Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

1

Appealability of interlocutory decisions in Brazilian law and the collateral order doctrine

Capacité à faire appel des décisions interlocutoires en droit Brésilien et la « collateral order doctrine »

César Augusto Martins Carnaúba
Lawyer in São Paulo, Brazil

Abstract: This article aims at studying the appellate system of interlocutory decisions in the U.S. legal system, grounded on the collateral order doctrine, in order to trace parallels with the Brazilian current state of the law.

Keywords: Appeals. Collateral order doctrine. Comparative law. Interlocutory appeal. Procedural law.

I. INTRODUCTION

After more than three years since the Brazilian Code of Civil Procedure (CPC, Law No. 13,105/2015) has entered into force, it has become possible to distinguish the common uncertainties that usually derive from any major change in the state of the law and, on the other side, the controversies that truly divide the scholars.[1,2,3] The second category encompasses the ideal interpretation and application of the appeal against interlocutory decisions – named by Brazilian law as *"agravo de instrumento"* and hereinafter referred to as "interlocutory appeal"[4] – and the many changes it has gone through between the former Code and the current one.

One of the distinctive features of the interlocutory appeal – which consists in an interpretative guide to all legal rules of that appellate procedure – is the axiological vector of *non-appealability of interlocutory decisions*[5] – an interpretational guide that leans towards the restrictive interpretation of interlocutory appeal hypothesis. From that vector, it is possible to jump to some conclusions regarding the appellate procedure (some of them grounded on statutory provisions), such as the absence

1. The author would like to acknowledge Ms. Letícia Machado Haertel and Mr. Marcello de Oliveira Gulim for the constant exchange of ideas that made this study possible.
2. All quoted references in Portuguese were freely translated into English. The original sources in Portuguese can be found on References.
3. And this should not come as a surprise, considering that "every Code constitutes expression of an inductive method, an analysis of certain legal reality, built and presented, however, as a system, translating the current and permanent needs of a people, in the considered area of the law. […] That means the Code represents, in fact, the legal system of process suitability (as an instrument) to the parties that trigger it, to the to the disputed object, and to the ends aimed by the judicial activity, always polarizing to the declaration and creation of the law in the concrete world" (LACERDA, Galeno. O Código como Sistema legal de adequação do processo. *Revista do Instituto dos Advogados do Rio Grande do Sul – IARGS*, Porto Alegre, v. 50, 1976, p. 163-170).
4. That appellate procedure may also be referred to as "bill of error" or "writ of error", as done by José Carlos Barbosa Moreira (Brazilian civil procedure: an overview. *A panorama of Brazilian Law*, Rio de Janeiro, vol. 1, p. 183-205, 1992).
5. *Cf.* VASCONCELOS, Ronaldo; GULIM, Marcello de Oliveira. Sistema recursal brasileiro e o vetor da não recorribilidade, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa (coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 13. São Paulo: Revista dos Tribunais, 2017, p. 503-523. Briefly saying, the "axiological vector of non-appealability of interlocutory decisions" is a concept created by Brazilian professor Ronaldo Vasconcelos and Marcello Gulim in the abovementioned paper – a figure we strongly support. It is necessary to understand the previous Brazilian Code of Civil Procedure (as will be more detailed in Part II) allowed interlocutory appeals against virtually any interlocutory decision. The 2015 Code, otherwise, prescribed one list of appealable interlocutory decisions that led to the interpretation any interlocutory decision not prescribed in law could not be appealed. Despite different interpretations from many scholars and the jurisprudential creation analyzed in Part IV, it is still well accepted in the Brazilian legal community that the scope of the current Code is to diminish the number of interlocutory appeals in general. Therefore, it is still useful to defend – as we do – the existence of that axiological vector, that may consist in an interpretational guide when discussing appealability in concrete cases.

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

of an automatic stay effect,[6] the impossibility of appealing some decisions[7] and the prevalence of the decision on the merits of the lower court judge.[8]

As mentioned above, the legal community has been intensely discussing the interlocutory appeal. Highly respected scholars defend a completely different orientation to that of the previous paragraph[9] – they defend the extension of the stay effect or of the list of appealable interlocutory decisions.[10]

Therefore, this paper's main goal is to contribute to the discussion concerning the interlocutory appeal with an argumentative proposal hardly used until now: the comparative study between Brazilian and American law.[11] Strongly grounded on

