

**Divorce of Brazilian Nationals in Japan**

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I. INTRODUCTION

At the end of 2003, the number of Brazilians registered as aliens in Japan was 274,700. This number corresponds to 14.3% of all aliens residing in Japan, and Brazil is now the third largest aliens' group after North/South Korea and China/Taiwan. The increase of registered Brazilians has been drastic in the last two decades, despite economic recession in Japan: 1,955 (1985); 4,159 (1988); 56,429 (1990); 119,333 (1991); 176,440 (1995); 201,795 (1996); 254,394 (2000); 268,332 (2002); and 274,700 (2003).<sup>1</sup> The cause of this phenomenon is to be ascribed to the reform of the "Immigration and Asylum Authorization Act" (*Shutsu-nyūkoku kanri oyobi nanmin nintei-hō*) in 1990,<sup>2</sup> which enabled Japanese descendants to easily obtain a visa and permission to stay in Japan.<sup>3</sup> These so-called "*dekasegi*" (temporary workers) from Brazil are sending approximately \$1,000 a month on the average to their families in Brazil, which has a substantial impact on Brazil's economy.<sup>4</sup>

The more Brazilian nationals settle in Japan, the more cross-border legal relations, especially family relations, are formed. In 2003, for example, 2,244 Brazilian nationals

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\* This paper is largely based on the author's article: "*Wagakuni ni okeru burajiru-jin no rikon ni tsuite*" (published in: *Hōgaku* 66-3 (2002) 36-63, as well as her lectures held at Rio Grande do Sul University (Porto Alegre/Brazil) in May 2001 and September 2002.

\*\* Abbreviations: FC = Family Court (*Katei Saibansho*); KG = Katei Saiban Geppō.

1 See the statistics at: <<http://www.moj.go.jp>>.

2 Directive No. 319 of Oct. 4, 1951, transformed into law since April 28, 1952.

3 M. WATANABE, *Dekasegi nikkei burajiru-jin*, Vol. 1 (Tokyo 1995) 22; see also HŌMUSHŌ (Ministry of Justice), *Shutsu-nyūkoku kanri wo meguru kinnen no jōkyō*, at: <<http://www.moj.go.jp>>.

4 Cf. WATANABE, *supra* note 3, 618.

married in Japan and 249 divorced.<sup>5</sup> This point is significant for legal practice in Japan, because our international family law is based on the principle of nationality<sup>6</sup> and we need to understand, interpret, and apply Brazilian law to Brazilian nationals. Among various problems we face today concerning private international law, this paper focuses on how to determine and apply the law governing divorce of Brazilian nationals in Japan (II) and under which conditions divorce effectuated in Japan is recognized in Brazil (III).

## II. DIVORCE IN JAPAN

### 1. Law Governing Divorce under Japanese Private International Law

In Japan, the law governing divorce is determined by Article 16 of *Hôrei*, Japanese Statute on the Application of Law.<sup>7</sup> After the thorough reform of *Hôrei* in 1989 as to international family law, Article 16, 1<sup>st</sup> sentence refers to Article 14 *mutatis mutandis*, which determines the law applicable to the personal effects of marriage. According to this rule, divorce is primarily governed by the law of the country to which both spouses belong. If there is no common nationality between the spouses, the law of their common habitual residence is applicable. If there is again no common habitual residence between the spouses, the law which has the most significant relationship to them is to be applied. This principle consists of cascading connecting factors, which designate the applicable law by three steps, namely: common nationality, common habitual residence, and the most significant relationship.<sup>8</sup>

As an exception to it, however, Article 16, 2<sup>nd</sup> sentence of *Hôrei* stipulates that if one of the spouses is a Japanese national and has his/her habitual residence in Japan, Japanese law is applicable.<sup>9</sup> This is a so-called “Japanese clause,” which gives priority to Japanese law based on the Japanese nationality of one of the spouses. This Japanese

5 See <<http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/suii03/marr2.html>> and <<http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/suii03/divo2.html>>.

6 For the principle of nationality in Japan, see NISHITANI, Mancini and the Principle of Nationality in Japanese Private International Law, in: Festschrift für Erik Jayme zum 70. Geburtstag (München 2004) 627-641; SAKURADA, Zum Staatsangehörigkeitsprinzip im japanischen IPR, in: Recht in Japan 1980, 67-82.

7 Law No. 10 of June 21, 1898 (entered into force on July 16, 1898). *Hôrei* is currently undergoing a thorough reform, which will be concluded by the end of 2005, approximately six months earlier than originally planned. See NISHITANI, Die Reform des *Hôrei*, in: ZJapanR / J.Japan.L. 15 (2003) 263-264.

8 This approach is called *Kegels* “Anknüpfungsleiter” in German and has been adopted in a number of civil law countries since the end of the 1970s in order to implement the constitutional principle of sexual equality.

9 As to Article 16 of *Hôrei*, see DOLINGER, Direito civil internacional, vol. 1 – A família no direito internacional privado, t. 1– Casamento e Divórcio (Rio de Janeiro 1997) 339.

clause, which has largely been criticized by Japanese authors as a “homeward trend,” aims at facilitating legal practice in Japan.<sup>10</sup>

Article 32 of *Hôrei* excludes “*renvoi*” with regard to divorce, which is in clear contrast to the ex-Article 29 prior to the reform of 1989. The reasoning of the legislators was that the law designated by the forum’s conflict-of-laws rules should not be deviated from, following the conflict-of-laws rules of a foreign country, when the law which is closely connected to both parties is determined step by step based on the above-mentioned cascading connecting factors.<sup>11</sup>

The law applicable to divorce governs questions such as allowance of divorce, the way of divorce (divorce by mutual consent, conciliation, administrative decision, or judgment), grounds for divorce, and effects of divorce (distribution of assets and claim for solatium).<sup>11a</sup> Also the maintenance obligation between ex-spouses is governed by the law which was applied to divorce according to Article 4 (1) of the Statute on the Law Applicable to Maintenance Obligations.<sup>12</sup> If Brazilian law is applicable, divorce by mutual consent is not permissible, because Brazilian law excludes free disposition of spouses with regard to the grounds of divorce and requires a court decision. We will come back to this point later.

