalement en Europe occidentale*, le principe qu'un rapport de droit doit être régi par la loi du pays avec lequel il entretient les liens les plus étroits (…)."[50] Such a rationale resonated with the American approach to the closest connection/significant relationship.[51]

In scholarly writing, there is a certain consensus that Savigny offered the inspiration for the principle of proximity,[52] considering that the quest for the 'seat' of the legal relationship "was only a metaphor for the best connection."[53] Indeed, in many traditional conflict rules, it is possible to identify the direct link between the legal relation and the chosen connecting factor. The Savignian base, however, was just the start and the principle of proximity "*va bien au-delà de la*

[45] Dolinger, "Evolution of Principles", *supra* note 25 at 464.
[46] Reimann notes, however, that the impact of the American Revolution was not as intense in contracts as it was in torts because, at the outset, contract law already accepted a degree of flexibility regarding conflict methods. See Mathias Reimann, "Savigny's Triumph--Choice of Law in Contracts Cases at the Close of the Twentieth Century" (1999) 39:3 Va J Int'l L 571 at 586–587.
[47] *Ibid* at 584.
[48] See e.g., Paul Lagarde, *Le principe de proximité dans le droit international privé contemporain: cours général de droit international privé*, Recueil des cours, t. 196 (I) (Dordrecht / Boston / Lancasyer: Martinus Nijhoff, 1986) at 25 and Reimann, *supra* note 46 at 592–594.
[49] Lagarde, *supra* note 48 at 25.
[50] *Ibid* at 27 [emphasis added] [footnote omitted].
[51] Reimann cautions, however, that this similarity did not mean an identical replica of the US model. Reimann, *supra* note 46 at 593 [footnote omitted].
[52] See e.g., Lagarde, *supra* note 48 at 27; Reimann, *supra* note 46 at 594–595; Meinero, "O desenvolvimento", *supra* note 4 at 324; and Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38:2 UBC L Rev 373 at 375. Dolinger, nonetheless, theorizes about the possibility of a different origin based on Max Gutzwiller's comments regarding one specific statement of Aldricus. See Dolinger, "Evolution of Principles", *supra* note 25 at 394–395.
[53] Reimann, *supra* note 46 at 595.

pensée du fondateur."[54] It assumed different formats and functions, such as rules with flexible connecting factors, expressed through the 'closer'/'closest connection' and 'soft connecting factors', as well as 'escape clauses',[55] granting courts a degree of flexibility and no longer leaving the choice of law matter solely to legislators.[56] In consequence, this principle came to be seen as an innovation and an evolution of PRIL,[57] and the flexibility of the connection criteria "appears to characterize the most recent development of private international law, like other expressions of this phenomenon (…)."[58] In this modernization process, many countries[59] and international instruments [60] embraced proximity over the years.

This historical retrospective focuses entirely on the area of choice of law. The appearance of the proximity principle, however, is not confined to this field, marking its presence in matters of international jurisdiction as well.[61] For a long time, though, the main preoccupation of PRIL fixated on choice-of-law issues, overshadowing its jurisdictional dimension, which only more recently became one of the lodestars of PRIL.[62] This (more recent) shift of focus explains why the proximity principle seems to appear in jurisdictional conflicts at a later time.

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[54] Lagarde, *supra* note 48 at 27.
[55] See Symeonides, *supra* note 33 at 175–186.
[56] Meinero, "O desenvolvimento", *supra* note 4 at 324.
[57] Sharing this opinion, see e.g., *ibid* at 317, 324; Lagarde, *supra* note 48 at 38; Peter McEleavy, "The Codification of Private International Law: The Belgian Experience" (2005) 54:2 Int'l & Comp LQ 499 at 513; Jacob Dolinger, "Direito Internacional Privado – O Princípio da Proximidade e o Futuro da Humanidade" (2004) 235 R. Dir. Adm. 139 at 140 [Dolinger, "O Princípio da Proximidade"]; and Diz & Diniz, *supra* note 1 at 101.
[58] Dimitris Liakopoulos, "The clauses of exception in 'domestic law' and in Hague conventions" (2019) 20:2 REDP 96 at 103 [footnote omitted].
[59] Art. 15 of the 1987 Swiss Statute on Private International Law is a prime example of the escape clause since it provides an exception to the pre-established conflict rules. Symeonides, *supra* note 33 at 181. Other examples can be found in the Canadian province of Quebec that adopted a similar exception clause in 1991 (Art 3082 CCQ), in Beligum (Art. 19, Belgium Code of Private International Law), and more recently in Argentina (Art. 2597, Civil and Commercial Code) and Uruguay (Art. 49, General Law of Private International Law - UGLPIL).
[60] Dolinger alludes to Art. 5 of the Convention on Certain Questions Relating to the Conflict of Nationality Law as the first explicit expression of the principle of proximity in the international setting. See Dolinger, "O Princípio da Proximidade", *supra* note 57 at 143. Other prominent examples are the Rome (Art. 4, [1]) and II (Art. 4 [3]) Regulations, which deal with contracts and torts. EC, *Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 116/7; *Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40; Art.9, Inter-American Convention on the Law Applicable to International Contracts. OAS, Fifth Inter-American Specialized Conference on Private International Law, *Inter-American Convention on the Law Applicable to International Contracts*, OAS No 78 (1994).
[61] Back in 1986, for instance, Lagarde already discussed, in his Hague course, the principle of proximity in applicable law (Part I) and jurisdiction (Part II) altogether. See Lagarde, *supra* note 48.
[62] See Arroyo, "Una mirada", *supra* note 8 at 91.

1.1.2 The Rise of Jurisdictional Concerns in Private International Law

Throughout a considerable part of its history, PRIL was predominantly seen as solely or primarily focused on determining the applicable law,[63] a situation that likely happened due to the secondary role that civil traditions accorded to procedural aspects.[64] This enduring focus, however, began to decline in the course of the 20th century with the development of international private relations[65] fostered by globalization.[66] Particularly since the middle of the last century, natural and legal persons have increasingly established relations no longer confined within borders, thus becoming connected to more than one country and creating a truly international process of circulation of persons, families, businesses and products.[67] Technological advancements have fueled the unprecedented figures of commercial, capital and investment exchanges that characterize the current phase of globalization.[68] The massive movement of privatizations boosted the number of private commercial sectors activities, granting private actors a more central role, furthered by the broad scope of the autonomy of the will.[69] Migratory movements, in turn, have intensified the number of people seeking relocation, building a multicultural society that is also characteristic of the contemporary world.[70] In such a globalized society, "citizens communicate,

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[63] Arroyo, "DIPr en el diván", *supra* note 3 at 22. In the same sense, Bernard Audit, Le Droit International Privé en Quête d'Universalité, Recueil des Cours de l'Académie de Droit International de la Haye, t. 305 (Leiden/Boston: Martinus Nijhoff, 2004) at 478.

[64] Fernando P. Meinero, "Um novo e injustificado caso de jurisdição internacional exclusiva no novo Código de Processo Civil" in Wagner Menezes, org, *Direito Internacional em Expansão*, v. VIII (Belo Horizonte: Arraes, 2016) 284 at 287 [Meinero, "Jurisdição Internacional"]. In fact, Audit affirms that, during centuries, the attention of PRIL was on matter of choice of law "*sans doute en raison du caractère accessoire prêté aux questions de procédure dans les systèmes civilistes et du faible nombre des cas internationaux, ou interprovinciaux*." Audit, *supra* note 63 at 478.

[65] Audit, *supra* note 63 at 478.

[66] See Christopher A. Whytock, "The Evolving Forum Shopping System" (2011) 96:3 Cornell L Rev 481 at 495–496. As Taruffo observes, globalization has become a "multifaceted and ambiguous" label "and has acquired so many meanings that any attempt to define its contents would be meaningless." Michele Taruffo, "Globalizing Procedural Justice. Some General Remarks" (IV Conference Gallego de Derecho Procesal [I Internacional] of Universidad de Coruña, 2 and 3 June 2011) (2011) 17 at 17. This observation does not impede establishing a few conceptual contours that fit the scope of this research, which borrows Arroyo's general description of globalization: "[The phenomenon that] is produced mainly, although not exclusively, by the rise of the transnational trade dimension, of production organization schemes, of financial markets and investment flows, to which corresponds the decline of their respective national dimension and the loss of state influence in the spheres of decision-making and regulation." Diego P. Fernández Arroyo, "El derecho internacional privado en el inicio del siglo XXI" (2003) 2:1 Cadernos do Programa de Pós-Graduação em Direito–PPGDir./UFRGS 209 at 209–210 [Arroyo, "DIPr del Ssiglo XXI"] [translated by author].

[67] Flávia Hill & Humberto D.B. de Pinho "A nova fronteira do acesso à justiça: a jurisdição transnacional e os instrumentos de cooperação internacional no CPC/2015" (2017) 18:2 Revi Eletrônica de Direito Processual 261 at 263.

[68] Arroyo, "DIPr del siglo XXI", *supra* note 66 at 210. Arroyo cautiously refers to the "current phase of globalization" to emphasize that the interest of consolidating the economy on a transnational level is not *per se* new and has appeared in other historical moments. The current features, however, set this phase apart from the chapters that preceded it.

[69] Arroyo, "DIPr en el diván", *supra* note 3 at 33.

[70] Arroyo, "DIPr del siglo XXI", *supra* note 66 at 222.

interact, exchange ideas and establish relationships of different types (…) independently of the traditional concepts of the nation-state."[71] By definition, globalization transcended borders, reduced distances, and made international relations spread in number and complexity.[72]

This scenario gave rise to a "world where every aspect of human affairs is increasingly international (…),"[73] leading to the consequent increase of disputes across borders.[74] The coexistence of different peoples and cultures in the same territory has also set the stage for conflicts stemming from the tension between integrating immigrants and respecting cultural identities.[75] The object and the content of PRIL have, therefore, been directly and indirectly impacted by such a transformed context,[76] forcing this legal field to rethink its paradigm[77] and demanding a closer look at procedural issues. PRIL thus moved from being essentially theoretical (mostly focused on the applicable law) to being more concerned with practical problems such as international jurisdiction and legal cooperation.[78] Also, the uneasiness regarding the traditional localizing function of PRIL advanced toward dispute resolution mechanisms[79] requiring a more central role for its jurisdictional dimension that could no longer be so instrumental to the point of losing sight of material justice[80] in the concrete case. The jurisdictional dimension has, thus, gained a new status of relevance, attracting significant attention from scholars and practitioners of PRIL: "(...) the eminent functionality of the substantive doctrines allow – even when they do not obligate to it – to structure a content of PRIL where the judicial dimension occupies a primordial place."[81]

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[71] Hill & Pinho, *supra* note 67 at 263.
[72] Renata Alvares Gaspar & Mariana Romanello Jacob, "As Cláusulas de Integração sob a ótica das CIDIPs: o papel desse instrumento na consecução da cooperação jurídica interamericana" (2014) 14 Anuario Mexicano de Direito Internacional 687 at 689.
[73] Neil Guthrie, "A Good Place to Shop: Choice of Forum and the Conflict of Laws" (1996) 27:2 Ottawa L Rev 201 at 203.
[74] Valesca Raizer Borges Moschen, "A Conferência de Haia e a Codificação do Direito Processual Internacional" in André de Carvalho Ramos & Nadia de Araújo, orgs, *A Conferência da Haia de Direito Internacional Privado e seus Impactos na Sociedade – 125 Anos (1893-2018)* (Belo Horizonte: Arraes Editores, 2018) 136 at 136 [Moschen, "Conferência de Haia"]. Indeed, as Robertson elucidates, "developments in industrial, communications, and transportation technology have facilitated international activity, which in turn has multiplied the number of international disputes." David W. Robertson, "Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion" (1994) 29:3 Tex Int'l L J 353 at 367–368.
[75] Arroyo, "Una mirada", *supra* note 8 at 82.
[76] Arroyo, "DIPr del siglo XXI", *supra* note 66 at 211.
[77] See Lukas Rass-Masson, "The HCCH and legal cooperation - shaping the fourth dimension of private international law" in Thomas John, Rishi Gulati and Ben Koehler, eds, *The Elgar Companion to the Hague Conference on Private International Law* (Cheltenham, UK: Edward Elgar Publishing, 2020) 150 at 154.
[78] Arroyo, "DIPr en el diván", *supra* note 3 at 25.
[79] *Ibid* at 30.
[80] About 'material justice' see note 9 above.
[81] Arroyo, "Una mirada", *supra* note 8 at 25 [translated by author].

Experiencing such impacts led PRIL to progressively redefine its primary function, overcoming the concept of a 'neutral' legal field and envisaging itself in a role where it serves global governance.[82] In consequence, the entire content of PRIL – its jurisdictional dimension included – has been fueled by this new and noble paradigm.[83] So much so that jurisdictional issues linked with procedural aspects of litigation – originally justified under a nationalist perspective in many countries[84] and designed to serve and solve domestic disputes[85] – were rethought to fit the new reality, where cross-border disputes were no longer accidental.

The need to seek access to justice abroad highlighted the jurisdictional differences among countries (such as jurisdictional limits and procedural structures) that ended up acting as real challenges for litigants.[86] Furthermore, the impact of human rights on private international law,[87] as well as the emphasis given to fundamental procedural rights,[88] contributed to considering jurisdiction from a different angle, in which it became more than a pure instrumental aspect of litigation. The parties involved in cross-border disputes should, then, enjoy the same opportunities and degrees of protection of access to justice.[89] While the latter add complexity to the discussion, for the purposes of this Thesis it suffices to underscore that, in virtue of the reasons explained above, conflicts of jurisdiction (encompassing both matters of international jurisdictional and recognition of foreign judgments) have become a central subject in contemporary PRIL.[90]

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[82] Arroyo, "DIPr en el diván", *supra* note 3 at 26, 30. As Rass-Masson well explains, "[i]t is necessary to present the *modern objective* of private international law *at the global level*, which is to contribute to a *global legal order* (…). The construing of this global legal order reveals a multidimensionality of private international law which *implies a re-conceptualisation of this legal field*." Rass-Masson, *supra* note 77 at 151 [emphasis added]. To deepen the understanding of the interrelation between PRIL and global governance, see Horatia Muir Watt and Diego P. Fernández Arroyo, *Private International Law and Global Governance* (Oxford, UK: Oxford University Press, 2014); and Javier L. Ochoa Muñoz, "Acceso Transnacional a la Justicia y Gobernanza Global (Comentarios Introductorios a los Principios ASADIP sobre el Acceso Transnacional a la Justicia)" (2018) 20:8 Revista de Direito Brasileira 336 at 347–353.

[83] Arroyo warns, however, that there is a considerable path to pursue between assuming a role to serve global governance and fully achieving this goal in practice. Arroyo, "DIPr en el diván", *supra* note 3 at 30.

[84] Moschen, "Conferência de Haia", *supra* note 74 at 138. The author also presents the different reasons that explain the nationalist perception of procedural law (*ibid.* at 138–140).

[85] Hill & Pinho, *supra* note 67 at 262.

[86] See Moschen, "Conferência de Haia", *supra* note 74 at 139.

[87] See Arroyo, "DIPr en el diván", *supra* note 3 at 20.

[88] Hill & Pinho, *supra* note 67 at 266.

[89] *Ibid* at 282.

[90] Jayme, *supra* note 5 at 47. In that sense, it is worth highlighting Roodt & Esser's commentary about the degree of relevance conflicts of jurisdiction has acquired: "There seems to be a general trend among scholars who sustain their interest in commercial conflict of laws to focus on jurisdiction and choice of forum instead of choice-of-law rules and criteria. Some European authors actively encourage adopting the grounds of jurisdiction and proper jurisdictional standards as the main focus point, instead of the development and critique of choice-of-law rules. Currently, the

1.1.3 The Principle of Proximity as a Tool for Addressing Conflicts of Jurisdiction

Given the internationalization of relations and the acknowledgement of the vital role of conflicts of jurisdiction, international jurisdiction *per se* has also suffered transformations. The idea that jurisdiction was drawn on territorial borders became relativized[91] and "reasoned less in terms of state sovereignty and more in terms of ensuring the right of effective access to justice."[92] In view of this reconceptualization, the connection between the forum, the case and the parties gained special relevance. As Lagarde argued:

> Si la *justice de droit international privé* commande en général que *la loi appliquée* soit celle qui présente *les liens les plus étroits* avec la situation juridique, (…), *cette même justice* de droit international privé demande que la situation soit soumise *à un tribunal ou à une autorité qui ne soit pas dépourvue de lien avec elle* et que la décision rendue par le tribunal ou l'autorité du pays présentant avec cette situation *un lien sérieux soit considérée* dans les autres pays comme rendue par une autorité compétente.[93]

Thus, like in the choice of law field, the proximity principle has also played a significant role in jurisdictional matters, as explored in more detail in the next sections.

a. The Concept of Reasonable Jurisdiction based on Proximity

Considering that, in general terms, jurisdiction refers to the power of courts of a given state to hear and decide a cross-border dispute,[94] the jurisdictional dimension of PRIL "was long perceived as an exercise of State power"[95] and reasoned under public law terms.[96] However, the relativization of sovereignty – provoked by the set of phenomena already described – has impacted the original foundations of international jurisdiction. Far from saying that sovereignty has vanished as one of the grounds for jurisdiction, it has, arguably, given space to coexist with other foundations that justify jurisdiction in the reality of a global society.[97] Accordingly, besides the lenses of public law, international jurisdiction also began to be analyzed and appraised taking into

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question of venue is seen to be more pertinent in conflict of laws than choice of law, even in matters of tort or delict." Christa Roodt & Irene-Marie Esser, "Venue in Transnational Litigation: Party Autonomy Adds New Impacts to the Judgment Project" (2006) 18:1 S Afr Mercantile LJ 13 at 13 [footnotes omitted].

[91] Ralf Michaels, "Territorial jurisdictional over territoriality" in Piet Jan Slot & Mielle Bulterman, eds, *Globalisation and Jurisdiction* (Kluwer Law International, 2004) [Michaels, "Territorial jurisdiction"].

[92] Arroyo, "DIPr en el diván", *supra* note 3 at 30 [translated by author].

[93] Lagarde, *supra* note 48 at 127 [emphasis added].

[94] All, *supra* note 14 at 422. See also Ralf Michaels, "Jurisdiction, foundations" (2016) 53 Duke L Sch Pub Leg Theory Series 1 at section I, 1. (Terminology and concepts) [Michaels, "Foundations"].

[95] Cuniberti, *supra* note 2 at 136.

[96] *Ibid* at 137.

[97] See Audit, *supra* note 63 at 377.

account the private interest of the parties[98] and the interests of international relations,[99] thus demanding a real connection between the forum, the case and the parties involved.[100]

As such, the modern conception of PRIL requires a dialogue between proximity and sovereignty, in which the former does not banish the latter but certainly offers a different perspective to it.[101] Within this 'proximity-sovereignty' binomial, Arroyo explains that, although the underlying idea of identifying the seat of a geographically dispersed cross-border relation remains the same, the substantial modifications that the paradigm of PRIL has suffered must be taken into consideration.[102] So, even when a particular court has, in theory, jurisdiction over a case, sovereignty alone (solely seen as the exercise of power) cannot justify the exercise of such jurisdiction if no substantial connection exists in practice between the forum and the dispute.[103] This dialogue means, therefore, that conceiving of international competence on a pure nationalist and territorial vision of sovereignty is an anachronistic approach; it disregards the internationalization of human activity and the impacts of human rights in this context.[104]

Indeed, the effort to ensure a jurisdiction substantially close to the case and the parties is directly concerned with guaranteeing fundamental rights. The 'minimum contacts' in the US, for instance, aims "to afford a fair treatment to the defendant, which is guaranteed by the Fourteenth Amendment to the U.S. Constitution (…)."[105] Accordingly, the defendant's domicile has been considered the paradigm of a reasonable connection due to, among others, allowing the right of

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[98] Cuniberti, *supra* note 2 at 137. In a similar vein, see also Audit, *supra* note 63 at 378.
[99] Audit, *supra* note 63 at 378–380.
[100] Regarding the interest of the parties, Cuniberti refers specifically to the minimum contacts requirement in the US and the close connection requisite in Europe, where in both cases, the interest of the defendant plays a role, albeit in different ways. See Cuniberti, *supra* note 2 at 137–149. Concerning the interests of international relations, Audit adduces that, to prevent one State from invading another State's competence, a connection sufficiently close between the forum and the dispute is an essential condition. Audit, *supra* note 63 at 378–379. The author makes a similar comment with respect to the interest of the states: "*Le maintien de la paix publique incite les Etats à prévoir la compétence de leurs tribunaux dès lors qu'un litige se relie de manière suffisamment significative à leur ordre juridique. Un élément de pondération est le souci de ne pas voir les tribunaux encombrés par des litiges ne présentant avec eux qu'un rattachement trop lointain, outre la charge financière que représente le fonctionnement des tribunaux*." Audit, *supra* note 63 at 377. For a more elaborated explanation of these three interests, see Michaels, "Foundations", *supra* note 94 at section III (Interests, theories, and paradigms).
[101] Arroyo, "Una mirada", *supra* note 8 at 92.
[102] *Ibid* at 93.
[103] Renata Alvares Gaspar & Thiago Paluma, "O *Forum Non Conveniens* à Luz do Novo CPC: um diálogo da doutrina com a jurisprudência nacional" in Inez Lopes Matos Carneiro de Farias & Valesca Raizer Borges Moschen, orgs, *Desafios do direito internacional privado na sociedade contemporânea* (Rio de Janeiro: Lumen Juris, 2020) 67 at 77.
[104] See Diego P. Fernández Arroyo, C*ompétence Exclusive et Compétence Exorbitante dans les Relation Privées Internationales*, Recueil des cours de l'Académie de Droit International, t. 323, 2006 at 129–130 [Arroyo, "Compétence Exclusive"].
[105] Cuniberti, *supra* note 2 at 136.

defence.[106] Audit, in turn, postulates that proximity to the forum is essential to certain procedural guarantees.[107] From the effective access to justice standpoint, this principle plays a role, e.g., in the indirect control of jurisdiction, attempting to ensure that the original court was closely connected to the dispute and aiming, ultimately, at the recognition and enforcement of decisions abroad.[108] Furthermore, Arroyo explains that the guarantee of access to justice outlaws the use of exorbitant fora, which are based on scant connections and, as such, are contrary to what is considered reasonable jurisdictions – which, in turn, are based on strong connectors and offer balance and predictability to the parties.[109] In this scenario, the assertion and exercise of international jurisdiction must be reasonable, which, to a large extent, depends on the proximity with the forum and the intensity of this proximity.[110]

A forum will then be defined as reasonable or unreasonable depending on whether it fulfills the principle of proximity or not,[111] thus requiring defining a connection that justifies a court's international competence.[112] The idea of reasonable jurisdiction entails that "every conflict or dispute caused by a multinational case must be trusted to a judge whose legal order has a *reasonable connection with the object of the dispute*."[113] In more practical terms, the proximity

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[106] Arroyo, "Compétence Exclusive", *supra* note 104 at 44.

[107] In the authors' words: "*Les tribunaux ont pour mission première de préserver la paix publique en garantissant aux particuliers le respect de leurs droits, empêchant ainsi qu'ils ne se fassent justice à eux-mêmes. (…) La* proximité matérielle *du for et des éléments du litige est donc essentielle puisqu'elle facilite le rassemblement des preuves : comparution de témoins, production de pièces détenues localement, consultation de registres publics... Elle assure en outre la cooperation éventuellement nécessaire d'autorités locales d'exécution à cette fin*." Audit, *supra* note 63 at 375 [emphasis in original].

[108] The HCCH Judgments Convention, e.g., explicitly relates access to justice to the circulation of foreign decisions (Preamble: "Desiring to promote effective access to justice for all..."). See Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019, Hague Conference on Private International Law, (not yet in force) [HCCH Judgments Convention].

[109] See Arroyo, "DIPr del siglo XXI", *supra* note 66 at 221.

[110] Arroyo, "Compétence Exclusive", *supra* note 104 at 42. The author also explains that the notion of 'reasonableness' can be too abstract and subjective, reason why recurring to the proximity principle would aim to bestow objectivity to the test. He recognizes, though, that such an objectivity is not absolute since lawmakers can also define proximity differently according to their respective legal orders. See also Arroyo, "Una mirada", *supra* note 8 at 94–95.

[111] All, *supra* note 14 at 424.

[112] Lagarde, *supra* note 48 at 128. As mentioned in the introduction of this Thesis, this work focuses on the jurisdictional bases connected to the proximity principle. This is not to say, however, that proximity is the sole ground of jurisdiction as discussed in the beginning of this section. In fact, based on Arthur von Mehren's theory, Lagarde identifies three major grounds: i) the personal connection between the sovereign state and the subject; (ii) physical power; and (iii) a ground drawn on considerations related to convenience, fairness and justice, which would be, essentially, the principle of proximity (*ibid* at 128–129). It is worth noting that Michaels includes consent as an additional foundation for the exercise of jurisdiction and, differently from von Mehren and Lagarde, classifies 'personality'/'citizenship' under the umbrella of proximity. See Michaels, "Foundations", *supra* note 94 at section IV (Bases).

[113] Eduardo Vescovi, *Derecho Procesal Civil Internacional – Uruguay, el Mercosur y América* (Montevideo: Ediciones Idea, 2000) at 17 [translated by author] [emphasis in the original].

between the parties and the dispute requires more than a mere connection that is not essential and substantial to that particular case. Suppose, for instance, that a contract between parties domiciled in Quebec and Argentina, to be performed in Argentina and Colombia, was signed in Peru. In theory, a dispute related to this contract is connected to at least four jurisdictions via three connecting factors: the parties' domicile, places of performance, and place of signature. The connection with Peru, however, solely related to where the contract was made may be too scant when viewed with proximity lenses, thus not justifying entertaining the dispute.

Simply identifying the location of connecting factors may, therefore, be insufficient, especially when adopting a narrow perception of geography and territory.[114] Accordingly, "[f]or a court to reasonably exercise its jurisdiction, there must be a *genuine and substantial connection* between the case and the court."[115]

b. The Opposite Side: Exorbitant Jurisdictions

In a context where reasonable jurisdictions are largely identified through a substantial link between the case and the forum, the logical[116] opposite side consists of rejecting jurisdictions not founded on this premise. Better put, jurisdictional criteria that disrespect the principle of proximity are considered exorbitant connecting factors,[117] leading to an exorbitant or abusive exercise of jurisdiction.[118] In this vein, selecting a connecting factor that is solely tangential, accidental, or

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[114] Territoriality remains playing a relevant role but must be understood in a globalized context: "[u]nder conditions of globalization, territoriality changes its meaning. Some authors think that territoriality should lose its importance for the law of jurisdiction. Others argue the opposite: precisely because borders become more permeable, the law has to use territorial borders to delineate jurisdictional competences (…). Even if the latter view prevails, territoriality still shifts its meaning: it is concerned less with considerations of power and fairness, and more with the need for formal and easily administrable criteria of jurisdictional allocation." Michaels, "Foundations", *supra* note 94 at section IV, 2., a) (Territoriality).

[115] Marcel Vitor de Magalhães Guerra & Valesca Raizer Borges Moschen, "Influências do *common law* no Brasil. Questão relacionada ao *forum shopping*: afinal, é possível a um juiz nacional derrogar sua competência internacional com base na doutrina estrangeira do *forum non conveniens*?" (Paper delivered at the Congress Annals of the XIX National Congress of CONPEDI: Direitos Fundamentais e transdisciplinariedade, Fortaleza, 9, 10, 11 and 12 June 2010) 3707 at 3712 [Guerra & Moschen, "Influências do *common law*"].

[116] See Cuniberti, *supra* note 2 at 166.

[117] Arroyo, "Una mirada", *supra* note 8 at 95–96. In the same vein, see Augusto Jaeger Junior & Nicole Rinaldi de Barcellos, "Comparative transnational civil procedure: exclusive and exorbitant civil jurisdiction in Brazil, United States of America and European Union" (2019) 54:1 Unicuritiba 73 at 87.

[118] Although it seems indeed logical, as Clermont & Palmer explain, 'exorbitant jurisdiction' is a concept yet to be more properly defined. They provide nonetheless an insightful normative statement (and, ultimately, propose a definition): "To be 'exorbitant' is to *exceed ordinary or proper bounds, to be immoderate*, perhaps even offensive-literally to have departed from one's track. Identifying a particular basis for jurisdiction as exorbitant is, thus, *to condemn it as inappropriate from an international standpoint*. Accordingly, we might *define* exorbitant jurisdiction

completely unrelated to the relation under dispute is an essential component of what characterizes an exorbitant jurisdiction.[119] Such a forum also tends to lean towards benefiting the local party, thus disrespecting the other party's right to not be unjustifiably attracted to a jurisdiction with little or no connections. As Arroyo explains, "[i]n general terms, it can be considered that there is no justification when the attraction to the forum, in addition to not complying with the proximity index, is carried out to the detriment of the balance between the parties, favoring one of them, which is usually the one linked to the forum." [120] This imbalance is at odds with the concept of a reasonable jurisdiction.[121]

Notwithstanding their widespread rejection, some legal orders retain some connecting factors that others consider exorbitant, reinforcing that "what is considered exorbitant is often a matter of perspective."[122] In this scenario, a jurisdiction that, for country A, is perfectly acceptable can be vehemently repudiated by country B, which, in turn, may be applying a rule that is abusive according to the parameters of country A.[123] Such rules have often been "crafted in times where jurisdiction was conceptualized differently (allegiance, power theories)."[124]

Transient physical presence, for example, is a traditional English rule that stemmed from "the territorial theory of jurisdiction whereby persons present within the jurisdiction owed as least partial allegiance to the king"[125] and it is usually present in jurisdictions embedded in the common law tradition.[126] Particularly in the US, this factor is translated to physical presence for natural

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as *jurisdiction exercised validly under a country's rules that nevertheless appears unreasonable because of the grounds necessarily used to justify jurisdiction*. But we can probably go farther than this subjective test and *identify an objective standard on which accusations of exorbitance tend to rely*. That standard seems to focus on whether a class of jurisdiction, as opposed to a single assertion of jurisdiction, *is unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute*." Kevin M. Clermont & John R. B. Palmer, "Exorbitant Jurisdiction" (2006) 58:2 Me L Rev 474 at 475–476 [emphasis added] [footnotes omitted].

[119] Diego P. Fernandez Arroyo, "Competencia internacional exclusiva y exorbitante de los jueces de los estados miembros de la Unión Europea: ¿hasta cuándo?" (2004) 34 Jurídica - Anuario del Departamento de Derecho de la Universidad Iberoamericana 59 at 62 [Arroyo, "Competencia internacional"].

[120] *Ibid* at 61–62 [translated by author].

[121] Clearly, this situation differs from protective forums, which, even though appear to 'favour' the weaker parties with the most accessible forum to them, restore, in fact, the balance of a relationship structurally unequal. Arroyo, "Compétence Exclusive", *supra* note 104 at 43.

[122] Michaels, "Foundations", *supra* note 94 at section IV, 3.a) (Exorbitant jurisdiction).

[123] Clermont & Palmer initiate their paper with a fictional dialogue (originally proposed by Rudolf B. Schlesinger) between a comparative professor and a corporation's counsel about French and US exorbitant connecting factors (respectively, nationality and physical presence). This dialogue epitomizes how the perception of what is seen as exorbitant or abusive varies among countries. See Clermont & Palmer, *supra* note 118 at 474–475; footnote 1.

[124] Cuniberti, *supra* note 2 at 166.

[125] *Ibid* at 144.

[126] See Michaels, "Foundations", *supra* note 94 at section IV, 3.a) (Exorbitant jurisdiction) and Arroyo, "Compétence Exclusive", *supra* note 104 at 128.

persons and was, for a long time, translated to 'doing business' for legal persons.[127] The latter, however, was overcome by the US Supreme Court decisions in *Goodyear* and *Daimler*, which significantly minimized this connections as a jurisdictional basis.[128] Transient presence nonetheless tends to be seen as exorbitant by civilians[129] because assuming jurisdiction based on the service of a defendant ephemerally present in the territory would not correspond to the 'substantial connection' parameters and modern international disputes.[130] Likewise, the property-based jurisdiction, when the asset has no connection with the claim whatsoever,[131] is also often considered an exorbitant jurisdictional basis. While property in the territory may reasonably justify jurisdiction when the claim refers to that asset, in cases where the defendant's property is unrelated, it does not appear to be a substantial connecting factor to legitimize entertaining the dispute.[132] The party's nationality is also commonly rejected due to its exorbitance.[133] Perhaps one of the most prominent examples is article 14 of the French Civil Code,[134] where, historically, jurisdiction was seen as a right that a nation provided to its nationals.[135] This provision grants high value to the plaintiff's French citizenship authorizing nationals to bring practically any claim[136] to France, even though nationality[137] has little or nothing to do with the dispute.[138] It is thus perceived as exorbitant given a lack of proper justification and the tendency to negatively impact the other party.[139]

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[127] Michaels, "Foundations", *supra* note 94 at section IV, 2.a) (Territoriality).
[128] Michaels, "Foundations", *supra* note 94 at section IV, 2.a) (Territoriality). It is worth pointing out that, considering this development of the US jurisprudence, it is likely that jurisdiction purely based on service on an only transiently present individual defendant will not remain as a valid jurisdictional basis.
[129] Michaels, "Foundations", *supra* note 94 at section IV, 3.a) (Exorbitant jurisdiction). In addition, Cuniberti explains that, in civil law countries, service is a condition of admissibility of the claim and not jurisdiction. Cuniberti, *supra* note 2 at 144.
[130] Guerra & Moschen, "Influências do *common law*", *supra* note 115 at 3712.
[131] Clermont & Palmer also call it 'attachment jurisdiction' since the plaintiff "seeks to satisfy the claim *by attaching unrelated property* of the defendant--or by garnishing *an unrelated obligation owed the defendant by a third party*-*without obtaining personal jurisdiction over the defendant*." Clermont & Palmer, *supra* note 118 at 478 [footnote omitted] [emphasis added].
[132] Cuniberti, *supra* note 2 at 169. The author highlights that Section 23 of the German Code of Civil Procedure and section 99 of the Austrian *Jurisdiktionsnorm* still explicitly provide this basis of jurisdiction.
[133] For other examples, see Clermont & Palmer, *supra* note 118 at 503–504.
[134] *Ibid* at 482.
[135] Cuniberti, *supra* note 2 at 178.
[136] Cuniberti explains that, although art. 14 alludes to contractual obligations, "the material scope was extended by the French Supreme Court to all disputes involving French nationals." Real property and enforcement matters would be the only exception. *Ibid*. Similarly, see Arroyo, "Compétence Exclusive", *supra* note 104 at 138.
[137] For a more detailed explanation about the element of nationality in France and the influence of this ground in other jurisdictions, see Arroyo, "Compétence Exclusive", *supra* note 104 at 138–141.
[138] Clermont & Palmer, *supra* note 118 at 482–483.
[139] Guerra & Moschen, "Influências do *common law*", *supra* note 115 at 3711.

Exploring these examples demonstrates that, even though the perception of exorbitance can vary, they tend to converge on why they are seen as exorbitant and the adverse effects they provoke. As commented earlier, disrespecting the principle of proximity is a common thread of these examples since, due to their history and tradition, they are grounded on reasons that do not comport with the contemporary global landscape. Exorbitant forums suffer, therefore, from a lack of reasonableness.[140] They also share the fact that these jurisdictions cause an imbalance in the legal relation and unjustifiably benefit one of the parties (usually the local one).[141]

Given these common threads, adopting exorbitant bases have a high potential to disrespect fundamental procedural rights and, not rarely, violate these guarantees in practice.[142] Arroyo also postulates that exercising a jurisdiction based on exorbitant factors would, ultimately, amount to a violation of international law as this would challenge the (more appropriately connected) jurisdiction of other states.[143] Indeed, considering that the concurrency of forums is the default in jurisdictional matters, whereby States recognize the sovereignty of others and, therefore, acknowledge that they are also competent to entertain the same disputes,[144] exorbitant (and exclusive) jurisdictional bases are individualistic and non-cooperative, hence incompatible with the modern aspirations of PRIL.[145]Another notorious effect is the indirect refusal of enforcement of the decision in another state.[146] Since the competence of the court of origin is practically a universal criterion for recognition, chances are that a jurisdiction assumed exorbitantly will be rejected and, ultimately, frustrate the winning party's access to justice.

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[140] Arroyo, "Una mirada", *supra* note 8 at 96.

[141] As Clermont & Palmer conclude: "Closer examination nevertheless suggests that *the world's exorbitant bases of jurisdiction may not be so different after all*. Even in the doctrinal details of these exorbitant bases, where national peculiarities start to peak, *the differences are smaller than they initially appear*. French nationality-based jurisdiction (or Dutch domicile-based or German property-based jurisdiction) may not sound much like U.S. transient or attachment or doing-business jurisdiction, *but in fact they share a common core: nations incline to disregard defendants' interests in order to give their own people a way to sue at home*, if the home country will be able to enforce the resulting judgment locally." Clermont & Palmer, *supra* note 118 at 504–505 [emphasis added].

[142] Arroyo, "Compétence Exclusive", *supra* note 104 at 133.

[143] *Ibid*.

[144] *Ibid* at 37–38.

[145] Arroyo, "Competencia Internacional", *supra* note 119 at 60. About the close relationship between proximity and concurrency of forums, see also Cuniberti, *supra* note 2 at 161.

[146] Gizem Ersen Perçin, "Within the Scope of Right to Fair Trial the Principle of 'Forum Necessitatis' and Its Effect on Turkish International Jurisdiction Rules" (2021) 27:1 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 676 at 678.

In conclusion, although history and tradition can explain the emergence and the original suitability of bases today considered exorbitant, their harmful consequences and misalignment with the idea of reasonable jurisdictions demand a joint effort to eliminate their existence.[147]

c. Exorbitant Use of Reasonable Forums

The exorbitance of a jurisdiction is not always blatantly evident. Sometimes, a perfectly reasonable jurisdiction on paper, i.e., grounded on a widely acceptable connection, may be exercised abusively. Arroyo calls this practice "exorbitant use of reasonable forums."[148] The author explains, for example, that albeit hardly contestable in theory, the defendant's domicile may present grey areas not easily surmountable when applied to a concrete case:

> *Dans le domaine du droit privé (...) le domicile pose un dilemme : ou, pour le rendre objectif, le critère est fixé au moyen de définitions légales, en perdant ainsi — dans certains cas — un rapport avec la réalité (une personne est réputée domiciliée dans un endroit avec lequel elle n'a aucun lien), ou, pour le rapprocher de la réalité, le critère se fonde sur des aspects de fait et sur la volonté de la personne, en provoquant une souplesse parfois intolérable*.[149]

Thus, simply establishing that jurisdiction must be reasonable and compliant with proximity, fundamental rights, and international law – though a crucial step – does not make asserting jurisdiction easy. On the contrary, this endeavour is not simple and presents many layers of complexity.[150] To begin with, jurisdictional issues are at the heart of any cross-border litigation since it precedes the applicable law dilemma.[151] Also, states have the autonomy to determine their own rules and which cases will fall under their power, thus favouring the emergence of both positive and negative conflicts of jurisdiction.[152] In addition, as stated earlier, "the concept of reasonable forum, analyzed without reference to a specific positive right, can be very diffuse."[153]

Consequently, even though some rules and paradigms appear to work on paper, when legal actors face the reality of international disputes, these same rules and paradigms may present nuances and obscure areas that are not easily solved in a "black and white" perspective, offering a fertile terrain for abusive uses of certain reasonable connectors.