6. *Cf.* VASCONCELOS, Ronaldo; CARNAÚBA, César Augusto Martins. Efeito suspensivo do agravo de instrumento contra decisão parcial de mérito, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa (coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 14. São Paulo: Revista dos Tribunais, 2018, p. 525-540. The Brazilian current CPC prescribed, as a general rule, that appeals shall not stay proceedings in lower courts. The higher courts, however, may grant stay effect to appeals when necessary (see *infra* Part II). The exception to the general rule is the appeal from a final decision (judgment), that usually stays the lower court proceedings and the court may withdraw it.
7. "Some could imagine that, not existing an appeal to fight certain interlocutory decision, the party would be immediately able to propose an action for a writ of mandamus. However, we need to see that the legislator made a clear choice when he drew the interlocutory appeal such as presented in the law. Hence, the writ of mandamus acceptance is conditioned to a previous question: knowing if the choice made by the legislator is constitutional or not" (MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Comentários ao Código de Processo civil*, vol. XVI: artigos 976 ao 1.044, *in:* MARINONI, Luiz Guilherme (dir.); ARENHART, Sérgio Cruz; MITIDIERO, Daniel (coord.). *Comentários ao Código de Processo Civil*. São Paulo: Revista dos Tribunais, 2016, p. 209, comentários ao artigo 1.015).
8. The narrow interpretation of appealable interlocutory decisions comes hand-by-hand with a greater number of duties and responsibilities to the lower court judge, that must, at all times, such as the duty to give reasons or effectively applying the principle of *audi alteram partem* (*Cf.* VASCONCELOS, Ronaldo; GULIM, Marcello de Oliveira. Sistema recursal brasileiro e o vetor da não recorribilidade, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa (coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 13. São Paulo: Revista dos Tribunais, 2017, p. 503-523).
9. To Paulo Lucon, although the Code established a hermetic list of appealable interlocutory decisions, that list should be read through an extensive interpretation, in order to provide the same legal treatment to substantially similar situations, and preventing parties from major injuries (LUCON, Paulo Henrique dos Santos. Agravo de instrumento no Código de Processo Civil de 2015, *in* MENDES, Aluído Gonçalves de Castro *et al*. *O novo processo civil brasileiro:* temas relevantes – estudos em homenagem ao professor, jurista e ministro Luiz Fux, vol. II. Rio de Janeiro: LMJ Mundo Jurídico, 2018, p. 383-398).
10. And, as we will see below (*infra* Part IV), the Brazilian Superior Court of Justice established a similar orientation, when its Third Panel stated that "Although not expressly established by article 1,015 of the new CPC, an interlocutory decision related to the definition of jurisdiction continues to allow challenge by means of an interlocutory appeal, given an analogous or extensive interpretation of the rule contained in item III of article 1,015 of the new CPC" (Brazilian Superior Court of Justice (STJ), REsp 1.969.396/MT, 3ª Turma, rel. Min. Nancy Andrighi, j. 05 Dec. 2018).
11. For an extensive study regarding interlocutory decisions and interlocutory appeals that examines civil law legal systems, such as France and Germany, we recommend the work of Rafael Vinheiro Monteiro Barbosa (*Sistematização das decisões interlocutórias e os regimes de recorribilidade*. Tese (doutorado em Direito), Pontifícia Universidade Católica de São Paulo, São Paulo, 2016, 339 p.). There

the thesis of the axiological vector of non-appealability of interlocutory decisions, we intend to demonstrate that it is also present in a common law system (the US system).[12] That could serve, at least, as a persuasive example in favor of Brazil adopting a similar perspective and applying some American appellate procedure standards.[13] Furthermore, we intend to trace some parallels between the American appealability of interlocutory decisions and the recent Brazilian Superior Court of Justice decision, which brought to Brazilian law system an interpretation of the law that is highly consonant with the collateral order doctrine.

Part II of this article presents the evolution of the interlocutory appeal in Brazilian law, from its beginning in the Portuguese Ordinations to the interpretational guides established by the current CPC.

Part III presents the appealability of interlocutory decisions in the United States of America, developed from the now known as "collateral order doctrine".

Part IV, at last, compares the precedent exposition with the recent decision by the Brazilian Superior Court of Justice, that – at the best of our knowledge – leaned towards a similar orientation to that established by the collateral order doctrine.

---

are also studies comparing Brazilian and German appeals, such as Christoph Kern's (Appellate justice and miscellaneous appeals – the proposals for a reform of Brazilian civil procedure as compared to the German solution. *Revista de Processo*, São Paulo: Revista dos Tribunais, vol. 188, p. 147-162, out. 2010). The comparison between Brazilian law and common law countries is far less usual, but Cesar Pritsch's paper is a good example of that matter (The Brazilian appellate procedure through Common Law lenses: how American standards of review may help improve Brazilian civil procedure. *University of Miami Inter-American Law Review*. Miami, vol. 48, issue 3, p. 56-96, 2017).

12. Though not in those exact terms, but what can be seen in American common law appellate rules – as demonstrated *infra* (Part III) is an inherent interpretational guide that tends to restrict the hypothesis of appealable interlocutory decisions.

13. It is perfectly possible to apply American appellate standards in Brazilian law, since in Brazil "here is a favorable environment for changes that promote efficiency in civil procedure, including ideas based on comparative law. The last twenty years have seen several reforms focusing on the limitation of appeals and a progressive march towards precedent unification and binding effect. Additionally, there is a debate on the necessity of empowering the trial courts by giving deference to their reasonable decisions, and a national policy of the judiciary branch to empower the trial courts by balancing budget and infrastructure, and by encouraging innovative practices" (PRITSCH, Cesar Zucatti. The Brazilian appellate procedure through Common Law lenses: how American standards of review may help improve Brazilian civil procedure. *University of Miami Inter-American Law Review*. Miami, vol. 48, issue 3, p. 56-96, 2017). In addition, "the lack of a statutory rule introducing and regulating standards of appellate review does not prevent judges from applying a deferential review based on a systematic interpretation of the legal system, notably constitutional principles. On the other hand, no constitutional principle or statutory provision bar the immediate adoption of such standards by the Brazilian courts. However, a statutory change expressly introducing them in the Brazilian civil procedure would ensure the uniform adoption, best furthering the goal of reducing the burden on appellate courts and improving the efficacy of the entire system" (*Idem*).