On the other hand, the question of who shall be appointed custodian of the spouses’ children after divorce is not characterized as a matter of divorce, but that of parent-child relationship under Japanese private international law.<sup>13</sup> Under Article 21 of *Hôrei*, the law governing parent-child relationship is the national law of the child if he/she has a nationality which is common to one of his/her parents. If there is no common nationality, the law of the child’s habitual residence is applicable.

The surname of spouses after divorce is governed by their national law respectively in practice, without any regard to the law which governs divorce.<sup>14</sup> For example, a Japanese woman who married a Brazilian national and took his surname after marriage, can keep it even after divorce in accordance with Japanese law (Article 107 (3) of Family Registration Act [*Koseki-hô*]<sup>15</sup>). Likewise, it is up to Brazilian law whether the surname of a Brazilian national is changed upon divorce.<sup>16</sup>

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10 See, e.g., TAMEIKE, *Kokusai shihô kôgi* (2<sup>nd</sup> ed., Tokyo 1999) 436 *et seq.*

11 MINAMI, *Kaisei Hôrei no kaisetsu* (Tokyo 1992) 206 *et seq.*

11<sup>a</sup> See TAMEIKE, *supra* note 10, 437 *et seq.*

12 Law No. 84 of June 12, 1986. Article 4 (1) of this Statute corresponds to Article 8 (1) of the 1973 Hague Convention on the Law Applicable to Maintenance Obligations, which Japan ratified on June 5, 1986 (entered into force on Sept. 1, 1986).

13 See TAMEIKE, *supra* note 10, 446, 486.

14 MINJI HÔMU KYÔKAI, *Jitsumu koseki roppô* (Tokyo 2001) 392 *et seq.*

15 Law No. 224 of Dec. 22, 1947.

16 For various problems concerning family names and the Japanese family registration system in cross-border cases, see NISHITANI, *Das japanische Familienregister und grenzüberschreitende Rechtsverhältnisse*, in: *ZJapanR / J.Japan.L.* 14 (2002) 229-249.

## 2. *Application of the Law Governing Divorce*

### a) *Japanese Substantive Law of Divorce*

If Japanese law is applicable to divorce, four types of divorce are available: (1) divorce by mutual consent, (2) divorce by conciliation, (3) divorce by Family Court resolution, and (4) divorce by judgment.<sup>17</sup>

(1) The first category is “divorce by mutual consent” (*kyôgi rikon*), which constitutes over 90% of all divorce in Japan. Divorce by mutual consent is generally regarded as “the easiest divorce in the world,” because spouses only have to fill out a divorce form and submit it to the Family Registration Office, without any involvement of courts. They can submit it even by post or an agent. It also means that not only divorce itself, but also settlement over the partition of assets, as well as custody and maintenance (alimony) of children, are determined by the spouses themselves. Maintenance obligations between ex-spouses after divorce do not exist under Japanese substantive law. Because there is practically no official control over the actual willingness of spouses as to divorce, a number of people abused this institution in the past and submitted a form without notifying the other spouse. As a result, a preventive measure called “Divorce Notice Rejection System” (*rikon todoke fujuri seido*) has been developed through several administrative directives since 1952, which enables a spouse to notify the Family Registration Office in advance not to accept a divorce form handed in by the other spouse.

(2) If the spouses fail to agree upon divorce voluntarily, a conciliation procedure is to be commenced at Family Court according to Article 18 (1) of the Domestic Causes Inquiries Act (*Kaji shinpan-hô*).<sup>18</sup> This principle of “*priority of conciliation*” obliges spouses to first bring the case to the conciliation procedure at the Family Court. A conciliation commission consists of two mediators and one family judge. They first attempt to reconcile the spouses and then, if there is no prospect for reconciliation, make an effort to lead the spouses to an agreement upon divorce with certain conditions which are acceptable to both parties, such as an appropriate partition of assets, solatium, and custody and maintenance of children. This second category of divorce is called “divorce by conciliation” (*chôtei rikon*), which can be declared only if both spouses agree to divorce as a result of conciliation. When registered, divorce by conciliation has the

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17 With regard to the divorce institution under Japanese substantive law, see BAUM / KLIESOW, *Scheidung japanischer Ehen vor deutschen Gerichten*, in: ZJapanR / J.Japan.L. 6 (1998) 83 *et seq.*; MIZUNO, *Die rechtliche Regelung der Ehescheidung in Japan (hereinafter: Ehescheidung)*, in: ZJapanR / J.Japan.L. 7 (1999) 120 *et seq.*; *idem*, *Sex Discrimination in Japanese Family Law*, in: *International Review of Comparative Public Policy*, Vol. 4 (1992) 160 *et seq.*; NISHITANI, *Privat- und Schlichtungsscheidung deutscher Staatsangehöriger in Japan und die Scheidungsanerkennung in Deutschland*, in: *IPRax* 2002, 49 *et seq.*

18 Law No. 152 of Dec. 6, 1947.

same effects and authority as a formal judgment (Article 21 of the Domestic Causes Inquiries Act).