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[147] In that vein, see Clermont & Palmer, *supra* note 118 at 505; Audit, *supra* note 63 at 415; and Jaeger Junior & Barcellos, *supra* note 117 at 91.
[148] See Arroyo, "Compétence Exclusive", *supra* note 104 at 134–137 [translated by author]. Vescovi proposes a similar discussion. See Vescovi, *supra* note 113 at 17–18.
[149] Arroyo, "Compétence Exclusive", *supra* note 104 at 135.
[150] See Arroyo, "Competencia Internacional", *supra* note 119 at 60.
[151] Jaeger Junior & Barcellos, *supra* note 117 at 75.
[152] Meinero, "Jurisdição Internacional", *supra* note 64 at 285–286.
[153] Vescovi, *supra* note 113 at 18 [translated by author].

1.2 The Impacts of Proximity on Jurisdictional Connections

Considering how the proximity principle acts as a tool to address jurisdictional conflicts, it must assume different roles[154] to properly serve the complexity of conflicts of jurisdiction and the demands of a cooperative PRIL. Each of these roles has its relevance, purpose and impact and interacts with different values and principles. One first function is identified in the elaboration of jurisdictional rules. Despite the criticisms of their rigidity, this topic will demonstrate that, in fact, many of these rules are inspired by proximity since lawmakers try to determine beforehand which forums are closely connected to the parties or the dispute (section 1.2.1). Concomitantly, it will become clear that, in some situations, the rules alone are insufficient, forcing the parties and the courts to resort to functions that allow correcting the course initially envisaged by such rules and reach actual proximity in a concrete case (section 1.2.2). Section 1.2.3, in turn, discusses the role of proximity in the recognition and enforcement of foreign decisions.[155] Finally, presenting these roles[156] will expose that the proximity principle constantly interacts with other fundamental principles of PRIL and must be cautiously coordinated with them, disallowing a 'romanticized' view of proximity as the sole saviour of all jurisdictional problems (section 1.2.4).

1.2.1 The Classic Jurisdictional Rules – Not "Close" at All?

As widely known, pre-established rules (via codes, statutes or other forms of systematization) presuppose prior choices made in the political and legal spheres. Rules of PRIL and, consequently, of international jurisdiction are no exception. In the process of defining which

[154] The set of roles outlined in this research are largely inspired by the categorization proposed by Lagarde in his Hague Course, although presenting some adaptations and updates. See Lagarde, *supra* note 48 at Part Two. Such a classification is not absolute. Dolinger, e.g., proposed different categories that are also highly valid and relevant, especially from the choice-of-law perspective. See Dolinger, "Evolution of Principles", *supra* note 25 at 397–401. From a different angle, Michaels presents different levels of regulation regarding jurisdiction, whereby the second level refers to the provision of rules and the third one to judicial discretion, levels where proximity plays some of the roles discussed below. See Michaels, "Foundations", *supra* note 94 at section II, 2. And 3. (Second level: specific rules and Third level: discretion on a case-by-case level). The choice made herein is, therefore, methodological since it serves the purposes of this Thesis but does not disregard other possible classifications.

[155] As already pointed out in the Introduction, I do not intent to divert from the focus of this Thesis – which remains on direct jurisdiction. The goal is to emphasize that the proximity between the original court and the case might be determinant during the recognition process, reason why understanding this role is necessary for a proper decision on direct jurisdiction.

[156] It is worth noting that, even though Dolinger has characterized the proximity principle as "a principle of a different nature and different effects than the classic principles of law in general", some of the functions discussed in this Thesis are not necessarily exclusive to the principle of proximity. Dolinger, "Evolution of Principles", *supra* note 25 at 376–377. As Vescovi elucidates, many of the principles and central ideas of the procedural aspects of PRIL inspire lawmakers, provide substrate for the interpretation of rules and for filling and correcting gaps that norms and rules sometimes leave unanswered. Vescovi, *supra* note 113 at 16.

connections will justify the competence of a given court in cross-border disputes, the principle of proximity plays a role and "*[c]omme dans les conflits de lois, mais sous des formes différentes, (…) peut servir à l'élaboration des chefs de compétence internationale*."[157]

Indeed, while some rules of jurisdiction reveal an interest misaligned with proximity, it should not be surprising that many long-established rules attempt to embody the idea of proximity between the forum and the case. If, back in the day, Savigny conceived of conflict rules seeking to locate the 'seat' of the relationship, proximity is inherent to such rules.[158] It seems then logical that the connecting factors will try to reflect the proximity between them and the relation provided for in the norm. As a result, the current global trend interested in promoting certainty and harmony in jurisdictional matters has suggested that international disputes should be directed to the *forum conveniens*, i.e., the most appropriate forum.[159] Accordingly, although some jurisdictional bases rely on different reasoning, "[t]he large majority of bases of jurisdiction are based on proximity, some connection that exists between the court and either the transaction or the parties."[160]

To visualize more concretely how proximity pervades the elaboration of rules, it is important to understand the fundamental distinction between general and specific jurisdictions.[161] Rules of the former type are formulated to attract international competence to any claim against the defendant, irrespective of the kind of action it concerns.[162] The connecting factor is present in every cross-border dispute and disregards the object or nature of the proceeding.[163] General jurisdiction is, therefore, party-related and comprehensive.[164] Conversely, specific rules are

[157] Lagarde, *supra* note 48 at 131.
[158] Meinero, "O desenvolvimento", *supra* note 4 at 334–335. It is worth reminding that Savigny's proposal referred more directly to the issues around choice-of-law since, as discussed in section 1.1, PRIL was for a long time focused on this issue. Yet, the philosophical reasoning can be applied, *mutatis mutandis*, to the proximity principle in conflicts of jurisdiction; in that vein, see the enlightening words of Audit: "*Les rattachements susceptibles de fonder une compétence juridictionnelle en matière internationale sont les mêmes que ceux qui sont usités pour l'application des règles de fond, puisqu'il s'agit dans un cas comme dans l'autre de rattacher une situation à un ordre juridique*." Audit, *supra* note 63 at 374.
[159] Michaels, "Foundations", *supra* note 94 at section III, 1.c) (Structural interests/interests of the international system).
[160] *Ibid* at section IV, 2. (Proximity).
[161] See Audit, *supra* note 63 at 395–396. Such a dichotomy tends to be shared by both civil and common law systems, although presenting slight definitional differences among them. Michaels, "Foundations", *supra* note 94 at section IV, 2. (Proximity).
[162] Audit, *supra* note 63 at 396.
[163] All, *supra* note 14 at 425.
[164] Michaels, "Foundations", *supra* note 94 at section IV, 2. (Proximity).

designed for certain types of disputes, privileging a connection characteristic of that kind of action[165] and limiting its application to matters related to the selected connecting factor.[166]

The most prominent example of general jurisdiction is the defendant's domicile, one of the most traditional[167] and accepted forums worldwide,[168] which has been considered the paradigm of a reasonable connection based on proximity.[169] This factor presupposes a pre-existing balance between the parties in which the defendant is, *a priori*, not obligated to the claimant, thus requiring the latter to displace themselves to sue the former.[170] On the defendant's side, this jurisdictional basis guarantees that they will litigate in the place that, in theory, offers the elements for their right of defence; the claimant, in turn, would benefit from the fact that the counterparty likely has assets in their domicile, favouring future enforcement should the claimant win.[171] Therefore, besides the link with territoriality,[172] the proximity corroborated by the defendant's domicile rests on the fact that it "*présente des signes externes, visibles et au moins partiellement objectifs pour indiquer le lieu dans lequel une personne peut être trouvée avec une marge considérable de probabilité et qui en même temps doit lui permettre, en principe, d'exercer ses droits de la défense*."[173]

This connecting factor, however, is far from being immune to problems and criticisms. Among them,[174] the fact that it presupposes the link between the forum and the dispute does not necessarily guarantee the truthfulness of this link: "*Mais du fait que le domicile est une notion juridique, qui ne se traduit pas nécessairement par une véritable proximité* (…)."[175] The 'domicile' poses a dilemma between being purely objective – and, therefore, more distant from reality – or being more accurate with the situation at hand, thus considering factual aspects and the party's

[165] Audit, *supra* note 63 at 396.
[166] Michaels, "Foundations", *supra* note 94 at section IV, 2. (Proximity).
[167] In that sense, Arroyo, "Compétence Exclusive", *supra* note 104 at 44; Audit, *supra* note 63 at 416.
[168] See Audit, *supra* note 63 at 418. This widespread acceptance does not necessarily entail a unanimous understanding of what domicile is since it can vary among legal orders. Jayme offers a very didactic explanation, for example, between the common and civil law domiciles. See Jayme, *supra* note 5 at 204–206.
[169] Arroyo, "Compétence Exclusive", *supra* note 104 at 44–46; Jaeger Junior & Barcellos, *supra* note 117 at 84.
[170] Audit, *supra* note 63 at 416.
[171] All, *supra* note 14 at 425.
[172] As stated by Michaels when discussing territoriality in the camp of proximity, "[t]he most important territorial connection in the law of jurisdiction is a party's domicile (...)". Michaels, "Foundations", *supra* note 94 at section IV, 2.a) (Territorialty).
[173] Arroyo, "Compétence Exclusive", *supra* note 104 at 44.
[174] Arroyo gleans in total five main difficulties that might arise in certain cases, such as the possibility of expanding the concept and manipulating it, its risk of excessive abstraction and the differences between private law and private international law. For a detailed explanation, see *ibid* at 134–136.
[175] Audit, *supra* note 63 at 418.

intention, at risk of being too flexible.[176] As a result, the party's habitual residence has often been invoked as a replacement in jurisdictional rules since it tends to offer a more decisive tone of reality.[177]

Thus, alongside the defendant's domicile, habitual residence has commonly integrated the general rules as a connector directly related to the goal of guaranteeing proximity – which has been preferred over nationality that, as discussed earlier, raises red flags concerning exorbitant jurisdiction. Domestic legislations offer numerous examples attesting to this reality. The Civil Code of Quebec, for instance, provides that "[i]n the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec."[178] Similarly, the recently enacted Uruguayan General Law of Private International Law (UGLPIL) states in Art. 56 that its courts will have competence over cases where the defendant is domiciled in Uruguay. In turn, Belgium accepts both the defendant's domicile and habitual residence in Belgium to assert jurisdiction in any case except otherwise stated in the Belgian Code of Private International Law.[179]

Beyond domestic borders, the defendant's domicile or habitual residence has also been adopted by supra and international instruments as general jurisdiction. The foundational rule[180] of the Brussels Regulation Ia (Brussels Ia Recast – 1215/2012) – a legal instrument aiming to unify the international jurisdiction law within the European Union (EU)[181] and binds 27 Member States[182] – is "the *actor sequitur rei* rule, whereby jurisdiction is accorded to the courts of the defendant's domicile state (Article 4(1))."[183] In soft law, the ASADIP Principles on Transnational

[176] Arroyo, "Compétence Exclusive", *supra* note 104 at 135.
[177] *Ibid* at 136–137. See also Jayme, *supra* note 5 at 207. Arroyo, however, does not disregard the possibility that 'habitual residence' may also be subject to manipulation due to its subjective component.
[178] Art. 3134, CCQ.
[179] Art. 5, § 1. McEleavy explains that this code repealed art. 15 of the Civil Code that accepted nationality as a factor to attract jurisdiction. McEleavy, *supra* note 57 at 510. Indeed, Art. 139, 1º revokes art. 15.
[180] See Recital (15): "The rules of jurisdiction should be highly predictable *and founded on the principle that jurisdiction is generally based on the defendant's domicile*. Jurisdiction should *always be available on this ground save in a few well-defined situations* in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor (…)" [emphasis added].
[181] Cuniberti, *supra* note 2 at 144.
[182] Michiel Poesen, "Is specific jurisdiction dead and did we murder it? An appraisal of the Brussels Ia Regulation in the globalizing context of the HCCH 2019 Judgments Convention" (2021) 26:1 Uniform Law Review 1 at 2.
[183] *Ibid*.

Access to Justice (TRANSJUS)[184] consider the defendant's habitual residence a substantial connection making no mention of their domicile whatsoever.[185]

Outside the sphere of general jurisdiction, proximity can also ground specific (or special) rules. Contractual obligations, for example, often select the place of performance, i.e., the venue where the contractual obligation is supposed to take (or has taken) place. According to Audit, this connection is the one that best demonstrates proximity because most contractual disputes arise from their obligational aspect.[186] Since all the grounds of special jurisdictions in the Brussels Ia Recast rely on a close connection between the case and the forum,[187] this instrument offers again an elucidative example of this jurisdictional rule. Its Art. 7 (1) (a) generally establishes that, in contractual cases, the defendant of a Member State may face litigation in the place of performance of the obligation in question.[188] In domestic law, Argentina also sets forth this special rule but explicitly authorizes the performance of *any* contractual obligation to attract jurisdiction[189] – as opposed to the Brussels 1a Recast provision. Brazil, in turn, establishes the place of performance but offers no instruction on which obligation should be taken into account.[190] The place where the contract is made has also composed special jurisdictional rules based on the proximity between the place of contracting and the case. Modern approaches to international competence, however, have abandoned this connection due to its insufficient significance and openness to manipulation by the party that can impose the place of signature.[191] Yet, it has persisted in some countries.[192]

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[184] The TRANSJUS is a soft law document elaborated under the auspices of the American Association of Private International Law (ASADIP) driven by the goal of establishing rules to regulate cross-border private litigation, as well as facilitating and guaranteeing access to justice in the transnational sphere. For a thorough overview of the TRANSJUS see Muñoz, *supra* note 82. For a specific explanation of its jurisdictional provisions, see Vieira & Gaspar, *supra* note 9 at 60–63.

[185] Article 3.2, b.

[186] Audit, *supra* note 63 at 426.

[187] Poesen, *supra* note 182 at 2. See also Pietro Franzina, "The Proposed New Rule of Special Jurisdiction Regarding Rights in Rem in Moveable Property: A Good Option for a Reformed Brussels I Regulation?" (2011) Diritto del commercio internazionale 3 (2011) at 3.

[188] Note that point (b) of this provision offers guidance on specific types of contracts (sales of goods and services, respectively), while point (c) circles back to (a) when letter (b) does not apply. Grušić explains that this article represents the major innovation of the Regulation taken place in 2000. See Uglješa Grušić, "Jurisdiction in Complex Contracts under the Brussels I Regulation" (2011) 7:2 Journal of Private International Law 321 at 321–322. The wording has only slightly changed since then.

[189] Article 2650, b, Civil and Commercial Code (Argentina).

[190] Art. 21, II, Brazilian Code of Civil Procedure (BCCP/15).

[191] Audit, *supra* note 63 at 428.

[192] Brazil, for instance, expressly adopts the place of signature in choice of law (Art. 9, ILNBL) and implicitly admits this connection to assert jurisdiction due to the vagueness of Art. 21, III, BCCP/15.

Tort disputes, in turn, usually consider the forum where the damaging event occurred and/or where the damages were felt by the victim(s). These possibilities apply mostly in cases where the tort is dispersed, and the wrongdoing and injuries take place in two or more different jurisdictions.[193] Since the facts are at the heart of this kind of litigation, the rules embodying these connectors are justified by the proximity to the place where the facts happened: "*A l'époque moderne, où une règle de compétence générale permet normalement de saisir le for du défendeur, le for du délit conserve toute sa légitimité en tant que règle de compétence spéciale car il y a le plus souvent lieu d'établir des faits contestés*."[194] This rule was embraced by Art. 7 (2) of the Brussels Ia Recast, encompassing both the forum of the harmful event and the damage.[195] Similarly, the Civil Code of Quebec has established a provision that sets out three legitimate connectors that attract jurisdiction to Quebec: if Quebec is the place where a fault was committed, an injury was suffered, or an injurious act or omission occurred.[196]

For sure, the general and specific jurisdictional rules discussed above are not the only ones based on proximity. There are other rules related to property, exclusive jurisdiction, family law etc., that are also founded on the idea of a substantial connection and even other grounds and state/party interests. It should, though, be clear that some of the most traditional jurisdictional rules attempt to establish, at the outset, a forum supposedly close to the dispute or the parties. They show, therefore, the inspirational role that the proximity principle plays in elaborating rules.[197]

The practical reality, however, has demonstrated that this noble effort does not always suffice to ensure procedural fairness, just decisions, recognition abroad and harmony between jurisdictional rules and judgments worldwide. First, the international community has not yet reached a consensus regarding rules on direct jurisdiction,[198] and even though there is an ongoing project in the Hague Conference of Private International Law (HCCH),[199] doubts have been voiced

[193] Audit refers to this type of tort as *délit complexe* as opposed to *délit simple* where all the objective connections of the tort are situated in the same place. See Audit, *supra* note 63 at 440.
[194] *Ibid*.
[195] Poesen, *supra* note 182 at 2.
[196] Art. 3148 (3), CCQ.
[197] See Lagarde, *supra* note 48 at 132.
[198] Moschen, "Conferência de Haia", *supra* note 74 at 144.
[199] For the history and the main documents related to this project, see: <https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project>.

about the likelihood of such an achievement in the short run.[200] Issues around predictability also bring about certain challenges. On the one hand, predictability in excess, where no room for judicial interpretation or discretion is allowed, may yield results distant from the reality of a given case, leaning toward a link that is rather weak, fictitious, or inexistent – a situation that resonates with the criticisms that 'revolutionized' PRIL decades ago. On the other hand, jurisdictional provisions seldom offer clear-cut guidance for judges and parties facing a dispute. While wording such as 'place of damage' or 'place of performance' may seem straightforward at first glance, the definitions, extensions, intensity, and other aspects of connecting factors come out of the shadows of the written text and haunt courts and parties in real life. It is necessary, in consequence, to provide legal actors with the means to grapple with shortcomings when the rule itself reveals to be insufficient. One of these tools can be the corrective role assumed by the proximity principle.

1.2.2 The Proximity Principle as a Corrective Tool

The following paragraphs will discuss two ways through which the proximity principle can operate as a corrective function regarding jurisdictional challenges. The first one is the well-known doctrine of *forum non conveniens* (FNC), which has been invoked as an alternative approach for those cases where the jurisdictional rule leads to a forum less appropriate than others. Subsequently, we turn our attention to the interpretative guidance that, as a principle, proximity can offer, assisting legal actors in seeking and applying the real intention that lurks behind the jurisdictional rule, mainly when the rule itself falls short in precision and accuracy.

a. *Forum Non Conveniens*

To properly understand FNC, one must first clearly grasp the difference between 'having jurisdiction' and 'exercising jurisdiction' since this doctrine is founded on such a distinction.[201] Assessing whether a court has jurisdiction over a case precedes the question of whether this jurisdiction should be exercised. FNC focuses on the second issue and, in theory, is irrelevant if

[200] As Blom cautiously states, "[a] separate Hague jurisdiction convention is a remoter prospect. Such a convention may one day see the light of day, but the jurisdictional principles in the 1999 and 2001 drafts elicited little consensus at the time, and it is doubtful whether they would garner any more now. If a new jurisdiction convention eventually emerges, it is almost certainly going to look very different from these drafts." Joost Blom, "The Court Jurisdiction and Proceedings Transfer Act and the Hague Conference's Judgments and Jurisdiction Projects" (2018) 55:1 Osgoode Hall L J 257 at 266 [Blom, "The CJPTA"].

[201] Richard Fentiman, "Chapter C.17: Forum non conveniens" in Jürgen Basedow et al, eds, Encyclopedia of Private International Law (Edward Elgar Publishing, 2017) 797 at 797–798.

the courts do not have jurisdiction to decide the case in the first place. Thus, this doctrine is not a jurisdictional rule[202] because its application is relevant only after a given court has established jurisdiction.[203] Accordingly, FNC pertains to the camp of judicial discretion; once the existence of jurisdiction is asserted, the court will – usually upon the defendant's request – assess the circumstances of the case and decide whether it should exercise or decline such jurisdiction.[204]

The origin of FNC dates back to the 19th century when the Scottish courts first developed it.[205] The doctrine then spread and was well received mainly by the common law courts since it is typically rejected by civil law countries.[206] FNC, therefore, presents nuances and distinctive features among the jurisdictions that adopt it.[207] Better said, even though FNC generally bestows a degree of discretion to the courts to decide whether to exercise or decline jurisdiction, how they assess and which factors they consider can vary among legal orders.[208] Without disregarding these variations, we will abstract these differences and discuss FNC in general terms, focusing on the similarities that tend to be shared.

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[202] Michaels, "Foundations", *supra* note 94 at section II., 3.a) (Common law, especially *forum non conveniens*).

[203] Tanya Monestier, "(Still) A Real and Substantial Mess- The Law of Jurisdiction in Canada" (2013) 36:2 Fordham Int'l L. J. 397 at 441 [Monestier, "Still a Mess"].

[204] Michaels, "Foundations", *supra* note 94 at section II., 3.a) (Common law, especially *forum non conveniens*). Nonetheless, the author warns that, in functional terms, the distinction between existence and exercise of jurisdiction is not always easy to draw since they are closely related. Indeed, the Canadian common law furnishes an elucidative example of this close relation (and the consequences it can bring about) since some Supreme Court decisions established similar criteria for the jurisdictional inquiry and its exercise. For further details see Geneviève Saumier, "Forum Non Conveniens: where are we now?" (2000) 12:121 SCLR 121 at 130–131 [Saumier, "Forum Non Conveniens"].

[205] Cuniberti, *supra* note 2 at 193. Lagarde explains that, at the time, FNC "*a servi de remède contre les abus du forum arresti et du forum contractus lorsque ces fors étaient utilisés pour attraire de façon abusive et vexatoire devant les tribunaux écossais un défendeur domicilié hors d'Ecosse dans un pays où existait un tribunal compétent*." Lagarde, *supra* note 48 at 143. See also Arroyo, "Compétence Exclusive", *supra* note 104 at 162 and Carmen Tiburcio, *Extensão e Limites da Jurisdição Brasileira: Competência Internacional e Imunidade da Jurisdição*, 2nd ed (Salvador: JusPODIVM, 2019) at 198, footnote 690.

[206] Michaels, "Foundations", *supra* note 94 at section II., 3.a) (Common law, especially *forum non conveniens*) and section II., 3.b) (Discretion in civil law systems). See also, Fentiman, *supra* note 201 at 799.

[207] For instance, Saumier explains that, in the case *Amchem Products Inc. v B.C.*, the Supreme Court "crafted a Canadian version of the *forum non conveniens test*" that was different in certain aspects from the English FNC rule. See Saumier, "Forum Non Conveniens", *supra* note 204 at 124–125.

[208] See, for example, Cuniberti discussing FNC in England and Wales: "(…) the doctrine of forum non conveniens empowers common law courts to decide whether to exercise jurisdiction by comparing the appropriateness of the forum and of the foreign court to decide the particular case. Whether one court is more appropriate than the other will be assessed by taking into account a number of factors, *which vary from one common law jurisdiction to another*." Cuniberti, *supra* note 2 at 199 [emphasis added]. Such variations may appear even within countries, particularly those that integrate multijurisdictional legal systems. Saumier, for instance, provides a didactic explanation about the differences that FNC presents in the Canadian framework, specifically between the CCQ regulation and the common law rule. See Saumier, "Forum Non Conveniens", *supra* note 204 at 129–133.

One distinctive characteristic of FNC is that it is a judicial solution to correct the course of an ongoing jurisdictional issue. In theory, this doctrine operates as an exception (since the court's jurisdiction does exist) and should be applied in particular circumstances.[209] As Audit states, "*[l]'exception de* forum non conveniens *constitue un remède de nature juridictionnelle à une ouverture trop large de la compétence*."[210]

Another usual condition for using FNC is guaranteeing that another competent forum is available.[211] In this regard, it is crucial to remember that, differently from what happens in choice-of-law,[212] a court cannot redirect the proceeding to the more appropriate forum since it has no jurisdiction over foreign territories. After assessing whether the other venue is competent, what the court can do, at most, is decline its own jurisdiction if it understands that other FNC requirements are met. Such peculiarity can lead to a denial of justice if applied without considering the existence of another better-suited venue,[213] which explains why such a condition is so relevant.[214]

Perhaps the most – though not exclusive[215] – widespread justification of FNC lies in the lack of a substantial jurisdictional connection between the case and the forum. As such, one of the primary measures to apply FNC is the connection with and appropriateness of the forum, inviting an analysis through the lenses of proximity: "*Ainsi, plusieurs ordres juridiques offrent à leurs juges en principe compétents la faculté de se dessaisir lorsque la compétence est fondée sur un lien faible*."[216] In other words, the incompatibility with the proximity principle – i.e., jurisdictional connection – is what often legitimizes a court to decline its jurisdiction in favour of a better-suited

[209] The reality, however, does not always correspond to the theory. See e.g., Saumier, "Forum Non Conveniens", *supra* note 204 at 123.
[210] Audit, *supra* note 63 at 445.
[211] See Jayme, *supra* note 5 at 101.
[212] As Lagarde explains, in applicable law, whenever a court applies an escape clause, it ends up discarding the law indicated by the conflict rule and applying another that is closer to the case. Lagarde, *supra* note 48 at 148. There is, therefore, a comparative exercise whose results will be entirely handled by the judge that hears the case on the merits.
[213] *Ibid*. See also Gaspar & Paluma, *supra* note 103 at 86.
[214] So much so that, in England, ensuring the claimant's access to justice overrides the cost-efficiency test. See Fentiman, *supra* note 201 at 803.
[215] The lack of concrete proximity is not the only reason that leads to the application of *forum non conveniens*. The FNC in the US, e.g., also considers public interest factors. Cuniberti, *supra* note 2 at 209. These factors refer, for example, to how much interest a given state has over a particular dispute, the need to unburden some busy US courts, and even to what degree judicial resources should be allocated in favour of foreign parties or international conflicts. Fentiman, *supra* note 201 at 798. English courts, in turn, take the costs of a proceeding into account as part of the FNC analysis. Cuniberti, *supra* note 2 at 199. Nonetheless, it could be argued that, due to the many technological advances in judicial cooperation currently under development, these cost-related justifications may soon shrink and lose relevance in the jurisdictional equation. In that vein, see Fentiman, *supra* note 201 at 801.
[216] Arroyo, "Compétence Exclusive", *supra* note 104 at 162–163.

one.[217] FNC thus has the potential to be a useful corrective tool in cases where the forum is clearly exorbitant or overshadowed by an apparently reasonable rule that is nonetheless inappropriate for that particular dispute.[218]

Moreover, although the main purpose of FNC is to regulate the jurisdiction of the forum, it can indirectly play a part in resolving issues of parallel litigation.[219] When similar proceedings are concomitantly being held in different jurisdictions, the assessment of which is more appropriate may be invoked[220] as one of the parameters to decide on staying or continuing the proceeding. In this case, the proximity principle – expressed through FNC – would appear.[221]

Despite the potential benefits of FNC, especially as a corrective mechanism against the unreasonable exercise of jurisdiction on a case-to-case basis, the doctrine is not necessarily easy to apply and receives criticisms of different sorts. Fentiman, e.g., explains that "[i]t has been suggested (…) that the *forum non conveniens* doctrine is incompatible with the requirements of art 6 of the ECHR (…), because merely to require a claimant to recommence proceedings, with the attendant cost and delay, is a denial of justice."[222] Other factors such as delay of the proceeding, lack of uniformity of application and practice of forum-shopping (whereby the court would act in a discriminatory way to benefit its local plaintiff) are also reasons that generated criticisms of FNC.[223]

The chief disapproval, nonetheless, likely relies on the judicial discretion granted by FNC. Civilian jurisdictions, in particular, consider that this discretion yields too much unpredictability and uncertainty.[224] Indeed, this perception led the European Court of Justice (ECJ) to refuse to apply FNC in the *Owusu v. Jackson (Case 281/02)* case, alleging that its inherent broad discretion

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[217] In that vein, see Vieira & Gaspar, *supra* note 9 at 47–48; Whytock, *supra* note 66 at 517; Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52:3 McGill LJ 555 at 562; and Fentiman, *supra* note 201 at 798.

[218] Lagarde, *supra* note 48 at 154. See also Arroyo, "Compétence Exclusive", *supra* note 104 at 162–165.

[219] Cuniberti, *supra* note 2 at 192.

[220] According to Cuniberti, such an approach depends on the perception given to FNC, i.e., if it focuses solely on jurisdictional regulation or also on regulating (potential) parallel proceedings. *Ibid* at 212.

[221] In fact, this is the core argument voiced by Vieira and Gaspar when advocating for the possibility of applying FNC in Mercosur. See Vieira & Gaspar, *supra* note 9. See also Lagarde, *supra* note 48 at 155. Solutions of *lis pendens*, however, do not always consider the appropriateness of the forum, which is why no generalization should be made in that regard. This is, for example, the case of France, where "(…) the discretion is confined to establishing that the grounds for declining jurisdiction are established, without the broad evaluation associated with the *forum conveniens* doctrine, and that discretion is an aspect of the mechanism of declining jurisdiction in the event of *lis pendens*, and not directed at allocating the case to the most appropriate forum." Fentiman, *supra* note 201 at 799.

[222] Fentiman, *supra* note 201 at 804.

[223] Guerra & Moschen, "Influências do *common law*", *supra* note 115 at 3710.

[224] Cuniberti, *supra* note 2 at 211.

would destabilize the predictability of the rules and the principle of legal certainty that grounded the Brussels Regulation.[225] Accordingly, FNC finds much more resistance in civil law jurisdictions, which tend to reject a high degree of judicial discretion and privilege pre-established rules.[226]

This reluctance, however, does not impede certain exceptions and a possible openness to FNC in the long run. One example[227] is the codification of FNC in Quebec. In 1994, the CCQ introduced FNC for the first time in this provincial legal framework.[228] Art. 3135 reads as follows:

> 3135. Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

Such wording contemplates key features and conditions of *forum non conveniens*. At the outset, it presupposes the existence of jurisdiction before the FNC analysis. It then reinforces that the measure should be exceptional and applied only upon request. Finally, the provision states that another state should be in a better position, thus implying that another forum should be available and more appropriate for that dispute. Although Quebec's judicial system is largely a common law model, its PRIL rules are codified (Book Ten, CCQ) and of civilian inspiration. This hybrid may make the example of Quebec unique but does suggest that jurisdictional rules can co-exist with the *forum non conveniens* discretion within a codification, which is of great significance not only to Canada but also to the world as a signal that such a co-existence is possible.

Finally, a sign that may herald an openness to FNC by civilian jurisdictions is its adoption by the TRANSJUS.[229] Even though these Principles are aimed at the whole world, one should not forget that many ASADIP scholars are from Latin America. Encompassing FNC in this document shows that a robust group of academics from civil law understands that applying this doctrine is not only possible but also necessary for the purposes of access to justice. It is worth noticing that Art. 3.9 expressly mentions the lack of substantial connection as one of the legitimate reasons to adopt FNC, again demonstrating the role proximity can have in this mechanism.

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[225] *Ibid* at 212.
[226] Michaels, "Foundations", *supra* note 94 at section II., 3.b) (Discretion in civil law systems). This confirms to be true, for instance, in the countries of Mercosur; they all belong to the civilian tradition and none of them has so far formally incorporated the doctrine of *forum non conveniens*. See Vieira & Gaspar, *supra* note 9 at 53–59.
[227] For other examples regarding judicial discretion in civil law traditions, see Cuniberti, *supra* note 2 at 211–218, Michaels, "Foundations", *supra* note 94 at section II., 3.b) (Discretion in civil law systems), and Fentiman, *supra* note 201.
[228] Saumier, "Forum Non Conveniens", *supra* note 204 at 123.
[229] Article 3.9, TRANSJUS.

b. *Interpretative Function*

Another role that proximity can assume with the bigger purpose of correcting the course of jurisdictional rules is what this Thesis calls the 'interpretative function'.[230] Particularly, I argue that this function can help address three specific problems that can arise regarding jurisdiction: plurality of connectors due to the concurrency of forums (a.); lack of guidance and precision of some jurisdictional rules (b.); and the rejection of FNC by certain countries (c.).

i. Plurality of connections due to the concurrency of forums

As widely known, the plurality of jurisdictions is desirable in a globalized world since it indicates that the sovereign states adopt a system of mutual recognition and respect.[231] Conversely, exclusive forums are inconsistent with a global system supposed to be based on trust and cooperation.[232] Exclusive jurisdictional bases prevent cases from being heard by any other country and should, therefore, be exceptional, privileging concurrent bases instead. Also, since the requirement of proximity is the modern paradigm of PRIL, it is very probable that multiple states – that have contacts with the case – will have jurisdiction over the same dispute.[233] In this scenario, it is worth recalling that, whereas, in choice-of-law, the court searches for the law with which the dispute or the parties is most substantially connected, the requirement in jurisdictional conflicts is less strict.[234] The degree of connection needed to establish jurisdiction does not necessarily require the *most* appropriate forum and accepts, *a priori*, minimum contacts, providing courts with various possibilities to entertain jurisdiction.[235] As a result, the concurrency of forums, i.e., the possibility of many countries considering themselves competent to hear a dispute on the merits, is the default reality of the current configuration of PRIL.

While desirable, the availability of multiple jurisdictions creates some challenges. Since, in principle, contacts with a state can lead to a (potential) jurisdiction without requiring the strongest connection to prevail, complex cases connected to several countries will present a myriad

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[230] At this stage, the comments on this interpretative role are general and disregard particularities of legal orders that will certainly interact with this function in order to respect other norms and principles, such as guaranteeing the right of defense regarding such an interpretation and constitutional limits that must be observed by the courts. Chapter Four will provide a more "customized" discussion about this function, adapting it to the Brazilian reality.
[231] Vieira & Gaspar, *supra* note 9 at 50–51.
[232] Arroyo, "Competencia Internacional", *supra* note 119 at 78.
[233] Cuniberti, *supra* note 2 at 162.
[234] Arroyo, "Una mirada", *supra* note 8 at 98.
[235] *Ibid* at 98–99.

of jurisdictions. The intensity of each connection, however, will likely vary and should, therefore, be considered when assessing whether that contact is real or only apparent, fictitious, or exorbitant.

Suppose, for example, that a claimant wants to file a compensatory action for damages related to their image and reputation caused via the internet. Should one single access to the misinformation in Paraguay justify its jurisdiction based on the place of damages? Would the answer remain or change if most accesses happened in Colombia, which was also a place where the claimant was widely known? Such a situation is, of course, an exaggeration for argumentative purposes. The idea is to shed light on the fact that, although the place of damage is largely accepted as a connecting factor, understanding concepts of 'proximity' and 'contacts' on pure geographical terms, without further interpretation, may lead to unreasonable forums in practice. In that sense, Symeonides provides an insightful reflection that, although focused on escape clauses, resonates perfectly with the risk of relying on too old-fashioned conceptions and interpretations:

> Escapes should be designed to cure the rule's deficiencies, not to reproduce them. To employ the escape intelligently, a court must know the reasons for which the drafters made the choices embodied in the rule and the goals that the rule seeks to promote. *To simply say that one should look for a "closer" connection gives courts little meaningful guidance and creates the risk of degenerating into a mechanical counting of physical contacts*. *This risk is reduced when the escape is correlated to the overarching principles that permeate the rules*, and/or when the escape allows an issue-by-issue evaluation.[236]

It should also be reminded that the plurality of jurisdictions creates a fertile terrain for the practice of *forum shopping*, which in turn can cause negative impacts.[237] It creates the risk of enabling lawsuits to happen in forums that the defendant cannot reasonably predict,[238] requiring them to deal with the potential disadvantages of a venue with little or no connections with the parties or the action.

In view of the comments above, legal actors should count on interpretative tools that allow them to invoke and apply jurisdictional rules and mechanisms according to the purposes behind them. And here, the interpretative function of the proximity principle can be useful. Interpreting the connectors in light of real and substantial proximity requires more than pure geography; finding the seat of the dispute continues, of course, to play a role, but it must be accompanied by an updated

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[236] Symeonides, *supra* note 33 at 186 [emphasis added].
[237] For a deeper understanding of *forum shopping*, see Franco Ferrari, "Forum Shopping: A Plea for a Broad and Value-Neutral Definition" (2014) NYU Lectures on Transnational Litigation, Arbitration and Commercial Law 1, NYU School of Law, Public Law Research Paper No. 14-39; Pamela K. Bookman, "The Unsung Virtues of Global Forum Shopping" (2016) 92:2 Notre Dame L Rev 579; and Solano de Camargo, Forum shopping*: modo lícito de escolha de jurisdição?* (Master Thesis, Universidade de São Paulo, 2015) [published on 23 May 2016].
[238] Arroyo, "Una mirada", *supra* note 8 at 99.

point of view that, as widely discussed in this research, considers the right of defence, the balance between the parties, procedural guarantees and effective access to justice in a broader sense. Otherwise, it seems that we circle back to the beginning, i.e., to the phase where PRIL was considered to be a localizing and neutral subject – features harshly criticized over the years.

ii. Lack of guidance and precision of some jurisdictional rules

This Thesis has already discussed that, although many times inspired by proximity, jurisdictional rules can be flawed and insufficient. The lack of precision and instructions of given rules, as well as the inherent broad scope of certain terms, are specifically relevant for the interpretative function. The following paragraphs will discuss a few hypotheses that illustrate the difficulties that can stem from given rules and, therefore, require interpretative mechanisms.[239]

The domicile of the defendant, when such a defendant is a legal person with a plethora of establishments worldwide, can raise the question about to which extension this connector should be applied. There are provisions that offer some guidance and require that the legal person being sued has a direct connection with the case. Art. 57 (B) of the UGLPIL (Uruguay) is a clear example in that sense since it provides that the Uruguayan courts will be competent:

> 57 (B) When the defendant has an establishment, agency, branch or any other form of representation in the territory of the Republic, through which he has entered into the contract or has participated in the event that gives rise to the lawsuit.[240]

Likewise, Art. 3148 (2) of the CCQ establishes that if the defendant is a legal person and has an establishment in the province, Quebec authorities have jurisdiction over the case as long as the dispute relates to the establishment's activities in Quebec. Even in the realm of soft law, it is possible to identify this same concern. The TRANSJUS, for example, explicitly provides that, in the case of legal persons incorporated in other states, the substantial connection related to their establishments, branches or agencies should concern their respective operations.[241]

There are, on the other hand, provisions that are vague and offer no guidance through their wording. This is, for example, the case of Brazil, which establishes that if the defendant is a foreign legal person with an agency, branch or affiliate in Brazil, it will be considered domiciled in the

[239] These situations are examples and do not exhaust all the interpretative issues that can potentially arise.
[240] [translated by author].
[241] Article 3.2, TRANSJUS.

territory and, consequently, justify jurisdiction.[242] The Brazilian code, however, offers no instruction on whether it requires a connection between the activities of that particular establishment and the dispute. In light of this, multiple interpretations may arise, and legal actors will need again to count on interpretative tools that enable them to avoid the exorbitant use of forums that are, in theory, reasonable. Proximity can be a good parameter – although not necessarily the only one[243] – to assess all the elements of the case and decide whether the domicile of that particular legal person does, in fact, grant jurisdiction to the Brazilian courts.