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

II. THE APPEALABILITY OF INTERLOCUTORY DECISIONS IN BRAZILIAN LAW

The provisions of article 1,015 of CPC represents an important breakthrough in Brazilian procedural law, since it establishes an exhaustive list of appealable interlocutory decisions.[14] Its item XIII specifies that the only appealable interlocutory decisions apart from the list enshrined in article 1,015 will be the *"other cases expressly provided by law"*.

On one side, part of legal community claims for the return of the previous legal logic (established in the former Code) that allowed interlocutory appeals against any interlocutory decisions, considering the several damages parties could suffer without an immediate remedy to tackle an unfair decision. At the end of the day, forbidding immediate appeals downgrades basic procedural rights, outcomes of *due process of law* and access to Justice themselves.

On the other side, enthusiasts of the new Code celebrate those changes, since the (properly done) postponement of interlocutory decisions appealability combats one of the worst nightmares of parties: *time*, a despicable legal effect that enshrines injustice and buries the hopes of those who, even with reason, see in the legal procedure an instrument capable of ensuring the maintenance of *status quo*, preventing them from satisfaction in a reasonable time. The whole proceeding, in these circumstances, is a real obstacle to the social pacification of litigation.[15]

Both extremist views on pros and cons of appealability of interlocutory decisions deserve a *cum grano salis* analysis, starting from a comparative perspective between the former Code and the current one, while also passing through jurisprudential evolution of Brazilian courts.

The 1973 Brazilian Code of Civil Procedure, once immersed in Portuguese influences, significantly altered the logic of interlocutory decisions appealability, breaking with the former rule (from the 1939 Code) by not prescribing an exhaustive

14. "Art. 1.015. An interlocutory appeal may be filed against interlocutory decisions that deal with: I – provisional remedies; II – the merits of the case; III – denial of the allegation of an arbitration agreement; IV – the piercing of corporate veil; V – denial of the request for free legal aid or the granting of the request for its revocation; VI – disclosure or possession of a document or thing; VII – exclusion of a co-party; VIII – denial of the request for the limitation of a joinder of parties; IX – admission or rejection of third-party interventions; X – grant, modification or revocation of the stay of execution; XI – reallocation of the burden of proof pursuant to art. 373, § 1; XII – (VETOED); XIII – other cases expressly provided by law. Sole paragraph. An interlocutory appeal may also be filed against interlocutory decisions rendered at the stage of the liquidation or satisfaction of the judgment, in execution and probate proceedings".

15. As mentioned by the world-known Italian professor, Francesco Carnelutti: *"Il valore, que il tempo ha nel processo, è immenso e, in gran parte, sconosciuto. Non sarebbe azzardato paragonare il tempo a un nemico, contro il quale il giudice lotta senza posa"* (CARNELUTTI, Francesco. *Diritto e processo*, Napoli, Morano, 1958, p. 354). In Brazil, the importance of time in procedural law was studied by José Rogério Cruz e Tucci (*Tempo e processo:* uma análise empírica das repercussões do tempo na fenomenologia processual (civil e penal). São Paulo: Revista dos Tribunais, 1997).

list of appealable interlocutory decisions, as occurred in articles 842 and 851 of the 1939 Code.[16]

Parting ways with the hermetic list of appealable interlocutory decisions, the Code of 1973, conscious of the need to ease access to higher courts and to make the due process of law feasible, prescribed in article 522 the possibility of virtually unrestrictedly appealing from an interlocutory decision.[17]

That innovation revealed a clear disapproval of the former state of the law, by which only a few ancillary orders, considered more critical, could be discussed on a higher court before a final judgment by the lower court judge.

Barbosa Moreira, renowned Brazilian scholar, described the procedure of interlocutory appeals, named by him as *bill of error*:

> Interlocutory orders are reviewable through the filing of a writ of error within 5 days (Art. 523).[18] The writ only permits review of the specific issue involved in the order; and even this is only possible after the lower court judge has reconsidered his decision, which he may alter (Art. 527). The filing of the writ, although it in fact adversely affects the proceeding, does not, according to the law, suspend the running thereof, (Art. 497), nor prevent the order from being immediately complied with, in the absence of a contrary order by the judge upon motion by the party filing the writ, which is provided for in certain limited cases (Art. 558).
>
> In most cases, the writ goes to the higher court in the form of a separate record, with copies of the decision appealed from the other relevant matters (Arts. 523 III, 524 and 527 § 3). The hearing and decision of the writ follow rules resembling those for an appeal, with two exceptions: there is no revising judge, nor are the parties' attorneys granted oral argument at the hearing (Art. 554). Notwithstanding, if the appellant prefers, the writ of error, rather than being immediately heard by the higher court, may remain "held in the record" for judgment before any eventual appeal against the decision is heard (Art. 522 § 1). This special procedure has the