(3) If during the conciliation procedure the family judge realizes that there are only insignificant points which the spouses do not agree upon, he can take the initiative to declare “divorce by Family Court resolution” (*shinpan rikon*) according to Article 24 of the Domestic Causes Inquiries Act. Divorce by Family Court resolution is, however, automatically voided if one of the spouses files an appeal (Article 25 of the Domestic Causes Inquiries Act). Needless to say, the appellability of Family Court resolution makes it vulnerable and discourages judges to put it into practice. In this respect, divorce by Family Court resolution, like divorce by mutual consent and divorce by conciliation, is based on mutual consent of the parties.

(4) If a conciliation or a Family Court resolution fails, the willing spouse has to move to an independent contentious proceeding at the Family Court, which is costly and time-consuming. The competence over contentious divorce proceedings has recently been transferred from the District Court to the Family Court with the enactment of Personal Affairs Procedure Act (*Jinji soshô-hô*) of 2003.<sup>19</sup> In this procedure, the plaintiff incurs the burden to prove the legal grounds for divorce provided in Article 770 of the Japanese Civil Code, and if he/she is successful, the judge renders a divorce judgment. This type of divorce is called “divorce by judgment” (*saiban rikon*). Article 770 (1) No. 1-4 of Japanese Civil Code defines objective causes for divorce as unfaithfulness (No. 1), malicious desertion (No. 2), disappearance for more than three years (No. 3), and severe mental illness (No. 4). In addition, Article 770 (1) No. 5 grants a general ground for divorce, *i.e.*, “any other serious cause making the continuation of the marriage difficult.” Article 770 (2), however, provides the court with discretionary power to dismiss the case notwithstanding objective grounds for divorce, in case the judge finds it appropriate to maintain the matrimonial relationship. This framework of legal grounds for divorce, accompanied by judges’ wide discretion, makes the outcome of the procedure unpredictable. It discourages, therefore, the spouses to file a contentious proceeding at the Family Court and compels them *de facto* to make compromises at an earlier stage of their divorce dispute.<sup>20</sup>

The divorce institution under Japanese substantive law, which consists of the above-mentioned four categories, is complicated and not efficient in protecting the weaker parties, who are usually women without any independent income.

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19 Law No. 109 of July 16, 2003 (entered into force on April 1, 2004). For a thorough explanation of this law, see, *e.g.*, ONOSE / OKA, *Atarashii jinji soshô seido – shinpô / shinkisoku no kaisetsu* – (Tokyo 2004). For discussions on this reform, see, *e.g.*, SAGAMI, *Jinji soshô jiken-tô no Katei Saibansho he no ikan to tetsuzuki kôsô*, in: *Minji Soshô Zasshi* 48 (2002) 1 *et seq.*; OSAKA BENGOSHI-KAI, *Kaji jiken shinri kaizen ni kansuru ikensho – kaji shinpan-hô / Jinji soshô-hô kaisei he mukete no teigen*, (9.2000), in: *Hanrei Taimuzu* 1045 (2000) 4 *et seq.*

20 MIZUNO, *supra* note 17, *Ehescheidung*, 126 *et seq.*

b) *Brazilian Divorce Law*

If both spouses are Brazilian nationals, Brazilian law is applicable to their divorce according to Article 16 (1) of *Hôrei* based on their common nationality. In this case, divorce by mutual consent is excluded because Brazilian law only provides for divorce by judgment. But what kind of procedure should be implemented in Japan then? This is a long-disputed issue among Japanese academics. Before dealing with this point, it is expedient to examine first whether Japanese judges can declare “judicial separation” according to Brazilian law, although this legal institution does not exist in Japan.

aa) *Judicial Separation*

The law governing judicial separation is to be determined according to Article 16 of *Hôrei mutatis mutandis*, which designates the law applicable to divorce.<sup>21</sup> The prevailing opinion among academics formerly advocated that Japanese judges could not declare judicial separation because Japanese law does not know this legal institution,<sup>22</sup> but this interpretation was due to the provision of ex-Article 16, 2<sup>nd</sup> sentence of *Hôrei* prior to the 1989 reform, which stipulated a cumulative application of Japanese law as to the grounds for divorce. According to this rule, the grounds for divorce under the foreign governing law had to correspond to those of Japanese law. On its analogy, the grounds for judicial separation under the foreign governing law had to have the same basis under Japanese law, which obviously could not be fulfilled, for Japanese law was and is still unfamiliar with judicial separation.<sup>23</sup>

Under the current Article 16 of *Hôrei*, however, the rule of cumulative application of Japanese law has been abolished. From a theoretical viewpoint, therefore, there are no more obstacles to granting judicial separation according to a foreign law in Japan. In addition, judicial separation does not completely differ from judicial divorce in its requirements and procedure, but constitutes an early stage of divorce in its effects: the matrimonial community (*sociedade conjugal*) is dissolved through judicial separation, accompanied with partition of assets and designation of custodian for children, and only the binding force of marriage (*vínculo matrimonial*) persists in the sense that the spouses cannot remarry.<sup>24</sup> From a practical viewpoint, cross-border legal relations

21 See, e.g., EGAWA, *Kokusai shihô (kaiteiban)* (Tokyo 1970) 276; TAMEIKE, *supra* note 10, 454.

22 EGAWA, *supra* note 21, 276; KUBO, *Kokusai shihô gairon (kaiteiban)* (Tokyo 1953) 228 *et seq.*; SANEKATA, *Kokusai shihô gairon* (Tokyo 1942) 296.

23 See TAMEIKE, *Rikon – bekkyo*, in: *Kokusai shihô kôza*, Vol. 2 (Tokyo 1955) 586. In this context, it is remarkable that Orimo already acknowledged the possibility of declaring judicial separation in Japan under the former Article 16 of *Hôrei*. His reasoning was that Article 16 of *Hôrei* only provided for taking Japanese law into consideration in respect to grounds for divorce and did not reject a foreign institution similar to divorce which is unknown to Japanese law. ORIMO, *Kokusai shihô kakuron (shinpan)* (Tokyo 1972) 314.