Although the place where the contract is made has significantly been reduced or eliminated in many jurisdictions and regulations,[244] it is still possible to find some vestiges.[245] This connector also exemplifies the need to undertake an interpretative endeavour since such a connection can be random and insufficient if the dispute has no relation whatsoever with the forum (e.g., neither the parties are domiciled nor the obligations should be performed in the place of signature) or even imposed by one of the parties.[246] An interpretation through proximity can thus shed some light on how to apply this rule where it still exists, and no instructions are offered to the interpreter. Tibúrcio postulates, e.g., that if the dispute relates to the existence, validity or efficacy of that contract, the proximity of the object of the litigation and the place of signature justifies asserting jurisdiction.[247] If, however, the case refers to other aspects, such as obligations or a request for compensation, the place of signature will likely be too fragile if the only contractual element there is the parties' signature. Focusing on how substantial the connection is can be a path to applying the rule in a reasonable manner.

One last example refers to the place of performance in contractual obligations, a connection that is clearly significant regarding the proximity between the venue and the dispute but presents difficulties as well.[248] Among the many topics that could be discussed regarding this connecting

[242] Art. 21, I, single paragraph, BCCP. As in most countries, the Brazilian statutes are organized in articles. In Brazil, these provisions are often broken down into paragraphs, which can specify their content by, for instance, adding information, exceptions etc. When the article has only one paragraph – instead of a sequence of paragraphs – it is called *parágrafo único* which, in English, would mean 'only one paragraph'. Given the lack of an equivalent term in legal English, this type of paragraph is herein translated as 'single paragraph'.
[243] In cases involving consumers, for instance, the need to protect the vulnerable party will require a dialogue between the proximity and protective principles. This interplay with different principles will be discussed in section 1.2.4.
[244] See Audit, *supra* note 63 at 428; and Tiburcio, *supra* note 205 at 58–59.
[245] See, for instance, Art. 21, III, of the Brazilian Code of Civil Procedure, which, due to its vagueness, implicitly admits this jurisdictional basis (Chapter Two).
[246] See Audit, *supra* note 63 at 428.
[247] Tibúrcio, *supra* note 205 at 58.
[248] Audit, *supra* note 63 at 430.

factor,[249] we turn our attention to what characterizes the place(s) of performance: does any portion of the obligation turn the forum into the place of performance? In other words, if one small obligation is fulfilled in a given country, does this country become a place of performance, even though the main obligations are entirely performed elsewhere? Arroyo explains that the Argentine Supreme Court faced this inquiry in 1998 and decided that such a rule opened the Argentine jurisdiction to *any* performance that happened therein.[250] The problem with this decision is that it can easily amount to a camouflaged rule in favor of the claimant since it is "(…) *très difficile qu'une partie ne soit pas obligée de faire au moins une petite chose (un début d'exécution) par rapport au contrat dans son propre pays* (…)."[251] In that case, evaluating how substantial the connection with the forum is can be a good parameter to avoid an exorbitant use of a rule that, in theory, is perfectly reasonable. Such an interpretation can also help evaluate how much emphasis is being given to justifications purely based on sovereignty and territory instead of focusing on the real connections that should justify the existence and exercise of jurisdiction.

It is worth pointing out that, by suggesting the use of the proximity principle as an interpretative tool to better apply jurisdictional rules, I do not intend to imply that this resource is easily handled or that it will always and unconditionally provide the best answers. It is undeniable, however, that it can be an additional mechanism to assist legal actors when facing jurisdictional challenges that sooner or later will require precise and wise use of all tools available for the purposes of ensuring reasonable exercises of jurisdiction.

iii. Rejection of FNC by certain countries

After perusing topics a. and b. above, one might think that the doctrine of *forum non conveniens* can probably address most problems posed therein. Indeed, in the cases where the rule led to a place weakly connected to the dispute, FNC could be invoked to, despite the existence of jurisdiction, decline it based on the lack of substantial link with the forum and the availability of other more appropriate venues. However, as Arroyo recalls, not all legal orders furnish means for

[249] For other problems that this factor can create, requiring not only an analysis of proximity but other issues as well, see *ibid* at 429–439.
[250] Arroyo, "Compétence Exclusive", *supra* note 104 at 137.
[251] *Ibid*.

judges to divest themselves when they are in a worse position than judges of other forums.[252] Thus, what remains of concern is the jurisdictions that do not encompass FNC in their legal framework.

It has already been established that jurisdictional rules alone do not always suffice to embrace all conflicts and challenges that can arise. Courts (and parties) can very often face situations that correspond to the existing rules but have no real connection with the case at hand.[253] If there are no mechanisms authorizing some degree of flexibility to correct the course of the rule and the results it will yield, all legal actors seem to become hostages of an immutable situation.

Considering that, in general, FNC undertakes two stages – first, establishing the existence of jurisdiction and, secondly, deciding about exercising it or not – in countries where such a doctrine is rejected, it appears that tackling the problem at the first stage is a legitimate approach. That because, in these states, once their jurisdiction is established, regardless of how strong, substantial and real it is, the court will have little – if any – leeway to abdicate from it, despite being manifestly unreasonable in a particular case. This situation is even worse when the rules are too broad and offer little or no instructions, enabling the acceptance of many connecting factors and kinds of disputes under the same big umbrella. Adopting an interpretative exercise based on proximity can provide some guidance to verify whether, in that case, the court's jurisdiction really exists. In other words, if the connecting factor is present (such as the place of signature), but it is too weak and unrelated to the dispute, a court may apply the interpretative function and decide that, in that particular case, the jurisdiction is fictitious, not allowing it to hear the case.

Such an approach is not at all new in the legal field. Tilting away from literal analysis of existing rules and adopting a more holistic and teleological interpretation has long been advocated by scholars and courts. Liakopoulos, for example, explains that this is the notion behind escape clauses: "[i]t is not only an exception to the rule but also an instrument to escape the concrete application of a rule where this application produces results that are *not compatible with the principles underlying the rule itself*."[254] Once it becomes clear that many classic rules are based on proximity – reason why it is so relevant to understand this inspirational role – it also becomes clear that the provision should be applied to achieve as much as possible the goals that inspired it

[252] *Ibid* at 65.
[253] Guerra & Moschen, "Influências do *common law*", *supra* note 115 at 3714.
[254] Liakopoulos, *supra* note 58 at 97 [emphasis added].

in the first place. As a result, when facing an exorbitant jurisdiction – which is the utmost disrespect to proximity – a judge should correct the situation[255] and be able to do so.

The most obvious downside of the corrective functions (including FNC) is the flexibility and room for judicial interpretation or discretion they bestow, reducing the degree of predictability that jurisdictional rules are so eager to provide. Although the interactions with other principles will be discussed in more detail in section 1.2.4, three brief comments are in order. First, this research does not argue that the corrective functions should be applied indiscriminately. There must be a controlled dosage of use in order to correct the situations that actually need to be corrected due to a blatant exorbitance of jurisdiction and/or its exercise. While the amount of this 'dosage' is certainly not precisely defined and poses challenges in practice, understanding how to handle the proximity principle, its purpose, potential and shortcomings is a first step in the right direction. Second, it is almost needless to say that a set of pre-established rules does not guarantee absolute predictability. It is, for sure, an effective way of ensuring legal certainty[256] and should, therefore, be preserved as much as possible. Achieving a high degree of certainty, however, depends to a large extent on the wording of the provisions, the precise definition of their scope, and how courts will handle the rules within the limits they enjoy in their legal framework. Allowing some room for flexibility is not necessarily the reason that will harm the predictability of an entire system if such quality is already flawed in and on itself. Lastly, although the tension between flexibility and predictability is legitimate and must integrate the jurisdictional debate, there is a very dangerous drawback in assuming jurisdictions that are weak or exorbitant: the risk of refusal to enforce the decision abroad based on the original court's incompetence. This topic merits special attention.

1.2.3 Proximity in the Recognition and Enforcement of Foreign Judgments

In a thesis primarily focused on direct jurisdiction, it might, at first glance, seem odd to include a topic dedicated to recognition and enforcement (R&E), whose concern lies in the extraterritorial effect of a foreign decision. Looking carefully, however, it becomes clear that

[255] Guerra & Moschen, "Influências do *common law*", *supra* note 115 at 3714.
[256] Predictability is, for instance, the basis of the Brussels 1a Regulation: "the jurisdictional regime of Brussels Ia pursues a different ideal of fairness and appropriateness than e.g. English or American conflict-of jurisdictions: predictability. It aims at allowing parties to predict with a high degree of certainty where they are able to sue and be pursued. Considerations about the appropriateness of the court to try an individual case have to yield to this aspiration." Poesen, *supra* note 182 at 6.

jurisdiction and recognition are interrelated and – though analytically different[257] – they are sides of the same coin. There is no conceivable effective access to justice without guaranteeing *both* a jurisdiction to adjudicate and the enforcement of the decision rendered by the original court.

A court's judgment is essentially the final product of the jurisdictional activity and although one might normally expect voluntary compliance by the counterparty, sometimes requesting enforcement abroad is the only resource available for the winning party.[258] In light of this reality, "[a]ccess to justice is a dead letter if the judgment a successful party obtains cannot be enforced in practice. Parties to disputes do not go to court in order to obtain a piece of paper with a decision recorded on it, and the seal of the court attached: they care about practical outcomes."[259] In addition, the broad and unobstructed circulation of judgments is a cornerstone of juridical cooperation among countries since it fosters mutual respect, trust, and the idea that justice should not be constrained by the borders of sovereign states.[260]

Encouraging foreign judgments to circulate, however, does not imply an automatic validation with no conditions or norms to be met before enforcement.[261] It is in everyone's interest that judgments are validly rendered in full respect of procedural guarantees, fundamental rights and all other requirements necessary to ensure access to justice in its broadest sense. Thus, the conditions in which a decision is rendered matter, and there must be mechanisms to verify them.[262] Notwithstanding the variations that exist between countries, the competence of the foreign court is undeniably one of the most common and relevant requirements,[263] allowing the enforcing court to confirm whether there was a connection with the dispute or the parties apt to justify jurisdiction.[264]

Under this prism, the interrelation between jurisdiction and R&E becomes uncontested. If the competence of the rendering authority is a requirement that will be decisive in the long run, the original court must ensure that it is reasonably assuming jurisdiction at the risk of, otherwise, rendering an unenforceable judgment. Thus, considering that the enforcement jurisdiction is "the

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[257] Michaels, "Foundations", *supra* note 94 at section I., 3. (Direct and indirect jurisdiction).
[258] Vescovi, *supra* note 113 at 22.
[259] David Goddard, "The Judgments Convention—The Current state of Play" (2019) 29 Duke Journal of Comparative & International Law 473 at 476. See also Rass-Masson, *supra* note 77 at 154.
[260] Vescovi, *supra* note 113 at 21–22. For a more theorical – but equally important – understanding of the public and private law theories that justify the recognition of foreign judgments see Cuniberti, *supra* note 2 at 272–286.
[261] Vescovi, *supra* note 113 at 22.
[262] Audit, *supra* note 63 at 453.
[263] Cuniberti, *supra* note 2 at 286.
[264] Lagarde, *supra* note 48 at 173

necessary extension of the main jurisdiction,"[265] keeping an eye on the process of R&E should also be part of the jurisdictional equation. Indeed, "*[l]a reconnaissance des jugements étrangers* s'inscrit dans le prolongement de l'étude de la compétence internationale *: dès lors que les juridictions nationales exercent leur compétence dans des situations internationales, les décisions qu'elles rendent ont vocation à être invoquées dans d'autres Etats,* et la compétence du juge d'origine constituera un élément essentiel du contrôle exercé dans l'Etat requis."[266]

But where exactly does the principle of proximity fit in this context? Lagarde explains that one of the assessments undertaken by the court seized is to verify whether the dispute falls under its cases of exclusive jurisdiction.[267] The indirect control of jurisdiction in these cases tends to be pretty straightforward: if only the court seized could have heard the case on the merits, it will likely refuse to enforce a judgement rendered elsewhere. Nonetheless, exclusive jurisdiction and the principles it relies upon cannot provide general solutions for the entire issue of indirect jurisdiction and "*[l]à où ils ne sont pas en cause, le contrôle de la compétence indirecte ne peut se fonder que sur le principe de proximité*."[268] As a result, the proximity principle frequently appears in cases of concurrent jurisdiction, and the sufficiency of the link between the case and the forum becomes an important parameter in the process of R&E.[269]

Apparently simple in theory, this analysis can be complex in practice. Unless an international convention is in place – and, therefore, uniformizes the rules of R&E among countries – the law of R&E remains in the realm of domestic law, provoking variations in the enforcement processes.[270] Consequently, the modalities through which countries appraise the link between the court of origin and the dispute also vary and can yield different results.

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[265] Rass-Masson, *supra* note 77 at 156.
[266] Audit, *supra* note 63 at 453 [emphasis added].
[267] The author mentions three main principles that would ground the exclusive jurisdiction of the seized court. First, the principle of sovereignty, whereby the legal order considers that certain matters should be exclusively heard by the state seized. Secondly, the protective principle, which leads the legal order of the state seized to determine exclusive jurisdiction over certain cases to protect a vulnerable party, or even to consider exclusive the forum that is most closely connected to such party. And, lastly, the autonomy of the will, i.e., the forum validly chosen by the parties should be deemed as exclusive. Lagarde, *supra* note 48 at 172–175.
[268] *Ibid* at 175.
[269] See *ibid*. Note that Cuniberti states that this link will be assessed considering the geographical connection with the dispute. Cuniberti, *supra* note 2 at 287. Without disregarding the relevance of a geographical/territorial link, as already argued in this Thesis, I defend that the proximity analysis should consider an updated vision on geography, as well as the interaction between sovereignty and proximity, and the substantiality of the connections.
[270] Cuniberti, *supra* note 2 at 272.

Certain legal orders establish that the court seized must evaluate the competence of the rendering court following its own criteria on direct jurisdiction, that is, the jurisdictional rules of the court seized. In other words, "the same rules on jurisdiction are used both to define the jurisdiction of the courts of the forum and to assess the appropriateness of the taking of jurisdiction of foreign courts."[271] Section 328 (1) of the German Code of Civil Procedure proffers one of the most prominent examples[272] of this modality:

> (1) Recognition of a judgment handed down by a foreign court shall be ruled out if:
> 1. The courts of the state to which the foreign court belongs do not have jurisdiction according to German law;[273]

Such a rigid system[274] has already been criticized. The main criticism[275] lies in the unilateral imposition that one state makes on all other countries, implicitly requiring them to assume jurisdiction based on its own terms. It thus demands that the original forum provides the same jurisdictional rules as those of the court seized, a situation that is contrary to the reality of cross-border decisions since, by definition, foreign judgments are made pursuant to different rules.[276] As Cuniberti explains, "[b]y using the same jurisdictional criteria to assess the jurisdiction of the foreign court, the forum in effect accepts to recognize foreign judgments only where made pursuant to the same rules."[277] Despite the plausible criticisms such a method has received, it remains in some legal orders and, as such, cannot be overlooked.

An alternative, more flexible approach allows the enforcing court to assess the foreign competence based on autonomous criteria,[278] not confining the court seized to the jurisdictional rules of its own country. In this case, as long as there is a connection between the case and the forum (i.e., proximity), the court seized can recognize the foreign judgment at hand; and the fact that the jurisdictional basis is different from the ones established by the enforcing forum should not constitute a barrier to recognition.[279] Cuniberti explains that both France and (common law)

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[271] *Ibid* at 288. The author considers this system to be under the derivative theory and indicates other names this process carries: bilateralism or multilateralism of the rules, as well as mirror image principle (*ibid* at 288–289).
[272] Lagarde, *supra* note 48 at 175–176. See also Cuniberti, *supra* note 2 at 288–289 (with examples in Italy and Japan).
[273] The English version of this section was obtained from the official website of the German Federal Ministry of Justice: <https://www.gesetze-im-internet.de/englisch_zpo/>.
[274] See Lagarde, *supra* note 48 at 175.
[275] Lagarde refers specifically to two main authors that have criticized this approach: Dominique Holleaux and Jürgen Basedow. See *ibid* at 176.
[276] Cuniberti, *supra* note 2 at 289.
[277] *Ibid*.
[278] This is what Cuniberti calls non-derivative theory. See *ibid* at 287, 290.
[279] Lagarde, *supra* note 48 at 177–178.

Canada adopt this position and accept any appropriate connection – that is, real and substantial – as sufficient to authorize recognition and enforcement.[280] The goal is, therefore, to avoid enforcing a decision made by inappropriate heads of jurisdiction instead of pre-establishing which are the appropriate ones for the purposes of R&E.[281] The proximity principle plays a crucial part in this equation since it demands the seized court to appraise whether the link with the original forum was substantial.

That being said, once aware that the proximity between the forum, the parties and the dispute will be a relevant – and even decisive – parameter to determine whether the foreign decision will be enforced or not, courts should not assume jurisdiction ignoring and disregarding the role of the proximity principle in the R&E process. That is the reason why comprehending this function matters in a thesis primarily focused on direct bases of jurisdiction.

1.2.4 Relations (and Tensions) with other Principles

Considering that jurisdictional rules reveal and promote relevant principles and values,[282] understanding the roles/functions outlined in the previous sections sheds light on the interactions that often happen between proximity and other principles. Such awareness matters because it reminds us that adopting proximity cannot ignore the interplay it has with other values, a conduct that would be incoherent with the pluralism of PRIL.[283] If the 'dose makes the poison', depositing all solutions on one principle would be not only naïve but also dangerous[284] since it would suppress important elements necessary for the good functioning of justice in cross-border disputes. In view of this, this section focuses briefly – and non-exhaustively – on four principles with which proximity coexists and often interacts, particularly relevant for this Thesis.

The first one has already been discussed: the principle of sovereignty. Traditionally, this is the principle that grounded jurisdictional rules and legitimized the existence of connecting factors clearly based on the interest of the state and the idea that only the state can exercise power over people and things situated in its territory[285] – such as nationality,[286] *forum rei sitae* and exclusive

[280] Cuniberti, *supra* note 2 at 293–301.
[281] *Ibid* at 301.
[282] Tibúrcio, *supra* note 205 at 137.
[283] About the coexistence of proximity with other principles as a confirmation of the pluralist characteristic of PRIL, see Lagarde, *supra* note 48 at 49.
[284] See *ibid* at 39.
[285] Tibúrcio, *supra* note 205 at 139–141.
[286] See Dolinger, "Evolution of Principles", *supra* note 25 at 259.

bases of jurisdiction.[287] Besides this traditional inspiration, sovereignty will always maintain an irreducible core of importance[288] since states remain a crucial (though no longer exclusive) subject of international law. However, as previously mentioned, the transformations experienced by globalization, the increase of cross-border disputes, and the ensuing need to coordinate this new reality with fundamental rights have imposed limits on sovereignty. Particularly, the emergence of the proximity principle in PRIL matters has brought the binomial 'proximity-sovereignty' to the center and reshaped the concept of sovereignty. As a result, it cannot (or should not) ground the assertion and exercise of jurisdiction alone, i.e., if no real and substantial connection exists.[289] More concretely, when coping with international jurisdiction, the dialogue between proximity and sovereignty is necessary to preserve the essence of the latter but concomitantly ensure that no exorbitant bases (grounded purely on a restricted perception of sovereignty[290] or another element that disregards proximity) prevail over forums more substantially connected.

Legal certainty is another principle with which proximity is in constant tension. That because the latter tends to bring margins of flexibility to jurisdictional issues offering room for judicial interpretation or discretion, which can be seen as (and sometimes indeed causes) an affront to the necessary predictability in cross-border relations. It is worth reminding, though, that the 'certainty-flexibility tension' is "as old as law itself," [291] as well as "cyclical and perpetual" [292] and, therefore, not exclusive to PRIL[293] issues. Whereas codification offers stability and predictability, its opponents (often from common law) argue that it freezes the development of the law and renders it too inflexible, obstructing proper solutions to unpredicted or exceptional cases.[294]

In conflicts of jurisdiction, a rule that simply states that the dispute should be heard in a close or substantial forum, offering, therefore, an open connecting factor, is a clear example of a

[287] Tibúrcio, *supra* note 205 at 139–140.
[288] Arroyo, "Una mirada", *supra* note 8 at 92.
[289] *Ibid* at 92–97.
[290] In that sense, see *ibid* at 97.
[291] Symeonides, *supra* note 33 at 174. For an overview of the tension between certainty and flexibility throughout time, both from the philosophical and juridical perspective (including in PRIL), see Dolinger, "Evolution of Principles", *supra* note 25 at 360–365.
[292] Symeonides, *supra* note 33 at 174.
[293] Although not exclusive, Arroyo reminds us that the tension between certainty and justice (through flexible solutions) is also inherent to the indirect method of PRIL. See Arroyo "Una mirada", *supra* note 8 at 142.
[294] Symeonides, *supra* note 33 at 174.

flexible situation[295] where the principle of proximity can be a source of uncertainty. The absence of more concrete guidance by the rule leaves a wide room for judicial interpretation and impairs predicting the results. As Arroyo accurately remarks:

> On the other hand, leaving the locating task to the judge does cause the (…) distortion between the search for justice in the case and the predictability of the result. If he [the judge] is the one who must evaluate the contacts that the case presents with the different systems involved in order to find the one that shows a more significant link, *the margin for certainty about this decision narrows considerably*. *The distance between security and justice will tend to widen the fewer guidelines the legislators provide to the judge*.[296]

Consequently, when a rule provides more elements or parameters to steer the interpretation of the court, flexibility and predictability get closer again, and the tension, though remaining, tends to attenuate. Modern codifications of PRIL have adopted this approach, using diverse tools that grant, through pre-set rules, discretion to the courts.[297] In the field of jurisdiction, one of these tools is the doctrine of *forum non conveniens*, which, however, has not been immune to concerns due to the uncertainty it can also create.[298]

As Saumier explains, the reduction of certainty and predictability – due to the flexibility of FNC – hinders the internalization of the risks involved in cross-border transactions that can help avoid unnecessary litigation.[299] Accordingly, "[t]he doctrine of *forum non conveniens* should (…) be sufficiently circumscribed in terms of its role and scope of application to balance these two perennial considerations of flexibility and predictability."[300] Indeed, FNC has an undeniable value to intervene in situations where the forum is clearly exorbitant or even to prevent the exercise of jurisdiction that is reasonable in theory but improper to the case at hand.[301] Dealing with its shortcomings is, therefore, a necessity to guarantee the benefits such a doctrine can offer but also impede or mitigate its degrees of uncertainty. The tensions between the proximity principle and certainty are evident in this case and, in this regard, a few observations are in order.

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[295] It is worth noting that not all forms assumed by proximity cause flexibility. When inspiring the jurisdictional rule, for example, establishing a pre-defined connecting factor (such as the defendant's domicile or the place of performance), proximity plays more on the predictability side than on flexibility. Also, this Thesis does not explore all means through which proximity can yield flexibility and uncertainty. The examples selected aim to demonstrate (but not exhaust) the interaction between certainty and flexibility regarding the jurisdictional facet of proximity.
[296] Arroyo, "Una mirada", *supra* note 8 at 142–143 [translated by author] [emphasis added] [footnote omitted].
[297] Symeonides, *supra* note 33 at 174.
[298] Similar criticisms have also been voiced regarding escape clauses in choice-of-law. For a specific example in the Belgian legal framework, see McEleavy, *supra* note 57 at 513–514.
[299] Saumier, "Forum Non Conveniens", *supra* note 204 at 122. Whytock offers additional examples of some concerns and criticisms regarding the unpredictability of FNC. See Whytock, *supra* note 66 at 521, footnotes 182 and 183.
[300] Saumier, "Forum Non Conveniens", *supra* note 204 at 122.
[301] Lagarde, *supra* note 48 at 154.

First, it would be very resourceful to have concrete measures of how unpredictable FNC is in practice since research in specific jurisdictions has demystified the 'inherent unpredictability' of this doctrine.[302] Even if, in a given legal order, FNC decisions reveal to be truly unpredictable, these concrete parameters would help to design a strategy to address this uncertainty. Second, excess rigidity (aiming to ensure legal certainty) has already proven to collapse since it is humanly impossible to predict all the situations that might fall under a given rule, as well as future social and legal changes.[303] And, in a PRIL centred around the binomial proximity-sovereignty, flexible solutions are important to allow and strengthen the reach of proximity.[304]

This is not to say that one should ignore the work behind the provisions that pre-establish jurisdictional connectors and the predictability that cross-border relations should enjoy. The idea is, conversely, to make aware that this tension exists, and when applying the proximity principle, that there must be a concern with legal certainty. Keeping an eye on this interaction may help to find a reasonable dosage of flexibility if a particular case requires it, thus avoiding exorbitant jurisdictions and, ultimately, flagrant injustice to both or one of the parties.

The principle of effectiveness also interrelates with proximity since it is primarily concerned with "the need for certainty that the final judgment will be enforceable in another jurisdiction (…)."[305] In absolute terms, effectiveness implies that a court should declare itself incompetent if its decision will be unenforceable where it is expected to be enforced; this principle, however, must be applied with caution.[306] Naturally, the mere fact that a local decision might not be enforced in the forum of origin – and enforced abroad instead – does not alone justify declining jurisdiction, considering that there are many mechanisms of juridical cooperation in place[307] and

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[302] Whytock, for example, has undertaken insightful research with empirical findings to estimate to which extent FNC decisions were unpredictable in the US. Ultimately, he concludes that his "analysis suggests that forum non conveniens decision making might not be as unpredictable as widely believed" and his findings "suggest that judges apply the forum non conveniens doctrine fairly well". Whytock, *supra* note 66 at 521–528.

[303] See Symeonides, *supra* note 33 at 187.

[304] Arroyo "Una mirada", *supra* note 8 at 142. In this sense, the following words are elucidative: "*(...) on pourrait affirmer que la marge d'appréciation du juge est aussi susceptible d'être perçue comme un aspect de la garantie de ce que le juge s'occupe lui-même de la réalisation de la justice au lieu de se limiter à l'application mécanique des critères abstraits établis a priori. Il fallait tout simplement réclamer que l'utilisation du mécanisme correcteur ait un caractère clairement exceptionnel, ce qui n'est pas le cas dans quelques juridictions*." Arroyo, "Compétence Exclusive", *supra* note 104 at 69 [footnote omitted]. It is important to point out, however, that establishing that FNC should be exceptional does not necessarily guarantee that the courts' application will be as such. See e.g., Saumier, "Forum Non Conveniens", *supra* note 204 at 129-130.

[305] Dolinger, "Evolution of Principles", *supra* note 25 at 268–269.

[306] Tibúrcio, *supra* note 205 at 208.

[307] *Ibid* at 209.

one should not automatically presume that the losing party will not comply with the decision voluntarily. The problem, however, relies on assuming jurisdiction over a dispute that knowingly will not produce effects, thwarting the expectations of the parties and, ultimately, their access to justice in its broadest sense.[308] As discussed earlier, the original court in a cross-border dispute should not decide on jurisdictional matters by adopting a unilateral approach, disregarding the effectiveness of their judgement elsewhere.[309] The proximity principle enters here. If a court assumes an unreasonable or even exorbitant jurisdiction with weak or no connections, chances are that such a decision will be barred regarding the 'competent authority' requirement. Thus, the effectiveness of a judgment (locally or abroad) should, at least, be part of the equation when deciding whether or not to assume/exercise jurisdiction. Acting otherwise may lead to a waste of resources not only for the parties but also for the courts involved.[310]

Such a concern should not, though, be restricted to the judicial sphere. When elaborating jurisdictional rules, lawmakers should start from the premise that establishing jurisdiction is only justifiable when the recognition of the decision is possible.[311] But, again, when the provisions in the abstract do not correspond to the reality of the case, the court might be called to correct the course of the rule, at risk of rendering an ineffective decision. Here, the interpretative function of the proximity principle comes to mind.[312] If, for example, a given rule is too open or vague, looking at the interaction with the effectiveness principle may be particularly useful. That because, even though a certain case falls under the umbrella of a vague rule, the concern with how real and substantial the connection is and the risk of the enforcing court considering it unreasonable or exorbitant may be good parameters for a judge to decide whether to assume jurisdiction or not.

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[308] Tibúrcio offers an illustrative example in the Brazilian framework: if a case involves an immovable abroad and the country where the immovable is located considers this case a matter of exclusive jurisdiction, the Brazilian court should not retain jurisdiction based on the effectivity principle, even if the case is a matter of concurrent jurisdiction under the Brazilian perspective. *Ibid*.

[309] Vieira & Gaspar, *supra* note 9 at 60.

[310] See Fentiman, *supra* note 201 at 802.

[311] Tibúrcio, *supra* note 205 at 210. The author also considers that lawyers should take effectiveness into account when deciding where to sue.

[312] Some scholars also relate effectiveness with *forum non conveniens*. In this case, a court would decline to exercise jurisdiction at the FNC stage invoking the lack of enforceability elsewhere. See, e.g., *ibid* at 213 and Gaspar & Paluma, supra note 103 at 78–79. However, this direct association – FNC and effectiveness – is not unanimous as the doctrine of FNC is generally more related to procedural aspects than R&E and, as such, not always recognized as an answer to the effectiveness problem or accepted only exceptionally. See Dolinger, "Evolution of Principles", *supra* note 25 at 268–269; and Fentiman, *supra* note 201 at 802.

One final principle worth mentioning is the protective principle. Even though the defendant's domicile is the default connecting factor, it has already become clear that the imposition to litigate elsewhere may dissuade certain types of plaintiffs – such as natural persons and small companies – from initiating proceedings abroad, ultimately amounting to a denial of justice.[313] These situations encourage a different approach to jurisdiction, justifying specific jurisdictional rules in order to protect certain categories of parties.[314] In Arroyo's words, "*[d]ans le domaine du conflit de juridictions, la protection se concrétise par l'établissement de fors de compétence spécialement accessibles et prévisibles en faveur de la partie tenue pour faible dans la relation et par des restrictions imposées aux clauses de soumission*."[315] Therefore, the relation of this principle with proximity is evident.

First, the concern of these specific types of jurisdictional rules combines the interest of a party with a particular link with the dispute.[316] So, a connecting factor that is usually rejected in general circumstances is adopted in certain cases due to its accessibility and proximity to the weaker party. Second, as already pointed out, there cannot be a truly reasonable jurisdiction if there is an unbalance between the parties.[317] Since protective forums aim precisely to restore the balance of an unequal relationship, the interaction between proximity and protection appears again.

There might be at least two perspectives about this interaction. One might perceive that the protective principle relativizes proximity because it allows a weaker link to justify a jurisdiction that, otherwise, would not be accepted under the parameters of proximity. Another vision might consider that the protective principle reinforces proximity because it privileges the forum that is more substantial and closely connected to the vulnerable party[318] since, if unequal, the forum would be unreasonable in any way. Regardless of the position taken, what should be uncontested

[313] Audit, *supra* note 63 at 419–420.
[314] *Ibid* at 420–421.
[315] Arroyo, "Compétence Exclusive", *supra* note 104 at 64.
[316] Audit, *supra* note 63 at 421.
[317] Arroyo, "Compétence Exclusive", *supra* note 104 at 43.
[318] In choice-of-law, for example, Dolinger has already argued that "there is nothing more proximate than protection of the party by the law", suggesting that the protective principles are a "manifestation of maximum proximity.". Dolinger, "Evolution of Principles", *supra* note 25 at 457. Even though the author refers to applicable law and there are indeed differences between the principle of proximity in choice-of-law and jurisdiction, *"[c]es differences (...) sont pourtant relativement mineures par rapport au rôle que peut jouer le principe de proximité*." Lagarde, *supra* note 48 at 131. Considering that the focus here is the interaction between proximity and protection, Dolinger's understanding seems appropriate to explain this other point of view.

is the existence of an interplay between the two principles, thus requiring its understanding to properly elaborate, interpret and apply a protective jurisdictional rule.

1.3 Interim Conclusion

From all the sections above, it can be inferred that, even though there are particularities of the proximity principle when situated in specific contexts – which will be explored in Chapters Two and Three from the Brazilian and Canadian perspective –, there are conceptual aspects of this principle that tend to similarly impact the field of international jurisdiction across different legal orders.

In general, proximity largely sets the tone for what should be considered a reasonable forum. It has not succeeded in offering precision (and maybe never will), but there is a fair consensus that assuming jurisdiction should be based on close, real, substantial connections. As such, this principle also offers guidance as to what exorbitant and/or abusive forums are. All these concepts are central when it comes not only to assuming jurisdiction but also exercising it, elaborating jurisdictional rules and enforcing decisions abroad. Every country in the world must face these issues when dealing with cross-border disputes, especially since the jurisdictional dimension has become central to the new paradigm of PRIL.

As a consequence of this bigger picture, the proximity principle ends up assuming different roles and functions, thus pervading jurisdictional issues in different ways at different stages. It is present in pre-established rules, in corrective and interpretative mechanisms, and in the R&E process. It constantly interacts with other principles and, as such, requires to be cautiously coordinated with them.

Proximity has, therefore, gained an undeniable relevance in conflicts of jurisdiction that is not possible to overlook. Understanding the implications from and around this principle and learning if, how and when to apply it has become a necessity, which, in turn, justifies investigating its status in Brazil – the jurisdiction chosen for this Thesis. More salient to the research steps, Chapter One reveals that, although the idea of being closely connected seems straightforward at first sight, there are many layers of complexity to be taken into account. Thus, delving deeply into proximity was a crucial prior step to better contextualize it when studying Brazil and Canada.

CHAPTER TWO: CONTEXTUALIZING THE PRINCIPLE OF PROXIMITY IN THE BRAZILIAN LEGAL ORDER – WHERE DOES BRAZIL STAND CONCERNING THE PRINCIPLE OF PROXIMITY?

Now that we have already explored the history and the roles of the proximity principle in modern PRIL, we turn our attention to a narrower context. The following sections are dedicated to investigating the status of this principle in Brazil, aiming to understand the room it has in in the Brazilian legal order and the roles/functions it assumes. Section 2.1 first provides an overview of the current jurisdictional scenario since Brazil has recently enacted a new Code of Civil Procedure that, among many topics, regulates international jurisdiction directly. Understanding the objectives, modifications, and ensuing implications of this new code will be crucial to answering the question of which space proximity has in the Brazilian landscape, which is, in turn, discussed in section 2.2 This section focuses on the specific rules set forth by the new code in order to discuss how proximity can be identified. Subsequently, this research analyzes the recent application of the jurisdictional rules to understand whether Brazilian courts are adopting proximity in any manner (section 2.3). Lastly, section 2.4 poses concluding reflections on this Brazilian context, especially about the need to perfect the use of the proximity principle to maximize its potential and minimize its shortcomings.

To facilitate understanding this chapter, it is worth introducing the domestic sources that rule jurisdiction in Brazil. As mentioned above, these rules will be studied in more detail in the following sections, but it is important to present a clear overview beforehand to better navigate them later. This overview excludes international sources (i.e., case law from international courts and international treaties[319]), considering that they tend to relate and apply to specific matters and be limited to the parties of the treaties.[320] In addition, provisions on civil jurisdiction set by international treaties prevail over the rules of the current code,[321] ruling out the application of general provisions (which are the focus of this Thesis) in cases where the treaties are applicable.[322]

There are presently two national sources that rule direct jurisdiction in Brazil: the Brazilian Code of Civil Procedure and the Introductory Law to the Norms of Brazilian Law (ILNBL). The

[319] Ramos, *supra* note 17 at 196.
[320] For example, the Buenos Aires Protocol on International Jurisdiction in Contractual Matters regulates jurisdiction in civil and commercial matters, but binds only the State-Parties of Mercosur. For a portrait of the treaties in force and specific legislation on jurisdiction in Brazil, see Tibúrcio, *supra* note 205 at 111–134.
[321] Art. 13, BCCP/15. See Appendix A.
[322] Ramos, *supra* note 17 at 204.

latter was enacted in 1942[323] and, therefore, predates the current procedural code (2015). As its name suggests, the ILNBL provides general guidance for the interpretation of the Brazilian norms as well as for key aspects regarding the functioning of the law, such as entry into force and validity. Among the provisions of this introductory statute, the first paragraph of art. 12 determines the cases of international competence for Brazilian courts, stipulating the defendant's domicile and the place of performance as connecting factors:

> Art. 12. The Brazilian judicial authority is competent when the defendant is domiciled in Brazil, or the obligation has to be performed here.

This article has two additional paragraphs that regulate exclusive jurisdiction and *exequatur*.[324]

The BCCP/15, in turn, encompasses five provisions on international jurisdiction (Arts. 21-25). Arts. 21 and 22 focus on concurrent jurisdiction and read as follows[325]:

> Art. 21. The Brazilian judicial authority is competent to prosecute and judge actions in which:
> I - the defendant, whatever their nationality, is domiciled in Brazil;
> II - the obligation shall be performed in Brazil;
> III - the basis is a fact that occurred, or an act practiced in Brazil.
>
> [Single paragraph.]
> For the purposes of the provisions of item I, a foreign legal entity with an agency, affiliate or branch is considered domiciled in Brazil.
>
> Art. 22. The Brazilian judicial authority is also competent to process and judge actions:
> I – of maintenance, when:
> a) the creditor is domiciled or resident in Brazil;
> b) the defendant maintains ties in Brazil, such as possession or ownership of assets, income or economic benefits;
> II - arising from consumer relations when the consumer is domiciled or resident in Brazil;
> III - in which the parties expressly or tacitly submit to national jurisdiction.

With this new code[326], it could be argued that, since the BCCP/15 also enshrines the defendant's domicile and place of performance, the ILNBL became redundant when it comes to jurisdiction. In fact, the understanding that Art. 12 remains in force is not unanimous.[327] The

[323] At this time, Brazil was under Getúlio Vargas' dictatorship.
[324] See Appendix A.
[325] [translated by author]. Art. 23 establishes the cases of exclusive jurisdiction; Art 24 provides for parallel proceedings/*lis pendens*; and Art. 25 deals with choice of forum clause. These subjects fall outside the scope of this research and will not be discussed in further detail except for brief mentions to support other arguments. Their translated content can be read in Appendix A.
[326] I refer to the 'new' code because it replaced a prior codification. This transition is explained in section 2.1 below.
[327] Rechsteiner, for instance, considers that this provision had already been revoked by the procedural code of 1973 – which preceded the current BCCP/15. Beat Walter Rechsteiner, *Direito internacional privado: teoria e prática*, 20th ed (São Paulo: Saraiva Educação, 2019) at Title II, Chapter 3, C, footnote 1088.

BCCP/15, nonetheless, has not expressly revoked art. 12, ILNBL[328] and many scholars and courts still allude to this provision to discuss and decide jurisdictional matters.[329] As such, this Thesis considers it as part of the Brazilian jurisdictional framework.

Both the BCCP/15 and the ILNBL must conform to the Brazilian Federal Constitution of 1988 (BFC/88), which does not provide rules on jurisdiction but has general principles and values that directly impact jurisdictional issues. This constitutional influence will also be discussed in the following lines.

2.1 The New Code of Civil Procedure and its Impacts on International Jurisdiction

In March 2016, Brazil witnessed a new milestone in its legal procedural framework. After seven years of continuing debates and legislative steps,[330] the new Brazilian Code of Civil Procedure (BCCP/15) came into force on March 18, 2016. This codification has been considered a turning point[331] regarding what will be called here "International Civil Procedure (ICP),"[332] especially when compared to the code it replaced – the 1973 Brazilian Code of Civil Procedure (BCCP/73). For this significant shift to be clear, it is important to understand the main points of transition and innovation from one code to the other.