16. "Such law established, in its article 841, three species of interlocutory appeals: petition interlocutory appeal, instrument interlocutory appeal, and interlocutory appeal in the proceeding. The petition interlocutory appeal was intended to fight terminative decisions, that ended litigation but not on the merits (article 846). The other two species had lists of appealable decisions prescribed on the Code, so that any interlocutory decision not fitting in articles 842 and 851 would be unappealable" (LUCON, Paulo Henrique dos Santos. Evolução do agravo no sistema jurídico brasileiro das Ordenações Lusitanas ao novo CPC. *In*: SILVA, José Anchieta da. (Org.). *O novo processo civil*, vol. I. São Paulo: Lex Magister, 2015, p. 591-655).
17. Brazilian Code of Civil Procedure, article 522: "Interlocutory decisions may be appealed, within 10 (ten) days, as a withheld appeal, except when the decision may cause grave harm or make compensation difficult or even impossible to the party, as well as in cases of final appeal non admission, when the instrumental interlocutory appeal may be admitted".
18. It is noticeable that Barbosa Moreira mentioned a five days deadline, but the Code of 1973 suffered many changes, especially from 1995 to 2011. The 10 days deadline for the interlocutory appeal (*supra* note 10) was not prescribed in law until 2005.

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

> advantage of avoiding formalities and expenses; on the other hand, if the court finds in the appellant's favor, the granting of the writ can frequently mean that all activity after the order has been wasted.[19]

Regardless of good intentions, the withdrawal of the hermetic list did not have the expected effect on legal community, because, despite guaranteeing people's rights, it resulted in the higher courts being overloaded with numerous interlocutory appeals,[20] preventing them from carrying out its main mission: examining mature disputes, discussed in higher courts only after final judgments.

Consequently, legal reforms were carried out in order to restrain the motivation to appeal at any cost, as an attempt to contain the claimant's voracious will of using both lower and higher courts to discuss ancillary issues that, in fact, could be concentrated in one single moment of discussion: the final judgment.

It is worth mentioning Law No. 11,187/2005, whose amendments were intended to prevent the unreasonable use of the interlocutory appeal. That can be noted with the modification made in article 527 II of the Code, imposing on the higher court rapporteur the duty of converting instrumental interlocutory appeal into a withheld one. Exceptions could be made in the case of a decision likely to cause serious injury and of difficult reparation, as well as in cases of inadmissibility of the appeal against final judgment and regarding the effects on which the appeal is received (remand and stay effects).

Mutatis mutandis, the intention of the aforementioned article is closely related to the current logic of hermetic lists of appealable interlocutory decisions. This is because the goal of article 527 II, when the instrument interlocutory appeal turned into a withheld one, was to return the appeal to the lower court, waiting the final judgment to be examined later by the higher court, should there be an appeal against the final decision. That is: if the higher court saw no urgency in the interlocutory appeal, it would send it back to the lower court (which would then be a withheld interlocutory appeal), and the issues raised by that appeal would wait until final judgment on the lower court to be discussed by the higher court.[21]

---

19. BARBOSA MOREIRA, José Carlos. Brazilian civil procedure: an overview. *A panorama of Brazilian Law*, Rio de Janeiro, p. 183-205, 1992, p. 201.

20. "The 1995 modifications, although provided improvements in the legal system regarding access to higher courts, could not reduce the number of appeals there. Easing both appealability and the granting of stay effects led to expressive amounts of interlocutory appeals, situation which intensified with the 1994 generalization of provisional proceedings" (LUCON, Paulo Henrique dos Santos. Evolução do agravo no sistema jurídico brasileiro das Ordenações Lusitanas ao novo CPC. *In*: SILVA, José Anchieta da. (Org.). *O novo processo civil*, vol. I. São Paulo: Lex Magister, 2015, p. 591-655).

21. At first, converting instrumental interlocutory appeals into withheld ones may be great to the proceeding speed and efficiency, but it is actually a tough choice. When pretending to reduce the number of interlocutory appeals, legislators risk excessively delaying the procedure, because, in many cases, the future granting of the appeal could lead to the return of the whole procedure

The abovementioned situation – turning instrument interlocutory appeals into withheld ones – reflects the current logic of non-appealability of interlocutory decisions and was already widely used by the courts at the time of the previous Code. Firstly, because the matter was not urgent or capable of generating damages to the part if not decided at that moment, and could be analyzed, more safely and more appropriately, after the exhaustive examination of the lower court. Also, transforming the instrument interlocutory appeal into withheld appeal would diminish the volume of proceedings in higher courts, leaving to them more time to devote itself to its real function: aligning and correcting judgments accordingly to jurisprudence and the law.

However, that modification turned out to be insufficient to reach its designed goal, since the conversion of instrument interlocutory appeal into withheld interlocutory appeal was an interlocutory decision that could also be appealed (!). Also, when analyzing if it was necessary to convert instrumental interlocutory appeals into withheld ones, the higher court judge found better to avoid future workload and decide as soon as possible on the merits of the appeal.[22] Hence, the withheld appeal became an innocuous initiative from the law that had no correspondence in real life forensic practice.