24 Articles 1575-1576 of Brazilian Civil Code (see note 40). Cf. RIZZARDO, *Direito de Família*, vol. 2, 1<sup>a</sup> ed. (Rio de Janeiro 1994) 376.

would be severely hindered if Brazilian nationals residing in Japan for a long time had to return to Brazil in order to obtain a judgment which grants judicial separation. Therefore, Japanese courts should be entitled to declare a judicial separation on the basis of Brazilian law, as today's prevailing opinion suggests.<sup>25</sup> We still have to wait for the first court decision to declare judicial separation in Japan.

bb) Procedure before Japanese Courts

Provided that Brazilian law governs judicial separation or divorce, the question arises as to what kind of procedure should be taken in Japan.

With regard to procedural rules in cross-border disputes, the principle of "*forum regit processum*" has been taken as a matter of course since the beginning of the modern conflict-of-laws history. This means that, so long as procedural rules are concerned, *lex fori* (the forum's law) is always applicable, though the majority of Japanese authors do not deduce from this principle an unconditional application of the above-mentioned Domestic Causes Inquiries Act, which requests "*priority of conciliation*" at Family Court. Rather, they consider that both divorce by conciliation and divorce by Family Court resolution are based on the mutual consent of spouses, which presupposes free disposition of the spouses with regard to the grounds for divorce. They put forth, therefore, that a contentious proceeding should be filed without any previous recourse to the conciliation, so long as a foreign law such as Brazilian law, which requests a judgment for divorce, is applicable.<sup>26</sup> The reasoning is that the availability of divorce by conciliation or Family Court resolution is a question of how to carry out divorce, which is up to the substantive rules of the law governing divorce, not the procedural law of the forum state.

On the other hand, some other Japanese authors argue that both divorce by conciliation and divorce by Family Court resolution can be regarded as "divorce carried out by a court decision" for the purpose of private international law. Furthermore, they put forth that these procedures are executed by a judicial body in Japan, where family judges render a decision based on impartial assessment, and the decision itself has the same effects as a judgment when registered. These authors say, therefore, that family

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25 KIDANA / MATSUOKA / WATANABE, *Kokusai shihô gairon* (3<sup>rd</sup> revised ed., Tokyo 2001) 192; ORIMO, *supra* note 23, 314; SAKURADA, *Kokusai shihô* (4<sup>th</sup> ed., Tokyo 2005) 261 *et seq.*; SAWAKI / DÔGAUCHI, *Kokusai shihô nyûmon* (5<sup>th</sup> ed., Tokyo 2004) 114 *et seq.*; TAMEIKE, *supra* note 10, 232, 454; *idem*, *supra* note 23, 585 *seq.*; YAMADA, *Kokusai shihô* (3<sup>rd</sup> ed., Tokyo 2004) 457 *et seq.*

26 KUWATA, *Jurisuto* 247 (1962) 84; ORIMO, *supra* note 23, 303 *et seq.*; SAKURADA, *supra* note 25, 256; TAMEIKE, *supra* note 10, 438 *et seq.*; *idem*, *Kokusai kazoku-hô kenkyû* (Tokyo 1985) 402 *et seq.*; YAMADA, *supra* note 25, 448 *seq.* Also *Torii* follows this prevailing opinion, though acknowledges a previous recourse to the conciliation procedure, in order to make efforts to reconcile the spouses. TORII, *Shôgai hanrei hyakusen* (2<sup>nd</sup> ed., Tokyo 1986) 124.

judges in charge of conciliation or Family Court resolution should have the competence to apply a foreign divorce law which requests a judgment for divorce.<sup>27</sup>

For the reason of practicality, the case law has followed the latter minor opinion and declared divorce by conciliation<sup>28</sup> or Family Court resolution,<sup>29</sup> even though the law governing divorce provided for divorce by judgment. In some cases, the judge explained in the official record that these types of divorce have the same effects as a judgment under Japanese law, in order that the divorce be recognized in foreign countries.<sup>30</sup>

In this context, it is noteworthy in European countries and the U.S. that the divorce procedure has been simplified and sets great store on the mutual consent of spouses as a proof of a broken marriage since the “fault principle” (*Verschuldensprinzip*) was substituted by the “principle of broken marriage” (*Zerrüttungsprinzip*).<sup>31</sup> Under these circumstances, authors in Japan are now generally inclined to accept simpler procedures, *i.e.*, conciliation or Family Court resolution, rather than contentious proceedings, in applying a foreign divorce law which requires a judgment.<sup>32</sup>