The BCCP/73 was enacted by a non-democratic government. For over 20 years, Brazil lived under a military dictatorship initiated with a *coup d'etat* in 1964. Fruit of this period, this Code was created already obsolete and misaligned with the international context as it disregarded

[328] Ramos, *supra* note 17 at 204.
[329] Regarding scholars, see e.g., *ibid*. Regarding case law, see e.g., *Caramori* in section 2.3.
[330] For a concise (but complete) explanation of the parliamentary trajectory of the BCCP/15, see Gaspar & Paluma, supra note 103 at 70.
[331] Gaspar and Paluma consider the BCCP/15 to be a "Copernican turn" when it comes to the autonomous regulation of the international civil procedure. See *Ibid* at 70–71 and footnote 5.
[332] Since the concept of ICP is not commonly used in Canada and some other legal orders, a few comments on this issue are in order. The term "International Civil Procedure" was not coined in this Thesis and has already gained space in some juridical landscapes around the globe. Arroyo, for instance, has already referred to the "classic composition of international civil procedural law" as: international jurisdiction, recognition and enforcement of foreign decisions, and the procedural facet of juridical cooperation. Arroyo, "DIPr del siglo XXI", *supra* note 66 at 218. Particularly in Brazil, this expression has also been disseminated as part of PRIL. Araujos's general course of private international law is an illustrative example of this trend as it dedicates an entire chapter to "International Civil Procedure in Brazil" (Chapter III). In fact, for the sake of using an appropriate definition, this Thesis adopts Araujo's definition of ICP: "The so-called International Civil Procedure aims to regulate civil procedural situations with international contacts. It deals with the regulation of international conflicts of jurisdiction (including issues of international competence and immunity from jurisdiction), the determination of conditions for the recognition and enforcement of foreign judgments, as well as the performance, in a jurisdiction, of procedural acts in the interest of another jurisdiction. Nádia de Araújo, *Direito Internacional Privado [livro eletrônico]: teoria e prática brasileira*, 9th ed (São Paulo: Thomson Reuters Brasil, 2020) at position 5500 [translated by author].

the degree of globalization and the consolidation of this phenomenon in the following years.[333] Even after the re-democratization – marked by the Brazilian Federal Constitution of 1988 – the BCCP/73 remained in force until 2016 when it was revoked by the BCCP/15, the first[334] code of civil procedure "adopted in full democratic force."[335] This political difference between both codes has significant implications for the ICP regulation and, hence, international jurisdiction.

On the one hand, the BCCP/73 provided a rigid set of rules (Articles 88, 89, and 90)[336] on international competence consisting of generic and abstract connections established by the legislator, with a stringent judicial interpretation and discretion threshold.[337] As such, procedural matters were categorized as public policy, largely refraining national courts from adopting a broad interpretation that encompassed private interests. Under the BCCP/73, for example, the Brazilian courts would not decline jurisdiction even if a valid forum selection clause established jurisdiction elsewhere.[338] Differently put, the attachment to the Brazilian jurisdiction as a national matter was so strong under the former code that courts often disregarded the parties' autonomy of the will and assumed jurisdiction instead. The following comment from a 2009 decision of the Superior Court of Justice epitomizes this understanding: "Regarding *international jurisdiction*, even if concurrent (…), the forum selection clause (…) is ineffective, since, *as it is a matter of sovereignty, such a competence cannot be modified*."[339] Courts tended, therefore, to interpret the provisions on

[333] Gaspar & Paluma, *supra* note 103 at 70 footnote 6.
[334] For a historic overview of the Brazilian regulation of international jurisdiction in other periods, see Vera Maria Barrera Jatahy, *Do conflito de jurisdições: a competência internacional da justiça brasileira* (Rio de Janeiro: Forense, 2003) at 81–93; Ramos, *supra* note 17 at 198–199.
[335] Valesca Raizer Borges Moschen, "El caleidoscopio de la armonización del derecho internacional privado em materia de derecho procesal civil internacional" in Cecilia Fresnedo de Aguirre & Gonzalo Lorenzo Idiarte, eds, *130 Aniversario de los Tratados de Montevideo de 1889: legado y futuro de sus soluciones en el concierto internacional actual* (Montevideo: Instituto Uruguayo de Derecho Internacional Privado, 2019) 457 at 468 [Moschen, "El caleidoscopio"] [translated by author].
[336] See their translation in Appendix A.
[337] Marcel Vitor de Magalhães e Guerra & Valesca Raizer Borges Moschen, "Compatibilidade de sistemas – necessidade de quebra de um modelo de atribuição de competência internacional rígido: artigos 88 e 89 do CPC" (Paper delivered at the Congress Annals of the XVIII National Congress of CONPEDI, 4, 5, 6 and 7 November 2009) (2009) Publica Direito 6582 at 6583, 6586, 6590 [Guerra & Moschen, "Compatibilidade de sistemas"].
[338] Gaspar & Paluma, *supra* note 103 at 68.
[339] Superior Tribunal de Justiça, 10 December 2009, *Südleasing GMBH v Saraiva Equipamentos Ltda*, STJ – Jurisprudência do STJ, Resp No. 1.159.796 (Brazil) at 3 [translated by author] [emphasis added]. See also the case *American Home*, where the Fourth Panel of the Superior Court of Justice (STJ) decided, unanimously, to dismiss the appeal stating that the case was under the Brazilian concurrent jurisdiction "which [could not] be withdrawn by the will of the parties." Superior Tribunal de Justiça, 8 August 2000, STJ – Jurisprudência do STJ, Resp No. 251.438 (Brazil) at 1 [translated by author].

international jurisdiction in a strict manner with little – or none – leeway to authorize judicial discretion or broad interpretation.[340]

Another visible difference is the position of the rules of competence within the two codes. The jurisdictional provisions were clearly misallocated within the BCCP/73 as they belonged to Title IV "Judiciary bodies and auxiliaries of Justice" specifically "Chapter II International Competence."[341]. As such, international and internal competence (Chapter III) were chapters under the same Title and no emphasis was given to the role Brazil should have in the international setting as well as its jurisdictional limits regarding other sovereign states. The regulation of ICP in the BCCP/73 was, therefore, "insignificant and did nothing more than generate inadequacies before the ICP codification movement."[342]

Given this scenario, the BCCP/15 has enshrined important innovations, incorporating pleas from part of the courts and scholars.[343] It has rectified the position of the ICP provisions and included them in a Title exclusively dedicated to international jurisdiction and cooperation (Title II "The Limits of National Jurisdiction and International Cooperation"). Under this new Title, the jurisdictional rules are concentrated in Chapter I, whose terminology has also been updated to "The Limits of National Jurisdiction."[344] This new terminology and reallocation of the ICP rules signal that Brazil intends to be on the same footing as other domestic and international regulations.

Indeed, this choice demonstrates the willingness to "integrate the determination of international jurisdiction (…) with the rules regarding procedural collaboration between States (…)."[345] Also, by delimiting its jurisdiction, Brazil recognizes it coexists with other sovereign states[346] and accepts participating in a plurality of jurisdictions, adopting the concurrency of

[340] It should be noted that with the advent of the BCF/88 and the increased influence of fundamental rights, voices began to echo in favor of a broader interpretation of the BCC/73 focused on access to justice. See, e.g., Guerra & Moschen, "Compatibilidade de sistemas", *supra* note 337. Such a movement, in fact, greatly contributed to the procedural reform that culminated in the new code.
[341] Gaspar & Paluma, *supra* note 103 at 71 [translated by author].
[342] *Ibid* [translated by author] [footnote omitted].
[343] Antonio do Passo Cabral & Ronaldo Cramer, coord, *Comentários ao novo Código de Processo Civil*, 2ed (Rio de Janeiro: Forense, 2016) at 73.
[344] [translated by author] Ramos points out that, despite this updated term, "international competence" – used by the BCCP/73 – has remained in the wording of the articles. Ramos, *supra* note 17 at 187; 204.
[345] Araújo, *supra* note 332 at position 5653 [translated by author].
[346] Ramos, *supra* note 17 at 196.

competence as a general rule.[347] Ultimately, it rejects abusive jurisdictions by avoiding the extremes of both an excessively broad and a highly restricted jurisdiction.[348]

An additional remark of the BCCP/15 lies in how the BFC/88 (the watershed of re-democratization) interacts with the new code and how this dialogue impacts the ICP and jurisdictional rules.[349] One of the so-called *cláusulas pétreas*[350] (immutable clauses) of the BCF/88, for instance, is the right of access to justice.[351] As such, the right of access to jurisdiction is brought to the category of a fundamental right.[352] Another sign of the approximation between procedural and constitutional law is, as Moschen explains, Art. 1 of the BCCP/15:

> Art. 1. The *civil procedure* will be ordered, regulated, and interpreted *according to the values and fundamental norms established in the Constitution of the Federative Republic of Brazil*, observing the provisions of this Code."[353]

In Moschen's own words, "as stated by Zaneti Jr, (…) [the Brazilian civil procedure model] is *aimed at the protection of rights*, in which the procedural law itself is *constituted by fundamental rights* aimed at the adequate, timely, and efficient effectiveness *of the merits*."[354]

In sum, the BCCP/15 stems from a trend of legislative reform whereby Brazil intends to assimilate into its legal system "the main marks of contemporary legal thought, such as the expansion and consecration of human rights, the search for improvement in the judicial exercise

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[347] Gaspar & Paluma, *supra* note 103 at 73.
[348] Ramos, *supra* note 17 at 196.
[349] Moschen considers this approximation (BCF/88 and the BCCP/15) as one of the three marks of innovation (or disruption) that the BCCP/15 has introduced to the Brazilian ICP system. The other two trends relate to: (i) the prevalence of international treaties, and (ii) the systematization of international legal cooperation in an eclectic way. For a more thorough analysis on these topics, see Moschen, "El caleidoscopio", *supra* note 335 at 468–474, and Valesca Raizer Borges Moschen & Luiza Nogueira Barbosa, "Hacia el acceso transnacional a la justicia: un análisis de la consonancia entre los Principios TRANSJUS y el Código de Proceso Civil Brasileño CPC/2015" (2019) 2:55 Rev Unicuritiba 77 at 82–84.
[350] The BCF/88 establishes that certain provisions of its text are not susceptible of change or revocation, not even through a constitutional amendment. These clauses are named *clausula pétrea*. In that sense, the definition offered by the National Council of the Public Prosecutor's Office is elucidative: "Immutable constitutional provision, which cannot be changed even through an Amendment to the Constitution. The objective is to prevent innovations in crucial issues for citizenship or the State itself. (…)". Conselho Nacional do Ministério Público, "Institucional – Glossario – Clausula pétrea" online: CNMP: <https://www.cnmp.mp.br/portal/institucional/476-glossario/8148-clausula-petrea> [translated by author].
[351] Art. 5, XXXV, BFC/88: "the Law shall not exclude from the Judiciary's consideration any injury or threat to a right" [translated by author].
[352] Araújo, *supra* note 332 at position 5637. See also Ramos, *supra* note 17 at 199. It is worth mentioning that 'access to jurisdiction' (as well as 'access to justice') refers to a concept broader than simply 'access to court'. As Tiburcio explains, it relates to facing access to justice as more than a formal possibility of litigating before a court; it focuses also on the effectiveness of rights and, ultimately, on a just legal order with an ethical, adequate and effective procedure. Tibúrcio, *supra* note 205 at 141–142.
[353] [translated by author] [emphsasis added].
[354] Moschen, "Conferência de Haia", *supra* note 74 at 138 [footnote omitted] [emphasis added] [translated by author].

and the coordination of procedural systems."[355] As a result, this new regulation enshrines more innovative and updated provisions on matters of civil procedure in the international setting and cross-border disputes. There is no longer room for a hermetic nationalist view of procedural law[356] nor a restrictive and inviolable interpretation of jurisdiction.[357]

To put it differently, a comprehensive understanding of the BCCP/15 commands that jurisdiction must be interpreted as serving the purposes of fundamental rights and principles, effective access to justice among them. As Gaspar & Paluma observed: "the ICP will then be challenged to offer ways – and therefore procedural tools – to (…) find, among all concurrent jurisdictions, the most appropriate in order to *guarantee material justice*."[358] The new Brazilian scheme is thus legitimized "by the search for qualitative access to global justice, based on procedural guarantees and on the principles of effectiveness and celerity of jurisdictional provision (…)."[359] So much so that, as will be discussed shortly, the BCCP/15 expanded the cases of concurrent jurisdiction to protect vulnerable parties and guarantee legal certainty.

Some characteristics and provisions have not changed, though. As pointed out in the preamble of this chapter, Brazil still has a dual system whereby rules on direct jurisdiction derive from the BCCP/15 and the Introductory Law to the Norms of Brazilian Law.[360] The separation between international and internal competence,[361] the repeal of nationality as a connecting factor, and the systematization into two categories of jurisdiction (concurrent and exclusive)[362] – three marks already established by the BCCP/73[363] – have also remained untouched. In fact, the wording of Art. 21, I and II of the current code are identical to Art. 88, I and II of the BCCP/73.

Before moving on to the next topic – and considering that this Thesis touches upon enforcement of foreign decisions –, it is important to draw a few remarks on the current regulation of indirect jurisdiction. Alongside the BCCP/15 and the ILNBL, the recognition of foreign judgments and the *exequatur* of letters rogatory are also ruled by the Internal Rules of the Superior

[355] *Ibid* at 141 [translated by author] [footnote omitted].
[356] Moschen & Barbosa, *supra* note 349 at 84. Meinero identified, however, that the new provision for exclusive jurisdiction established by Art. 23, III is "the mirror of an exacerbated nationalism," for which there is no reasonable justification. Meinero, "Jurisdição Internacional", *supra* note 64 at 293 [translated by author].
[357] Moschen, "Conferência de Haia", *supra* note 74 at 138.
[358] Gaspar & Paluma, *supra* note 103 at 73 [translated by author] [emphasis added].
[359] Moschen, "El caleidoscopio", *supra* note 335 at 470 [translated by author].
[360] Ramos, *supra* note 17 at 199–200.
[361] *Ibid* at 202–203.
[362] Meinero, "Jurisdição Internacional", *supra* note 64 at 293.
[363] Jatahy, *supra* note 334 at 95–97.

Court of Justice (IRSCJ). Within this framework, Brazil does not authorize an automatic efficacy of foreign decisions and requires a recognition process.[364] In short, it consists of a deliberation judgment (*juízo de delibação*) whereby the STJ[365] verifies whether the decision has respected specific formal requisites and principles (e.g., public policy).[366] Like many countries worldwide, among these requirements, the decision must have been rendered by a competent authority.[367]

It may be surprising, though, how this requirement has been assessed. Although Ramos claims that the foreign competence should be the one that "(i) by its rules and by International Law could have rendered the decision,"[368] the STJ "limits itself to examining whether the foreign authority (…) did not invade the exclusive competence of the national judge."[369] As such, under the BCCP/73, the STJ assessed the competence of the foreign authority by basically analyzing whether the competence was concurrent (Art. 88) or exclusive (Art. 89). If the decision referred to a matter of exclusive jurisdiction of Brazil, the Court denied the effects of that foreign judgment in the Brazilian territory, without, however, delving into the reasonableness of the original forum[370] In a nutshell, "the objective of the STJ, when examining the requirement of a competent foreign authority, is only to verify that there is no offence to the exclusive national jurisdiction."[371] With the new code, it remains to be seen whether there has been (or will be) any behavioural change by the Court in this regard.

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[364] Araújo, *supra* note 332 at position 7226. For a historical view of the introduction of this system in Brazil, see Renata Alvares Gaspar, *Reconhecimento de sentenças arbitrais estrangeiras no Brasil* (São Paulo: Atlas, 2009) at 10–18 [Gaspar, "Sentenças Arbitrais"].

[365] Before 2004, the Supreme Court (STF) had the original competence to undertake this process. The Constitutional Amendment 45/2004 has shifted the competence to the STJ. For a more detailed explanation see Gaspar, "Sentenças Arbitrais", *supra* note 364 at 51–54 and Ramos, *supra* note 17 at 474.

[366] Ramos, *supra* note 17 at 473–474.

[367] Art. 963, I, BCCP/15 and Art. 216-D, IRSCJ. See their translation in Appendix B.

[368] Ramos, *supra* note 17 at 478 [translated by author]. In fact, as Gaspar explains, Prof. Ramos' understanding is exceptional and most PRIL courses only refer to this requirement but do not delve into its content – a situation that signals that Brazil has thus far routinely recognized foreign decisions. Renata Alvares Gaspar, "Reconhecimento de decisões estrangeiras no Brasil: controle indireto da jurisdição prolatora da decisão. Avanço ou um retrocesso para a livre circulação de decisões?" in Claudia de Freitas Chagas et al., orgs, *Novas Perspectivas da Cooperação Jurídica Internacional - uma visão de juristas brasileiras* [forthcoming in 2023] [Gaspar, "Reconhecimento"].

[369] Nadia de Araujo & Marcelo De Nardi, "Projeto de Sentenças Estrangeiras da Conferência de Haia: por um regime global de circulação internacional de sentenças em matéria Civil e Comercial" (2016) 2:2 REI-Revista Estudos Institucionais 707 ato 714 [translated by author].

[370] In fact, Araujo & De Nardi clearly state that "[o]nly on few occasions, the decisions for homologation of foreign judgments have indicated that the examination of the competence of the rendering authority is designed to investigate whether there were reasonable links between the original action and the foreign jurisdiction" [translated by author] [footnote omitted]. *Ibid* at 716.

[371] *Ibid* at 718 [translated by author].

Once understood the larger canvass of Brazil's current landscape, it is now time to situate the principle of proximity in this scenario.

2.2 The Principle of Proximity in the New Brazilian Procedural Framework

This section investigates how the new structure makes room for the principle of proximity and its roles in jurisdictional matters. For the time being, no evaluative judgment will be made, especially regarding contested theories (e.g., *forum non conveniens*). The goal is to understand the status of the principle of proximity in Brazil and in what form(s) it presents itself.

As previously explained, the BCCP/15 and its ICP provisions were designed to surpass the mere achievement of instrumental and formal procedures, aiming to also serve material justice.[372] Significant changes like the new architecture of the ICP rules and the increase of concurrent jurisdictions signal that Brazil aspires to align itself with the global movement, whereby PRIL has become concerned with achieving concrete justice in transnational cases.[373] Furthermore, the dialogue with constitutional norms, through which access to jurisdiction consists of a fundamental right, the principle of cooperation acts as a guide to international relations,[374] and human dignity is a fundament of the Brazilian State,[375] causes a direct impact on the new ICP provisions of the new code.[376] Jurisdictional matters are, consequently, fuelled by this set of guidance and directions, thus becoming clear that, through this new Brazilian procedural system, "the legislative option is the full effectiveness of jurisdiction (…)."[377] To achieve this goal, the interpretation and application of jurisdictional rules must occur in the light of guiding principles to foster the purposes of material justice that those rules now entail.

As discussed in Chapter One, the modern conception of PRIL requires, as a rule, that the existence and exercise of international jurisdiction by an authority must pass a test of reasonableness, in which the proximity between the forum and the case is the main measure.[378] In Lagarde's words, the justice of PRIL requires that "*la situation soit soumise à un tribunal ou à une*

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[372] About 'material justice' see note 9 *supra*.
[373] See Chapter One above. See also Arroyo, "DIPr en el diván", *supra* note 3 at 25–26.
[374] Art. 4, IX, BFC/88. Araujo, drawing on Vescovi's theory, explains that cooperation is one of the general principles guiding international competence, and states that "[u]nderstanding cooperation between Judiciary Authorities as a principle also represents a new way of situating PRIL as a protective system for the human person, and not just as a disciplining tool in the relationship of States." Araújo, *supra* note 332 at position 5534 [translated by author].
[375] Art. 1, III, BFC/88.
[376] Vieira & Gaspar, *supra* note 9 at 50–51.
[377] *Ibid* at 51 [translated by author].
[378] See Arroyo, "Compétence Exclusive", *supra* note 104 at 42–43.

autorité qui ne soit pas dépourvue de lien avec elle *et que la décision rendue par le tribunal ou l'autorité du pays* présentant avec cette situation un lien sérieux *soit considérée dans les autres pays comme rendue par une autorité compétente*."[379] To a large extent, therefore, fulfilling the proximity principle meets the criteria of reasonableness of the forum.[380] This emphasis on proximity requires a different dialogue with the principle of sovereignty, which traditionally justified the jurisdiction of a given state and still directly grounds a few rules, such as *forum rei sitae*.[381] The analysis on jurisdiction, pursuing material justice, must, therefore, grapple with the binomial proximity-sovereignty.[382] Proximity provides a new perspective on sovereignty and prevents it from becoming the only one to justify the existence or exercise of the jurisdiction of a court at the risk of constituting an exorbitant jurisdiction.[383]

Thus, within the new procedural framework in Brazil, national courts cannot interpret and apply their jurisdictional rules without considering the link between the case and the state. Beyond the relevance of proximity exposed in Chapter One as a guiding principle in general, the legislative choices that compose the current regulation demand that this principle becomes part of the jurisdictional equation. Otherwise, the handling of jurisdiction will go in the opposite direction of what the legislative reform intended. Consequently, especially after the BCCP/15, "the State is *not entirely free in its decision to exercise jurisdiction* in its territory. The dispute over which it claims jurisdiction *must have at least some connection* with it (…)."[384]

From that, one of the most important conclusions is that although some provisions have remained identical/similar to the previous code, the fact that they belong to this new configuration requires an attentive look that does not blindly replicate the interpretation given under the old system. In fact, beyond the rules provided, "the BCCP/15 offers an important framework of principles that (…) ends up opening up a range of instrumental possibilities for the use of legal tools that were not previously available in our IPC microsystem."[385]

Once identified this general openness to the proximity principle, it is now possible to pinpoint which specific functions are (or can be) present in the current ICP system in Brazil.

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[379] Lagarde, *supra* note 48 at 127 [emphasis added].
[380] Arroyo, "Una mirada", *supra* note 8 at 94.
[381] See Tiburcio, *supra* note 205 at 139–141.
[382] Gaspar & Paluma, *supra* note 103 at 77. See also Arroyo, "Una mirada", *supra* note 8 at 91–99 and Chapter One of this Thesis.
[383] Gaspar & Paluma, *supra* note 103 at 77–78.
[384] Rechsteiner, *supra* note 327 at 254 [emphasis added] [translated by author].
[385] Gaspar & Paluma, *supra* note 103 at 85 [translated by author].

2.2.1 Elaboration of rules

a. *Art. 21, BCCP/15*

The new *Codex* has not expressly regulated the principle of proximity. It can be argued, however, that the BCCP/15 implicitly enshrines this principle, considering that some – if not all – chosen connecting factors to limit international jurisdiction rely on proximity.[386] Thus, its first function appears in the elaboration of rules on direct bases of jurisdiction.[387]

As explained in the preamble of this Chapter, where no international treaties are in force, cases related to international jurisdiction will fall under the regulation of Art. 21 to 25, BCCP/15. Art. 21 and 22 regulate cases of concurrent jurisdiction. In these situations, Brazil agrees that it is not the only one to have authority over a dispute, and other countries can assert jurisdiction regarding the same case.[388] Ergo, even though Brazil considers itself competent, it accepts the effects of a decision rendered by another state[389] insofar as the requisites for recognition are met. Art. 23, in turn, deals with exclusive jurisdiction; in these cases, Brazil claims that only its courts have jurisdiction, not recognizing foreign decisions on those matters.[390] All these provisions are non-cumulative, i.e., the sole existence of one of them suffices to establish Brazilian competence.[391]

For the sake of facilitating the analysis, it is worth repeating the translation of key provisions. Art. 21 reads as follows:

> The Brazilian judicial authority is competent to prosecute and judge actions in which:
> I - the defendant, whatever their nationality, is domiciled in Brazil;
> II - the obligation shall be performed in Brazil;
> III - the basis is a fact that occurred, or an act practiced in Brazil.
>
> [Single paragraph.] For the purposes of the provisions of item I, a foreign legal entity with an agency, affiliate or branch is considered domiciled in Brazil.

[386] This is not to say that proximity is the sole principle underlying the connecting factors described herein; as already discussed, other structuring principles can coexist and justify a choice for a given rule. My argument relies on the fact that the link between the case and the forum was *a* relevant criterion in determining the rules that limit the jurisdiction of national courts.
[387] For a detailed explanation of the role of the principle of proximity in the elaboration-process of rules on direct jurisdiction see Chapter One, topic 1.2.1; and Lagarde, *supra* note 48 at 131–142.
[388] Ramos, *supra* note 17 at 204.
[389] Araújo, *supra* note 332 at position 5762–5769.
[390] *Ibid* at position 5769. For a general explanation on exclusive jurisdiction see Cuniberti, *supra* note 2 at 162–168. For an updated analysis on the subject in Brazil see Meinero, "Jurisdição Internacional", *supra* note 64 at 297–301.
[391] Araújo, *supra* note 332 at position 5656.

The first connecting factor is thus the defendant's domicile, which gives general preference to the forum of the defending party, presuming that it is easier to proceed with the lawsuit where the defendant has their activities.[392] As discussed earlier, the defendant's domicile is the most evident connection based on proximity, remaining as the paradigm of reasonable jurisdiction,[393] an understanding echoed in the Brazilian doctrine.[394] The BCCP/15 also maintained the express repeal of nationality as a connecting factor,[395] thus not being considered a close connection within the Brazilian system. Residence, in turn, remains not – at least explicitly – included as a criterion for international jurisdiction, an exclusion made since 1942 by the ILNBL.[396] Finally, the legal person's domicile has become the object of a rich debate among scholars and courts, which will be explored in the following sections.

The second connecting factor (Art. 21, II) refers to the place of performance in obligational matters,[397] a criterion clearly drawn on proximity. That is because "it starts from the premise that the place of performance has more connections with the concrete case than any other objective or subjective element of the legal relationship."[398] Additionally, the closeness represented by the place of performance is more justifiable than, for instance, the place where the contract was made,[399] a factor considered more random and less certain.[400] There are some debates, though, regarding what precise obligation justifies the Brazilian competence according to this provision. Tibúrcio postulates that, under a broad interpretation, jurisdiction is justified as long as the cause of action has some relation with the obligation to be performed in Brazil (even if remote).[401] She also states that, in case of obligations happening in multiple places, any obligation in Brazil would suffice.[402] And, according to Ramos, once established the Brazilian jurisdiction, the claim can refer to any issue related to the obligation – even, e.g., the validity of the juridical act.[403] Conversely,

[392] Jatahy, *supra* note 334 at 99–100.
[393] Arroyo, "Compétence Exclusive", *supra* note 104 at 44.
[394] See e.g., Tibúrcio, *supra* note 205 at 42–43 and Meinero, "Jurisdição Internacional", *supra* note 64 at 293.
[395] Jatahy explains that the principle equalizing nationals and foreigners exists since the times of the Brazilian empire. Nationality was not, therefore, considered a factor for international competence. Jatahy, *supra* note 334 at 81–82.
[396] Ramos, *supra* note 17 at 208.
[397] Such obligations can be either contractual or non-contractual. See Cabral & Cramer, *supra* note 343 at 73.
[398] Tibúrcio, *supra* note 205 at 47 [translated by author].
[399] Ramos, *supra* note 17 at 211.
[400] Tibúrcio, *supra* note 205 at 47.
[401] *Ibid* at 56.
[402] *Ibid* at 55–56.
[403] Ramos, *supra* note 17 at 212.

Jatahy affirms that "it is necessary that the object of the action is the specific obligation to be performed in [the Brazilian] territory."[404]

Item III of Art. 21, in turn, refers to juridical acts – contractual or not[405] – and facts that occurred in Brazil, a rule that already existed in the BCCP/73 and suffered minor changes in its wording for more technical precision.[406] With this new phrasing, the fact/act must be part of the cause of the action to be considered the 'basis' of the claim.[407] One can also perceive proximity embedded in this provision since it starts from the premise that "in some cases, the court where the act or fact took place is the closest and most interested in the solution of the dispute."[408] It offers, though, a fairly big umbrella of situations that can be deemed as under the Brazilian competence. Ramos affirms that this provision broadens the Brazilian jurisdiction extensively, whereby a contract made in the country, for example, suffices to establish jurisdiction.[409] Many family law situations and tort cases (either the event or the damage),[410] including cross-border torts stemming from the Internet,[411] are also examples encompassed in this wording. Therefore, although proximity does underlie the rule, such a vague text and the broad scope it promotes can have significant implications concerning the direct basis of jurisdiction and its effects abroad, reason why proximity can also serve as an interpretative tool to adjust it in concrete cases (see topic 4.1.1, c. below).

Art. 21 contains standards that have been stable throughout the years,[412] and all of them already existed in the BCCP/73. The BCCP/15, however, introduced new provisions on concurrent jurisdiction in Art. 22, specifically referring to maintenance actions, consumer disputes, and submission of the parties to the Brazilian jurisdiction. Considering the scope of this Thesis, the following lines will focus on the provision related to consumers.

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[404] Jatahy, *supra* note 334 at 118 [translated by author].
[405] Tibúrcio, *supra* note 205 at 57.
[406] See Cabral & Cramer, *supra* note 343 at 73.
[407] Ramos, *supra* note 17 at 212.
[408] Tibúrcio, *supra* note 205 at 57 [translated by author]. Meinero shares this same understanding. Meinero, "Jurisdição Internacional", *supra* note 64 at 293. It is worth mentioning that Ramos states that this rule relies on the (i) principle of territoriality and (ii) defence of the state sovereignty, making no reference to proximity. See Ramos, *supra* note 17 at 213. Although it is possible to identify these other principles, this research disagrees with the understanding that they legitimize the assumption of jurisdiction alone, mainly considering, generally, the binomial proximity-sovereignty and, specifically, the new BCCP/15 framework.
[409] Ramos, *supra* note 17 at 213.
[410] See Tibúrcio, *supra* note 205 at 57.
[411] Ramos, *supra* note 17 at 213.
[412] Jaeger Junior & Barcellos, *supra* note 117 at 79.

b. *Art. 22, II, BCCP/15*

Art. 22, II requires two key elements to extend the Brazilian competence in consumer cases: the claim must stem from consumer relations, and the consumer must have either their domicile or residence in Brazil.[413] Its translation reads as follows:

> Art. 22 The Brazilian judicial authority is also competent to process and judge actions:
> II - arising from consumer relations when the consumer is domiciled or resident in Brazil;

Albeit praiseworthy, this new rule cannot be considered entirely innovative since it is part of an international trend (e.g., Brussels Regulation 1215/2012) to privilege and protect vulnerable parties in imbalanced relations.[414] Without it, consumer disputes would fall under the general rule of the defendant's domicile (Art. 21, I),[415] forcing the consumer (if the claimant) to file an action abroad, a situation that "means, in general, denying them access to justice."[416] Thus, Art. 22, II sets forth an exception to the general rule, drawing on the premise that the consumer is a vulnerable party.[417]

Given this protective inspiration, it is possible to identify, in this provision, the interaction between proximity and protection discussed in section 1.2.4 above. That is because the perception of what is considered 'substantially close' is reshaped in the context of a consumer relationship. First, not only is their domicile accepted to ground jurisdiction, but also their residence in Brazil.[418] As such, when the consumer acts as a claimant, the BCCP/15 authorizes them to use residence – a connection considered 'weaker' than domicile (not mentioned, for instance, in art. Art. 21, I) – to ground jurisdiction in Brazil, thus not obligating the consumer to sue abroad. In fact, the possibility for the consumer domiciled/resident in Brazil to file an action in Brazil is the most significant

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[413] Ramos, *supra* note 17 at 216.
[414] Araújo, *supra* note 332 at position 5812. In the same vein, see Ramos, *supra* note 17 at 216. Tibúrcio also reinforces that Art. 22, II is not an isolated initiative, since both internally and in the realm of Mercosur there have been attempts to ameliorate consumers' protection. See Tibúrcio, *supra* note 205 at 75, 77. See also article 3149 CCQ in Quebec.
[415] Before the BCCP/15, it had already been voiced that the Code on Consumer Protection (Law No. 8.078/1990) could justify the assertion of jurisdiction in Brazil based on Art. 101, I, which provided that the action could be filed in the consumer's domicile. As Ramos explains, however, this argument was weak because the provision under the Consumer Code referred to internal competence, rather than international. See Ramos, *supra* note 17 at 216. With a similar understanding, see also Tibúrcio, *supra* note 205 at 76.
[416] Tibúrcio, *supra* note 205 at 75 [translated by author].
[417] Cabral & Cramer, *supra* note 343 at 74.
[418] Logically, the consumer's residence will suffice to sue them in Brazil in consumer disputes. See Ramos, *supra* note 17 at 216. About the correlation between habitual residence and the protective principle, see Dolinger, "Evolution of Principles", *supra* note 25 at 260.

innovation of Art. 22, II,[419] considering that the claimant's domicile or residence is not usually deemed as a close connection (and sometimes even an exorbitant factor[420]).

Again, the two perspectives mentioned earlier can fit here. One can either understand that the protective principle is relativizing proximity by accepting a weaker link to ground jurisdiction or, on the contrary, interpret it as an even stronger connection since it privileges the forum that is closer to the vulnerable party.[421] Considering that no other link is required in Art. 22, II – besides the consumer's domicile or residence – it might be more accurate to perceive this provision as enshrining an exception to proximity rather than reinforcing it. This seems to hold true, for instance, in comparison with the application of Art. 18 of the Brussels Regulation Ia by the Court of Justice of the European Union. Section (1) of this provision authorizes consumers to bring claims in their forum of domicile. To assume jurisdiction through this specific prerogative, however, the European Court requires that the other party deliberately directed their activities to the consumer's domicile.[422] This connecting factor, therefore, does not stand on its own but is taken into account along with other layers of proximity. As such, this latter example seems to fit within the second perception mentioned above, i.e., that the protective goal of the law allows to expand (and thus reinforce) the concept of proximity when it comes to vulnerable parties. Be that as it may, what seems to matter for the purposes of this Thesis, is the need to understand the interplay between the two principles in this specific rule. That because legal actors can only take a stand on whether it consists of an exception or a reinforcement of proximity by having a good grasp of crucial concepts regarding jurisdiction and its underlying principles.

Once concluded the analysis on the role of proximity in the elaboration of jurisdictional rules, the focus now shifts to another one that, despite not being codified,[423] has been discussed by Brazilian scholars: the corrective function through *forum non conveniens*.

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[419] Ramos, *supra* note 17 at 216.
[420] See e.g., Art. 3.6., b, TRANSJUS which lists the claimant's domicile/residence an exorbitant jurisdictional ground.
[421] In this vein, see note 318 above; see also Dolinger, "Evolution of Principles", *supra* note 25 at 358. More specifically to conflicts of jurisdiction and reasonableness of the forum, Arroyo explains that a forum that favours one of the parties, inclining the balance to only one of them, loses its reasonable character (largely drawn on proximity). Arroyo, "Compétence Exclusive", *supra* note 104 at 43. From that, one can infer that protection *fora*, by aiming to protect the vulnerable party and guarantee the more accessible jurisdictions, restore the balance between the parties and, consequently, the reasonableness previously lost.
[422] Ramos, *supra* note 17 at 217–218. The author explains that, through this additional requirement, the European Court aims to avoid creating excessive burden to small and medium companies. Ramos, *supra* note 17 at 218.
[423] *Ibid* at 240.

2.2.2 Proximity via *Forum Non Conveniens*

Forum non conveniens is not a settled topic in Brazil. Scholars diverge on whether the doctrine is available in the Brazilian legal order and are generally divided between advocating for its application or rejecting it entirely (at least in the current framework).

On the part of those who support FNC, Gaspar & Paluma argue, for example, that the new code and its ICP microsystem receive the principle of proximity as one of the main guides to interpret and apply rules of jurisdiction, having material justice as the final goal.[424] Therefore, although not codified, the new procedural configuration[425] allows using different tools to ensure the maximum efficiency of jurisdiction – *forum non conveniens* (based on proximity), among them.[426] Tibúrcio, in turn, defends this corrective tool by basing her argument on procedural good faith and the abuse of the right to litigate.[427] Since *forum shopping* is, in her view, a right that claimants enjoy,[428] FNC authorizes the court to decline jurisdiction in cases where the chosen forum has no connection with the case (which, in Tibúrcio's words, would be a clear expression of the principle of proximity) or there is no local interest in hearing that dispute, thus avoiding the abuse of the right to 'shop'.[429] Vieira & Gaspar also advocate in favour of FNC to hinder the adverse effects that *forum shopping* can cause, mainly considering the current lack of international consensus regarding *lis pendens*.[430] They argue that, due to this gap in the international setting, there is a real chance of parallel proceedings[431] at the risk of culminating in contradictory decisions, creating legal uncertainty.[432] Given this reality combined with the fact that Brazil expressly denies the effects of international *lis pendens*,[433] they postulate that FNC would be one of the available tools to mitigate these harmful effects; and proximity would be the main parameter to do so.[434]

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[424] Gaspar & Paluma, *supra* note 103 at 77–78. This argument has been explained in the beginning of this section.
[425] This is not to say that, before the BCCP/15, there were no defenders of *forum non conveniens* in Brazil. See e.g., Guerra & Moschen "Compatibilidade de sistemas", *supra* note 337.
[426] Gaspar & Paluma, *supra* note 103 at 76–81.
[427] Tibúrcio *supra* note 205 at 212.
[428] *Forum shopping*, however, remains controversial, dividing opinions among scholars worldwide varying from those who harshly criticize it to those who favor its non-abusive use. See Bookman, *supra* note 237.
[429] Tibúrcio *supra* note 205 at 197–198.
[430] Vieira & Gaspar, *supra* note 9 at 64.
[431] For the relation between *forum shopping* and parallel litigation see Campbell McLachlan, *Lis pendens in international litigation* (Leiden, Boston: Martinus Nijhoff, 2009) at 36–40.
[432] Vieira & Gaspar, *supra* note 9 at 51.
[433] Art. 24, BCCP/15. See Appedix A.
[434] Vieira & Gaspar, *supra* note 9 at 47–48. Peixoto also defends FNC in Brazil but with a different approach. He advocates for a more flexible interpretation of the principle of the natural judge, whereby the rules on concurrent jurisdiction would be guided by the principle of the adequate competence, authorizing courts to decline jurisdiction in

They warn, however, that, because FNC is not codified, it could not be applied *ex officio*; it should be requested by the interested party and only decided after the right of defence has been duly exercised,[435] i.e., after the defendant had the opportunity to manifest themselves regarding the request.

Other scholars, however, do not envisage a possibility for FNC in the current procedural framework. Rechsteiner, for example, claims that applying this theory in Brazil, where jurisdiction is expressly limited through codification, can clash with the principle of access to justice, yielding legal uncertainty and time waste for the parties.[436] Similarly, Ramos states that: "in the absence of an express provision on the adequacy of the Brazilian jurisdiction, (…) it is the plaintiff's right to access justice in the defined cases of concurrent Brazilian jurisdiction, not to mention the potential violation of predictability and the right to legal certainty (…)."[437]

Despite the lack of consensus, it is undeniable that the new procedural framework has set a large stage to discuss the use of this corrective function, considering the rich dialogue that has arisen among scholars, thus justifying a closer look at FNC throughout this research.