It is within that context of overloaded higher courts and parties angered with excessive delays, that the CPC of 2015 came to life. Hence, it is easy to understand now why the current state of the law establishes a vector of non-appealability of interlocutory decisions.

In Brazil, a judge's decisions consist of judgments, interlocutory decisions and orders. Their meanings are prescribed in article 203 §§ 1 to 3 of CPC:

> Art. 203. A judge's decisions shall consist of judgements, interlocutory decisions and orders.
>
> § 1 Except for the express provisions of the special provisions of the special procedures, the judgment is the declaration through which a judge, based on arts. 485 and 487, finalizes the cognizance stage of common proceedings, and dismisses the execution.
>
> § 2 Interlocutory decisions are all those judicial decisions which do not fit the provisions of § 1.

to its very beginning. Hence, the withheld interlocutory appeal appellate procedure could favor defendants with dilatory or procrastinatory conduct, since any nullity occurred in the middle of the proceeding but acknowledged within the withheld interlocutory appeal could nullify many phases of the procedural *iter* (LUCON, Paulo Henrique dos Santos. Evolução do agravo no sistema jurídico brasileiro das Ordenações Lusitanas ao novo CPC. *In*: SILVA, José Anchieta da. (Org.). *O novo processo civil*, vol. I. São Paulo: Lex Magister, 2015, p. 591-655).

22. LUCON, Paulo Henrique dos Santos. Evolução do agravo no sistema jurídico brasileiro das Ordenações Lusitanas ao novo CPC. *In*: SILVA, José Anchieta da. (Org.). *O novo processo civil*, vol. I. São Paulo: Lex Magister, 2015, p. 591-655.

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

> § 3 All other decisions rendered by the judge in the proceedings, whether *ex officio* or upon request, are orders.

During the prevalence of the previous Code, a judgment was considered to be every judicial pronouncement that decided litigation on the merits or ended the procedure without analyzing the merits. The new CPC added to that concept a timeline requirement: a judgement shall be a decision placed in the very end of the procedure (ending the cognizance stage or dismissing the execution proceeding). That means, *a contrario sensu*, every decision that – however deciding on the merits – does not end cognizance stage or dismiss the execution will be an interlocutory decision, and not a judgment.

The Code is clear when prescribing the correct appellate procedure against judgment is the "final appeal" of article 1,009 (*"apelação"*, in Brazilian Portuguese), and the correct appellate procedure against interlocutory decisions is the interlocutory appeal of article 1,015 (*"agravo de instrumento"*).

Article 1,015, however, presented an exhaustive list of appealable interlocutory decisions in its subsections. Article 1,009, on the other hand, permits final appeals against any judgment.

Nowadays appellate procedure for interlocutory appeals are described by Gonçalves, Simão and Freitas:

> An interlocutory appeal may also be filed against interlocutory decisions rendered in the award calculation phase or judgment enforcement phase, in enforcement proceedings, or in probate proceedings (paragraph 1, article 1015 of the CPC).
>
> Unlike appeals against final decisions, the litigant must file interlocutory appeals directly before the appellate court. For this reason, there are some special requirements regarding the documents that must be submitted with the interlocutory appeal. If the case records are not electronic and the appellate court has no access to them, the interlocutory appeal must be supported by copies of the following documents: statement of claim, answer, petition that resulted in the appealed decision, the appealed decision itself, the certificate of notification of the appealed decision or another official document evidencing timeliness of such interlocutory appeal, as well as the powers of attorney granted to the appellant's and the appellee's attorneys.
>
> In addition, the appellant must file a pleading before the trial court with a copy of the interlocutory appeal, proof of its filing and a list of documents supporting the interlocutory appeal. This is very important because, if the case records are not electronic, non-fulfilment of this requirement will render the interlocutory appeal inadmissible (paragraph 2, article 1018 of the CPC).[23]

23. GONÇALVES, Diógenes; SIMÃO, Lucas Pinto; FREITAS, Priscilla Martins. Appeals. *Getting the deal through*, Aug. 2018. Source: <https://gettingthedealthrough.com/area/98/jurisdiction/6/appeals-brazil/>, access 20 Mar. 2019.

The differences between final and interlocutory appeals are also present in its effects. The general rule prescribed in article 995 (which speaks of any kind of appeal) specifies that appeals do not have stay effects *ope legis* and shall not suspend proceedings in lower courts. However, the judge may grant a stay effect to the appeal if a *prima facie* case seems probable and there are grounds to fear that delay in the main case will cause grave harm or make compensation difficult or even impossible.[24]

In complete opposition, the final appeal (as prescribed in article 1,012 § 1) has an automatic stay effect. It may be withdrawn by the judge if grounded on the same prerequisites (a probable *prima facie* case and fear that delay will cause harm to the party), but the final appeal ordinarily leads to the stay of lower court proceedings.