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- 27 KUBO, *Kokusai mibun-hô no kenkyû* (Tokyo 1973) 129 *et seq.* (especially p. 149 *et seq.*). Also Satoshi Watanabe argues that in both divorce by conciliation and Family Court resolution, the power to alter the personal status is given to the court, so that these procedures can be implemented in applying a foreign divorce law which requires a judgment. S. WATANABE, in: *Kihon-hô konmentâru*, Article 16 of *Hôrei* (Tokyo 1994) 103 *et seq.*; *idem*, in: *Minshô-hô Zasshi* 107-2 (1992) 283 *et seq.* Interestingly, *Ebisawa* asserts that the procedure of Family Court resolution provided by Article 23 of the Domestic Causes Inquiries Act presupposes the exclusion of parties' disposition (*e.g.*, nullity of marriage and divorce) and can be implemented with regard to cross-border divorce instead of the Family Court resolution under Article 24 of the Domestic Causes Inquiries Act. EBISAWA, *Kokusai shihô sandai*, in: *Kokusai shihô no kihon mondai* (Tokyo 1962) 322 *et seq.* His position was supported by TAMURA, *Jurisuto* 407 (1968) 131 *et seq.*; SAWAKI, *Hanrei Taimuzu* 454 (1982) 3.
- 28 *E.g.*, Tokyo FC 21.4.1958 (KG 10-8, 52); Yokohama FC 4.5.1959 (KG 11-8, 130); Tokyo FC 1.8.1960 (KG 12-11, 165); Yokohama FC 24.7.1961 (KG 14-1, 119); Tokyo FC 8.11.1962 (KG 15-2, 162); Sendai FC (Furukawa Branch) 26.2.1976 (KG 29-1, 109); Hiroshima FC 1.12.1980 (KG 34-2, 174).
- 29 Osaka FC 4.6.1963 (KG 15-8, 133); Tokyo FC 22.8.1968 (KG 21-1, 121); Tokyo FC 19.12.1973 (KG 26-7, 59); Kyoto FC 4.6.1975 (KG 28-4, 127); Tokyo FC 31.5.1976 (*Hanrei Taimuzu* 345, 297); Sapporo FC 13.9.1985 (KG 38-6, 39); Tokyo FC 23.2.1988 (KG 40-6, 65). There are also cases which implemented the procedure provided for by Article 23 of the Domestic Causes Inquiries Act in accordance with *Ebisawa's* opinion note 27. Tokyo FC 13.3.1975 (KG 28-4, 121); Yokohama FC 14.5.1991 (KG 43-10, 48).
- 30 *E.g.*, Hiroshima FC 1.12.1980 (*supra* note 28); Tokyo FC 22.8.1968 (*supra* note 29); also as to divorce of two Turkish nationals, Kobe FC 23.1.1959 (KG 11-4, 143).
- 31 As the most recent example, we may refer to the reform of French Civil Code in 2004, which introduced “divorce by mutual consent” and “accepted divorce” in its Articles 229 to 234 (Loi n° 2004-439 du 26 mai 2004 art. 3 *Journal Officiel* du 27 mai 2004, entered into force on Jan. 1, 2005).
- 32 See, *e.g.*, TAMEIKE, *supra* note 10, 441; *idem*, *Kokusai shihô no sôten (shinpan)* (Tokyo 1996) 172; TORII, in: *Shôgai hanrei hyakusen* (3<sup>rd</sup> ed., Tokyo 1995) 131.



The most important point with regard to this issue is that the procedural law of every country is established in concert with its substantive law. An unconditional application of the forum's procedural law may, therefore, change the result of the application of foreign law. This holds true especially for divorce, as its procedural and substantive rules are inextricably connected. We must, therefore, select a procedure which is most suitable for the foreign law governing divorce out of conciliation, Family Court resolution, and contentious proceeding in Japan.<sup>33</sup>

cc) The Application of Brazilian Law in Japan

There are three cases published in Japan which deal with the divorce of a Brazilian national. In the first case, Tokyo District Court judgment of August 3, 1984,<sup>34</sup> the wife was Japanese and the husband Brazilian. They had been living in Brazil together after their marriage, but the wife came back to Japan alone after their relationship broke up because of the husband's adultery. She filed a divorce suit before the Tokyo District Court. In this case, the law applicable to divorce was Brazilian law according to the former Article 16 of *Hôrei*, which designated the national law of the husband. The judge excluded, however, the application of Brazilian law on the grounds of public policy according to the former Article 30 (currently: Article 33) of *Hôrei*. The judge opined that Brazilian divorce law, which required three years' duration of judicial separation before filing a divorce suit and (still) prohibited an immediate divorce, infringed on Japan's public policy and good morals (*ordre public et bonnes mœurs*), for in this case the marriage was already broken and the husband agreed to divorce.

In the second case, Urawa District Court judgment of Nov. 29, 1985,<sup>35</sup> the husband was Japanese and the wife Brazilian. As the former Article 16 of *Hôrei* only referred to the national law of the husband in determining the law governing divorce, Japanese law was applied.

In the third case, Nagoya High Court judgment of March 23, 2004,<sup>36</sup> both spouses were Brazilian nationals living separately for more than two years in Japan, but had not requested a judicial separation. Both spouses agreed upon divorce, but not on child custody. The first instance, Nagoya District Court judgment of February 13, 2003, rightly declared Brazilian law applicable according to the present Article 16 of *Hôrei*, though it made a mistake in applying it, as the judge considered that Brazilian divorce law still requested three years' duration of judicial separation before filing divorce, disregarding its reform in 1989 and 1992.<sup>37</sup> The Nagoya High Court applied Brazilian

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33 NISHITANI, *supra* note \*, 42 *et seq.*

34 KG 37-10, 107.

35 Hanrei Taimuzu 596, 73.

36 <<http://www.tkclx.ne.jp/lexbin/ShowZenbun.aspx?sk=632425488526968750&pv=1&bb=28092080>> (with limited access).

37 Brazilian divorce law after the reform of 2002 would not have been applicable in any way, because the court hearing had been concluded on January 9, 2003, *i.e.*, the day before it entered into force.

divorce law as it was most recently reformed in 2002 and declared divorce based on the parties' factual separation for more than two years.

Although Brazilian law was applicable under Article 16 of *Hôrei* in the first and third cases, there are no indications as to whether the parties had applied for divorce by conciliation or Family Court resolution before filing contentious proceeding. Thus, court decisions do not give us a clue as to the issue on the procedure adapted to the application of Brazilian law.