2.2.3 Proximity outside Arts. 21-25, BCCP/15

One last word should be said about a different role that proximity may be invoked to play in the new Brazilian procedural context. Araújo argues that the principle of reasonable jurisdiction (which, based on Vescovi, requires a reasonable connection with the forum – herein understood as 'proximity') "can *serve to inform and determine situations not provided for* in Arts. 21 to 25 of the BCCP/15, always taking into account the need to avoid choosing an arbitrary or abusive forum through the use of forum shopping."[438] This argument is premised on the understanding that, because jurisdiction is pre-existent (arising from sovereignty), the situations apt to fall under the

favour of a more adequate forum, avoiding limiting the defendant's right of defense. According to him, many different criteria would serve as parameter to guide the judge in this new reading; among them, the doctrine of minimum contacts. See Ravi Peixoto, "O forum non conveniens e o processo civil brasileiro: limites e possibilidade" (2018) 279 Revista dos Tribunais Online 381.

[435] That is because Art. 10, BCCP/15 establishes that: "The judge cannot decide, at any instance, based on grounds on which the parties have not been given the opportunity to express themselves, even if it is a matter to be decided ex officio." [translated by author]. Vieira & Gaspar, *supra* note 9 at 53. See also Gaspar & Paluma *supra* note 103 at 80.

[436] Rechsteiner, *supra* note 327 at 258.

[437] Ramos, *supra* note 17 at 241 [translated by author].

[438] Araújo, *supra* note 332 at position 5522 [translated by author] [footnotes omitted] [emphasis added].

Brazilian competence are not restricted to Arts. 21-25.[439] As a result, principles can, on the one hand, determine the Brazilian competence in hypotheses not expressly codified and, on the other, impede the exercise of jurisdiction even if expressly provided.[440] In the first case, the principle of proximity would assume a different function since it would not be grounding a codified rule nor correcting an existent one. In short, it seems that proximity would be applied directly to a case without the intermediation of a jurisdictional rule or a pre-established corrective function. As such, it would require a more active and creative role from the courts, but with no concrete parameters of what would be considered a close and substantial connection outside the list of connecting factors of the new BCCP/15.

The role of the Brazilian courts is, in fact, our next subject. The following section investigates whether, within this new framework, the principle of proximity has been part of the jurisdictional equation when the courts face cross-border disputes.

2.3 The Doors Have Been Opened – But Are Brazilian Courts Paying Attention?

Aiming to obtain a reliable and overarching answer concerning the status of the proximity principle in Brazil, this Thesis has also examined recent decisions on international jurisdiction. The objective of this case law study is, therefore, to assess whether (and how) the Brazilian courts have considered proximity to decide jurisdictional matters within the new procedural landscape.

To pursue this endeavour, I searched through the databases of seven State Courts of Appeal[441] and the STJ. The search was based on keywords/expressions[442] carefully chosen to identify – if any – the application of proximity by the courts. As such, the keywords spanned specific[443] and generic terms, as well as combinations of them.[444] The search ranged from March 2016 (entry into force of the BCCP/15) to December 2021, and the cases selected for analysis are

[439] Tibúrcio, *supra* note 205 at 25. The author explains that this understanding differs from the premise that lawmakers are the ones who create the jurisdictional power when establishing rules of competence, in which case the jurisdictional rules would be exhaustive. For a compilation of this debate, see Araújo, *supra* note 332 at positions 5686–5710.
[440] Tibúrcio, *supra* note 205 at 26.
[441] São Paulo, Minas Gerais, Rio de Janeiro, Espírito Santo, Paraná, Santa Catarina, and Rio Grande do Sul. Extending the research to all 27 Brazilian State Courts of Appeal would require more time and space not available in this program.
[442] Naturally, every term was searched in Portuguese. They are translated to English for the sake of intelligibility.
[443] Namely, 'principle of proximity', 'substantial connection', 'reasonable connection', 'real connection', 'close ties', 'closer ties', 'reasonable jurisdiction', 'forum non conveniens', 'exorbitant jurisdiction', 'exorbitant connection', 'exorbitant forum', and 'weak connection'.
[444] These generic terms and combinations were: 'international jurisdiction' and 'international competence AND BCCP/15'. Since the term 'international competence' alone gave rise to a high number of decisions, I narrowed the search down by also referring to the BCCP/15.

within the research scope, i.e., civil and commercial matters. There was, however, one keyword that was searched without a time limit due to its specificity for this Thesis: 'principle of proximity'. Not limiting the time range of such a specific term was important to understand the true impact of the new code, i.e., whether the BCCP/15 was also a turning point regarding the principle under study.[445]

Regarding this precise term ('principle of proximity'), only one decision has mentioned it to decide a jurisdictional matter. Searching other specific keywords shows that only three cases have used some of them (namely, 'reasonable jurisdiction', 'reasonable connection' and 'forum non conveniens') to decide international jurisdiction. Meanwhile, terms concerning exorbitant jurisdictions/connections did not produce one single result. When it comes to the more general terms, however, the number of decisions that appear on the databases increases. Some of them reveal an implicit approach based on proximity (many of them are discussed below), whereas others focus on different jurisdictional aspects – such as a more straightforward reading of the jurisdictional rules, the incidence of an international treaty or a forum selection clause.

This search method did not intend to be exhaustive nor to allow absolute conclusions – it would be humanly impossible to conjecture all the ways by which courts could apply the principle of proximity explicitly or implicitly. It attempts, however, to yield solid results and an overview of the current use of the principle in question.

After searching the databases based on the terms and method described above, I identified sixty-nine decisions. After a cursory reading of all judgments, those related to aspects outside this Thesis scope (such as submission, forum selection clauses and international treaties) were excluded. A detailed analysis of the remaining cases allowed me to investigate and select those that, in some manner, were related to the proximity principle and relevant for this Thesis' purposes – I discuss fourteen cases in total on direct jurisdiction. It thus becomes clear that the judgments discussed in this section were selected because they always relate to the proximity principle to some extent. The Brazilian case law that deals with international jurisdiction, however, does not end in these judgments.

[445] The last consultation of this term was made in May 2022.

Accordingly, these databases' results can furnish some initial insights. On the one hand, jurisdictional matters are being brought to the courts and, as such, are relatively often litigated.[446] On the other hand, even though it is possible to identify an implicit use of proximity in some judgments (see section 2.3.1., b. below), the fact that specific terms are rarely used by the courts suggests that this principle is still incipient in the Brazilian case law. Time is likely an additional factor in this scenario. Since the new code came into force only five years before 2021, and considering that court litigation sometimes lasts many years, it might take some more time to see the principle of proximity more consistently underlying arguments and decisions regarding jurisdiction.

To investigate proximity on indirect bases of jurisdiction, a few changes regarding the search method had to be made. First, indirect jurisdiction is not the primary focus of this research, thus requiring less analytical depth. Second, as explained earlier, only the STJ is constitutionally competent to recognize foreign decisions, which limited the search to its database. Finally, even after narrowing down the search with terms such as 'international competence', a much higher number of decisions – when compared to direct jurisdiction – appear. They tend, though, to have a very similar pattern, and, by briefly reading them, it becomes clear that most still do not delve into the 'competent authority' requirement adopting proximity as a criterion. I found, nonetheless, three recent decisions that reveal a different approach and are discussed below.

Before discussing the decisions, two remarks are in order. First, the analysis is limited to the use of the principle of proximity by the courts. So, even when I diverge from the general approach adopted by the court – unless this approach relates to proximity – I refrain from making comments to avoid tainting the analysis with different topics. There are air transport cases, for instance, that, in my view, should have applied the Montreal Convention[447] or disputes that should have been interpreted as a consumer relation. My assessment will primarily focus on the proximity principle and the decision in the exact terms as it was rendered.

Secondly, some decisions reveal persistent misinterpretations regarding elementary premises of PRIL. It is not uncommon, e.g., to stumble upon arguments/judgments on international

[446] It is worth pointing out that, under the BCCP/73, although subject to a much narrower and more nationalist analysis, courts already dealt with international competence. By searching, for instance, the term 'international competence' in the TJSP database, without any time limit, 209 decisions appear. Among them, 117 are prior to the BCCP/15.
[447] Convention for Unification of Certain Rules for International Carriage by Air, 28 May 1999, International Civil Aviation Organization (entered into force 4 November 2003 | in Brazil 18 July 2006) [*Montreal Convention*].

jurisdiction referring to rules of applicable law. In *Silva*,[448] for example, the Court of Appeal of Paraná (TJPR) decided about the Brazilian competence over a claim for compensation using Art. 9, ILNBL – which indicates the *applicable law* in obligational matters. Because the airline tickets were purchased in Portugal, the court understood that the Portuguese law was applicable to analyze jurisdiction, thus excluding the BCCP/15.[449] This understanding causes concern. Assessing jurisdiction (which, in Brazil, follows the *lex fori*) always precedes the analysis of which substantive law applies to the case. *Silva* also epitomizes another non-rare misinterpretation: using rules of internal competence (designed to organize the proceedings internally) to decide matters of international jurisdiction. The appellant argued that Art. 101 of the Brazilian Consumer Protection Code (BCPC/90) – provision of internal competence – was applicable, thus justifying jurisdiction over the dispute.[450] This argument is unacceptable in Brazil as internal competence rules cannot ground international jurisdiction.[451]

These recurrent confusions represent a practical challenge to the principle of proximity. If judges and parties still misunderstand or misapply fundamental concepts of PRIL, more sophisticated reasonings – such as the roles of the principle of proximity – in ICP end up jeopardized. Not all decisions and claims, of course, are entirely grounded on mistaken premises, as will be seen below.

2.3.1 Direct Grounds of Jurisdiction

a. *Explicit Use of the Principle of Proximity*

As pointed out above, only one judgement expressly mentions the proximity principle as part of the rationale for deciding international competence. Albeit small in quantity, this finding can still be impactful if put in retrospect. Considering that no time limit was used to search the term 'principle of proximity' in the online databases, the first explicit appearance – at least with these exact words – of proximity in jurisdictional matters happened after the BCCP/15. This result indicates that the innovations of the Code may have actually opened space for the proximity principle in judicial decisions.

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[448] Tribunal de Justiça do Paraná, 21 May 2020, *Raquel Gianni da Silva v A.N.A Aeroportos de Portugal, Dream Grow Agência de Viagem, and SATA Internacional Serviços e Transportes Aéreos*, TJPR – Jurisdprudência do TJPR, No 0000868-21.2015.8.16.0037 (Brazil) [*Silva*].
[449] *Ibid* at 5–6.
[450] *Ibid* at 2.
[451] Tibúrcio, *supra* note 205 at 76.

The judgement is *Marchal*,[452] rendered in a tort case involving an international air transport contract (from Lyon to Rio de Janeiro). Mr. Marchal and Ms. Veillié (both domiciled abroad) filed an action for compensation against the air company TAP due to the cancellation of their connecting flight in Lisbon and the consequent delay of twelve hours until they arrived in Brazil. In the first instance, the judge dismissed the claim based on the lack of Brazilian jurisdiction.[453] She inferred that, although TAP had a domicile in Brazil, Art. 21, I, single paragraph was not applicable because the airline tickets were issued online by the French branch and, as such, the Brazilian TAP had no connection with the case. Art. 21, III was also inapplicable since the facts that based the claim had happened in Lisbon. Finally, she stated that the claimants' argument that the obligation should be fulfilled in Brazil was unsustainable because "[this connecting factor] is based on the link to the object of the obligation, *by the principle of proximity*. As already explained, the deal was concluded abroad, and the alluded damage occurred in the connection in Portugal."[454] The claimants appealed against this decision bringing the case before the TJSP. The court dismissed the appeal, fully adopting and corroborating the grounds of the original decision.[455]

Although the judge and the court mentioned the principle of proximity as the basis of only one connecting factor inapplicable to the case, the fact that the judges referred to this principle merits attention and allows us to draw a few conclusions. On the one hand, in expressly referring to this principle, they demonstrate that the jurisdictional rule in question (art. 21, II) serves the purpose of proximity and, to justify jurisdiction, the connection between the object of the obligation and the forum should be substantial. It is an interpretation that goes beyond the mechanical application of the rule and considers its reason to exist in the new framework.

On the other hand, the way the principle was handled can be questioned. To assess the 'bond to the object of the obligation', the judge mentions two other unelated connecting factors. Alluding to the place where the contract was made might have been justifiable through the lenses of proximity if the purchase *per se* were put into question (such as its validity, efficacy etc.). But relating the place of the contract to the obligation and place of performance appears to be a

[452] Tribunal de Justiça de São Paulo, 11 December 2020, *Victor Gerald Jean Roger Marchal and Améile Geraldine Chrystel Veillié v Transport Air Portugal - TAP*, TJSP – Jurisdprudência do TJSP, No 1119690-36.2019.8.26.0100 (Brazil) [*Marchal*].
[453] *Ibid* at 5.
[454] *Ibid* at 4–5 [emphasis added] [translated by author].
[455] *Ibid* at 3; 5–6.

misunderstanding of these connectors and how proximity underlies them. The same comment can be made regarding the place of damages, which relates to torts and is, therefore, under art. 21, III – not art. 21, II.

A more accurate use of the principle of proximity might have been assessing which obligation should legitimize jurisdiction. Considering that the completion of the air travel at the stipulated time was the main obligation by TAP, then proximity could have led to conclude that Brazil had jurisdiction as it was the final destination. Art. 21, II would, therefore, apply.

Though not expressly, proximity was also used to deny the application of Art. 21, I, single paragraph. *Marchal* will, therefore, also appear in the next section, which presents cases that reveal the implicit use of proximity as part of the decision.

b. *Implicit Use of the Principle of Proximity*

As mentioned above, in *Marchal*, the judges affirmed that the mere existence of a branch in Brazil was insufficient to establish jurisdiction because it had no connection to the case: "It is necessary that the legal relationship entered into is related to the affiliate, agency or branch."[456] Interestingly, Art. 21 does not offer any parameter that could inform the judge (or the parties) whether the branch had to be directly linked to the case. The judges' interpretation stemmed from a doctrinal source[457] and case law, concluding that the lack of relation between the TAP branch in Brazil and the dispute led to the court's incompetence. It can be argued that proximity acted as an interpretative tool and the ultimate measure for deciding whether to apply or not Art. 21.

Schrieken,[458] also a compensatory action originated from a delay in an international flight, had a similar outcome, although some steps taken by the court must be challenged. In this case, the non-resident claimants travelled from Brussels to Brazil with a connecting flight in Lisbon. The delay happened in Brussels, leading the claimants to miss the connecting flight and arrive fourteen hours late. In the first instance, the judge decided to dismiss the claim.[459] The claimants appealed, stating, among other arguments, that since TAP had a branch in the state of São Paulo,

[456] *Ibid* at 4–5 [translated by author].
[457] The decision quotes Ramos, *supra* note 17. In fact, scholarly writing plays an undeniable significant role in Brazilian judgments since most judges refer to scholars to corroborate their decisions.
[458] Tribunal de Justiça de São Paulo, 14 April 2021, *Simon Schrieken, Luna Schrieken, Mika Schrieken and Bianca Schaekens v Transport Air Portugal - TAP*, TJSP – Jurisdprudência do TJSP, No 1010986-89.2020.8.26.0100 (Brazil) [*Schrieken*].
[459] *Ibid* at 2.

Art. 21, I, single paragraph was applicable. TJSP assessed all the possible connecting factors, confirming that the claimants resided in the Netherlands, the tickets were purchased abroad, and the delay also happened overseas. The court concluded that Art. 21 was inapplicable to the TAP Brazilian branch, as well as Art. 12, ILNBL. It dismissed the appeal stating that: "in view of *all these elements*, (…) there is *no relationship between the facts* narrated in the initial claim *and the competence of the Brazilian justice* to judge the present case (…)."[460]

The analysis of every connecting factor to identify whether there was a link between the facts and the Brazilian forum merits emphasis since the court showed a concern with the proximity of the connections instead of promoting a perfunctory interpretation of the legal rules. The reasoning, however, to render Art 21, I, single paragraph inapplicable was tainted by the 'applicable law-international jurisdiction' confusion: because the tickets were bought in the Netherlands, the court understood that contractual obligations were established under Dutch law, thus excluding the concurrent competence from Brazil, regardless of the existence of a TAP branch. So, besides the pressing need to start distinguishing applicable law and jurisdiction, a more accurate handling of proximity would have likely yielded the same outcome but in a technically correct way.

In *Google*,[461] the TJSP also coped with Art. 21, I, single paragraph. The court assumed jurisdiction, understanding that there was a link between the branch and the claim. In a nutshell, the claimant sought a 'preliminary injunction' requesting Google Brasil to furnish registration data from a Gmail (managed by Google LLC) user to allow her – the claimant – to file a criminal action against said user. In the first instance, the judge granted the injunction ordering Google Brasil to provide the claimant with the information needed,[462] a decision contested by the defendant and brought before the appealing instance. The TJSP concluded that since Google LLC had a Brazilian branch and one of the accessed terminals was in Brazil (accessed by the claimant), national courts had jurisdiction to hear the case.[463] The court also considered the claimant's argument that the forum could not be defined only by the place where the sender accessed his terminal since, if so, "the claimant would be obliged to file lawsuits in all countries of the Globe until finding the one

[460] *Ibid* at 7 [emphasis added] [translated by author].
[461] Tribunal de Justiça de São Paulo, 4 February 2019, *Google Brasil Internet Ltda. v Karen Cristina Ferreira Da Silva*, TJSP – Jurisdprudência do TJSP, No 1001507-77.2016.8.26.0079 (Brazil) [*Google*].
[462] *Ibid* at 13.
[463] *Ibid* at 12–13.

in which the [Gmail] use happened (…).”[464] In this scenario, the defendant’s domicile was the root of the decision, but the court considered more elements than the mere existence of the branch. The judges identified a connection in Brazil (terminal used by the claimant)[465] to justify the claim against the defendant – instead of any other international branch or the US headquarter, which would eventually deny the claimant proper access to justice.

Other decisions appear to have adopted the parameter of proximity in a different manner; they considered not only one jurisdictional rule but the existence of many connecting factors to affirm the Brazilian jurisdiction. In *Savetman*,[466] the (non-resident) claimants filed an indemnity action against the Brazilian Latam Airlines branch for 80 hours of delay in a flight from Israel to Buenos Aires. Due to a delay in Israel, the claimants missed the connecting flight in São Paulo, where the next available flight was scheduled for only three days after. As an aggravating factor, the claimants could not travel during the *Shabat*, which coincided with the days of the delay. In the first instance, the judge dismissed the action, a decision that the TJSP reversed. The court started applying Art. 33 of the Montreal Convention, which allows the claimant to choose the forum among the ones available – one of them being the carrier’s domicile.[467] Referring to this source was the correct move since international treaties do prevail in cases where they are applicable and in force (Art. 13, BCCP/15), thus sufficing to establish competence over the dispute. The TJSP, however, added, in their reasoning, other elements[468] that also justified the Brazilian jurisdiction: (i) the defendant’s domicile (Art. 21, I, single paragraph, BCCP/15); (ii) the obligation was supposed to be performed, partially, in Brazil, and; (iii) part of the facts also happened in Brazil (Art. 21, III, BCCP/15).[469] It is valid to remember that Brazilian jurisdictional rules are non-cumulative, i.e., the concrete existence of only one authorizes national courts to assert jurisdiction. The TJSP could have, in theory, stopped with the Montreal Convention.

[464] *Ibid* at 13 [translated by author].
[465] The court adopted this reasoning by interpreting Art. 11, para 1, of Law No 12.965/2014 called “*Marco Civil da Internet*”, which establishes principles, guarantees, rights and duties for the use of the Internet in Brazil. Given the specificity of the topic and the protections involved (personal data, among them), it will not be discussed whether this statute could have been used to assess jurisdiction since this inquiry would fall outside the present scope.
[466] Tribunal de Justiça de São Paulo, 18 March 2021, *Meir Savetman and Others v Latam Airlines Group S/A*, TJSP – Jurisdprudência do TJSP, No 1048704-23.2020.8.26.0100 (Brazil) [*Savetman*].
[467] *Ibid* at 4.
[468] Beyond the elements described herein, TJSP also alluded to internal competence and capacity rules, which will not be considered because incorrectly used to assess international jurisdiction.
[469] *Savetman*, *supra* note 466 at 4–6.

Accumulating connecting factors to ground its decision seems to demonstrate consideration of the intensity of the proximity between the forum and the claim.

Censi,[470] in turn, shows the adoption of one jurisdictional rule to assert jurisdiction, using more than one factor to determine that said rule was, in fact, applicable. The claimant (a Brazilian company) and the defendant (a Colombian company) made a contract of sales of goods, encompassing the maritime transport from Brazil to the Colombian city of Cartagena and then Bogotá. While the delivery happened as agreed, the defendant did not pay all the amount due, motivating the claimant's action to collect the remaining payment. In the first instance, the action was dismissed due to the lack of Brazilian jurisdiction, leading Censi to appeal before the Court of Appeal of Santa Catarina (TJSC). Although the parties did not present a copy of the contract, the court considered that, for legal purposes, it had been made in Brazil (the supplier's country) since Censi was a Brazilian exporter and the negotiations and consents happened online.[471] The TJSC, thus, understood that Art. 21, III was applicable because the fact occurred in Brazil: "(…) despite the fact that the goods were destined for (…) Colombia, *all the negotiations carried out between the parties took place in Blumenau/SC,* and it was in this place *where the commitments to provide services and their respective payment* (…) *were established* (…)."[472]

This interpretation matters for two reasons. First, the place where the contract is made can be a fragile and random connecting factor if no real elements strengthen the link with the forum. In lieu of only referring to the technical rule that identifies where an online contract is deemed to be made, the TJSC underscored that *all* the essential elements that form a contract (negotiations, consent, mutual obligations) were considered to have occurred in Brazil. Second, as already discussed, the wording of Art. 21, III offers a big umbrella. Using interpretative tools (the principle of proximity, among them) to assess whether these cases have, in fact, connections to the Brazilian forum helps to adjust the theoretical norm to the concrete situation.

In *Vitorelli*,[473] the place where the damages were felt was the decisive connecting factor to apply Art. 21, III. The claimants used to provide freight services to the defendant, a company not domiciled in Brazil. After a disagreement about the amount due regarding one specific freight, the

[470] Tribunal de Justiça de Santa Catarina, 2 June 2016, *Censi Indústria e Comércio de Reparos Ltda. v Soluciones Tigre S.A.S.*, TJSC – Jurisdprudência do TJSC, No 2014.063551-4 (Brazil) [*Censi*].
[471] *Ibid* at 2.
[472] *Ibid* at 3 [translated by author].
[473] Tribunal de Justiça do Paraná, 27 June 2019, *Cleverson Vitorelli and Walcir Vitorelli v Agrofértil*, TJPR – Jurisdprudência do TJPR, No 0003778-77.2015.8.16.0083 (Brazil) [*Vitorelli*].

parties ceased their relationship. Following this event, the defendant emailed other companies narrating the discord and discouraging them from negotiating with the claimants, conduct that negatively affected their image and, consequently, their business in Brazil. Seeking compensation for moral damages, they filed an action, which was dismissed in the first instance based on the Brazilian incompetence.[474] The claimants appealed, arguing that the fact/act that happened in Brazil and apt to justify jurisdiction was their refusal to provide the services to the defendant (due to the disagreement over the price).[475] The defendant, on the other hand, claimed that the fact/act to be deemed as a connecting factor was the issuing of the emails which happened abroad, thus excluding the Brazilian jurisdiction.[476]

The TJPR affirmed that the claimants' refusal to provide services was not the fact that gave rise to the claim but the emails sent by the defendant.[477] Nonetheless, because emails belong to a virtual environment, territoriality could not be a criterion, leading the court to consider, instead, the place where the damages were felt.[478] The TJPR recognized that this interpretation was controversial but stressed that the STJ had already decided similarly in another dispute involving damages caused online.[479] In this other case, the STJ stated that the local court of the Internet user is a legitimate forum as it coincides with the place where the damages have been felt more intensively.[480] Finally, the TJPR concluded that the effects of the tort relate to: "*the results* of the conduct practiced in a virtual environment, *which reverberate and repercuss in the social context of the victim and negatively affect their honour and image before potential contractors* (…)."[481]

By corroborating its decision with a previous judgement based on "the place where the tort provoked the greatest negative effects to the victim,"[482] it seems that the TJPR used proximity to interpret the vagueness of Art. 21, III since other facts could also have been considered (e.g., the place from where the emails were sent). The court understood that, in a virtual environment,

[474] *Ibid* at 1.
[475] *Ibid* at 1.
[476] *Ibid* at 1.
[477] *Ibid* at 2–3.
[478] *Ibid* at 3.
[479] *Ibid* at 3. This STJ judgment dates from 2010, indicating that, even under the BCCP/73, some decisions were already interpreting jurisdictional rules concerned with the substance of the connection – although likely to a lesser extent.
[480] *Ibid* at 3.
[481] *Ibid* at 3 [translated by author] [emphasis added].
[482] *Ibid* at 3 [translated by author].

territoriality was a weak factor and focused on the repercussion the emails had on the claimants' business in Brazil, which was their market of operation.

The last decision of this sub-topic is *Caramori*,[483] a case that refers expressly to the term 'reasonable jurisdiction' but does not actually assess the proximity between the connecting factors and the forum. Ms. Caramori filed a claim for compensation against FB Líneas Aereas due to the cancellation of her flight (purchased in Argentina) supposed to happen entirely within the Argentine territory. In the first instance, the judge assumed jurisdiction over the dispute and decided the case on its merits.[484] FB Líneas Aereas appealed against this decision claiming, among other arguments, the absolute Brazilian incompetence. The TJPR reversed the decision on the merits but maintained the national jurisdiction. The court started its analysis by referring to a quote from Araújo[485] regarding the principle of 'reasonable jurisdiction' as one guiding principle that courts had to consider when assessing international competence.[486] This quote (discussed in section 2.2.3) mentioned not only the requirement of a reasonable connection but also the possibility of this principle to determine other situations not provided for in the BCCP/15.[487] Despite this referral, to ultimately decide, the TJPR simply stated that the jurisdiction was concurrent, thus allowing Brazil to judge the dispute under Arts. 12, ILNBL and 21, I, single paragraph, BCCP/15.

It is relevant, once again, that the court paid attention to the purposes of the jurisdictional rules instead of interpreting them literally and superficially. Thus, quoting a lesson about 'reasonable jurisdiction' deserves to be highlighted. The court, however, did not apply proximity in the specific case. To start with, the TJPR did not assess whether the Brazilian branch of FB Líneas Aereas had a connection with the case, a move that would have been important since, in principle, the elements were linked to Argentina. More aggravating, though, is the fact that the court did not analyze the case as a consumer relation,[488] not applying the protection envisaged by Art. 22, II – which, as already argued, can be seen as interacting with the principle of proximity.

[483] Tribunal de Justiça do Paraná, 21 May 2021, *FB Líneas Aéreas S.A v Vanessa Gattelli Caramori*, TJPR – Jurisdprudência do TJPR, No 0038644-37.2019.8.16.0030 (Brazil) [*Caramori*].
[484] *Ibid* at 2.
[485] The court referred to the same source used in this Thesis: Araújo, *supra* note 332.
[486] *Caramori*, *supra* note 483 at 3–4.
[487] *Ibid* at 4.
[488] Assuming that the claimant was domiciled/resident in Brazil.

In fact, cases related to consumer relations have proved to fuel many interpretations, deserving our specific attention.

c. *Consumer Particularities*

Oliveira[489] involves a compensatory action for loss of luggage during a flight within the United States (US). The claimant was domiciled in Brazil and purchased the tickets in the US through the defendant's website. The first-instance judge dismissed the action based on the Brazilian incompetence since the connecting factors were linked to the US, and the defendant had no branch in Brazil. The judge also stated that the consumer relation was established in the US, reason why the action should follow the US rules on competence and consumers.[490] In the appealing instance, the Court of Appeal of Rio de Janeiro (TJRJ) reaffirmed that the case involved a consumer relation but examined the jurisdiction matter under Brazilian law. Very objectively, the court identified that the appellant (the consumer) was domiciled in Brazil and applied Art. 22, II, BCCP/15. It reversed the original decision and ordered the action to proceed in the first instance.

Although there was no direct mention of proximity, the TJRJ decision privileged the protective forum. Art. 22, II accepts the consumers' domicile/residence as a connecting factor to legitimize the Brazilian competence even when the consumer is the claimant. It disregards other factors, such as whether the supplier has directed its services/products to the Brazilian market[491] or if the supplier has a branch/affiliate in Brazil. Applying this provision in the right circumstances fosters the important interaction between proximity and the protective rule.

Less simple interpretations have appeared in other cases involving consumer relations with resident consumers. These disputes are under the umbrella of what will be hereinafter referred to as 'Meliá cases' since they all involve the hotel company Meliá. Although every proceeding and claim has its particularities, the facts that gave rise to a chain of actions against the Meliá's branch in Brazil tend to be very similar. Thus, for the sake of concision, these facts will be generally narrated once (based on the descriptions of the decisions), followed by each interpretation.

In short, while spending their vacations in Meliá hotels in the Caribbean (mainly the Dominican Republic), many Brazilian guests were offered to contract a program called 'Meliá

[489] Tribunal de Justiça do Rio de Janeiro, 3 August 2017, *Célia Regina Honorato de Oliveira v Frontier Airlines Holdings*, TJRJ – Jurisdprudência do TJRJ, No 0016029-16.2016.8.19.0211 (Brazil) [*Oliveira*].
[490] *Ibid* at 103–104.
[491] Ramos, *supra* note 17 at 218.

Vacation Club', which authorized their stay at Meliá hotels worldwide through the system of time-sharing. The payments were significant amounts in dollars, and the written agreements had forum clauses (the Dominican Republic as the exclusive forum). When, however, the guests tried to make reservations, they found out that only specific types of hotels were included. These facilities had restricted availability throughout the year, ultimately thwarting the enjoyment of the program. As a result, many guests filed actions against the Meliá Brazilian branch to terminate the contracts, recover the amounts and/or claim material/moral damages. Regarding jurisdiction, the main issues under debate usually were: whether the case involved a consumer relation; the validity of the choice of forum clause; and whether the Brazilian Meliá branch could attract jurisdiction.

In *Richtmann*,[492] for example, even though the TJSP analyzed the dispute as a consumer relation and, under this argument, disregarded the forum selection clause, it *did not* apply Art. 22, II, BCCP/15 to confirm its competence, even though both claimants were domiciled in Brazil. It adopted, instead, Art. 21, I, single paragraph, which refers to general concurrent jurisdiction. If the court had applied Art. 22, II, the debate on international jurisdiction would have been quickly overcome.[493] However, because the decisive connecting factor was the defendant's domicile, the court had to provide additional explanation since the contract was signed with a foreign branch and not Meliá Brasil. It concluded that both Brazilian and Dominican branches, although different legal persons, pertained to the same economic transnational group (hotel chain Meliá), thus authorizing Meliá Brasil to be the defendant in this case.[494] It seems that the court gave a broad interpretation to the general rule. It did not require that the defendant had a direct link with the action (which would likely happen in a non-consumer case), accepting that belonging to the same

[492] Tribunal de Justiça de São Paulo, 29 April 2021, *Meliá Brasil Administração Hoteleira e Comercial Ltda v Angela Cristina Polycarpo Richtmann and Paulo Santochi Richtmann*, TJSP – Jurisdprudência do TJSP, No 1071639-94.2019.8.26.0002 (Brazil) [*Richtmann*].
[493] This was the outcome in Tribunal de Justiça de São Paulo, 20 February 2020, *Meliá Brasil Administração Hoteleira e Comercial Ltda v Alys Abreu Cobra and Elcio José Moreira Cobra*, TJSP – Jurisdprudência do TJSP, No 1062944-56.2016.8.26.0100 (Brazil)).
[494] *Richtmann*, *supra* note 492 at 6–8.

economic group was substantial enough to justify jurisdiction.[495] A similar approach was adopted in *Piccioto*, *Pereira* and *Saccaro*.[496]

Freire,[497] in turn, has likely had the most surprising outcome. In the first instance, the claimants won the action, leading Meliá to appeal before the TJRJ. The court recognized that the case should be categorized as a consumer relation but decided that Brazil had no jurisdiction over the dispute due to the choice of forum clause. It claimed that Art. 25, BCCP/15 authorized the parties to exclude the Brazilian competence in international contracts if the jurisdiction was concurrent. The TJRJ then granted the appeal and completely reversed the original decision. This judgment shows a legalist reading of the jurisdictional rules, running over crucial aspects that should not have been overlooked: the vulnerable party, the protective forum, and public policy, to list a few. It amounts to an inexplicable inversion of values since, to this day, there are decisions assuming jurisdiction even with valid forum selection clauses signed between peer companies.[498]

Now, what does proximity have to do with all these cases? An accurate understanding of the interplay between the proximity and protective principles, as well as Art. 22, II as a protective forum would likely have yielded the same result seen in *Oliveira*. It would have corroborated the purpose of protecting the weaker party – who, between one guest and one global conglomerate of hotels, is evidently the former – by accepting that the connection between the case and the consumer's domicile is enough to rebalance the relation.

Applying Art. 21, I, single paragraph in consumer cases seems to create more confusion than solution. If Art. 22, II had been relied on, the issue of whether Meliá Brasil could be the defendant would fall exclusively under the question of 'legitimacy to be a party.' So, even if the

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[495] Ramos is one of the advocates in Brazil of this broad interpretation regarding the domicile of the legal person due to the new scenario set by globalization and the development of powerful economic groups. See Ramos, *supra* note 17 at 210–211. Tibúrcio, however, claims that applying this interpretation outside consumer disputes does not seem to have been the legislator's intention. See Tibúrcio, *supra* note 205 at 71.

[496] Respectively: Tribunal de Justiça de São Paulo, 15 March 2021, *Meliá Brasil Administração Hoteleira e Comercial Ltda v Flavio Egon de Piccioto and Priscila Eisenstadt de Piccioto*, TJSP – Jurisdprudência do TJSP, No 1126163-09.2017.8.26.0100 (Brazil) [*Piccioto*]; Tribunal de Justiça do Rio Grande do Sul, 21 November 2018, *Meliá Brasil Administração Hoteleira e Comercial Ltda v José Vicente Pereira e Norma Terezinha Araújo Prado Pereira*, TJRS – Jurisdprudência do TJRS, No 0319379-14.2018.8.21.7000 (Brazil) [*Pereira*]; and Tribunal de Justiça do Rio Grande do Sul, 21 November 2021, *Meliá Brasil Administração Hoteleira e Comercial Ltda v Renata de Oliviera Saccaro e Lisete de Oliveira Saccaro*, TJRS – Jurisdprudência do TJRS, No 0028270-92.2021.8.21.7000 (Brazil) [*Saccaro*].

[497] Tribunal de Justiça do Rio de Janeiro, 29 April 2021, *Meliá Brasil Administração Hoteleira e Comercial Ltda v Rafael de Oliveira Fonseca and Andreia Ghizi Freire*, TJRJ – Jurisdprudência do TJRJ, No 0003251-54.2015.8.19.0209 (Brazil) [*Freire*].

[498] See e.g., Tribunal de Justiça de São Paulo, 2 August 2017, *Aliança Navegação & Logísica Ltda. v Balboa Comércio, Serviços, Importação e Exportação Ltda.*, TJSP – Jurisdprudência do TJSP, No 1056819-75.2016.8.26.0002 (Brazil) [*Aliança*].

court concluded that the 'correct' defendant should be the foreign branch, the appropriate jurisdiction would still be Brazil. The consumer would still be able to file the action in their forum of residence/domicile, and the proceeding would recur to the mechanisms of judicial cooperation (letters rogatory, production of evidence abroad etc.). Moreover, applying Art. 22, II would have fostered legal certainty since, in not doing so, very similar facts resulted in different reasonings and outcomes.

d. *Forum Non Conveniens*

So far, the arguments in favour of FNC seem not to have convinced the Brazilian courts to adopt this doctrine in jurisdictional matters. In *Hering*,[499] the STJ argued that civil law countries have a very restricted acceptance of this tool, and the Brazilian legal order does not provide any rule apt to authorize this practice.[500] It also cast doubt about the FNC in Brazil, confronting it with the principle of free access to the Judiciary, which is a constitutional guarantee.[501] Gaspar & Paluma agreed with the outcome of this decision that ultimately made prevail the forum election clause (assigning the Argentine jurisdiction) previously signed by the parties who were not imbued in an imbalanced relationship and freely consented to the forum.[502] They disagreed, however, with the general reasoning for not applying FNC since they advocate for its application in Brazil.

Interestingly, there have been decisions on internal competence, adopting FNC within the Brazilian territory. In one of them, the TJSP enforced the forum clause signed by the parties not only because it was valid but also because Rio de Janeiro (the selected forum) was the most appropriate according to the doctrine of FNC.[503] Similarly, the STJ also referred to FNC to corroborate its decision on an action of conflict of competence between the Federal Courts of Rio de Janeiro and Bahia.[504]

2.3.2 Indirect Grounds of Jurisdiction

[499] Superior Tribunal de Justiça, 8 November 2016, *Companhia Hering v Minimex SA*, STJ – Jurisprudência do STJ, No 1.633.275 / SC (Brazil) [*Hering*].
[500] *Ibid* at 9–11.
[501] *Ibid* at 11.
[502] Gaspar & Paluma, *supra* note 103 at 84.
[503] Tribunal de Justiça de São Paulo, 2 April 2018, TJSP – Jurisdprudência do TJSP, No 2242545-77.2017.8.26.0000 (Brazil) at 10–11.
[504] Superior Tribunal de Justiça, 14 October 2020, STJ – Jurisprudência do STJ, CC 175210 (Brazil).

To conclude the analysis, this Thesis also investigated whether there have been any signs of change in the recognition of foreign judgments and *exequatur* of letters rogatory, which must be rendered by a competent authority in the country of origin.

In *Stmicroeletronics*,[505] the claimant requested the recognition of a US judgment that ordered the opposing party to pay more than US$ 1 million. Among other arguments, the defendant claimed that the US court was incompetent because Intelvac had no operation in the US and had not signed the contract to be performed abroad.[506] Instead of limiting himself to the 'exclusive or concurrent jurisdiction' analysis, Justice Fisher concluded that the US Court was indeed competent considering several factors: (i) STM had an affiliate in the US; (ii) this affiliate was responsible for shipping the products agreed upon in the contract; and (iii) Miami was the place where the negotiations happened, thus authorizing jurisdiction, in accordance with Florida laws.[507]

Confirming whether there was a connection between the US affiliate and the dispute, as well as analyzing the foreign rules to assess the foreign competence, seems to demonstrate a deeper concern of the STJ with how real the connection between the foreign court, the case and the parties was. Perhaps, if Intelvac had not claimed the foreign incompetence, Justice Fischer would have only checked if the decision overlapped a matter of exclusive jurisdiction. But it is undeniable that, in this case, the STJ analyzed more aspects than simply verifying whether the decision involved a matter of exclusive jurisdiction, a behaviour not very common under the BCCP/73.