The Brazilian Code of Civil Procedure, when regulating interlocutory appeals' procedure, consolidates a legislative evolution that started with the beginning of the previous Code in 1973 and was followed by its reform in the 90's and 00's. The exhaustive list of article 1,015 represents by no means a definite answer to Judiciary problems like effectiveness and legal certain. Nevertheless, it is indeed a brand-new effort towards the right direction.[25]

III. THE APPEALABILITY OF INTERLOCUTORY DECISIONS IN U.S. LEGAL SYSTEM AND THE COLLATERAL ORDER DOCTRINE

The interlocutory appeal is a creation of Portuguese law.[26] On the other side, the evolution of precedent-based systems – such as the American common law – has traced a different path.

It is a fact that American law has only recently begun to admit appeals against interlocutory decisions.[27] Until the half of 20th century, the competence of higher

24. VASCONCELOS, Ronaldo; CARNAÚBA, César Augusto Martins. Efeito suspensivo do agravo de instrumento contra decisão parcial de mérito, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa (coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 14. São Paulo: Revista dos Tribunais, 2018, p. 525-540.
25. "Brazilian law keeps seeking a solution to courts' overloading and the presented alternatives always evidence the tendency to restrict interlocutory decisions appealability and to grant prerogatives to higher court judges to monocratically decide some appeals" (LUCON, Paulo Henrique dos Santos. Evolução do agravo no sistema jurídico brasileiro das Ordenações Lusitanas ao novo CPC. *In*: SILVA, José Anchieta da. (Org.). *O novo processo civil*, vol. I. São Paulo: Lex Magister, 2015, p. 591-655).
26. ARRUDA ALVIM, Teresa. *Os agravos no CPC brasileiro*. 4. ed. São Paulo: Revista dos Tribunais, 2006.
27. "The courts have a settled policy against "piecemal appeals", even though this policy can be a source of great frustration for litigants and their counsel. Indeed, the inability to secure immediate review of important preliminary rulings, such as the denial of a motion to dismiss or of a motion for summary judgment, often means that there will never be *any* appeal. The reason is practical: Once the district court establishes the basic legal rulings under which the case will proceed, many, if not most, cases will settle before reaching a final judgment" (PARASHARAMI, Archis; RANLETT,

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

jurisdictional courts was limited to appeals against final decisions (28 U.S.C., § 1291),[28] and those are the ones that *end litigation on the merits*.[29]

Only in 1949 jurisprudence consolidated a thesis that allowed the appeal against decisions that, albeit not "final", were really deciding the merits of the conflict and its impugnation only at the end of the procedure would reveal itself ineffective. It was in *Cohen v. Beneficial Indus. Loan Corp.*[30] that the Supreme Court broadened the sense of the legal expression "final decision",[31] allowing the appeal against an interlocutory decision that, in that case, considered that a federal court was not required to apply a state law.[32] That thesis, known through time as the *collateral order doctrine* (or *Cohen doctrine*), was conceived to be exceptionally used by judges: the interlocutory appeal

Kevin. Chapter 4 Discretionary interlocutory appeals and mandamus, *in* NETTER, Brian (ed.). *Federal Appellate Practice*, 2. ed. Arlington: Bloomberg BNA, 2018, p. 152).

28. References to American law (both precedents and statues) are most times concerning to federal rules, both in legislative (with references to the United States Code) and jurisprudential mentions (with Supreme Court precedents). The eventual mention to aspects of state law will be expressly pointed out.

29. *Cf.* Catlin v. United States, 324 U.S. 229 (1945). About federal courts competence: "Congress has plenary authority to control both the original and appellate jurisdictions of the federal courts. Pursuant to its constitutional authority, Congress has mandated that, as a general rule, a litigant has the right to appeal only after a final decision. This statutory requirement codified a long-established common-law precedent and the Supreme Court generally has given the statute a strict interpretation: '[A] final decision is one that ends the litigation on the merits, leaving the court nothing to do except execute the judgement'" (ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998, p. 539-540).

30. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

31. As the Court exposed, the appealable "final decision" in the terms of the law should not mean that the decision was placed at the very end of the process, but that it should not be incomplete or inconclusive: "The Court determined that Congress did not intend the statute to apply only to decisions that terminate an action. Rather, the Cohen Court interpreted the statute to allow for appeal of any final ruling, and it found certain interlocutory decisions final so long as they were not tentative, informal, incomplete, open, unfinished, or inconclusive" (PIKOR, Matthew R. The collateral order doctrine in disorder: redefining finality. *Kent Law Review*, Chicago, v. 92, n. 2, p. 619-651, out. 2017, p. 624).