Let us think about an appropriate solution by taking a closer look at Brazilian law.<sup>38</sup> With the promulgation of the Brazilian Divorce Act in 1977,<sup>39</sup> the terminology of separation was changed from “*desquite*” to “*separação*” and the grounds for separation were no longer restricted to those enumerated in the statute (*clausus apertus*). Furthermore, through the reform of the Divorce Act in 1989 and 1992, as well as its insertion into the Civil Code in 2002, the “principle of broken marriage” has been driven forward and the requirements for divorce have been reduced.<sup>40</sup>

If we come to select an appropriate procedure in applying Brazilian substantive divorce law in Japan, both consensual judicial separation (*separação judicial consensual*) and consensual direct divorce (*divórcio direto consensual*) can sufficiently be carried out in conciliation at the Family Court in my opinion. For consensual judicial separation, the mutual consent of spouses is the decisive factor<sup>41</sup> and the judge does not examine objective grounds for judicial separation in principle. In this respect, a conciliation procedure can fulfill these requirements.<sup>42</sup> The fact that consensual separation is called a “bilateral legal act” (*negócio jurídico bilateral*) may confirm this position.<sup>43</sup>

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38 As to this point, see NISHITANI, *supra* note \*, 44 *et seq.*

39 Lei N. 6.515, de 26.12.1977, “Regula os casos de dissolução da sociedade conjugal e do casamento, seus efeitos e respectivos processos, e dá outras providências” (*hereinafter*: Divorce Act).

40 *Cf.* Article 226 § 6.º Constituição da República Federativa do Brasil de 5.10.1988; Lei 7.841 de 17.10.1989; Lei 8.408 de 13.2.1992; Código Civil = Lei N. 10.406, de 10.1.2002 (*hereinafter*: Brazilian Civil Code [entered into force on Jan. 10, 2003]). Article 226 § 6.º of the Constitution of 1988 introduced the institution of “direct divorce” and reduced the least duration of judicial separation for filing a divorce suit to one year. GOMES, *Direito de Família* (Rio de Janeiro 2001) 211 *et seq.*

41 The substantive requirements for consensual separation are the spouses' mutual consent and the duration of marriage for more than one year (Article 1574 of Brazilian Civil Code). As an exception, Article 1574, Paragraph 1 provides judges with the discretion to dismiss the claim for consensual judicial separation when they find that the parties' agreement does not reflect the interests of children or of one of the spouses.

42 For the procedural requirements for consensual separation, see Article 34 of Brazilian Divorce Act, as well as Articles 1120 to 1124 of Civil Procedure Code.

43 *Cf.* RIZZARDO, *Direito de Família*, vol. 2, (1<sup>st</sup> ed., Rio de Janeiro 1994) 398 *et seq.*

Arguably, the same considerations apply to consensual direct divorce as well.<sup>44</sup> An important question at this point is whether judicial separation or divorce carried out by conciliation in Japan can be recognized in Brazil. As we will examine later, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal*) is generous in recognizing foreign divorce and it is safe to assume that divorce effectuated in conciliation in Japan can be put into the same category as divorce by judgment in Brazil.<sup>45</sup>

The “indirect divorce” (*divórcio indireto*) under Brazilian law, which requires the “conversion of legal separation into divorce” (*conversão em divórcio*) through a court decision, can be carried out by way of Family Court resolution. Since Brazilian law does not require a control over the objective grounds for divorce in this case and even prohibits a renewed control over the grounds for judicial separation,<sup>46</sup> indirect divorce seems to be compatible with Japanese Family Court resolution.

On the other hand, contentious procedure at Family Court should be implemented for litigious judicial separation (*separação judicial litigiosa*) under Brazilian law, because objective grounds for judicial separation, such as violation of matrimonial obligations or impossibility of continuing marriage, must be proven by one of the spouses.<sup>47</sup> In this case, contentious procedure is appropriate to guarantee the parties’ right to a fair hearing (*rechtliches Gehör*). However, as the spouses might possibly reach mutual consent to separation in the course of the procedure, in which case it is transformed into consensual judicial separation,<sup>48</sup> conciliation should primarily be attempted before turning to contentious procedure at Family Court. The same considerations will also apply to litigious direct divorce (*divórcio direto litigioso*) under Brazilian law.<sup>49</sup>

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44 The substantive requirements for consensual direct divorce are the spouses’ mutual consent and the duration of factual separation for more than two years (Article 1580 § 2 of Brazilian Civil Code). For its procedure, Article 40 § 2 of Divorce Act applies the rules on consensual judicial separation *mutatis mutandis*.

45 Cf. the scholarly opinion which argues that a foreign divorce effectuated in conciliation can be recognized in Germany: KONO, *Internationale Rechtshängigkeit durch japanische Schlichtungsverfahren?*, in: IPRax 1990, 94 *et seq.*; NISHITANI, *supra* note 17, 53; see also STAUDINGER / SPELLENBERG, § 328 ZPO (13<sup>th</sup> ed., Berlin 1997) number 192 *et seq.*

46 The substantive requirements for the conversion of legal separation into divorce are the duration of judicial separation for more than one year according to Article 1580 § 1 of Brazilian Civil Code.

47 Articles 1572 and 1573 of Brazilian Civil Code.

48 Article 1123 of Brazilian Civil Procedure Code.

49 Article 1580 § 2 of Brazilian Civil Code.

### III. RECOGNITION OF JAPANESE DIVORCE IN BRAZIL

Now we come to the last point on the recognition of Japanese divorce in Brazil.<sup>50</sup> As to the recognition of foreign judgments, Brazilian law is not based on the so-called automatic recognition as under Article 118 of the Japanese Civil Procedure Law, but demands a formal confirmation by the Federal Supreme Court (*deliberação*) that the requirements for recognition are fulfilled. There have been more than twenty cases in Brazil since 1952<sup>51</sup> in which the recognition of a divorce carried out in Japan was requested at the Federal Supreme Court.