In the realm of letters rogatory, two decisions reveal a similar concern. In *Letter No 15638*,[508] a Portuguese court sent a letter rogatory to Brazil requesting the service of Ms. Carneiro, who was the defendant in a compensatory action filed by Mr. Bottura in Portugal. Despite her preliminary defence, the STJ granted the *exequatur* based on the absence of exclusive jurisdiction over the case[509] (the common position adopted by the STJ). Ms. Carneiro was served, motivating her to appeal before the court, where she insisted on the incompetence of the Portuguese courts. In reviewing the decision, the Special Court of the STJ decided to reverse the *exequatur* based on the evidence that Portugal could, indeed, be incompetent to hear the case. After analyzing the

[505] Superior Tribunal de Justiça, 2 August 2018, *Stmicroeletronics Inc v Intelvac Cartões Ltda.*, STJ – Jurisprudência do STJ, No 2017/0034654-0 (Brazil) [*Stmicroeletronics*].
[506] *Ibid* at 2.
[507] *Ibid* at 7–8.
[508] Superior Tribunal de Justiça, 11 May 2021, *Bruna Calil Alves Carneiro v Luiz Eduardo Bottura*, STJ – Jurisprudência do STJ, No 15638 (Brazil) [*Letter No 15638*].
[509] *Ibid* at 3.

Portuguese law and stating that the facts of the tort happened in Brazil and not in Portugal, the STJ found plausible the possibility of the foreign court being incompetent.[510] Ultimately, it partially granted Ms. Carneiro's appeal and returned the proceeding to Portugal until it expressly declared its competence to judge the original dispute.[511] The STJ adopted the same approach in *Letter No 16538,*[512] but, in this case, the court denied the *exequatur* right up front.

2.4 Good Timing to Advance in the Handling of the Principle of Proximity

The last three sections have outlined the status of the principle of proximity in Brazil embedded in the context of recent changes in ICP and international jurisdiction. This portrait reveals that now is a particularly opportune time to ameliorate the use of the proximity principle in Brazil. Generally speaking, any macro change in legislation sets the stage for multiple doubts and interpretations. Previous and stable legal opinions and decisions are shaken by a codification born in a new context to serve old and new local and global needs. Art. 22, II, BCCP/15 exemplifies this scenario. In six years of existence, this provision has already been the object of opposite decisions in similar consumer cases and is sometimes completely ignored, even when applicable. Therefore, Brazil's current procedural context will benefit from the enhancement not only of the use of the principle of proximity but of all procedural and interpretative tools legal actors have at hand.

More specifically, topic 2.2 has shown that the proximity parameters have been voiced in scholarly writing. To different degrees, there are scholars referring to this principle and its correlatives (such as 'reasonable jurisdiction') to explain rules of jurisdiction, justify different interpretations and even advocate for new approaches like FNC. Considering the influence of scholarly writing on Brazilian courts, chances are that the principle of proximity will find more room to appear in their decisions. This possibility requires legal actors to at least be prepared to accurately handle this principle since it can present downsides, especially if not applied cautiously.

Scholarly writing has also been responsible for drawing attention to issues not answered by Arts. 21-25 that deal with proximity to a certain extent. For example, because Art. 21, I, single paragraph provides no direction regarding the foreign legal person's domicile, the traditional

[510] *Ibid* at 5.
[511] *Ibid* at 5.
[512] Superior Tribunal de Justiça, 8 September 2021, STJ – Jurisprudência do STJ, No 16538 (Brazil) [*Letter No 16538*].

interpretation has been that this rule applies "only to claims arising from the business of the agency, affiliate or branch because these are the claims that interest the legal order of the country."[513]

This understanding is not unanimous. Tibúrcio, for instance, questions why this provision should be interpreted restrictively, considering – among other factors[514] – that it belongs to a rule of general competence (Art. 21), which is not limited to specific situations.[515] Moreover, scholars have been challenging the direct connection with the affiliate/branch/agency due to globalization, the consequent growth of economic groups/subsidiaries worldwide, and the duty of the States to protect vulnerable groups.[516] Ramos claims that the interpretation of Art. 21, I, single paragraph should be broad to encompass acts not directly practiced by the establishment domiciled in Brazil but by another one of the same group[517] – similar to the 'Meliá cases'. In this case, the principle of proximity seems to be relativized, but some connection between the controlling company and the claim would still be necessary to assert jurisdiction.

Academics also comment on specific matters that could fall under Art. 21, III. Tibúrcio, for example, questions whether the place where the contract was made should justify jurisdiction over any related dispute, even if all other elements have no connection to Brazil.[518] In this case, the author seems to demonstrate a concern with the actual strength between the connecting factor and the forum. Torts linked to multiple jurisdictions and damages suffered through the Internet are other topics of Art. 21, III that challenge traditional territorial solutions, motivating scholars to propose different jurisdictional approaches.

The bottom line is that these daunting questions often relate to how real and substantial the connection is, demanding from all legal actors not only to apply the proximity principle correctly but also to analyze it critically and decide when and how its application is appropriate.

In turn, Brazilian case law has shown that, explicitly or implicitly, the principle of proximity has been – though incipiently – present in some decisions. This appearance may herald that courts and parties have been developing a more profound concern with the reasons that legitimize the exercise of jurisdiction in practice – a movement likely initiated before 2016 and

[513] Jatahy, *supra* note 334 at 101–102 [translated by author] [footnote omitted]. More recently, see Ramos, *supra* note 17 at 209–210 and Rechsteiner *supra* note 327 at 265.
[514] For her complete argument, see Tibúrcio, *supra* note 205 at 66–72.
[515] *Ibid* at 69.
[516] Ramos, *supra* note 17 at 210.
[517] *Ibid* at 210–211.
[518] Tibúrcio, *supra* note 205 at 57–58.

fostered with the BCCP/15. Even if the parameters of proximity remain a smaller trend in the long run, its application should be accurate, mainly if used to assert jurisdiction in cases not provided for in the BCCP/15[519] due to the high risk of legal uncertainty it may yield.

Regarding *forum non conveniens*, even though courts have not yet applied it in jurisdictional matters, some facts cannot be overlooked: (i) some scholars advocate for its application in Brazil, (ii) parties have been arguing FNC in their claims and appeals, and (iii) courts have already adopted the theory of FNC to solve conflicts of internal competence. This scenario means that this corrective tool is, to some extent, present in the current framework and, although in a non-linear way, the courts are beginning to address it.[520] Like any other legal tool, handling this function of the proximity principle (whether to apply it or not) requires profound knowledge and caution since its use comes with the risk of denial of justice.[521] This situation is even more serious in Brazil, considering that FNC is extremely new and not yet codified.

The doctrinal sources and case law have also shown how the proximity principle could be used as an interpretative tool to address questions arising from the lack of direction or vagueness of some BCCP/15 provisions. Using proximity to guarantee that the connecting factor established in the code is truly substantial may be crucial to avoid that, in a specific dispute, the jurisdiction is exorbitant because based on a weak connection. So, even if a contract is signed in Brazil, if no other element strengthens the link concluding that no real jurisdiction exists may be the correct approach. In a country still reluctant to apply FNC, this interpretative use through proximity can be another way to help ensure that Brazilian decisions will be enforceable elsewhere because drawn on substantial connections. Due to the risks, however, of legal uncertainty and lack of predictability, resorting to this interpretative tool must be accurate and cautious, justifying, once again, perfecting its use.

Finally, the unusual STJ decisions regarding indirect jurisdiction merit some comments. Undoubtedly, most decisions still focus on only verifying whether the foreign authority decided on a matter of exclusive jurisdiction, an approach that, over the years, has facilitated the circulation of foreign decisions in Brazil and, consequently, access to justice in practice.[522] However, the STJ

[519] Take, for instance, the decision in *Caramori*, where the court expressly quoted Araújo stating that situations not covered by Art. 21-25 could be informed by the principle of reasonable jurisdiction.
[520] Gaspar & Paluma, *supra* note 103 at 85.
[521] See Lagarde, *supra* note 48 at 148.
[522] See Gaspar, "Reconhecimento", *supra* note 368.

decisions discussed above analyzed the competence of the foreign authority based on the link between the case and the forum. They reveal a different behaviour that may again signal a deeper concern with the connections. Even if these judgments remain a minor trend, when the parameters of proximity are adopted for this purpose, its handling must be made correctly and considered in its context since the timing of the proceeding is much different from when analyzing direct bases of jurisdiction. Due to this possibility, perfecting the use of this tool is a necessity.

This entire section demonstrates that the current procedural framework of Brazil demands legal actors to, at the very least, understand how to apply the principle of proximity in their arguments, claims and decisions. Besides comprehending its history, traditional purposes and current status, the timing is opportune to analyze this principle critically, considering the global reality and its impact on cross-border relations. Studying and applying the proximity principle must, therefore, be aligned with the current aspirations of PRIL, which aims to do more than simply locate the forum and applicable law, serving instead as an instrument of material justice.
Learning from the experience of another country with a long-lasting relationship with the principle of proximity will certainly be valuable to this process. Enter Canada.

2.5 Interim Conclusion

Before discussing the Canadian experience, it is important to outline that the findings of this chapter lead to the answer that motivated it in the first place. In a nutshell, it is possible to state that the status of the proximity principle as a jurisdictional instrument in Brazil is incipient and subject to improvements.

From a macro perspective, the new procedural framework set out by the BCCP/15 has promoted an unparalleled openness to proximity in the Brazilian juridical history. There is, consequently, a new compass guiding legal actors in jurisdictional matters, thus demanding a renewed look at the rules in force, less focused on sovereignty and more concerned with the effectiveness of jurisdiction and access to justice in its broadest sense. Within this macro scenario, the principle in question assumes different roles; it underlies the jurisdictional provisions of the new code, and it has been present in the interpretation of the courts which, albeit timidly, have shown greater concern with the truthfulness of the connections in the assumption of jurisdiction and even in specific cases of recognition and enforcement. And although there is not yet a true

acceptance of *forum non conveniens*, the topic continues to generate a debate that will probably continue for some time.

Despite this new room for the proximity principle, the manners it has been handled and applied can be improved. On the one hand, the perusal of the Brazilian doctrine shows that there is still much discussion and unanswered questions regarding the connecting factors that underlie jurisdiction. Furthermore, although it does not go unnoticed, there is little scholarly writing that actually tackles seriously the many layers of complexity of this principle, which may lead to its misinterpretation and misuse. The Brazilian courts, in turn, still struggle to correctly handle elementary issues of PRL, which ends up directly and indirectly impacting the use of proximity. In the few cases that proximity was identified, many show room for deepening knowledge and improving its adoption.

In view of the above, considering the recent procedural changes and the relevance that this principle still has in the international jurisdictional setting, the timing to perfecting the use of the proximity principle in Brazil is particularly opportune, which is why a comparative study with an experienced country can be helpful.

CHAPTER THREE: THE CANADIAN ANGLE – A LONG-LASTING RELATIONSHIP WITH THE REAL AND SUBSTANTIAL CONNECTION TEST

Delving into Canada's jurisdictional framework and the history that led the country to its current landscape is as intriguing as it is enriching. By virtue of the many times that the provincial courts, the Supreme Court of Canada (SCC) and Canadian scholars have dealt with jurisdictional matters, one can learn a lot about the nuances, needs and pitfalls that these issues can raise in cross-border disputes. Even more salient to the purposes of this research are the decades that Canada has already spent discussing the real and substantial connection test, an approach that strongly resonates with the lodestar of this Thesis: the principle of proximity.[523]

This chapter explores this rich Canadian scenario, focusing on the RSC. The aim is to provide an overview[524] of the history, evolution and analysis already undertaken in Canada

[523] In fact, Castel has already used the terms "real and substantial connection" and "principle of proximity" interchangeably. See Castel, *supra* note 217.

[524] The narrative will be essentially descriptive as an attempt to avoid distortions that employing my point of view could cause at this stage. Coming from a civilian tradition, situated in the global south, from a country that adopts a different arrangement regarding the power of the courts and the states (which are the Brazilian version of 'provinces'), describing Canada as an outsider with no personal inputs seemed the most appropriate way to develop this chapter.

regarding the RSC, allowing me to later extract important lessons that Brazil can use to better apply the proximity principle in its own jurisdictional dilemmas. Section 3.1 describes the history that led the SCC to establish, in 2012, the framework that dictates the jurisdiction law in Canada to this day. Section 3.2 discusses this current framework in more detail, while the last one (Section 3.3) briefly compiles some scholarly assessments regarding its effects in the last decade.

Before moving on, two caveats are necessary.

First, the provincial analysis in this section focusses on the law of Ontario. Because of the constitutional division of powers,[525] Canada does not have one single uniform 'Canadian law'. The provinces are granted legislative power over private law and civil procedure, having the autonomy to enact statutes and codes on the same subjects.[526] So, as long as constitutional requirements are met, all these regulations coexist. Consequently, undertaking research on Canada – as an entire country – would require analyzing all these distinct regulations, which would not be possible in this Thesis format. For the current purposes, Ontario is an appropriate choice because it has been the source of several cases dealing with the real and substantial connection. Since it has not thus far enacted or adopted legislation on jurisdiction, the province still governs its jurisdictional matters on that case law, as well as the framework established by the Supreme Court.

Second, even though Canadian history shows a solid line of discussions and development on jurisdiction and the RSC test, many inquiries today remain unanswered, and several aspects are yet to be settled. As a largely common law system, tackling certain issues depend almost exclusively on cases to be brought before the courts, an initiative that involves many variants that impact the parties' choice to litigate or not and even to get to the Supreme Court. As such, a topic can take decades to be ultimately decided and incorporated as a major change of the Law. This constant 'work in progress' reality should be taken into account not only regarding the portrait I draw in the next lines but also regarding any inspiration or insights Canada can provide to Brazil.

[525] For a thorough overview of the Canadian Constitutional Law, see Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019).

[526] The Uniform Law Conference of Canada, for example, promulgated the Court Jurisdiction and Proceedings Transfer Act that focuses specifically on the law of judicial jurisdiction in Canada. So far, three provinces have adopted it: British Columbia, Saskatchewan and Nova Scotia. Quebec, in turn, has its own civil code and regulates jurisdiction in its Book Ten, which is entirely dedicated to private international law.

3.1 The Real and Substantial Connection in the Canadian Context: Timeline and Milestones until 2012

Although the RSC test can be traced to a time before the Supreme Court's judgment[527] in *Morguard Inv. Ltd. v. De Savoye*,[528] this decision was the one that "enshrined it [the RSC] as a central jurisdictional principle in 1990"[529] and, in doing so, ushered in a new era[530] of reordering the relationship between PRIL and the Canadian constitutional system.[531] *Morguard* dealt with an enforcement action involving two provinces: a judgement rendered in Alberta to be enforced in British Columbia.[532] In short, the SCC faced the issue of under what circumstances a decision of one Canadian sister province would be enforceable in another.[533] At that time, Canadian courts relied solely on two jurisdictional grounds for enforceability: the defendant's submission to the original forum (i.e., consent) or service in that province (i.e., presence),[534] conditions that would have rendered *Morguard* unenforceable since neither of these bases were met.[535] The Supreme Court, however, appraised this scenario as outdated and misaligned with a modern Canadian federation,[536] unanimously stating that the common law had to change.[537]

The SCC first established the premise that sister provinces should be obliged to recognize judgments rendered by other provinces, mainly considering the federal system of Canada.[538] Such an obligation, though, was not automatic, and required that the decision was given by a court that

[527] The RSC test in Canada was inherited from the English common law, which originally developed it in the case *Indika v Indika*. Matthew Johnson, "One More Brick in the Wall: The Impact of Personal Jurisdiction of Ex Juris Defendants on the Relationship between the United States and Canada" (2015) 4:1 Penn St JL & Int'l Aff 522 at 538. Prior to *Morguard*, Canada had already used it three times. See Blom & Edinger, *supra* note 52 at 377–378.
[528] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 [*Morguard*].
[529] Blom & Edinger, *supra* note 52 at 377.
[530] Blom explains that, despite the 'natural' points of contact between PRIL and the constitution, the relationship between these two systems only began to be well developed with and because of *Morguard*, considering that, until then, they practically 'ignored' each other. See a detailed explanation of this setting in Joost Blom, "Constitutionalizing Canadian private international law – 25 years since Morguard" (2017) 13:2 Journal of Private International Law 259 [Blom, "Constitutionalizing"] at 261–265.
[531] *Ibid* at 259. See also Monestier, "Stll a Mess", *supra* note 203 at 400.
[532] Blom, "Constitutionalizing", *supra* note 530 at 265.
[533] Monestier, "Still a Mess", *supra* note 203 at 400.
[534] *Ibid*. As will be seen below, most traditional bases still ground jurisdiction and coexist with the RSC test. These bases, however, are outside the scope of this research, which focuses entirely on proximity.
[535] Blom, "Constitutionalizing", *supra* note 530 at 266.
[536] Monestier, "Still a Mess", *supra* note 203 at 400.
[537] Blom, "Constitutionalizing", *supra* note 530 at 266.
[538] *Morguard*, *supra* note 528 at 21–24. This obligation was confirmed in a subsequent decision, *Hunt v T & N plc*, *infra* note 546.

exercised reasonable jurisdiction. As such, one of the main changes[539] of *Morguard* was the acknowledgement that the exercise of jurisdiction should be 'reasonable', which could be achieved through a real and substantial connection with the forum where the lawsuit occurred.[540] The SCC attempted, therefore, to balance order and fairness, understanding the latter as rooted in the close contacts between the case, the defendant, and the jurisdiction.[541] In practical terms, this meant that Alberta had jurisdiction under this new approach and therefore British Columbia was obliged to recognize and enforce the Alberta judgment.[542]

Notwithstanding the enforcement nature of the claim, the SCC underscored that the assumption of jurisdiction and recognition of judgments between provinces should be seen as directly related.[543] This suggested that defendants would have to defend themselves regardless of where a lawsuit was initiated in Canada unless they could demonstrate that the connection between the dispute and the province was insufficient.[544] As such, *Morguard* has profoundly impacted both ends of the spectrum to the extent that "jurisdiction over out-of-province defendants [could] be legitimate both from the perspective of the rendering court and the recognizing court based on a real and substantial connection test."[545] The SCC later declared that the new enforcement rule from

[539] Blom explains that, besides the RSC, the SCC also focused on the duty of comity in PRIL, which was crucial for the reality of a changing world with constant mobility of people, skills, and wealth. Comity, therefore, required less barriers for the enforcement of judges to facilitate the characteristic flow of the modern reality. Blom, "Constitutionalizing", *supra* note 530 at 266. For further details, see also Joost Blom, "The Enforcement of Foreign Judgments: Morguard Goes Forth into the World" (1997) 28:3 Can Bus LJ 373 at 374–375 [Blom, "The Enforcement"].
[540] Blom, "The Enforcement", *supra* note 539 at 376.
[541] See Johnson, *supra* note 527 at 539–540.
[542] *Morguard*, *supra* note 528 at 1111. See also Blom, "The Enforcement", *supra* note 539 at 376.
[543] As stated by the SCC, "(…) the conditions governing the taking of jurisdiction by the courts of one province and those under which they are enforced by the courts of another province should be view as correlative. If it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject-matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment." *Morguard*, *supra* note 528 at 1094. Although *Morguard* has significantly impacted the jurisdictional grounds for recognition and enforcement, this Thesis does not primarily focus on these effects and emphasizes, instead, the influence it had on jurisdiction and on judgments that later focused on direct jurisdiction *per se*. To explore the R&E facet, see Blom, "The Enforcement", *supra* note 539; Stephen GA Pitel, "Enforcement of Foreign Judgments: Where Morguard Stands after Beals" (2004) 40:2 Can Community LJ [Pitel, "Enforcement"]; and Tanya J. Monestier, "Jurisdiction and the Enforcement of Foreign Judgments" (2013) 42:1&2 Advoc Q 107 [Monestier, "Jurisdiction"].
[544] Blom, "The Enforcement", *supra* note 539 at 376.
[545] Geneviève Saumier, "Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business" (1995) 18:2 Dalhousie LJ 447 at 465 [Saumier, "Judicial Jurisdiction"].

Morguard was a constitutional imperative, limiting the legislative competence of the provinces in this matter.[546]

Despite the undeniable revolution of *Morguard* in Canadian law,[547] the years following the decision unveiled its shortcomings. Driven by the goal of ensuring flexibility in the process of assessing jurisdiction, the SCC left the real and substantial connection test wide open[548] and did not define its content. In *Hunt*, e.g., the SCC "chose not to further define the scope and application of the real and substantial connection test,"[549] and La Forest J. expressly stated that the RSC "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction. (…) The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied (…)."[550]

Moreover, the modifications in *Morguard* did not erase the previous traditional jurisdictional bases from the picture. This subject was debated for years afterwards but, ultimately, consent and presence in the province remained valid jurisdictional grounds in the Canadian framework. *Morguard* introduced the RSC test as an additional basis, precisely considering those cases not covered by those traditional grounds, i.e., in which the defendant had not submitted to the court, and was outside that court's jurisdiction.[551] In fact, it is worth noting that, before *Morguard*, statutory rules for service outside a given province also functioned as bases for jurisdiction, which meant that the same connecting factors that authorized service abroad without leave of the court were used to ground jurisdiction as well.[552] In the following years, however, due to the wide and general concept of the RSC criterion, the Canadian courts had to face the question "of how far the traditional jurisdictional rules comport with the constitutional norm,"[553] leading

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[546] Blom, "Constitutionalizing", *supra* note 530 at 267. The SCC's decision that has confirmed such a constitutional basis was *Hunt* rendered in 1993. See *Hunt v T & N plc*, [1993] 4 SCR 289 [*Hunt*]. *Morguard* was, in fact, the starting point of a set of judgments that, throughout the years, have had ground-breaking implications in the relationship between private international law and the Canadian constitutional system. Despite the relevance of this process, and without ignoring its existence, this Thesis does not focus on this specific – and complex – aspect of PRIL in Canada as it has no direct impact on the purposes of this research. For an overview from the constitutional perspective of the Canadian PRIL, see Blom, "Constitutionalizing", *supra* note 530.

[547] Stephen G. A. Pitel & Cheryl D. Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85:1 Can B Rev 61 at 62.

[548] Monestier explains that the SCC only defined – in *Hunt* – that the test *was not* a mechanical counting of connections but failed to outline its content. Tanya Monestier, "A Real and Substantial Mess: The Law of Jurisdiction in Canada" (2007) 33:1 Queen's L J 179 at 401 [footnotes omitted] [Monestier, "A Mess"].

[549] Johnson, *supra* note 527 at 541 [footnote omitted].

[550] *Hunt*, *supra* note 546 at 40.

[551] See *Morguard*, *supra* note 528 at 27–28.

[552] See Pitel & Dusten, *supra* note 547 at 62.

[553] Edinger & Blom, *supra* note 52 at 391.

lower courts to take "somewhat differing views,"[554] an issue that touched upon transient presence and service *ex juris*. It took more than two decades for the SCC to clearly dissociate service from jurisdiction;[555] service was eventually defined as a procedural matter that could no longer base the jurisdiction of the courts. In turn, other forms of presence (such as residence) remained part of the jurisdictional law.

From the summary above, it should be clear that, although the general RSC approach established in *Morguard* had the advantage of broadening the scope for enforcement of a foreign judgment, the decision raised many questions to be dealt with afterwards. The test was highly imprecise, especially to be applied as a direct jurisdictional rule. The fact that the SCC declined to provide further instructions that were very much needed did not help. Particularly regarding predictability, the Court left the issue of 'order and fairness' entirely to the courts' assessment on a case-by-case basis[556] and, in consequence, Canadian courts struggled to structure the RSC for about a decade,[557] visibly reducing the degrees of certainty.[558] As Blom puts it, "[t]he test was frequently litigated because it drew on the totality of the facts of the case, and the decisions in individual cases did not readily fall into any pattern that would offer even a modicum of precedential guidance."[559]

The first initiative attempting to offer some contours to the RSC test happened in 2002 when the Ontario Court of Appeal (ONCA) rendered its decision in *Muscutt v Courcelles*.[560] The Court heard five companion cases whose facts were very similar and related to torts occurring outside Ontario; the five actions raised the common question of "whether Canadian courts should assume jurisdiction over out-of-province defendants in claims for damage sustained in the province as a result of torts occurring elsewhere."[561] The Ontario court drew a list of eight non-exhaustive factors – composed of both factual factors and policy-driven considerations[562] – that should be considered when determining whether a real and substantial connection existed to base

[554] *Ibid*.
[555] *Van Breda v Village Resorts Ltd*, [2012] SCC 17 [*Van Breda*] at para 83.
[556] Blom, "The Enforcement", *supra* note 539 at 383.
[557] Monestier, "Still a Mess", *supra* note 203 at 401.
[558] Blom, "Constitutionalizing", *supra* note 530 at 271.
[559] *Ibid*.
[560] *Muscutt v Courcelles*, [2002] 213 D.L.R. (4th) 577 (Ont. C.A) [*Muscutt*].
[561] Janet Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" (2003) in 2002 Annual Review of Civil Litigation 61 at 61 [Walker, "Beyond"].
[562] Joost Blom, "New Ground Rules for Jurisdictional Disputes: The Van Breda Quartet" (2012) 53:1 Can Bus LJ 1 at 2 [Blom, "New Ground Rules"].

jurisdiction.[563] Only the first two factors, however, related directly to the connections between the forum and the parties[564]: (1) the connection between the forum and the plaintiff's claim and (2) the connection between the forum and defendant.[565] The other factors focused on fairness, involvement of third parties and comity.[566]

Although all factors received criticism,[567] the most controversial were the ones related to fairness to the parties.[568] Shortly after *Muscutt*, Monestier already stated that the subjective considerations required by factors like 'fairness' turned the jurisdictional question into a discretionary determination, impeding parties from making informed decisions given the lack of predictability.[569] Such a transformation also rendered the distinction between jurisdiction *simpliciter* and FNC redundant since the individual appraisals supposed to happen in the FNC stage were anticipated to the jurisdictional inquiry.[570]

The concerns and pitfalls foreshadowed by academics were proven to be true. Even though the SCC never openly endorsed the *Muscutt* factors,[571] they were widespread both in Ontario and elsewhere in common law Canada as a guide for jurisdictional determination.[572] Such a massive adoption of *Muscutt* ended up revealing the issues of uncertainty and discretion arising from

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[563] Gerard J. Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall L J 79 at 83.

[564] Blom, "New Ground Rules", *supra* note 562 at 2. Monestier criticized this structure because, since the idea of the RSC in *Morguard* was to protect the defendant against lawsuits in forums with little or no connections, the lack of connections in the six remaining *Muscutt* factors distanced them from the goals and instructions of the SCC. Monestier, "A Mess", *supra* note 548 at 184–186.

[565] *Muscutt*, *supra* note 560 at paras 77–85.

[566] Respectively, factors (3) Unfairness to the defendant in assuming jurisdiction, (4) Unfairness to the plaintiff in not assuming jurisdiction, (5) Involvement of other parties to the suit, (6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis, (7) whether the case is interprovincial or international in nature, and (8) comity and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere. *Muscutt*, *supra* note 560 at paras 86–110.

[567] For a thorough and elucidative critical analysis of each of the *Muscutt* factors see Monestier, "A Mess", *supra* note 548 at 193–205. More generally, Walker provides a complete compilation of the main criticisms in scholarly writing cited by the Court of Appeal in its review of the law. See Janet Walker, "The Distant Shore: Discretion and the Extent of Judicial Jurisdiction" in Andrew Dickinson and Edwin Peel, eds, A Conflict of Laws Companion (Oxford University Press, 2021) at 62 footnote 37 [Walker, "The Distant Shore"].

[568] Blom, "New Ground Rules", *supra* note 562 at 2. See also Johnson, *supra* note 527 at 543.

[569] Monestier, "A Mess", *supra* note 548 at 187–188; 191.

[570] See *ibid* at 192. It is worth noting that, even before *Muscutt*, Saumier had already discussed the confusing effects that adopting similar criteria (i.e., the broad concept of the RSC test) to decide on jurisdiction *simpliciter* and FNC could yield in the Canadian common law, ultimately jeopardizing the recognition and enforcement of foreign judgments. See Saumier, "Forum Non Conveniens", *supra* note 204 at 130–131.

[571] Monestier, "A Mess", *supra* note 548 at 183.

[572] Monestier, "Still a Mess", *supra* note 203 at 402. Indeed, Walker adduces that *Muscutt* "was cited (directly and indirectly) in more than 400 decisions across Canada in the years before the Supreme Court of Canada rendered its decision [in Van Breda]." Walker, "The Distant Shore", *supra* note 567 at 62 footnote 35.

factors that were not based on factual connections. Consequently, despite the efforts and virtuous purpose of the Ontario Court of Appeal, it became evident that the eight-factors design had rendered the jurisdictional analysis excessively more complex and unpredictable.[573] Even 'simpler' cases that, in theory, should cause no doubt about courts' provincial jurisdiction were subjected to the eight factors scrutiny, making these actions longer and more complicated.[574]

Besides complex, the factors ended up being too flexible, and kept offering too much judicial discretion, still leading to inconsistency and unpredictability of application[575] – which was precisely the situation that the ONCA had (unsuccessfully) tried to address regarding the contours of the RSC. As such, the *Muscutt* framework increased litigation and favored the procrastinating use of jurisdictional motions.[576]

The specific concerns about the 'fairness factors' were also confirmed. The Appeal Court itself pointed out years later that one of the main concerns about these factors was that "the Muscutt test allows ill-defined fairness considerations to trump order in an area of the law where order should prevail," also opening the doors to forum shopping and overlapping with *forum non conveniens*.[577] As Walker elucidates, "it soon became clear that such a multifactorial case-specific analysis would not produce certainty. The factors of 'unfairness to the defendant in accepting jurisdiction' and 'fairness to the plaintiff in denying jurisdiction' required an exercise of discretion as extensive as that involved in determining convenient forum."[578]

In sum, the *Muscutt* factors did not truly narrow down nor give actual contours to the general principle of the RSC. The imprecisions and difficulties stemming from the broad approach in *Morguard* had either remained or increased with the ONCA's decision. Meanwhile, the Supreme Court remained hesitant to offer some guidance[579] and said very little about how to meet the RSC criterion.[580]

It was only after a whole decade that the SCC finally faced the issue and rendered a group of companion decisions outlining the RSC standard;[581] the watershed judgement in *Club Resorts*

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[573] Monestier, "A Mess", *supra* note 548 at 205. See also *Van Breda v Village Resorts Ltd*, [2010] ONCA 84 at para 56 [*Van Breda* (ONCA)].
[574] Monestier, "A Mess", *supra* note 548 at 205.
[575] *Van Breda* [ONCA], *supra* note 573 at para 56.
[576] *Ibid* at para 56. For a complete summary of the criticisms see numbers (1) to (8) of para 56.
[577] *Ibid*.
[578] Walker, "The Distant Shore", *supra* note 567 at 62.
[579] Monestier, "A Mess", *supra* note 548 at 182.
[580] Black, *supra* note 12 at 414–415.
[581] *Ibid* at 415.

v. Van Breda[582] was, therefore, long-waited to finally define "how easy, or how difficult, it would be for plaintiffs to sue foreign defendants in Ontario (and by extension, Canada)."[583]

3.2 The Current Jurisdictional Framework in Common Law Canada: an Ontario Law Perspective

Although the SCC rendered a trilogy of decisions in 2012, *Van Breda* was the one that promoted a reworking of the RSC test[584] and remains "the leading decision on judicial jurisdiction in Canada" [585] to this day. The next pages will thus focus solely on the *Van Breda* judgement in order to discuss the proximity principle more profoundly. The first section (3.2.1) highlights the chief goal of the SCC and the general change it has made regarding the RSC standard. Section 3.2.2, in turn, addresses the specific propositions established in *Van Breda* concerning the proximity principle.

3.2.1 *Van Breda v Club Resorts*: The Supreme Court's Verdict

As Monestier accurately puts it, the two companion actions in *Van Breda* involved tragic facts.[586] In *Club Resorts v. Van Breda*, Ms. Van Breda suffered a severe accident while staying at a resort in Cuba, ultimately becoming paraplegic. In *Club Resorts Ltd. v. Charron*, Dr. Charron died participating in scuba diving organized by another Cuban resort (both hotels managed by the defendant Club Resorts), also during a family vacation.[587] Both claims, therefore, aimed at recovering damages for torts (injury or death) that happened abroad. The plaintiffs sued several local defendants, but the Canadian jurisdiction over the Cuban party was put into question.[588] Given the scenario of unpredictability and confusion caused by the *Muscutt* factors, as well as the

[582] Black explains that *Van Breda* encompassed three judgments: one for two negligence claims and two others in defamation cases. *Ibid* at 418. The cases in question are, respectively: *Van Breda v Village Resorts Ltd*, [2012] SCC 17 [*Van Breda*]; *Banro Corp v Éditions Écosociété Inc.*, [2012] SCC 18 [*Banro*]; and *Black v Breeden*, [2012] SCC 19 [*Black*].
[583] Monestier, "Still a Mess", *supra* note 203 at 405.
[584] Black, *supra* note 12 at 418.
[585] Walker, "The Distant Shore", *supra* note 567 at 63.
[586] Monestier, "Still a Mess", *supra* note 203 at 405.
[587] *Ibid* at 405–406. Besides the author's explanation of the facts, it is also worth seeing the summary the SCC offers in *Van Breda*. See *Van Breda*, *supra* note 555 at paras 2–8.
[588] Monestier, "Still a Mess", *supra* note 203 at 406.

factual similarities between *Van Breda*/*Charron* and *Muscutt*, the *Van Breda* case was an opportunity to tackle the main criticisms received by that jurisdictional framework.[589]

First, the Ontario Court of Appeal, in its *Van Breda* decision,[590] attempted to reconfigure the *Muscutt* test by implementing a two-step analysis; as a first step, it created a set of presumptive real and substantial connections based on most sub-sections of the service rules in Rule 17.02 of the Ontario Rules of Civil Procedure.[591] Second, it decided to apply "a newly formulated real and substantial connection test in light of the presumption in Step 1."[592] In a nutshell, the ONCA maintained the first two original *Muscutt* factors as part of the RSC inquiry, while the other six became analytic tools[593] in the process of "assessing the relevance, quality and strength of the connections with the forum."[594]

Dissatisfied with the outcome at the appealing instance, Club Resorts Ltd appealed once again and the case reached the SCC. The highest court in Canada, however, took another turn and reformulated the RSC in *Van Breda* by adopting a different approach from the ONCA.[595] It ultimately rejected the *Muscutt* factors[596] and established a new jurisdictional framework. The chief goal that drove the Supreme Court was, thus, the "simplification of the law in the service of increased predictability."[597] Justice LeBel recognized the need to balance fairness against the necessity of having clear rules that promoted certainty,[598] openly stating that "[j]ustice and fairness are undoubtedly essential purposes of a sound system of private international law. *But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction* by a court."[599] Predictability was, therefore, at the

[589] See *ibid* at 402–403.
[590] *Van Breda* [ONCA], *supra* note 573.
[591] Monestier, "Still a Mess", *supra* note 203 at 403–404.
[592] *Ibid* at 404.
[593] *Ibid*.
[594] *Van Breda*, *supra* note 555 at para 58.
[595] See Blom, "Constitutionalizing", *supra* note 530 at 271.
[596] Sophie Stoyan, "Just a click away? Jurisdiction and virtually carrying on business in Canada" (2017) 13:3 Journal of Private International Law 602 at 604.
[597] Black, *supra* note 12 at 419.
[598] Kennedy, *supra* note 563 at 83.
[599] *Van Breda*, *supra* note 555 at para 73 [emphasis added].

forefront of the decision,[600] and in a conflict between certainty and fairness, the latter would have to surrender.[601]

To achieve this central purpose, the SCC determined that the RSC test should not be applied as a conflict rule in itself[602] and, as such, should not directly rule the assumption of jurisdiction.[603] It differentiated, for the first time, the RSC as a constitutional limit from the conflict rules governing jurisdiction,[604] which, as such, "was not to be deployed as if it, itself, were a conflicts rule."[605] Such disaggregation was the main general change promoted by *Van Breda*.[606]

As a constitutional principle, the RSC remained imperative, imposing limits on the assumption of jurisdiction.[607] To fit, however, in the new jurisdictional approach, such a connection had to be identified in each case in a predetermined list[608] of presumptive connecting factors (PFC), which would trigger a presumption that a RSC indeed existed.[609] As a result, the current jurisdictional framework can be summarized as follows:

> So the common law development of assumed jurisdiction in Canada now consists of judges interpreting and applying the four connecting factors for tort established in *Club Resorts*, exploring possible new connecting factors for tort claims, and identifying presumptive connecting factors for claims other than tort and fleshing out their contours."[610]

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[600] Blom, "Constitutionalizing", *supra* note 530 at 271. See also Stephen G.A. Pitel & Vaughan Black, "Assumed jurisdiction in Canada: identifying and interpreting presumptive connecting factors" (2018) 14:2 Journal of Private International Law, 193 at 223.
[601] Monestier, "Still a Mess", *supra* note 203 at 408.
[602] In this vein, these extracts are elucidative: "[30] If it [the RSC test] is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system."; "[70] The real and substantial connection test does not mean that problems of assumption of jurisdiction (…) must be dealt with on a case-by-case basis by discretionary decisions of courts (…). Judicial discretion has an honourable history (…). Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of a private international law system." *Van Breda, supra* note 555 at paras 30; 70.
[603] Stephen G. A. Pitel, "Checking in to Club Resorts: How Courts Are Applying the New Test for Jurisdiction" (2013) 42:1&2 Advoc Q 190 at 190 [Pitel, "Club Resorts"].
[604] Blom, "Constitutionalizing", *supra* note 530 at 272. See also Pitel, "Club Resorts", *supra* note 603 at 190.
[605] Blom, "Constitutionalizing", *supra* note 530 at 272. In this sense, Blom's explanation about the distinction between *Muscutt* and *Van Breda* is highly clarifying: "The *Muscutt* factors were a means of applying the real and substantial connection concept directly as a working rule, whereas the *Van Breda* approach requires judges to work with specific rules that fit within, but are distinct from, the constitutional principle." Blom, "New Ground Rules", *supra* note 562 at 4–5.
[606] See Elizabeth Edinger, "Club Resorts Ltd. v. Van Breda: Extraterritoriality Revisited" (2014) 55:2 Can Bus LJ 263 at 269 [Edinger, "Club Resorts"].
[607] Monestier, "Still a Mess", *supra* note 203 at 407.
[608] *Van Breda, supra* note 555 at paras 82–90.
[609] Pitel, "Club Resorts", *supra* note 603 at 190.
[610] Pitel & Black, *supra* note 600 at 194.

To better understand how this new approach can offer insights into the Brazilian jurisdictional scenario, some specific propositions of *Van Breda* are discussed below.