32. "In 1943, soon after the Supreme Court's landmark choice-of-law decision in Erie Railroad Co. v. Tompkins, a small shareholder brought a shareholder's derivative action in federal court against the company's officers and directors, accusing them of raiding corporate coffers to enrich themselves. The corporation moved to require the plaintiff to post security to pay defense costs if the plaintiff lost, as required by state law. The district court held that a federal court was not bound to apply a state security law and denied the motion. Even though this decision did not terminate the litigation, the defendants appealed immediately. The Third Circuit of Appeals reversed on the ground that the Erie decision mandated the application of the state security requirement. The Supreme Court granted certiorari on both the appealability and the security issues" (ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998, p. 543-544).

would fit only if *(i)* the decision was ending an ancillary matter[33] and *(ii)* if an appeal against the decision, if presented only at the end of the procedure, resulted ineffective.[34]

Many practical considerations may justify immediate appeal of an order, since *time*, as already said, may be crucial to the matter discussed.[35]

The granting of a stay effect depended (and still depends) on a specific requirement of the appellant to the monocratic judge[36] – and the granting requirements are similar to those of Brazilian law:[37] probable existence of a *prima facie* case and grounds to fear that delay in the principal case will cause grave harm or make compensation difficult

33. The goal behind that requirement was clearly to appreciate procedural economy, bringing together in one single appeal (the final appeal) the judgement of issues that would otherwise be analyzes several times through numerous interlocutory appeals: "The Court required that ruling be sufficiently separable from the central merits of the case to prevent successive, piecemal appeals by combining 'all stages of the proceeding that effectively may be reviewed and corrected if and when final judgement results'" (PIKOR, Matthew R. The collateral order doctrine in disorder: redefining finality. *Kent Law Review*, Chicago, v. 92, n. 2, p. 619-651, out. 2017, p. 626).

34. ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998, p. 542.

35. "Various kinds of rulings can justify interlocutory appellate review. For example, if the trial judge overrules an objection to the court's jurisdiction, the proceedings in the trial court go forward, possibly through a full-scale trial. On subsequent appeal from the final judgment, the appellate court may decide that the objection to jurisdiction should have been sustained; on this basis, the trial on the merits will have gone for nothing. A similar problem can arise when privileged evidence is involved. If the trial judge sustains a claim of privilege – for example, communications between attorney and client – vital evidence may thereby be excluded. If upon appeal from the final judgment the communications are held not to be privileged, the appellate court may also be compelled to order a new trial because the evidence was withheld. On the other hand, if the judge overruled an objection to privileged communications, the receipt of that evidence may later be held on appeal to have contaminated the trial. Again a new trial would be required that could have been avoided if interlocutory appeal had been available" (HAZARD JR., Geoffrey; TARUFFO, Michele. *American Civil Procedure:* na introduction. New York: Vail-Ballou Press, 1993, p. 187-188).

36. "If a party pursuing a collateral order appeal wants a stay of the trial court proceeding pending resolution of the attempted appeal, it must move for such order. Federal Rule of Appellate Procedure 8 governs motions for stay or injunctions while an appeal is pending. Fed. R. App. P. 8(a)(1)(C). Rule 8 provides that a party must ordinarily move first in the district court for a stay of the order of a district court pending appeal or for an 'order suspending, modifying, restoring or granting an injunction' while an appeal is pending. Fed. R. App. P. 8(a)(1)(A), (C)" (COBB, Dana Livingston. Interlocutory appeals and mandamus in Federal Court. *14th Annual Conference on State and Federal Appeals*, University of Texas Law School, Texas, jun. 2004, p. 10).

37. "It goes without saying that obtaining a stay is difficult. Although the nomenclature varies by jurisdiction – you would file, for example, a 'motion for stay pending appeal' in the Fourth Circuit, Fed. R. App. P.8, and a 'petition for a writ of supersedeas' in the North Carolina Court of Appeals, N.C. R. App., P.8, 23 – the governing standards are largely uniform. You must establish, inter alia, that you are likely to succeed on the merits and that your client would suffer irreparable harm absent a stay. […] These requirements are demanding, and it is particularly challenging to satisfy them due to the page constraints for stay requests. See Fed. R. App. P.27(d)(2) (limiting motions to 20 pages, and replies to 10 pages)" (ZIMMERMAN, Erik R. The hidden risks and benefits of requesting a stay

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

or even impossible (derived from the Latin formulas *fumus boni iuris* and *periculum in mora*).[38]

Through the following years, American jurisprudence gradually spread the doctrine's application to other hypothesis – such as criminal law[39] – until, in 1985,[40] its inconsequential granting led to an excessive litigiousness, with delays and expenditures way beyond reasonable amounts, creating dubiety regarding the doctrine – and the resulting in legal uncertainty.[41] Additionally, the inconsistent changes of the requirements for interlocutory appeals gave rise to an essentially procedural litigation,[42] counterproductive in a scenario in which the scope of the process is social pacification.

In that critical context, the Congress designated, in 1988, a study committee – the Federal Courts Study Committee – to solve that matter.[43] The Committee report suggested the Supreme Court should be granted the power to define hypothesis if interlocutory appeal admissibility. In more original terms, closely related to the concept of "final decisions", the Supreme Court should be granted with the power to define which decisions were "final" for purposes of appeal, and which decisions, although not "final", were still appealable.