In most cases, the divorce for which recognition was requested was carried out by mutual consent of the spouses. Because this type of divorce under Japanese law is effectuated by a legal act of the parties at Family Registration Office without any involvement of courts, the question often arises as to whether it can be recognized as a “judgment” in Brazil. It is noteworthy that the public attorney has sometimes raised objections against its recognition in Brazil. The Federal Supreme Court, however, always recognized Japanese divorces by mutual consent, considering first that this type of divorce is implemented as an administrative act of Family Registration Office in Japan and has the same effect as a Brazilian judgment of divorce, and second that Brazil’s public interests require registering family relations established abroad and making them public in Brazil.<sup>52</sup>

On the other hand, the decision of the Federal Supreme Court of November 18, 1997,<sup>53</sup> concerned the recognition of a Japanese divorce judgment, and the decision of March 6, 2002,<sup>54</sup> that of a divorce carried out by the Yokohama Family Court. The

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50 The author expresses sincerest thanks to *Professor Claudia Lima Marques* (Rio Grande do Sul University, Porto Alegre, Brazil) and her students for providing useful information on the recognition of Japanese divorce in Brazil, which would have been otherwise inaccessible to the author. For further information on the recognition of Japanese divorce in Brazil, see L. MARQUES, *O Direito Internacional Privado solucionando conflitos de cultura: os divórcios no Japão o seu reconhecimento no Brasil*, in: *Cadernos do Programa de Pós-Graduação em Direito – PPGDir./UFRGS*, Edição Novembro 2003, 118 *et seq.*

51 The first case was decided on May 30, 1952 (Sentença Estrangeira <SE> N.º 1312-Japão). See NISHITANI, *supra* note \*, 47 *et seq.*

52 SE N.º 1312-Japão (*supra* note 51); SE N.º 2251-Japão, J 15/10/1975, Tribunal Pleno, Ministro Moreira Alves, *Revista Trimestral da Justiça* <R.T.J.> 77, 389; SE N.º 2891-3 Japão, J 19/3/1981; SE N.º 3298-8 Japão, 16/8/1983; SE N.º 3371-1 Japão; SE N.º 3371-2 Japão; SE N.º 3724-6 Japão, 2/6/1986; SE N.º 5125 Japão, 23/11/1997; SEC N.º 6399-0 Japão, J 21/06/2000, Tribunal Pleno, Ministro Marco Aurélio, *Diário da Justiça* <D.J.> 15.9.2000; SE N.º 6848 Japão, J 28/8/2001; SE N.º 6607 Japão, J 6/9/2001; SE N.º 6527 Japão, J 13/9/2001; SE N.º 6878 Japão, J 13/9/2001; SE N.º 6969 Japão, J 21/9/2001; SE N.º 7005 Japão, J 11/12/2001; SE N.º 7116 Japão, J 14/12/2001; SE N.º 7188 Japão, J 18/12/2001; SE N.º 7039 Japão, J 20/3/2002. The decision of 1.2.2002 (SE N.º 7202-Japão) recognized divorce by mutual consent, though with the reservation that the effect is restricted to judicial separation until one year after the divorce was carried out.

53 SE N.º 5608-Japão, J 18/11/1997, Ministro Celso de Mello, Presidente.

54 SE N.º 7292-Japão, J 15/3/2002, Ministro Marco Aurélio, Presidente.

judge of the Federal Supreme Court recognized these types of divorce as well. The details, however, are not explained in these decisions and it remained unclear whether divorce was declared by conciliation or Family Court resolution in the latter case. Either way, there should not be any obstacles to recognizing these types of divorce, since even divorce by mutual consent is recognized as a kind of “judgment” in Brazil.

Interestingly enough, the Federal Supreme Court in some cases acknowledged different effects for Japanese and Brazilian spouses respectively, namely the effect of divorce for the Japanese spouse and that of judicial separation for the Brazilian spouse. The reason was either that divorce was still unknown in Brazil (decision of October 15, 1975<sup>55</sup>), or the same spouses married once, got divorced, and later remarried, and at that time divorce was allowed only once in Brazil (decision of April 12, 1988<sup>56</sup>). In these cases, certain restrictions provided for by Brazilian law were imposed only on Brazilian nationals, not on Japanese nationals. Also, the current requirement for the recognition of foreign divorce judgments that one year has to have passed after it becomes *res judicata* in the rendering foreign country (Article 7 § 6° of the Law of Introduction to Brazilian Civil Code [*Lei de Introdução ao Código Civil Brasileiro*]) is set only for Brazilian nationals. If we think about the fact that Brazilian private international law has been based on the principle of domicile since 1942, it appears to be a recourse to the principle of nationality as an exception. The explanation might be that certain matters related to Brazil’s public policy must be strictly observed by Brazilian nationals.

To sum up, the recognition of foreign divorce is applied very generously in Brazil. Considering this practice, the ‘reciprocity’ requirement for the recognition of foreign judgments in Japan (Article 118 No. 4 of Japanese Civil Procedure Code) is fulfilled in relation to Brazil, even though Brazilian law does not have an automatic recognition system, but requires the entitlement of recognition by the Federal Supreme Court.

#### ZUSAMMENFASSUNG

*Der Artikel behandelt die rechtlichen Fragen im Zusammenhang mit der Scheidung brasilianischer Staatsbürger in Japan: im einzelnen vor allem kollisionsrechtliche Fragen, Verfahrensfragen und die Frage der Anerkennung japanischer Scheidungen in Brasilien. Dabei handelt es sich um ein Thema von zunehmend praktischer Relevanz in Japan, da die Zahl der Brasilianer, die sich in Japan aufhalten, in den vergangenen Jahren aufgrund einer Reform des Ausländerrechts, das nunmehr Brasilianern mit*

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55 See note 52.