3.2.2 The Key Propositions of Van Breda

a. A List of Presumptive Connecting Factors

As pointed out above, *Van Breda's* new approach came to remedy a context of imprecision and confusion with which courts struggled since 1990.[611] The SCC responded to this scenario by separating the constitutional principle of the RSC and the conflict rules that must comply with this overriding test.[612] To that end, it established a list of specific factors that presumably ensured the existence of a real and substantial connection in cases of adjudicatory jurisdiction, thus opposing a regime grounded on almost pure judicial discretion.[613] The PCFs came, therefore, to offer the direction and precision that had been missing so far. Identifying PCFs became "not merely an aid to establishing jurisdiction *simpliciter*, but the sole means of doing so."[614] After *Van Breda*, the Canadian courts cannot assume jurisdiction over a foreign defendant if no connecting factor is identified.[615]

Even though *Van Breda* was a negligence case, the SCC did not design the four PCFs solely for negligence; the list aimed to encompass tort claims in general.[616] Such connecting factors are categories of factual connections[617] to the extent that the courts should consider only objective criteria in their jurisdictional analysis; considerations of fairness, comity and efficiency were redefined as analytical tools, assisting the appraisal of the RSC test but not grounding jurisdiction on their own.[618] Thus, non-presumptive connecting factors cannot bundle up to base an assumption of jurisdiction as this would "open the door to case-by-case determinations of jurisdiction, which would undermine the order and predictability that the new test [was] designed to foster."[619]

The first connecting factor is the defendant's domicile or residence in the province. This connector relates to general jurisdiction since it is "not specific to holiday torts,"[620] and given its

[611] See *Van Breda*, *supra* note 555 at para 67.
[612] Blom, "New Ground Rules", *supra* note 562 at 8.
[613] *Van Breda*, *supra* note 555 at para 75.
[614] Blom, "New Ground Rules", *supra* note 562 at 10.
[615] *Van Breda*, *supra* note 555 at para 93.
[616] Pitel & Black, *supra* note 600 at 193–194.
[617] Blom, "Constitutionalizing", *supra* note 530 at 272.
[618] See *Van Breda*, supra note 555 at para 79.
[619] Monestier, "Still a Mess", *supra* note 203 at 409.
[620] Walker, "The Distant Shore", *supra* note 567 at 65.

generality and widespread acceptance (particularly residence), it is often used for other types of claims.[621] A defendant may, therefore, always be sued in their forum of residence or domicile.[622] The second PCF is also centred around the defendant[623] as it deems 'carrying on business in the province' a presumed sufficient connection, even though the defendant is not resident or domicile therein.[624] To qualify as a PCF, however, this activity must take the form of actual presence (such as having an office or visiting the province regularly) rather than a virtual presence through advertising or websites.[625]

The last two connecting factors focus on the subject matter under dispute.[626] PCF number three refers to the situs of the tort, i.e., it presumes that the place of a tort indicates a RSC between the forum and the tort in question.[627] While the SCC raised no questions regarding the appropriateness of this connector based on its wide use in different Canadian statutes and precedents,[628] it did recognize that such a PCF imposes the difficulty of locating the place of the tort.[629] The last factor refers to a contract connected with the dispute that was made in the province. So, even if a tort is committed abroad by a non-resident defendant that carried on no business there, a Canadian court may still have jurisdiction if that tort has a link with a contract concluded in the forum.[630] Black considers this connector peculiar because, on the one hand, the term 'connected with' moves away from the SCC's original intention of only grounding jurisdiction on objective

[621] See Black, *supra* note 12 at 422. The author also explains that the choice of domicile by the SCC was surprising because, in the Canadian common law, this term was still affiliated with precedents of English decisions of the nineteenth century. For further details, see *ibid* at 422–423.
[622] *Van Breda*, supra note 555 at para 86.
[623] Johnson, *supra* note 527 at 547.
[624] Black, *supra* note 12 at 423.
[625] Blom, "New Ground Rules", *supra* note 562 at 14. About virtual presence, the SCC was mainly concerned with avoiding creating forms of universal jurisdiction. *Van Breda*, supra note 555 at para 87. It cautioned, however, that the cases at hand were unrelated to e-trade and, in this vein, Stoyan's words are noteworthy: "Thus, by including this e-trade distinction, the Supreme Court of Canada alerted courts to the possibility that jurisdiction may be based solely on a defendant's online business activities. In other words, (…) *Van Breda* laid the foundation for a virtually carrying on business rule." Stoyan, *supra* note 596 at 605. Interestingly, the SCC was not explicit on whether there should be a link between the activities of the defendant and the case; it authorized, though, the presumption to be rebutted if the dispute was unconnected to the defendant's activities in the province. As a result, although there is a logical rationale that such a link should exist to justify jurisdiction, this argument was left to the rebuttal stage. Blom, "New Ground Rules", *supra* note 562 at 14.
[626] Johnson, *supra* note 527 at 548–549.
[627] Black, *supra* note 12 at 424.
[628] *Van Breda*, supra note 555 at para 88.
[629] *Ibid*.
[630] Blom, "New Ground Rules", *supra* note 562 at 16–17.

connectors;[631] on the other, the factor is *per se* debatable since the place of making the contract is not widely acknowledged by other Canadian sources – differently, e.g., from the place of substantial performance.[632]

One final comment deserves our attention. By repealing the *Muscutt* factors and creating the four PCFs, the SCC banned fairness as a jurisdictional basis (and other non-objective factors) "on the grounds that they [were] too attenuated and should not be separated from the factual factors announced in *Van Breda*."[633] The Supreme Court rejected thus the *Muscutt* approach, i.e., the direct and free-form inquiry into fairness from the RSC assessment.[634] Fairness, however, was not completely ruled out from the jurisdictional decision as a whole since, at least in theory, fairness was already embedded in the connecting factors listed in *Van Breda*.[635] Also, as noted earlier, fairness assumed the role of analytical tool to assist the judicial consideration of whether the RSC test is truly met and remained part of the FNC stage.

b. Other characteristics of Van Breda's PCFs

When articulating the list, the Supreme Court attributed two crucial characteristics that are particularly relevant to this Thesis. The first one reveals itself in the name: '*presumptive* connecting factors'. This means that if the connectors are only presumptions, they are subject to rebuttal.[636] As a result, when the plaintiff is able to file a claim based on a PCF, the onus to challenge the presumption shifts to the other party.[637] The SCC offered guidance on how a PCF could be rebutted: "That [challenging] party must establish facts which demonstrate that the presumptive connecting factor *does not point to any real relationship* between the subject matter

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[631] Monestier poses the same question and offers at least two interpretations to the phrase 'connected with'. See Monestier, "Still a Mess", *supra* note 203 at 426–427.
[632] Black, *supra* note 12 at 425–426.
[633] Johnson, *supra* note 527 at 544 [footnote omitted].
[634] Black, *supra* note 12 at 420.
[635] See *ibid* at 437. Even before 2012, Saumier had already insightfully explained how residence, e.g., relates directly with fairness: "Assuming the adoption of a more substantial criterion such as residence as opposed to mere presence, subjection to 'home' jurisdiction would not involve any *prima facie* injustice to the defendant. Provided that residence is defined in terms that ensure a real and substantial connection between the defendant and the forum, it fulfils the conditions of order and fairness (…). A residence rule meets the requirements of certainty and predictability which serve both order and fairness. The fairness principle also seeks to prevent subjecting the defendant to a jurisdiction with which she has no connections; this is respected under a residence rule defined in terms of real and substantial connections between the party and the forum." Saumier, "Judicial Jurisdiction", *supra* note 545 at 469 [footnotes omitted].
[636] Pitel & Black, *supra* note 600 at 197.
[637] Monestier, Still a Mess", *supra* note 203 at 409.

of the litigation and the forum or *points only to a weak relationship* between them."[638] Therefore, the criteria that authorize a rebuttal rely either on the lack of factual existence of a substantial relationship or the weakness of the relationship identified.[639]

A second distinctive characteristic is that the four PCFs list is not closed, meaning that courts can add presumptive connectors for other tort cases and will need to find new factors for other causes of action.[640] In other words, if the plaintiff fails to satisfy one of the pre-established PCFs, it is still possible for the court to assume jurisdiction if such a plaintiff convinces the court to acknowledge a new PCF.[641] Once again, the SCC provided some directions. Generally, Le Bel J. stated that PCFs should point to a relationship between the dispute and the forum reasonable enough for the defendant to expect to litigate in that venue.[642] He then added specific instructions involving "similarity with already recognized factors and the treatment of the new factor in case law, statute law, and the private international law of other legal systems."[643] Ultimately, he underlined the role that order, fairness and comity can play as analytical tools in appraising the strength of the new connection.[644] By giving these instructions, the SCC emphasized that only actual PCFs (both listed and new) could ground the jurisdiction of Canadian courts: "The list of common law PCFs, in other words, is capable of growth but it is the only route to establishing jurisdiction *simpliciter*." [645]

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[638] *Van Breda*, supra note 555 at para 95 [emphasis added].
[639] A contract made in the province, e.g., with little or no connection with the dispute, can show that the relationship with the forum is not sufficiently strong to ground jurisdiction. *Ibid* at para 96.
[640] Black, *supra* note 12 at 427.
[641] *Ibid* at 420.
[642] *Van Breda*, *supra* note 555 at para 92.
[643] Blom, "New Ground Rules", *supra* note 562 at 19 [footnote omitted]. See also *Van Breda*, *supra* note 582 at para 91.
[644] *Van Breda*, *supra* note 555 at para 92.
[645] See Blom, "Constitutionalizing", *supra* note 530 at 273. It is worth mentioning some critical analysis by scholars regarding these new PCFs instructions. Monestier, e.g., pointed out that, (i) when drawing the PCFs list, the SCC had already scrutinized connecting factors from case and statute law, thus closing the list in practical terms; (ii) situations that were, in fact, substantially connected but did not satisfy the newly-developed jurisdictional rules would be ruled out even if compliant with the RSC constitutional limit; and (iii) it would not be easy for a new PCF to meet all guidelines, making it difficult for a new connector to ever "make the list". Monestier, "Still a Mess", *supra* note 203 at 433–434. Black, in turn, affirmed that the new PCF approach would be harder than "merely establishing that an R&SC exists on the particular facts of their case, since courts, knowing that acknowledging a new PCF will mean that it becomes available in all future cases, will think twice before taking that step" [footnote omitted]. He also commented on certain problems that a comparative international inquiry – one of the SCC instructions – had already presented in the past, thus raising the question of whether these problems would remain after *Van Breda*. Black, *supra* note 12 at 420; 427–428.

c. Distinction between FNC and jurisdiction simpliciter

Especially after *Morguard*, the Canadian common law struggled with the two-stage approach that modulates the relation between assuming jurisdiction and FNC – i.e., that a court must first establish jurisdiction and only afterwards decide between exercising or declining it.[646] That is because, due to the general approach outlined in *Morguard*, the requirement of a RSC was essentially the same both for jurisdiction *simpliciter* and the doctrine of FNC,[647] leading the courts to use the tests interchangeably. Consequently, judges ended up skipping the first stage altogether and focused only on FNC, even when the debate was around jurisdiction *simpliciter*.[648] Given this scenario, scholars voiced throughout the years the need to clearly separate the two stages as well as distinguish the tests used in each of them.[649] Legal actors remained, however, failing to understand the distinction between establishing jurisdiction and the discretion proper of the FNC phase,[650] a confusion that did not get better with *Muscutt*. So, although the plea for a clear differentiation was not necessarily new, the SCC in *Van Breda* underscored the need to clearly separate both stages[651] and addressed some key aspects of FNC – though not as comprehensively as the review on jurisdiction[652] – attempting to end once and for all some remaining confusion and overlap observed until then.[653]

As jurisdiction *simpliciter* depended, after *Van Breda*, on specific rules, the separation from FNC became more visible since the latter aimed at balancing factual and policy-oriented factors.[654] The SCC also reiterated that only the parties could raise the FNC doctrine – never the courts[655] – and the burden of proof always relied on the party seeking the stay.[656] Moreover, it established that

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[646] Saumier, "Forum Non Conveniens", *supra* note 204 at 130.
[647] See *ibid* at 131.
[648] *Ibid*.
[649] See e.g., Saumier, "Judicial Jurisdiction", *supra* note 545 at 466–467.
[650] Vaughan Black & Stephen G. A. Pitel, "Reform of Ontario's Law on Jurisdiction" (2009) 47:3 Can Bus LJ 469 at 473.
[651] Accordingly, Le Bel J.'s first general statement in this regard was that "a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*". *Van Breda*, *supra* note 555 at para 101. At the appealing instance, Sharpe J.A. had already expressed this necessity. *Van Breda* [ONCA], *supra* note 573 at paras 81 and 82.
[652] Black, *supra* note 12 at 431.
[653] See Monestier, "Still a Mess", *supra* note 203 at 441.
[654] Blom, "New Ground Rules", *supra* note 562 at 5.
[655] *Van Breda, supra* note 5552 at para 102.
[656] Black, *supra* note 12 at 431. Blom explains that, until then, the precedents had been mixed, but this decision in *Van Breda* reflects "what seems to have become, more or less by acquiescence, the Canadian position on onus." Blom, "New Ground Rules", *supra* note 562 at 20. See also *Van Breda, supra* note 555 at para 103, where Le Bel J. offers some guidance on how to prove the requirements needed for a stay based on FNC.

a stay based on FNC could only happen if the alternative forum were *clearly* more appropriate from the parties and interests of justice standpoints.[657] As such, the SCC reinforced the idea of exceptionality that lurks behind *forum non conveniens* since it represents a residual but limited discretion to correct rigid outcomes that disregard individual circumstances.[658] Thus, considering that "the normal state of affairs is that jurisdiction should be exercised once it is properly assumed,"[659] the court must be convinced that the other forum is not merely as good as the chosen venue but that it "is i*n a better position to dispose fairly and efficiently of the litigation* (…) thus ensuring fairness to the parties and a more efficient process (…)."[660] The SCC, therefore, linked the need to have a *clearly* more appropriate forum to compliance with fairness, efficiency and predictability.[661]

3.3 Ten years later: Brief Comments on the Aftermath of Van Breda

In general, shortly after the SCC rendered its decision in *Van Breda*, Canadian scholars agreed that the shift from an open-ended application of the RSC test to a more delineated set of connecting factors had been necessary for some time.[662] Black, for instance, stated that by banishing fairness from the direct grounds of jurisdiction and rendering the jurisdictional analysis less flexible, the SCC might indeed have simplified the RSC inquiry.[663] Blom, in turn, agreed that the new approach towards PCFs had most of the virtues that the SCC aimed for in *Van Breda*: it (i) clearly separated the RSC constitutional principle from the jurisdictional rules; (ii) turned the adjudication less elastic (especially when compared to the *Muscutt* factors), thus increasing predictability; and (iii) clearly distinguished jurisdiction *simpliciter* from FNC.[664]

Acknowledging the ameliorations of *Van Breda*, however, did not refrain commentators from critically analyzing some shortcomings already visible in 2012. The main concerns relied on crucial unanswered questions. On the one hand, even though they were more precise than simply stating that 'a real and substantial connection must exist', the four PCFs themselves raised many questions regarding how they should be interpreted and applied. For instance, since the 'carrying

[657] Blom, "New Ground Rules", *supra* note 562 at 20–21.
[658] *Van Breda*, *supra* note 555 at para 104.
[659] *Ibid* at para 109.
[660] *Ibid*.
[661] See Monestier, Still a Mess", *supra* note 203 at 442.
[662] Johnson, *supra* note 527 at 546.
[663] Black, *supra* note 12 at 437; 421.
[664] Blom, "New Ground Rules", *supra* note 562 at 26. See also Monestier, "Still a Mess", *supra* note 203 at 412–413.

on business in the province' PCF never explicitly stated that the activities should be directly related to the tort, it was deemed too broad and conceptually unclear, making it difficult to interpret.[665] Similarly, no clarification was provided about what 'connected to the dispute' meant in the PCF 'contract made in the province'.[666]

Additionally, the PCFs list as a whole brought apprehensions among academics. Monestier, for example, demonstrated concern about the rigidity of the list, especially considering that if a plaintiff did not identify one of the PCFs, a court was not allowed to assume jurisdiction, thus making it harder for plaintiffs to file claims against foreign defendants in Canada.[667] On top of that, since the entire framework focused solely on tort claims, the lack of guidance regarding non-tort actions was also a source of concern: "Unfortunately, the Court endorsed a framework that was so tort-specific that parties and courts will be left guessing on how to approach a non-tort case. (…) That the Court ignored all the other 'claims known to the law' in its jurisdictional analysis is perhaps the most regrettable part of the *Van Breda* decision."[668] The form that future connecting factors would take was also put into question.[669] Indeed, one of the envisioned outcomes of the new framework was that it would deny cases that, before *Van Breda*, would have been accepted under the *Muscutt* approach.[670]

Throughout the last decade, scholars kept assessing *Van Breda*'s application, providing an overview of its effects and whether the above-mentioned concerns were confirmed. One first important note is that, despite a few signs of resistance,[671] most cases adopted the new framework through the PCFs.[672] From this wide application, it became possible to appraise whether predictability and simplification of the jurisdictional law increased as the SCC desired. After

[665] Monestier, Still a Mess", *supra* note 203 at 417–419; 421.
[666] *Ibid* at 426–427.
[667] *Ibid* at 413; 439.
[668] *Ibid* at 436.
[669] Black, e.g., wondered about cases involving weaker parties (such as consumers or workers) and whether a new PCF could favour them. Since the direct consideration of fairness was ruled out and no existing PCF displayed this feature, the author found this possibility hard to concretize in the post-*Van Breda* common law. Black, *supra* note 12 at 437–438.
[670] See Blom, New Ground Rules", *supra* note 34 at 562. Monestier expressed similar concerns: "(…) there will be scenarios where a compelling argument can be made that there is a legitimate connection between the dispute and Ontario, but none of the presumptive factors is engaged. In these scenarios, Canadian courts simply do not have the power under the new jurisdictional test to assume jurisdiction—subject, perhaps, to the forum of necessity doctrine. Maybe this is simply the price that litigants must pay for a jurisdictional test that is—at least on its face—certain and predictable. Or maybe the Supreme Court, in its zeal to simplify jurisdictional determinations, went a little too far in sacrificing fairness for predictability. Only time will tell." Monestier, Still a Mess", *supra* note 203 at 464–465.
[671] For examples of this minor but existent resistance see Pitel, "Club Resorts", *supra* note 603 at 192–194.
[672] *Ibid* at 192.

undertaking a quantitative analysis of the case law between 2010 and 2015,[673] Kennedy identified what appeared to be a slight, but genuine, decrease of jurisdiction motions after *Van Breda*, which suggested that predictability had somewhat been achieved.[674] He also pointed out that the relatively low and decreasing success rates of jurisdictional claims at the appellate stage "could be evidence that *Van Breda* has gone some way to clarifying the law of jurisdiction."[675]

Notwithstanding the positive outcome regarding this increase of predictability, Kennedy observed that a related explanation was that parties refrained themselves from bringing lawsuits in Ontario, knowing that they would no longer be accepted under the *Van Breda* PCFs.[676] This resonates directly with the concern of fairness some scholars mentioned when analyzing *Van Breda* because,[677] according to Kennedy, "the trade-off would be denying plaintiffs' ability to use the Ontario courts when it would be appropriate for them to do so. In other words, if the law is under-inclusive, it may create an insurmountable hurdle for plaintiffs, with the result being a chilling effect on cases being brought."[678] The author also cautioned that, despite the small decrease of jurisdiction motions, almost all of them appeared to have some basis, indicating a possible uncertainty of the state of the law of jurisdiction.[679] Indeed, Blom identified two cases brought before the SCC presenting indicia of unpredictability, much related to the difficulties of conciliating the RSC constitutional principle with PRIL in a system where the conflict rules are essentially made by judges.[680] One of them[681] is *Lapointe*,[682] a negligence claim whose core issue was whether Ontario had jurisdiction over 32 law firms in Quebec (part of the defendants). The author observes that the SCC treated the *Van Breda* decision as if it were a statute, focusing on the construction of the words ('contract connected with the tort'), barely reasoning whether this

[673] Kennedy, *supra* note 563. The author made an extensive quantitative research analyzing more than 140 jurisdictions motions in Ontario from 2010 to 2015, yielding results about the effects of *Van Breda* and its access to justice implications). He, however, recognizes the limitations of a quantitative investigation. See *ibid* at 91.
[674] *Ibid* at 91–92; 102.
[675] *Ibid* at 96.
[676] *Ibid* at 92.
[677] See note 670 *supra*.
[678] Kennedy, *supra* note 563 at 92.
[679] *Ibid* at 102. The author ultimately concludes that "*Van Breda* has gone some way to clarifying the law of jurisdiction, and thus mitigating the access to justice concerns surrounding jurisdiction motions. But Ontario's experience this decade suggests there remains a long way to go." *Ibid* at 111.
[680] Blom, "Constitutionalizing", *supra* note 530 at 273–275.
[681] The other is *Chevron Corp v Yaiguaje*, [2015] SCC 42 [*Chevron*], where the SCC addressed the conflicts and constitutional aspects of the RSC test. For a detailed explanation on this case, see *ibid* at 277–281; Elizabeth Edinger, "Policy Trumps the Constitution: Chevron v. Yaiguaje" (2017) 59:1 Can Bus LJ 104 [Edinger, "Policy Trumps"].
[682] *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, [2016] SCC 30 [*Lapointe*].

interpretation was constitutionally compliant.[683] He argues that the territorial connection with Ontario (considered the place of making the contracts) was fragile, but, motivated by the judicial efficiency of concentrating all claims in one court, the SCC accepted the 'scant' connection with Ontario to ground jurisdiction,[684] a decision that "has not helped the cause of predictability."[685]

Moreover, Pitel & Black reason that the expected simplification of the law has shown to be a more daunting task than initially predicted.[686] They observe that, in *Van Breda*, the SCC treated all torts as one category, thus implying that the PCFs would be equally applicable to all sorts of torts, a breadth that was, *per se*, questionable.[687] The authors also underscore that there were no instructions regarding private law categories outside tort claims, contributing to a lack of clarity and interpretative issues.[688]

Finally, regarding the openness of the PCFs list, despite the initial skepticism mentioned above, lower courts did create new PCFs in cases after *Van Breda* – such as property in the forum and a contract governed by the law of the forum.[689] Courts also rejected new PCFs based on the general conclusion that certain connections were too tangential or too subjective to amount to a connecting factor as envisioned by the SCC.[690]

The above comments are only a panoramic view – based primarily on scholarly writing – about the main effects that *Van Breda* has already produced. They do shed light, though, onto the general conclusion that the new Canadian framework has improved some aspects of jurisdiction law, but a lot of work still must be done either to overcome the shortcomings of *Van Breda* or to create different solutions to remaining problems that, despite the SCC's effort, are yet to be solved.

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[683] Blom, "Constitutionalizing", *supra* note 530 at 273–274.
[684] *Ibid* at 276–277.
[685] *Ibid* at 275. It is worth emphasizing that the PCF "contract connected with the tort" had already shown difficulties in its interpretation due to the lack of instructions in *Van Breda*. In 2013, Pitel discussed three Ontario cases in which the outcomes and reasonings make proof of these interpretative challenges. Pitel, "Club Resorts", *supra* note 603 at 197–199.
[686] Pitel & Black, *supra* note 600 at 223. For a thorough and complete understanding of the authors' arguments it is worth analyzing the entire paper, which deals with specific categories of private law and questions stemmed from the post-*Van Breda* framework.
[687] *Ibid* at 194. In fact, in the wake of *Van Breda*, Pitel argued that one of the most common errors courts were making at the time was to apply the four PCFs as they were generic factors applicable to other claims. Pitel, "Club Resorts", *supra* note 603 at 193.
[688] Pitel & Black, *supra* note 600 at 194–195.
[689] Pitel, "Club Resorts", *supra* note 603 at 200. The author also mentions that a contractual forum selection clause was also viewed as a presumptive connecting factor by a lower court, cautioning, however, that the more accurate interpretation is that it amounts to a conclusive – rather than merely presumptive – connecting factor. Pitel, "Club Resorts", *supra* note 603 at 200.
[690] *Ibid* at 201.

3.4 Interim Conclusion

The previous sections of this chapter have come to demonstrate that this exploratory research had a fruitful outcome. Canada offers enlightening and useful examples and, as such, was a proper legal order to look at. The more than three decades that Canadian legal actors have been dealing with proximity offer different approaches to it, and, during this time, there were many attempts, analyses and criticisms until the current scenario was established. It is true that the 'real and substantial connection' does not reign alone as a ground of jurisdiction, but it undeniably sets the tone for many aspects that are key to jurisdictional disputes.

As a constitutional imperative, no connecting factor can exist without passing the RSC test. This means that no direct rule exists – except for other traditional bases – if not compliant with the parameters of proximity. Accordingly, no new PCF can be created without a reasonable link with the forum and the dispute, and rebuttals are only possible if little or no actual connection with the forum can be established. *Forum non conveniens* is clearly – at least in theory – dissociated from jurisdiction *simpliciter*, but proximity plays a role at both stages. In a nutshell, many of the several topics on jurisdiction and substantial connections conceptually and theoretically discussed in Chapter One are materialized in the history of the RSC test in Canada/Ontario and, as will be discussed in the next chapter, there are, indeed lessons to be learned from this rich scenario.

In addition, understanding the Canadian jurisdictional background sheds light on the fact that dealing with proximity in transnational disputes is complex and no expertise will be achieved overnight. It has been more than three decades that the RSC entered the Canadian scenario and there are still problems unsolved and questions unanswered. Such a long time should not be underestimated. Even though, it can be partly explained by the common law system in Ontario (which requires parties to litigate to advance certain topics), it signals that the subject is indeed challenging and merits study. At the same time, the solutions that have already been reached in Canada deserve to be looked at with attention since they are the result of long and profound debates on the subject.

CHAPTER FOUR: PUTTING THE PIECES TOGETHER – HOW CAN THE CANADIAN EXPERIENCE SHED LIGHT ON THE APPLICATION OF THE PRINCIPLE OF PROXIMITY IN THE BRAZILIAN JURISDICTIONAL LAW?

As a whole, Chapter Four answers the second question that has driven this research. It presents the main learnings extracted from studying the Canadian real and substantial connection test and the principle of proximity in Brazil. This enriching analysis made it clear that Brazil can take some important lessons to better understand and apply this complex principle in its jurisdictional matters. By understanding the Canadian scenario, Brazil can drink directly from a resourceful fount, i.e., from a juridical framework that, for decades, has attempted to achieve reasonable jurisdictions based on actual proximity. As such, the focus of this chapter (and the Thesis as a whole) is not to deeply assess the jurisdictional system of Ontario in the sense of undertaking a critical analysis of the RSC test in the Canadian context alone – an endeavour that would likely require a different methodology, more time and space than the format of this Thesis program. Rather, the goal is to take the rich and complex Canadian background as an ancillary tool to Brazil now that the proximity principle has a true openness in its legal order through the new procedural framework.

This is not to say that the Canadian approach is a role model that Brazilian legal actors should blindly follow. This dynamic would not be possible for at least two reasons. First, it would disregard the systemic differences that inherently set both countries apart. While Canada is a country where both civil and common law traditions coexist, composed of provinces with a high degree of autonomy from each other, Brazil belongs to a civilian tradition,[691] and its states cannot rule themselves on procedural issues such as international jurisdiction.[692] In addition, other crucial aspects of the two countries are very much diverse: their geopolitical position (global north and south), the economic differences and degrees of inequalities within their societies, and the age of their democratic systems illustrate how simply 'importing' the Canadian/Ontario model with no adaptations or caveats would not serve well the Brazilian reality. Secondly, as will be discussed shortly, this research came to demonstrate that, in certain aspects, Brazil already presents some promising approaches and solutions, thus situating itself in a position of 'dialogue' with Canada –

[691] It is worth noting that there have been signs of influence from common law in Brazil and a approximation of both systems. The Brazilian juridical structure remains, nonetheless, primarily inherited from the civilian tradition. About the influence of common law in Brazil, see Guerra & Moschen, "Influências do *common law*", *supra* note 115.
[692] Art. 22, I, BFC/88.

and not merely in a place of 'watch and learn'. I argue, though, that the current jurisdictional framework in Canada/Ontario offers some valuable insights that Brazil can use or adapt. Despite the evident focus on the comparative analysis between the two countries, it is worth reminding that all these findings would not have been possible without Chapter One, which offered a general and comprehensive understanding of proximity in jurisdictional matters.

4.1 Important Lessons: What Can Brazil Take from the Canadian Experience?

In this section, I present and organize the findings of this research in the format of 'lessons', i.e., a set of insights that can be drawn from the comparative analysis promoted herein. Section 4.1.1 discusses 'general lessons', which refer to generalized conclusions that consider the jurisdictional systems of Brazil and Canada as a whole and the proximity principle in these macro scenarios. Section 4.1.2, in turn, explores specific aspects of the RSC/proximity principle and which ones can be particularly useful for Brazil in its current situation.

4.1.1 General Lessons

a. Proximity as a General Approach

The Canadian history from *Morguard* to *Van Breda* (described in Chapter Three) provides compelling evidence that, despite the need to establish reasonable jurisdiction based on real and substantial connections, a general command alone offers little guidance to legal actors. The main disagreements around this Canadian standard were not about whether this principle should exist and guide the parties and the courts. Rather, the chief concerns related to how the RSC test should be applied and what parameters should be considered when deciding if a substantial connection, in fact, existed.[693] This lack of concrete contours quickly revealed its shortcomings, such as legal uncertainty and the risk of blending the jurisdiction *simpliciter* and FNC analyses. And even when Ontario took the initiative to define the test in *Muscutt*, the absence of guidance from the Supreme Court led the Ontario court to establish a mix of factors that involved more than connecting factors, creating other layers of complexity. Unsurprisingly, the proximity principle came to be referred to as "the uncertainty factor",[694] "a mess,"[695] "a chimera."[696]

[693] Black, *supra* note 12 at 412–413.
[694] Castel, *supra* note 217.
[695] Monestier, "A Mess", *supra* note 548.
[696] Edinger & Blom, *supra* note 52.

After twenty-two years of proof that this open-ended approach (i.e., simply stating that jurisdiction and R&E must conform to a RSC test) was necessary but insufficient, the SCC limited its contours to objective connecting factors. That is, from *Van Breda* on, the only parameter to identify a RSC is to investigate whether one PCF exists in the concrete case. The Court established a list of four PCFs in torts and furnished some instructions on how future connectors should be created (both in torts and other areas). This new framework keeps presenting challenges, but commentators generally tend to agree that this delineated and more objective standard was – though limited – an improvement, mainly considering how it turned jurisdictional decisions more predictable.[697]

That being said, when we turn our attention back to the Brazilian framework,[698] one first important conclusion is that, when it comes to pre-establishing connecting factors, Brazil is already headed in a promising direction. Some aspects corroborate this argument. The new code of civil procedure has clearly defined the concurrency of jurisdiction as the default rule, which is the desired conduct in a cooperative PRIL. The connecting factors of Arts. 21 and 22 are not restricted to tort claims and already encompass situations of both general and specific jurisdiction. As such, the Brazilian regulation is more comprehensive than the one from Ontario one since *Van Breda* is limited to torts and leaves other claims to be outlined by lower courts. In terms of certainty, Brazil offers – at least at the surface[699] – a good degree of predictability to legal actors of whether their case will be heard or not. Also, proximity is arguably embedded in the elaboration of most Brazilian jurisdictional rules, considering that their foundation largely relies on criteria that presuppose a close connection to Brazil. Indeed, as Chapter Two demonstrates, scholars have already been voicing this understanding.

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[697] In that sense, see e.g. Blom, "Constitutionalizing", *supra* note 530 at 273; Monestier, "Still a Mess", *supra* note 203 at 411, 412.

[698] In the Canadian context, Blom points out that there can be inherent challenges emerged from the common law system, i.e., when the rules are judge-made (which is not the case of Brazil) and the general principle has a constitutional status: " (…) trying to integrate the constitutional principle, the real and substantial connection test, with private international law is a much more challenging undertaking if the private international law rules are judge-made (…). If the rules are statutory, except for problems of interpretation, there is no uncertainty as to what the rules are. Any constitutional challenge to a particular rule can be dealt with once and for all. Common law rules are subject to continual reassessment and reformulation. Every time a court is asked to perform this task, it has to do so, not only in light of the merits of the rule as a private international law rule, but also in terms of the rule's conformity with a very elastic, and elusive, constitutional standard." Blom, "Constitutionalizing", *supra* note 530 at 275 [footnotes omitted].

[699] I use the term 'at the surface' because as already discussed, even statutory provisions cannot guarantee an absolute predictability and presents other pitfalls.

Brazilian courts, on the other hand, do not seem to have fully grasped this association (proximity underlying many jurisdictional rules). The case law study undertaken in Chapter Two identified only one express mention of the principle of proximity in a jurisdictional decision. Without disregarding the relevance of this finding, it hints, at the same time, that judges and courts are not massively interpreting the written rules based on the general concept of proximity. There are indeed judgments that reveal an implicit use of this principle and demonstrate that courts have been more concerned with how substantial the connections are. However, there is no clear statement or consistent trend that shows more categorically that this train of thought has widely reached the courts' rationale. Given this context, Canada can offer another valuable insight.

For two decades, Canada witnessed the struggle that courts and parties faced when a general and open-ended principle (RSC) directly rules jurisdiction and R&E. The SCC, however, did not erase the principle of a RSC from the picture; the Court simply disaggregated it from the rules. As such, developing the PCFs was a way of defining in a more precise and foreseeable manner the contours of a real and substantial connection, which should remain to guide legal actors, not as a direct substantive rule, *but as a compass*. The connecting factors, whether listed or new, had to conform with parameters of proximity to reasonably ground jurisdiction. In short, Canada went from a general to a more narrow and defined approach.

If we consider that a 'more narrow and defined approach' is materialized in connecting factors, Brazil has already reached this stage since the BCCP/15 provides rules on jurisdiction based on them. However, what the Canadian history can contribute is the need to *accurately* identify what guiding principles lurk behind these jurisdictional rules. As discussed several times in this research, while, back in the day, sovereignty was the classic justification for jurisdiction, the modern PRIL has established that proximity is today one of the most important parameters of what makes up a reasonable jurisdiction. Brazilian courts (and legal actors in general) should, therefore, look carefully at the general approach based on this principle, not to replace the rules but to interpret and apply them adequately in accordance not only with the objectives of the new code but with international trends of a cooperative private international law.

Such an effort seems entirely possible because, as it became clear in Chapter Two, the reformulation of the Brazilian procedural framework demonstrates *per se* an openness to the principle of proximity, requiring it to participate in the process of assuming jurisdiction. In addition, the exercise of recurring to this general principle ultimately reinforces the conclusion

that, even though some provisions of the BCCP/15 remain identical or similar to the previous code, their interpretation must take a new turn. In short, it would be like Brazil took the opposite route (from narrow to general) of the one taken by Canada (from general to narrow), but both countries ended up meeting at the same point.

Lastly, mindful of the struggles that applying a generic approach of proximity as a direct rule can cause in a legal system (i.e., the example of Canada described in this Thesis), one final comment regarding the Brazilian system is in order. As pointed out in Chapter Two, Prof. Nádia de Araújo postulates that the principle of reasonable jurisdiction (herein called as 'proximity') can inform and determine situations not covered by arts. 21-25 of the Brazilian procedural code. Such a statement was, in fact, quoted by the Court of Appeal of Paraná in the case *Caramori* as a part of the rationale to decide the jurisdictional conflict.

Indeed, Art. 4 of the ILNBL expressly provides:

> When the law is silent, the judge will decide the case according to analogy, customs and general principles of law.[700]

So, my reflection here does not contest whether the principle of proximity can be used as a sort of gap-filler when the jurisdictional provisions in Brazil fail to reach certain situations in practice. The Brazilian system does allow alternatives when this is the case and general principles are among them. I question, however, how this application should occur, especially having the Canadian example as a backdrop.

Considering that such a general application without specific parameters can lead to vagueness and unsung unpredictability and uncertainty, misuse of the roles of the principle of proximity, use of factors that do not amount to real connections, and an overall scenario of confusion, endorsing such a generic approach may be not the best strategy to deal with eventual gaps found in the new BCCP/15. Perhaps legal actors can, when suggesting or applying the use of proximity in these cases, develop and propose some minimum standards and connectors that narrow down the vast field that opens up when one merely posits that a reasonable jurisdiction must be based on a real and substantial connection. Take, for example, how the Supreme Court in *Van Breda* offered some instructions on how lower courts could identify non-listed PCFs (see section 3.2.2, b). Despite the initial skepticism expressed by some scholars, courts did create new

[700] [translated by author]

PCFs in cases after *Van Breda* and also rejected new PCFs based on the general conclusion that certain connections were too tangential or too subjective.

This is not to say that this model is perfect and should be followed to the letter. The main point is the need to be cautious when using the principle of proximity in this 'gap-filling' role, considering that there is evidence that such a strategy (i.e., adopting it as a direct rule) has not worked well in another legal system.

b. Pre-established Connecting Factors and Predictability

Another important lesson Canada offers regards the potential and the limitations of pre-establishing connecting factors based on proximity, i.e., that presuppose a real link between the case, the parties and the forum. The Canadian timeline is a rich illustration of how the principles of proximity and certainty can interact. In *Morguard* and *Hunt*, flexibility was the touchstone of the SCC approach; in *Van Breda*, the Court shifted its approach to increase certainty in jurisdictional disputes. What is noteworthy is that the proximity principle was never off the table. Nonetheless, the formats it assumed before and after *Van Breda* gave the tone of what was the priority of the SCC at the time: first flexibility, then certainty.

At least from a quantitative perspective, Kennedy has shown that, in the aftermath of *Van Breda*, legal actors can count on a higher degree of predictability when it comes to knowing in advance whether a connecting factor fits or not *Van Breda*'s list of PCFs or at least the patterns for new ones.[701] While such foreseeability has covered to some extent the predictability gap created by the generic RSC test, other issues quickly started to appear.

As examined in Chapter Three, right after the SCC rendered its decision, Canadian scholars identified unanswered questions regarding the PCFs' application and interpretation. Lack of clear statements of what a contract 'connected to the dispute' meant and whether the defendant's business had to be related to the dispute are examples of these inquiries. Also, despite the instructions for identifying new PCFs, there was little guidance regarding non-tort actions, leaving this undertaking to lower courts. Scholars also voiced concerns with the rigidity of *Van Breda*'s list and the means of guaranteeing fairness within the new framework. With time, some of these preoccupations were confirmed, and to this day, signs of unpredictability remain.

[701] See Kennedy, *supra* note 563 at 91–92.

