

Luís Roberto Barroso



Associados

ESCRITÓRIO DE ADVOCACIA

NEWSLETTER – 2009 IN REVIEW

This newsletter was prepared by **Luís Roberto Barroso & Associates – Escritório de Advocacia**, under the scientific supervision of **Carmen Tiburcio, Esq.** Associate Professor of Private International Law and International Litigation at the School of Law of the State University of Rio de Janeiro, LLM and SJD in International Law granted by the University of Virginia – USA.

The purpose of this newsletter is to present a review of Superior Courts' case law and Brazilian legislation on international law matters, published in the firm's monthly International Law Bulletin. Both the Bulletin and this newsletter are also available on www.lrbarroso.com.br.

This issue:

Case law

- **Cesare Battisti**
- **International child abduction**
- **Warsaw Pact and CPDC regulations**
- **Rogatory letter and foreign non-judicial authorities**
- **Immunity from jurisdiction:**

Legislation

- **Vienna Convention on the Law of Treaties**
- **ILO Convention no. 178 concerning the inspection of seafarers' working and living conditions**

Case law

Extradition process against former left-wing Italian militant Cesare Battisti

This is an extradition process against a former left-wing Italian militant in the “years of lead”. Marked by intense mobilization of the Italian Government, this process was put under the spotlight when the offender was granted political refugee status by the Brazilian Chief Justice. Due to the semantic indetermination of the corresponding provision of law, Brazil's Supreme Court decided to emphasize the binding character of the government order granting political asylum and, by reviewing the decision of the Chief Justice by casting vote, rule out his decision. By doing so, it has opposed a global trend of regarding decisions by the Executive Branch on international affair matters and has set up a new milestone in its own life cycle of activism. Following that, his extradition was approved on the same quorum. However, at that time, the Supreme Court reaffirmed the traditional case law on the sense that its decision to extradite has an authorization character, and that the President of the Republic has the final say over the surrender or not of a person. (EXT 1085)

- **Letter rogatory issued by a foreign non-judicial authority**

There exist two opposite understandings on this matter. On the one hand, it is said that the letter rogatory is an instrument exclusive of the Judicial Branch, thus only this branch's bodies are entitled the right to make use of it. However, some also say that the letter rogatory is an instrument available to any competent institution pursuant to the request's origin law, thus the Brazilian court could only ascertain this requirement objectively. The second rationale is compatible with the guidance already adopted by the Brazilian Supreme Court of homologating foreign decisions issued by competent authorities pursuant to the local legislation. Divorce declared by the King of Denmark and other administrative authorities, and also those registered at a Japanese municipality can be homologated. On the same grounds, decisions issued by religious authorities, enforceable at the foreign country, are also always homologated. In 2009, we noticed that the Brazilian Supreme Court adopted an admirable position regarding international legal cooperation and granted exequatur to a letter rogatory issued by a foreign non-judicial authority, similarly to what has already been adopted at the Supreme Court. (CR 3.422)

- **Conflict between the Warsaw Pact and the Brazilian CPDC regulations**

Conflicting regulations between the Warsaw Pact and the Brazilian Consumer Protection and Defense Code (CPDC) are frequently contemplated by legal reviews. In general, such conflicts manifest as regards two aspects: (i) the prescription term to file the claim for damages and (ii) the quantification of compensation for luggage loss or delayed flight. There being or not joinder of claims for damages for pain and suffering, the conflicting hypotheses are as follows: (1) compensation for only loss/delay; (2) compensation for loss/delay joined with pain and suffering; and (3) prescription term. On this topic, the Brazilian Supreme Court understands that the relative limitation of property damage set forth in the Convention is valid, pursuant to article 178 of Brazilian Federal Constitution, which submits to international treaties regarding air traffic matters. (AI 715.877)

- **The Hague Convention of 1980 and international child abduction**

The Hague Convention on international child abduction of 1980 received international attention in 2009 due to Sean Goldman's case, which was under public spotlight in Brazil and in the U.S. In addition to this episode, other cases were subject of analysis by Justice. On this topic, it is worth notice that the Convention does not set forth who shall be awarded custody of children, but otherwise who is competent to decide over these issues – such a competency, under the Hague Convention, is that the child's country of habitual residence, where the child lived prior to the illegal abduction, has the right to determine custody. (Article 16). As we can see, the Convention bases on the assumption that the natural judge to decide issues regarding the custody of children younger than 16 years old (Article 4), when illegally performed from one country into another, should be that of habitual residence, who would be capable of deciding towards the child's best interest. The Brazilian Supreme Court decided for the competency of the federal justice over issues regarding the return of abducted children to their home countries of origin. (CC 100.345, MC 15.380)

- **Immunity from jurisdiction: Jango case.**

Following the enactment of the Brazilian Constitution in 1988, the Brazilian Federal Supreme Court, headed by Minister Francisco Rezek, relaxed the immunity of foreign states in Brazil, which had been regarded as absolute heretofore. This case is a labor claim filed against the Embassy of the German Democratic Republic, which was admitted in Brazil. Since then, several lawsuits have been successfully filed by individuals against foreign states. Only for the records, in Brazil, such a relativized immunity only takes place on the prejudgment phase; as regards execution, quasi-absolute immunity prevails.

An interesting case involved a lawsuit filed by the family of former Brazilian president João Goulart, claiming payment for material damage and personal injury from the United States by reason of American authorities participating in his removal from office. This is news for us. At the trial court level, the federal judge upheld that the U.S. could not constitute as defendant of the suit because of the principle of immunity, on the grounds that the defendant's behavior would be characterized as an empire. At the appellate court level, the decision was upheld by the Superior Court of Justice. (RO 57)

Legislation

Vienna Convention on the Law of Treaties

Following an amazingly long time, the Vienna Convention on the Law of Treaties now integrates the Brazilian legal system. On that regard, it complies with all stages set forth in the Brazilian legislation, including legislative approval (Legislative Order no. 496, of 17/07/2009) and executive enactment (Executive Order no. 7,030, of 14/12/09).

- **ILO Convention no. 178 concerning the inspection of seafarers' working and living conditions**

Establishes the inspection of seafarer's working and living conditions (Order no. 6,766, of 10/02/09).