56 SE N.º 3869-Japão, J 12/04/1988, Ministro Rafael Mayer, R.T.J. 125, 72.

*japanischer Abstammung unter erleichterten Bedingungen die Möglichkeit der Beantragung von Aufenthaltsgenehmigungen und Arbeitserlaubnissen in Japan einräumt, enorm angestiegen ist. Brasilianer bilden mittlerweile die drittgrößte Gruppe von Ausländern in Japan, nach Chinesen und Koreanern. Dies hat auch zu einer deutlichen Zunahme von Eheschließungen und Scheidungen in Japan unter Beteiligung mindestens einer Person mit brasilianischer Staatsbürgerschaft geführt (Eheschließungen 2003: 2244; Ehescheidungen: 249).*

*Das reformierte japanische Rechtsanwendungsgesetz (Hôrei), das die Regeln zum japanischen IPR enthält, bestimmt in Artikel 16, daß zur Bestimmung des Scheidungsstatuts Artikel 14 entsprechend anzuwenden ist, wonach sich das Statut der allgemeinen Ehwirkungen richtet. Artikel 14 sieht eine Anknüpfungsleiter vor, wonach die Wirkungen der Ehe sich zunächst nach dem gemeinsamen Heimatrecht der Ehegatten richten sollen; gibt es ein solches Recht nicht, so soll das Recht am gemeinsamen gewöhnlichen Aufenthaltsort das anzuwendende Recht sein. Führt diese Anknüpfung ebenfalls nicht zu einem eindeutigen Ehwirkungsstatut, so soll das Recht des Ortes gelten, zu dem die Ehepartner aus anderen Gründen die engste Beziehung haben. Dies führt in nicht wenigen Fällen zum brasilianischen Recht als Scheidungsstatut, insbesondere weil sich unter den Brasilianern in Japan viele Gastarbeiter befinden, deren Familien in Brasilien leben. Zu beachten ist, daß Artikel 16 S. 2 Hôrei eine Japanerklausel enthält, wonach japanisches Recht grundsätzlich vorrangig zur Anwendung gelangen soll, wenn einer der Ehegatten japanischer Staatsbürger ist und seinen gewöhnlichen Aufenthalt in Japan hat. Das Scheidungsstatut ist in erster Linie maßgeblich zur Bestimmung der Scheidungsvoraussetzungen und zur Entscheidung über die Frage der Auflösung der Ehe sowie der Art der Scheidung. Darüber hinaus richten sich danach auch verschiedene Scheidungsfolgen wie etwa die güterrechtliche Abwicklung der Ehe oder, ob ein Anspruch eines Ehegatten auf Schmerzensgeld besteht.*

*Die Anwendung von brasilianischem Recht im Falle einer Scheidung bereitet in Japan erhebliche Schwierigkeiten, die zum einen durch die Unterschiede im materiellen Recht beider Länder, viel stärker aber noch durch die unterschiedlichen Arten der Scheidungsverfahren hervorgerufen werden. Dies hängt damit zusammen, daß in Japan grundsätzlich vier verschiedene Formen der Scheidung anerkannt sind, in Brasilien aber die Scheidung ein Gerichtsurteil voraussetzt. So unterscheidet man in Japan zwischen „einverständlichen Scheidungen“, der Scheidung im Anschluß an ein Schlichtungsverfahren vor den japanischen Familiengerichten, die Scheidung durch Beschluß des Familiengerichts und die Scheidung durch Urteil eines ordentlichen Gerichts. Zudem kann im brasilianischen Recht die Trennung durch Gerichtsbeschluß als Vorstufe einer Scheidung erforderlich sein, ein Rechtsinstitut, das in Japan unbekannt ist. Daher stellt sich etwa die Frage, ob japanische Gerichte einen solchen Trennungsbeschluß fassen dürfen. Bisher hat kein Gericht in Japan einen solchen Beschluß erlassen.*

*Da sich die Ehescheidung durch die ordentlichen Gerichte im japanischen System als ein langwieriges, kostenträchtiges und zudem aus japanischer Sicht nachrangiges*

*Verfahren darstellt, stellt sich die Frage, ob auch andere Formen der Ehescheidung in Japan die Voraussetzung einer gerichtlichen Scheidung nach brasilianischem Recht erfüllen. Hierüber besteht in Japan Streit, vor allem da hier ein Prinzip im IPR, daß Verfahrensfragen sich grundsätzlich nach der lex fori richten, mit einer scheinbar materiellrechtlichen Voraussetzung der Scheidung im brasilianischen Recht kollidiert. Die Rechtsprechung in Japan hat sich letztlich aus rechtspraktischen Erwägungen dafür entschieden, auch die Ehescheidung durch Beschluß eines Familiengerichts und die Feststellung der Ehescheidung nach Abschluß eines Schlichtungsverfahrens durch ein Familiengericht als „gerichtliche Scheidungen“ im Sinne des brasilianischen Rechts anzusehen. Es gibt bisher lediglich drei japanische Gerichtsurteile, die eine Ehe, an welcher brasilianische Staatsbürger beteiligt waren, geschieden haben.*

*Vom Gesichtspunkt der Rechtspraxis der Anerkennung der Scheidungen von Brasilianern in Japan aus betrachtet, stellt sich das Problem als eher gering dar. Das Oberste Bundesgericht Brasiliens (Supremo Tribunal Federal) verfährt sehr großzügig bei der Anerkennung japanischer Scheidungen.*

*(deutsche Übersetzung durch die Redaktion)*