Without ignoring that the systems of Ontario and Brazil differ, some of the issues that emerged in the post-*Van Breda* scenario resonate with similar uncertainties identified in the Brazilian jurisdictional framework. Even the most traditional and enduring connecting factors, such as domicile and place of performance, still cause divergence among Brazilian legal actors about their interpretation. Regarding, for example, the branch, affiliate or agency of the defendant (Art. 21, single paragraph), the majority trend requires it to be directly connected to the dispute. Nonetheless, as discussed in Chapter Two, such an understanding has been challenged due to, among other aspects, globalization and vulnerable plaintiffs. Had the legislator clearly specified whether a direct connection was necessary or not, much fewer doubts and debates would likely exist on this front. Such a lack of instructions can also be pointed out in the other two connecting factors (place of performance and juridical act that happened in Brazil). Thus, it can be inferred that, even statutory and proximity-based, the provisions of Art. 21 are not infallible.[702] Although they also work in favour of predictability, these rules do not cease once and for all inquietudes that have been defying legal actors in Brazil – and *mutatis mutandis* in Canada.[703]

The bottom line is: even though the connecting factors approach was expected for a long time in Canada and was indeed received as a positive development in terms of predictability, old and new difficulties kept creating and challenging jurisdictional disputes. Such a reality confirms to Brazil that solely clinging to the existence of jurisdictional rules (even when they are objective connecting factors visibly based on proximity) is not always enough to guide those who grapple with international jurisdiction in practice. As such, the Canadian example also reinforces that the Brazilian legal actors must handle well all the other functions of proximity (beyond the role of 'elaboration of rules'), as well as how it interacts with different principles and values. This effort

[702] Interestingly enough, if the provisions were, for instance, too specific, they might cross the line into becoming rigid and excluding many situations that otherwise could reasonably fit under a country's jurisdiction. Legal actors would then have to cope with other challenges, such as interpreting the provisions more or less extensively, or even creating new connecting factors more often, thus leading to other types of uncertainty. This seems to resonate with Monestier's concern about the rigidity of the list in *Van Breda*: "The Court created a rigid presumptive factors approach whereby a court can only assume jurisdiction if the plaintiff can fit himself within one of the four pre-determined factors. In this respect, the Supreme Court has arguably still not found the right balance between 'order' and 'fairness.' Whereas the Court of Appeal in *Muscutt* seemed to sacrifice order at the altar of fairness, the Supreme Court in *Van Breda* has done the opposite." Monestier, *supra* note 203 at 413.

[703] In fact, it is worth reminding that, the Brazilian cases regarding the domicile/residence of consumers gives clear examples of how the existence of pre-set rules does not *per se* guarantee predictability of outcomes. As a very specific and targeted protective rule, Art. 22, II is (or should be) fairly clear to understand. So much so, that, thus far, scholars seem to agree on its extent, scope and objective. Nonetheless, as the case law analysis demonstrated, even when the cases are very similar, courts – when not completely ignoring its existence – interpret and apply this provision in very different ways, thus yielding different results and ultimately jeopardizing predictability.

circles back to realizing that a general concept of proximity hovers above the jurisdictional rules and should guide the entire process: elaborating, interpreting, applying and correcting them.

Again, this is not to say that the proximity principle is the holy grail of international jurisdiction. But one cannot overlook the fact that, globally, it remains as one of the most important guiding principles in taking jurisdiction and recognizing foreign judgments – a scenario that does not appear will change soon.[704] Until another solution, guidance or principle takes over – although no definitive alternative seems to have widespread to this point[705] – Brazilian legal actors must commit to the task of applying the principle of proximity in a way that fosters its potential and minimizes its shortcomings.

In my view, they can start handling the proximity principle more precisely in specific ways. The first one – though seemingly obvious – must be pointed out: knowledge. Knowledge not only of proximity but of every aspect in PRIL that precedes getting to the 'real and substantial' assessment – such as correctly distinguishing applicable law from jurisdictional matters. Regarding proximity *per se*, the Brazilian case law offers concrete examples of how not comprehending this principle can taint its application and sometimes the whole decision about a jurisdictional dispute. In *Marchal,* although an express reference to the principle of proximity should be praised, the way it was considered was arguably faulty and did little to create a precedent that could truly offer some guidance. In fact, correctly adopting proximity would have likely changed the outcome of the decision to establish jurisdiction and hear the dispute. A similar argument can be made about the decisions involving consumers, which, depending on the circumstances of the case, can require an even more sophisticated understanding of proximity due to how it interacts with the protection of vulnerable parties.

Secondly, legal actors should resist taking a superficial approach to the principle of proximity, both in the doctrine and in judicial decisions. As one of the most important principles that ground jurisdiction, it could be said that the Brazilian doctrine seems to lack a greater depth

[704] Take, e.g., the recent approval of the Judgments Convention, which will enter into force in 2023 due to the also recent adhesion of the EU. Hague Conference on Private International Law, "The EU and Ukraine join the 2019 Judgments Convention – Ukraine ratifies the 2007 Maintenance Obligations Protocol" online: HCCH: <https://www.hcch.net/en/news-archive/details/?varevent=870>.

[705] Recently, however, Farnoux has carried out a thorough and promising research in the realm of torts where he criticizes the principle of proximity and exposes its inadequacies regarding jurisdiction, proposing an alternative approach based on procedural and substantive justice. See Étienne Farnoux, *Les Considérations Substantielles Dans Le Règlement De La Compétence Internationale Des Juridictions : Réflexions Autour De La Matière Délictuelle*, Bibliothèque De Droit Privé, Tome 618 (LGDJ, un savoir-faire de Lextenso: Paris La Défense, 2022).

of such an important theme. Proximity does not go unnoticed and is mentioned in scholarly writing (as can be seen from the large number of Brazilian references used herein), but few scholars truly go into detail about its complexities, which may favour its misapplication by the courts that largely guide themselves by doctrinal research. Regarding the conduct of the courts, this research has demonstrated that there has been a growing concern about the connections between the case, the forum, and the parties among Brazilian judges. Most of these decisions, however, do not mention proximity expressly – or a different principle or interpretative tool if that is the case. Keeping it implicit to be perceived between the lines, in addition to favouring multiple different interpretations, conveys the feeling that serious issues such as jurisdiction – and ultimately access to justice – are decided intuitively without an express technical basis. It is necessary to actually deal with proximity, tackle its challenges and use it correctly.

One final way of handling proximity more precisely has already been mentioned and was extracted directly from the Canadian experience: to avoid as much as possible using it generally as a direct rule, mainly when no statutory bases are in place. Such a broad application can open the doors to unprecedented connecting factors that may harm the degree of predictability that Brazil has with its jurisdictional provisions. To get to the point where proximity can ground situations not enshrined by the new code, there must exist a prior and careful process of determining which concrete parameters can justify the Brazilian jurisdiction in these cases. As the Canadian history shows, this process does not happen overnight and only time will tell if and how this gap-filling function is actually possible in the Brazilian scenario.

c. The Correlation between Jurisdiction and Recognition: A Lesson about the Role of the Corrective Functions in Brazil

The jurisdictional regulation of the new Brazilian code has arguably two general upsides. One refers to the fact that Arts. 21-22, BCCP/15 are not limited to torts, and by providing rules on general and specific jurisdiction, many types of action can, with some degree of predictability, fit into those rules. As previously commented,[706] in comparison with *Van Breda* (and considering the legal tradition and landscape of Brazil), it is advantageous to know beforehand which claims fall under the Brazilian jurisdiction instead of leaving this undertaking to a future effort of the courts.

[706] See section 4.1.1 a. above.

A second characteristic that can be positive from a certain angle is the breadth of certain provisions. Take, for instance, Art. 21, item III, stipulating jurisdiction for any action based on a fact or act that occurred in Brazil. Even based on proximity, this rule is undeniably overarching. Non-contractual claims, such as those related to family law,[707] torts, damages caused through the Internet, and even contractual disputes, can be received by the Brazilian courts due to this general wording. When compared with some of the concerns Canadian scholars have expressed about the rigidity of *Van Breda*'s list,[708] this openness to different sorts of claims can be an upside, especially from the 'access to justice' point of view. While a given court in Canada could deny jurisdiction based on *Van Breda* (and/or other PCFs), such a big umbrella in Brazil may allow a party to file their claim and have it heard. Similar arguments can, *mutatis mutandis*, be made when it comes to Art. 21, II, which does not indicate what obligation or performance is necessary to justify jurisdiction in contractual disputes, as well as if a connection is required or not between the legal person's branch, affiliate or agency and the claim (Art. 21, I, single paragraph).

But if almost everything has at least two sides, such broad provisions and lack of instructions in their wording can also present weaknesses. Besides unpredictability (already discussed above), there is another one that the Canadian framework particularly helps to identify. To better understand this argument, we must take a few paragraphs to recall that, since 1990, Canada has understood that jurisdiction *simpliciter* and recognition and enforcement are directly intertwined.

The Canadian system grants considerable autonomy to their provinces and from this dynamic stems a duty of comity between them and their authorities; considering that *Morguard* was an inter-provincial case, the SCC acknowledged that a province had the constitutional obligation to recognize a decision rendered in any other province in Canada.[709] This process should not, however, happen blindly or automatically. The Supreme Court also commanded that, for this recognition to happen, the rendering court had to have assumed jurisdiction properly, a

[707] Tibúrcio proffers a few examples: declaratory action of a common-law union (if the couple lived in Brazil), divorce action (when the marriage happened in Brazil), judicial separation (if the violation of marital duty occurred in Brazil). Tibúrcio, *supra* note 205 at 57.
[708] See e.g., footnote 702 above.
[709] See *Morguard*, *supra* note 528 at 21. It is necessary to point out, however, that when it comes to foreign country judgments, their recognition still rests on comity and, as such, can be limited by provincial legislation. See *Beals v Saldanha*, [2003] 3 SCR 416 at para 28 and *Chevron*, *supra* note 681 at para 51–52.

requirement that was largely measured by the contacts between the case and the original court (i.e., the RSC):

> (…) recognition in other provinces should be dependent on the fact that the court giving judgment 'properly' or 'appropriately' exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. *But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit*; (…)[710]

'Proximity' works, therefore, as a key parameter for deciding whether the jurisdiction was properly assumed and profoundly resonates with the enduring role of the proximity principle in the process of R&E discussed in Chapter One. Such an association is truly remarkable, especially considering that it has been guiding the Canadian framework since 1990.[711] In the international setting, a similar structure has only recently been formalized in the Judgments Convention, which, though focused on recognition and enforcement alone, managed to create a control of indirect jurisdiction based on the connection between the original court, the parties and the dispute (Art. 5).[712]

Coming back to Brazil and some of the broad provisions of the new BCCP/15, the downside mentioned earlier relates to this continuous effect that the assumption of jurisdiction will have when it comes to enforcing decisions in a different jurisdiction. In cases where the wording is too vague and comprehensive, it may not be hard for a weak or only hypothetical connection to 'make the cut' and justify the Brazilian jurisdiction – such as the classic example of a contract made in Brazil even though nothing else connects Brazil to the dispute. In a situation like this, not only the proceeding in Brazil can potentially disadvantage one of the parties, but it also can have harmful impacts when the moment to enforce the decision comes.[713] It may be the case that the

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[710] *Ibid* at 27 [emphasis added].

[711] Other initiatives directly relating jurisdiction and recognition had been taken elsewhere (e.g., the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters). What seems remarkable, though, is the fact that Canada – more than thirty years ago – identified this relation in the light of proximity, reshaping its PRIL based on this insight.

[712] HCCH Judgments Convention, *supra* note 108.

[713] It is true that this Thesis has not gone that far enough to investigate the rates of recognition of Brazilian decisions around the world, especially after 2016 – an endeavor that would require another focus and research. However, there have been signs in the international context that indicate a trend of concern with real proximity as a measure to decide requests of recognition. Two recent examples are the already mentioned Judgments Convention and its Art. 5, and the TRANSJUS which, in Art. 7.4 (a), expressly establishes that exorbitant jurisdictions are one of the few grounds that can justify a recognition refusal. This scenario should at the very least call the attention to the association between jurisdiction, recognition and proximity. Also, as discussed in Chapter Two, section 2.3.2, even the STJ in Brazil, when analyzing requests for R&E, has given some indication of greater concern with the connection between the original court elsewhere and the case at hand.

connecting factor used to justify the taking of jurisdiction is, in the eyes of a recognizing court, deemed insufficient (i.e., exorbitant) due to the lack of a substantial connection with Brazil.[714]

While Canadian legal actors (including courts) have for decades handled the long-lasting effects that the assumption of jurisdiction can have in the final step of the proceeding (i.e., R&E), this does not seem – at least expressly – to be the case of the Brazilian courts. None of the decisions analyzed in this research mentions such a concern while deciding whether Brazil had jurisdiction or not.[715] When, of course, there are no doubts about the connecting factor and the strength of the connection, such a concern is rapidly overcome and does not require further analysis. However, as already pointed out, the scenario can change substantially when the link ends up being exorbitant because the provision on which the court based its decision was too broad and vague. In these cases, keeping an eye on the final outcome of the proceeding (i.e., taking into account whether it will be enforceable elsewhere), may be particularly relevant for the Brazilian courts to decide whether, in certain cases, the corrective functions of the principle of proximity should be part of their appraisal and ultimate decision.

The most evident and straightforward solution would likely be advancing, if necessary, to a *forum non conveniens* stage. After identifying that, under a given broad provision, the Brazilian courts have jurisdiction, in order to increase the chances that the future decision will be enforceable elsewhere, the court assesses whether it should exercise this jurisdiction.[716] Otherwise, entertaining the dispute could jeopardize the enforceability process if the contacts with Brazil were, in that individual case, too scant or random. Adopting FNC would help correct the course of the provision pre-established in the BCCP/15 when such a correction is necessary.

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[714] This can be particularly possible when the court analyses jurisdiction under its own rules (and not according to the country of origin) such as the German courts.

[715] This finding is corroborated by an article about a recent judgement of the TJSP that denied the Brazilian jurisdiction in a contractual dispute based, among others, in the effectiveness principle. The defense attorney celebrated the decision stating that although there is scholarly writing on the principle of effectiveness, it is rare to find precedents, reason why this decision is particularly important. See "Justiça aplica princípio da efetividade para afastar jurisdição nacional em disputa" (6 March 2023), online: *Jota* <https://www.jota.info/tributos-e-empresas/saude/pelo-principio-da-efetividade-causa-nao-e-da-jurisdicao-brasileira-diz-tjsp-06032023>. The judgment in question is: Tribunal de Justiça de São Paulo, 22 Novemeber 2022, *Recepta Biopharma S.A. v Agenus Inc.*, TJSP – Jurisdprudência do TJSP, No 1083669-56.2022.8.26.0100 (Brazil).

[716] As already discussed throughout this Thesis, FNC can be used to make assessments other than the link between the dispute and the case. It may be used to analyze issues of cost-efficiency, to prevent abusive litigation, or even to address concerns with fairness toward the parties. The point here is to sustain that, in cases where the exorbitant jurisdictions can impede the recognition of a decision in the future, FNC can too be used to avoid this situation that ultimately thwarts access to justice.

As the preceding chapters reveal, however, the correlation between FNC and enforceability is not unanimous.[717] Also, Brazilian courts still resist to apply FNC, except in some very specific domestic cases (not in cross-border disputes so far). Considering this scenario, and keeping an eye on the enforceability of the decision, it seems that the interpretative function can be crucial for Brazilian courts to render decisions in conformity with the modern standards of PRIL.

Recapping my argument in Chapter One, Brazil presents all three of the specific issues that can be addressed by the interpretative function. First, the new code is structured in a way that the concurrency of forums is the default approach. While this structure is desirable and completely aligned with modern trends, it increases the possibility of one case being connected to multiple countries. These connections do not always have the same strength and some of them can be too fragile. So, Brazil can, in practice, be connected to a dispute but not in a manner that would justify its international competence if applying the parameters of proximity. Second, some provisions in the BCCP/15 can be too broad and ambiguous, expanding the possibility of, in a specific case, a weak connection justifying the Brazilian competence just because it is encompassed by the big umbrella of a jurisdictional rule. Lastly, since Brazil demonstrably continues to resist the FNC doctrine, some correction mechanism is needed at least in extreme cases, where the connection is truly hypothetical and could cause problems for the parties during the proceeding in Brazil and in the future during the recognition stage.

Once again, it is worth noting that I do not argue for an indiscriminate use of the corrective functions (be them FNC, interpretative function, or both); as I already mentioned, there are positive aspects of having an overarching jurisdictional rule. My argument relies on the importance of not losing sight of the effects that one decision at the beginning can have at the far end in another country. This direct association between jurisdiction and recognition may help to indicate the cases in which the corrective roles of proximity come in handy.

4.1.2 Specific Lessons

a. If Ever Brazil Adopts *Forum Non Conveniens*…

Another lesson that Canada and the current framework from Ontario can offer to Brazil relates to the doctrine of *forum non conveniens*. The Brazilian piece developed in Chapter Two shows that FNC, herein understood as a corrective function of the proximity principle, has been

[717] See footnote 312 above.

voiced more by scholars than by courts. Through different justifications and generally based on the premise that the Brazilian system is not hermetic and closed to any degree of flexibility, many academics have been sustaining the possibility to adopt FNC in jurisdictional disputes.[718] While the Brazilian courts are not yet convinced by these arguments, one cannot overlook the fact that this doctrine has 'pierced the bubble' in Brazil[719] and it is now under debate among scholars, lawyers and judges, even if ultimately rejected by a court in a concrete case. Academia has, therefore, been tremendously contributive to this trend, forcing a more attentive look at this relevant tool.

Given, however, the early stage of discussions, there seems to be a high focus on whether FNC should/could be used in Brazil and less emphasis on how this doctrine should be applied if it ever comes to that. I address this scenario by suggesting that some features of FNC consolidated by *Van Breda* could serve as inspiration to Brazil, not as an automatic replication but as a source of insights that can fit the Brazilian landscape. This sub-topic aims, therefore, to contribute to this incipient and ongoing debate.

One first significant aspect refers to the clear separation between jurisdiction *simpliciter* and FNC that the Supreme Court of Canada corroborated in *Van Breda*. Such a segregation is a true landmark of the decision because legal actors struggled for more than two decades with the conflation of using the same test (RSC) in both situations. These 'two decades' should not be underestimated. They signal how complex and challenging it can be to deal with the duality '*existence-exercise*' of jurisdiction. Even when the Ontario Court of Appeal tried to delineate some contours of the RSC test in *Muscutt* it insisted on an approach that facilitated blending the decision of taking jurisdiction with FNC. So, the fact that the SCC expressed, in *Van Breda*, that a clear distinction had to be made is undeniably significant.

Considering that, in Brazil, there is no express rule providing for *forum non conveniens* – let alone instructions on how to apply it – handling this tool must happen in an extremely cautious manner. The Canadian history before *Van Breda* warns Brazil of the risk of skipping the former step altogether and analyzing a jurisdictional conflict with the lenses of FNC. As discussed in Chapter One, although proximity plays a role in both cases, these roles are different from each other and should operate as such. In the elaboration of jurisdictional rules, proximity is

[718] As already discussed, this understanding is not unanimous but seems to be the majority trend.
[719] Take, e.g., the fact that some decisions of internal competence in Brazil adopted *forum non conveniens* expressly.

inspirational and generic, i.e., it attempts to foreshadow what connections will be substantial and truly close to a subject matter or the parties in a large number of cases. As part of the FNC doctrine, proximity gains a corrective role and, as such, falls under a discretionary and more individual analysis. It is supposed to come into play only when the jurisdictional rules fail to guarantee that the desired proximity actually exists in a given case. Blending both stages ends up distorting their purposes. Therefore, the separation that the SCC clearly reinforced in *Van Breda* aligns very well with the rationale behind FNC and can, therefore, help Brazilian legal actors when (and if) operating this doctrine in cross-border disputes.

Other two characteristics that might be particularly relevant to Brazil refer to: (a) FNC can be pleaded only by the parties, and (b) a stay based on FNC can only happen if the alternative forum is *clearly* more appropriate from the parties and interests of justice standpoints.

Point (a) fits precisely in the new system established by the new code of civil procedure. As Gaspar & Paluma well explain, the fact that the new BCCP/15 does not expressly provide a rule for FNC impede the courts from applying it *ex officio* since it could violate the parties' access to justice.[720] In respect to Art. 10[721] of the new code, only the party seeking the stay could allege *forum non conveniens* and such a decision by the court could only be rendered after the other party had the opportunity of defence. Therefore, understanding how the Canadian courts and parties have dealt with this specificity since *Van Breda* can be an insightful source when applying FNC in Brazil.

Point (b) also seems to squarely fit the Brazilian legal order, mainly considering its civilian tradition and tendency to resist large rooms for judicial discretion. By requiring the alternative forum to be *clearly* more appropriate than Canada, the SCC reiterated the idea that FNC should be exceptional. As explained in Chapter Three, it is not, therefore, *any* other forum that could justify declining an existent jurisdiction in favour of a different one – which due to the contemporaneous global trend of concurrent jurisdictions can easily happen and undermine predictability. The other forum is so much more appropriate and substantially connected than Canada (or a given province) that it is in a better position to adjudicate the dispute fairly and efficiently. As such, at least in theory, the judicial discretion is limited because subject to certain pre-established conditions.

[720] Gaspar & Paluma, *supra* note 103 at 80.
[721] Art. 10: "The judge cannot decide, at any level of jurisdiction, based on grounds on which the parties have not been given the opportunity to express themselves, even if it is a matter on which they must decide *ex officio*." [translated by author].

Ultimately, this limited discretion based on exceptionality and the necessity of request by the party are features that can help Brazilian legal actors to better handle and apply the *forum non conveniens* doctrine at least as a starting point in a comparative effort. It also weakens the argument (already sustained by Brazilian courts) that FNC is a common law tool and cannot not be used in a civil law country. Since these features constrain the room for discretion – one of the main concerns of civilians – and provides at the same time a manner of guaranteeing the most appropriate forum to hear the dispute, the possibility of adapting FNC to Brazil should be studied more carefully and open-mindedly.

b. The Unsung Role of the Parties

One last lesson that can serve Brazil when analyzing its own jurisdictional dilemmas and the proximity principle is the role that the parties, through their lawyers, can play in enhancing these key issues. Two aspects of the Canadian framework come to mind in this regard.

First, the doctrine of *forum non conveniens* can be claimed only by the party seeking a stay. Better said, if parties never argue that jurisdiction, despite existent, should be declined, the lawsuit will proceed with never even discussing FNC. Secondly, the connecting factors established in *Van Breda* (whether listed or not) are purposely called presumptive, authorizing the parties to rebut them with facts that demonstrate that they do not point to a real and substantial connection in the concrete case.[722] In fact, regarding PCF number two ('doing business in the province'), if the party does not rebut the presumption, it is possible that a Canadian court assumes jurisdiction even if the connection with those activities is weak or inexistent. Since the SCC deliberately left this effort to the parties and refrained from providing this information expressly in *Van Breda*, guaranteeing the substantiality of the connection in this PCF relies almost entirely on the interested party.

It is true that one may wonder what real role FNC would have since the connecting factors of *Van Breda* are *per se* rebuttable. Theoretically, this distinction makes sense considering the Canadian jurisdictional history and the goal of clearly stipulating that only objective connectors can be part of the analysis on jurisdiction *simpliciter*, leaving other considerations to the FNC stage. In practice, though, it may seem hard – at least in certain cases – to find these hard lines and ensure that no overlapping will happen.

[722] *Van Breda*, supra note 555 at para 95.

Nonetheless, for the purposes of this sub-topic (and mindful that the emphasis here is the lessons for Brazil and not a critical analysis on Canada), I invite the reader to put aside the fact that rebuttal and FNC may be redundant in practice and focus on what parties can learn from this context. That because this scenario in Canada arguably bestows a cardinal role to the parties, giving them the chance to change the course of the claim if they effectively rebut the presumption or convince the courts that all the requirements for a stay based on FNC are met. Nonetheless, for that to happen successfully, parties – and particularly, their lawyers and legal advisors – must have a profound and accurate knowledge of the real and substantial connection test, its implications in jurisdictional matters, and the roles it assumes both in the jurisdictional *simpliciter* and FNC stages. Otherwise, they might not even bring these subjects to the table (even when it is possible) or, if they do, the arguments may be unsustainable, producing no real impacts in the final decision of the court.

This protagonism that the parties can potentially assume in Canada should inspire Brazilian legal actors to give more attention to the role of the parties in jurisdictional issues. As I conclude in Chapter Two, the time for enhancing the use of the principle of proximity is particularly ripe in Brazil. Considering this context, legal professionals should take the opportunity to understand the role they can play to better assist their clients in guaranteeing that their case will be heard in reasonable forums, developing sophisticated arguments regarding jurisdiction and its guiding principles. Particularly, if the parties in Brazil have a solid grasp of (i) the general idea of proximity, (ii) the openness that the current procedural framework has to this principle, (iii) the roles it plays (or can play) in jurisdictional disputes and (iv) how it interrelates to other principles and values, there is a vast camp for argumentation and improvement of the issue. Little by little, this movement has the potential to demand courts to also develop the required expertise[723] to deal with such matters, impacting the Brazilian jurisprudence and even legislation in the medium and long terms.

The idea is not to stimulate unjustified and frivolous litigation. It is to reinforce the centrality that – similar to what we witness in Canada – the parties can play in jurisdictional issues. This is especially true in a context in which the principle of proximity is still maturing in Brazil

[723] It is worth reminding that one interim conclusion of the case law study I undertook of Brazil was the fact that courts lacked understanding of some elementary aspects of PRIL, thus preventing more sophisticated arguments (such as the roles of the proximity principle) to be duly analyzed in concrete cases.

and that some provisions are either too broad or vague, thus requiring tools that ensure a reasonable existence or exercise of jurisdiction that will ultimately enable a judicial decision to be enforced anywhere in the world. As such, parties (and their respective lawyers and legal advisors) assume their role as legal actors, understanding that a true and effective access to justice requires more than access to court; it requires also access to the appropriate knowledge of the Law and the complex system that composes it.[724] That because, as Gaspar & Paluma elucidate:

> (…) an integral access to justice will only be possible if the system works as a whole, i.e.: 1. The guarantee of a jurisdictional or extra-jurisdictional conflict resolution system with open doors; and 2. That the procedural actors *correctly handle, with technical and intellectual knowledge, the juridical tools*, which culminate in the application of the legal regime applicable to the specific case, according to the dialogue of sources appropriate to it.[725]

4.2 Interim Conclusion

In conclusion, the comparative analysis undertaken in this final chapter reveals that a lot can be absorbed from the Canadian experience, especially now that Brazil has an updated jurisdictional framework more aligned with the international aspirations of PRIL.

On the one hand, the conclusion that Brazil already has connecting factors based on proximity, capable of encompassing different types of actions, is quite positive. On the other hand, Canada helps to see that 'having connecting factors' alone does not suffice and their interpretation must be guided by the principle that inspired those connectors in the first place. At the same time, a general approach as a direct rule can create degrees of uncertainty difficult to overcome, and, as such, attempting to use the proximity principle in this manner should be avoided.

In terms of legal certainty, the Canadian framework reiterates that even a well-thought-out list of connections designed for specific situations (torts) does not guarantee absolute predictability. There are intrinsic limitations in pre-established rules and learning other tools – the other functions of proximity among them – offers guidance to address the situations that the rules cannot.

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[724] In this regard, Gaspar & Mendonça refer to access to justice as having two dimensions: direct and indirect access to justice. The second one alludes to the moment that a competent authority solves the dispute and, for this indirect access to be complete, the authority must have the expertise to handle all PRIL tools applicable to that case. Otherwise, such a lack of knowledge would amount to denial of justice in this second dimension. Even though the authors mention the competent authority, they also refer to legal actors in general, thus requiring that everyone dealing with cross-border proceedings (i.e., not only judges, but also parties, lawyers, lawmakers etc.) have the appropriate PRIL expertise. Renata Alvares Gaspar & Samuel Mendonça, "O DIPR – Direito Internacional Privado e a Educação Jurídica: Um Diálogo Essencial" (2018) 13:1 Revista Eletrônica do Curso de Direito d UFSM 1 at 11–12 (footnote 28); 17.

[725] Gaspar & Paluma, *supra* note 103 at 72 [translated by author] [footnote omitted].

The interrelation between jurisdiction *simpliciter* and recognition and enforcement that, since 1990, has reshaped Canadian private international law is another valuable lesson to learn from. Considering that Brazilian courts do not demonstrate an explicit concern with the enforcement of their decisions abroad while assessing whether to assume jurisdiction or not, taking Canada as an example may be a relevant first step – mainly now that the HCCH Judgments Convention will soon be in force and many Brazilian scholars advocate for its ratification.

If Brazil comes to adopt *forum non conveniens* – a possibility that should not be ruled out given the many supporters in academia and its recent use to solve internal conflicts of competence – Canada provides again some resourceful insights. First, one should not ignore or underestimate the decades of struggle due to the blending of tests for jurisdiction and FNC. It can be too easy to skip the jurisdictional assessment and jump directly to the *forum non conveniens* stage if no true and clear distinction is drawn beforehand. In addition, the Canadian FNC has characteristics that are very much aligned with the idea of exceptionality which may be more accepted by those Brazilian legal actors who are concerned with a wide room for judicial discretion.

Lastly, Canada offers a reminder of a cardinal role that parties can play in jurisdictional issues with the potential to change the outcome of an action through an accurate handling of the proximity principle. As such, *all* legal actors should, at the very least, understand and enhance its adoption if and when jurisdictional matters so require.

CONCLUSION

Similar to its role in choice of law, the principle of proximity has marked its presence in conflict of jurisdiction with the objective of avoiding the mechanical application of jurisdictional rules and seeking, instead, solutions that are more truthful to the reality of the concrete case. Especially since the jurisdictional dimension became central in the paradigm shift of private international law, proximity has gained undeniable relevance as the parameter of what constitutes reasonable jurisdiction, pervading jurisdictional matters in a myriad of ways. This principle does, however, present inadequacies and can undermine certainty and predictability, which are indispensable to the well-functioning of private international law.

Given the degree of importance of the proximity principle, as well as the criticisms that accompany it, in this Thesis, I investigated its status in Brazil, aiming to identify which room and functions it assumes in the jurisdictional framework that has recently gone through a ground-

breaking legislative update. Once identified the answers to this first inquiry, I studied the Canadian long experience with the real and substantial connection in order to, through exploratory research and a comparative effort, investigate whether there were lessons Brazil could use in applying this principle in its new legal landscape.

Before situating the object of this research in specific contexts, Chapter One was necessary to provide a comprehensive and deep understanding of conceptual key elements of proximity. In the first chapter, I examined the history that led the principle of proximity to become a tool in conflicts of jurisdictions, as well as the different roles it plays in this scenario. As a result, it became clear that proximity is indeed embedded in several jurisdictional aspects and has multiple layers of complexity in and on itself.

Equipped with this preliminary study, I researched, in Chapter Two, the proximity principle in a narrower context in order to answer the first question that has motivated this Thesis – i.e., the status of the principle of proximity in Brazil. By analyzing the shift from the previous procedural code to the new one and understanding the major changes intended by this new legislation, it became possible to conclude that the BCCP/15 has promoted an unprecedented openness to proximity in Brazil. As such, it was equally possible to identify different functions that this principle now has in the Brazilian framework. Its application by the courts – and even some scholarly work – has come to demonstrate, however, that its use is still incipient and somewhat superficial, with room for improvement.

In Chapter Three, I took the necessary steps to find the answer to the second research question of this Thesis. Exploring the Canadian/Ontario jurisdictional background and, specifically, the real and substantial connection from *Morguard* to *Van Breda*, offered an enriching and elucidative study with multiple insights. Investigating how the current framework has been assessed by scholars in the last decade was also crucial to identify shortcomings that were not overcome yet. While Brazil has just started to handle and adopt the principle of proximity, Canada has spent at least thirty years thoroughly discussing the subject. As such, selecting Canada as a jurisdiction to be used for comparative purposes did produce positive results, considering that are indeed lessons to be learned from the Canadian enduring relationship with the RSC.

These lessons are discussed in detail in Chapter Four. I argue that there are at least three general lessons that Brazil can take with respect to the RSC test when looking at Canada/Ontario. First, the general approach that stems from proximity – due to its nature as a legal principle –

should guide the interpretation and application of the Brazilian connecting factors in force but should not act as a direct rule at the risk of creating precedents that are detrimental to the predictability that jurisdictional rules are so eager to achieve. Second, the Canadian/Ontario jurisdictional history demonstrates that, although a list of connecting factors serves relatively well the purposes of predictability and legal certainty, the existence of pre-established rules is not infallible and, even based on proximity, will not be the answer to all disputes involving jurisdiction. Dealing with other functions of proximity – and other juridical tools, for that matter – is, therefore, a necessity. A third general lesson refers to the association between jurisdiction and R&E that, back in 1990, the Supreme Court of Canada had already confirmed. Having the Canadian example as inspiration may help Brazilian legal actors consider the enforcement abroad in the jurisdictional assessment, thus favouring the use of the interpretative function of proximity, mainly while no consensus on *forum non conveniens* is achieved in Brazil.

I also argue that there are two specific lessons Brazil can absorb. If it ever comes to that and Brazil wants to further the discussion on how to apply FNC in its legal landscape, looking at Canada/Ontario may be one good place to start. Not only the lesson regarding the need to clearly separate jurisdiction from *forum non conveniens* is valuable, but many characteristics of the FNC from Ontario law seem aligned with the idea of proximity and exceptionality, which may be more acceptable to Brazilian scholars and courts. Finally, Canada illustrates the crucial – and sometimes underrated – role that parties, through their lawyers and legal advisors – can have in jurisdictional issues and, more specifically, in deepening and improving the handling of the proximity principle. In a nutshell, it offers a reminder ta *all* legal actors should, at the very least, understand and enhance its adoption if and when jurisdictional matters so require.

From all the findings above, there are two unsung implications I would like to highlight. The Canadian experience is a living example that jurisdictional issues are not simple, and applying proximity in this context can be a complex and daunting task. Given the incipient status of this principle in Brazil, the Canadian experience with the RSC should be a reminder that perfecting its use and reaching solutions that are adequate to the Brazilian reality will require time, study, and a general commitment to use (and sometimes *not* use) the principle of proximity to achieve the effectiveness of jurisdiction that the new code came to provide. Looking carefully at other legal orders and their jurisdictional experiences can be a valuable part of such a commitment.

In fact, this leads to my last point. The comparative approach I undertook in this research was indispensable for me to identify the lessons I pointed out above. Without this comparative effort, many insights and conclusions might have gone unnoticed by this researcher. The title of this Thesis is, therefore, not accidental. As a nearsighted person who sees better with glasses, I was also able to better see jurisdictional and proximity-related issues in my own country through Canadian lenses. And even though the comparative approach is useful to all areas of Law, the fact that it is so intrinsic to private international law invites us more and more to continue to investigate, learn from and promote dialogues with different legal orders, aiming to ultimately promote effective access to justice to everyone, anywhere in the world.

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APPENDIX A – BRAZILIAN JURISDICTIONAL RULES [ENGLISH]

Brazilian Code of Civil Procedure/2015 (BCCP/15) [in force]

GENERAL PART

BOOK I
CIVIL PROCEDURAL RULES

CHAPTER II
APPLICATION OF PROCEDURAL RULES

Art. 13. Civil jurisdiction will be governed by the Brazilian procedural rules, with the exception of specific provisions provided for in international treaties, conventions or agreements to which Brazil is a party.

BOOK II
JURISDICTIONAL FUNCTION

TITLE II
THE LIMITS OF NATIONAL JURISDICTION AND INTERNATIONAL COOPERATION

CHAPTER I
THE LIMITS OF NATIONAL JURISDICTION

Art. 21. The Brazilian judicial authority is competent to prosecute and judge actions in which:
I - the defendant, whatever their nationality, is domiciled in Brazil;
II - the obligation shall be performed in Brazil;
III - the basis is a fact that occurred, or an act practiced in Brazil.
[Single paragraph]
For the purposes of the provisions of item I, a foreign legal entity with an agency, affiliate or branch is considered domiciled in Brazil.

Art. 22. The Brazilian judicial authority is also competent to process and judge actions:
I - of maintenance, when:
a) the creditor is domiciled or resident in Brazil;
b) the defendant maintains ties in Brazil, such as possession or ownership of assets, income or economic benefits;
II - arising from consumer relations when the consumer is domiciled or resident in Brazil;
III - in which the parties expressly or tacitly submit to national jurisdiction.

Art. 23. The Brazilian judicial authority is competent to, with the exclusion of any other:
I – hear of actions related to real estate located in Brazil;
II - in matters of hereditary succession, proceed with the confirmation of a private will and the inventory and distribution of assets located in Brazil, even if the heir is of foreign nationality or has their domicile outside the national territory;
III - in divorce, legal separation or dissolution of a common-law union, proceed with the sharing of assets located in Brazil, even if the owner is of foreign nationality or is domiciled outside the national territory.

Art. 24. The action filed before a foreign court does not induce lis pendens and does not prevent the Brazilian judicial authority from hearing the same cause and those related to it, subject to the contrary provisions of international treaties and bilateral agreements in force in Brazil.
[Single paragraph]
The pendency of the case before the Brazilian jurisdiction does not impede the ratification of a foreign decision when required to produce effects in Brazil.

Art. 25. The Brazilian judicial authority is not competent to process and judge the action when there is a forum selection clause choosing an exclusive foreign forum in an international contract, argued by the defendant in the defense.
§ 1 The provisions of the header do not apply to the hypotheses of exclusive international jurisdiction provided for in this Chapter.
§ 2 Art. 63, §§ 1st to 4th applies to the header of this provision.

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Brazilian Code of Civil Procedure/1973 (BCCP/73) [revoked]

TITLE IV
JUDICIAL BODIES AND COURT AUXILIARIES

CHAPTER II
INTERNATIONAL COMPETENCE

Art. 88. The Brazilian judicial authority is competent when:
I - the defendant, whatever their nationality, is domiciled in Brazil;
II - the obligation shall be performed in Brazil;
III - the action stems from a fact that occurred or from an act performed in Brazil.
[Single paragraph]
For the purpose of the provisions of item I, a foreign legal entity thbranch or branch here is deemed to be domiciled in Brazil.

Art. 89. The Brazilian judicial authority is competent to, with the exclusion of any other:
I - hear of actions related to real estate located in Brazil;
II - proceed with an inventory and share property located in Brazil, even if the heir is a foreigner and has resided outside the national territory.

Art. 90. The action brought before a foreign court does not induce lis pendens, nor does it prevent the Brazilian judicial authority from hearing the same cause and related ones.

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Introductory Law to the Norms of Brazilian Law [ILNBL]

Art. 12. The Brazilian judicial authority is competent when the defendant is domiciled in Brazil, or the obligation has to be performed here.
§ 1 Only the Brazilian judicial authority is responsible for hearing actions related to real estate located in Brazil.
§ 2 Once granted the exequatur and according to the form established by the Brazilian law, the Brazilian judicial authority will carry out the diligences requested by the competent foreign authority, observing the law of the latter, regarding the object of the diligences.

APPENDIX B – BRAZILIAN RULES ON RECOGNITION AND ENFORCEMENT [ENGLISH]

Brazilian Code of Civil Procedure/2015 (BCCP/15) [in force]

BOOK III
PROCEEDINGS IN COURTS AND MEANS OF CHALLENGING JUDICIAL DECISIONS

TITLE I
ORDER OF PROCEEDINGS AND PROCEEDINGS WITHIN THE ORIGINAL JURISDICTION OF THE COURTS

CHAPTER VI
RECOGNITION OF FOREIGN DECISIONS AND GRANTING OF EXEQUATUR TO THE LETTER ROGATORY

Art. 963. The following requirements are indispensable for the homologation of the decision:
I - be rendered by a competent authority;
Single paragraph. For the granting of exequatur to letters rogatory, the requirements set forth in the header of this article and in art. 962, § 2 must be observed.

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Internal Rules of the Superior Court of Justice (IRSCJ)

PART II – PROCEEDINGS

TITLE VII-A PROCEEDINGS FROM FOREIGN STATES - Articles 216-A to 216-X

CHAPTER I
RECOGNITION OF FOREIGN DECISIONS

Art. 216-D. The foreign decision must:
I - have been rendered by a competent authority;