In 1992, the law consolidated the Supreme Court normative power to determine which interlocutory decisions could be appealed, whilst adding the subsection *(e)* to the § 1,292 of the United States Code, Title 28. The item granted the Supreme Court general powers to prescribe the interlocutory appeal of interlocutory decisions not mentioned in previous subsections.[44]

The primary rule of interlocutory decisions appealability in American common law is grounded on subsection *(a)* of § 1,292, but it is relevant to transcribe here the whole section:

> § 1292. Interlocutory decisions

pending appeal. *Per Curiam*, North Carolina Bar Association Appellate Section Newsletter, Raleigh, p. 9-11, mar. 2016).

38. BARBOSA MOREIRA, José Carlos. Brazilian civil procedure: an overview. *A panorama of Brazilian Law*, Rio de Janeiro, p. 183-205, 1992, p. 199-200.
39. Abney v. United States, 431 U.S. 651 (1977).
40. Mitchell v. Forsyth, 472 U.S. 511 (1985).
41. ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998, p. 540.
42. PIKOR, Matthew R. The collateral order doctrine in disorder: redefining finality. *Kent Law Review*, Chicago, v. 92, n. 2, p. 619-651, out. 2017, p. 619-620.
43. Judicial Improvements and Access to Justice Act of 1988, Pub. L. n. 100-702, 102 Stat. 4642 (1988).
44. "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection *(a)*, *(b)*, *(c)*, or *(d)*".

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[45]

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

45. It is worth noticing the law prescribes that, so the judge can expose in the interlocutory decision its potential appealability, there must be the expressions *"Provided, however..."*. At the end of the day, the appealability of those decisions is basically kept hostage by hermetic verbal formulas, grounded on a formalist practice that, at least to the eyes of Brazilian law, seems unreasonable. The attention to vocabulary of parties and judges is noted also in state law, such as in Meehan v. Hopps, 45 Cal. 2d 231, 217, 288 P.2d 267, 270 (1955): "Whether or not an appeal will lie depends upon the wording used by the lawyer in drafting the motion. If an attorney moves for an order 'directing' a receiver to pay money or perform an act against a party to the action, that party may appeal under the collateral order doctrine if the order is granted. But if the attorney moves for an order 'authorizing' the receiver to pay money or perform an act against a party to the action, no appeal will lie if the order is granted because the order has not complied with the requirement that it be a direction to pay money or perform an act. The justification is that if an appeal could be taken every time a receiver was authorized to do something, there would be undue delay and expense. However, in substance the order is the same whether the receiver is authorized or directed" (LUKENS, William M. The collateral order doctrine in California. *The Hastings Law Journal*, São Francisco, v. 15, p. 105-110, ago. 1963, p. 109).

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes

in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the

Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

The normative powers of the Supreme Court (subsection *(e)*), allied to the casuistic hypothesis of interlocutory appeal admissibility (subsections *(b)* and *(d)*) left the strict outlines of the appeal in the hands of a hesitant jurisprudence.[46] The wavy expansions and restrictions of appealability requirements led a trail of confusion and contradiction, even generating solely procedural litigation regarding that matter.[47] In contrast, it is worth pointing out that, after the birth of the doctrine in 1949, the Supreme Court reviewed the interlocutory appeal requirements once every six years; with its expansions from 1974 to 1988, the court started to reexamine that matter on average once a year – a self-flexibilization of the Court's own jurisprudential standards.[48]

The current diagnosis for the appealability of interlocutory decisions in American law points towards a very clear necessity: The Supreme Court must *(i)* return to the origins of the collateral order doctrine, adopting a narrower interpretation of the interlocutory appeal requirements, and *(ii)* resolve potential ambiguities through the usage of its normative powers.[49] Therefore, it is because of that the Supreme Court

46. Of course, it not the case of an inescapable cause-effect relation. The Judicial Power can be granted powers (which would also be *duties*, for the record) while aiming the best and most effective administration of Justice, but the absence of limits able to stop contradictory and conflicting decisions is quintessential. The Colorado experience is good example of broad powers granted to judges to determine appealability of interlocutory decisions (even though they could not decide on stay of the proceedings): "Colorado Appellate Rule (CAR) 21 – based on the Colorado Supreme Court's original appellate jurisdiction provided by the state constitution – is available for a variety of cases. However, the criteria are stringent: the rule grants original jurisdiction to the Colorado Supreme Court only when 'no other adequate remedy', including an ordinary appeal or Colorado Rule of Civil Procedure (CRCP) 106 review, is available. The Supreme Court quickly reviews CAR 21 petitions, and if the Court accepts the petition by ordering a rule to show cause why the requested relief should not be granted, the underlying proceedings are automatically stayed" (YATES, Jessica E. Knowing when to change trains: the ins and outs of interlocutory appeals. *The Civil Litigator*, Colorado, vol. 41, n. 6, p. 31-37, jun. 2012).
47. PIKOR, Matthew R. The collateral order doctrine in disorder: redefining finality. *Kent Law Review*, Chicago, v. 92, n. 2, p. 619-651, out. 2017, p. 647.
48. ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998, p. 581-607.
49. "The collateral order exception to the final judgement rule functions most efficiently as a narrow mechanism with requirements that, when satisfied, adequately balance the institutional burdens of increased appellate caseloads with the benefits of mitigating unduly harsh consequences for litigants. The U.S. Supreme Court has, however, gradually stretched these requirements, albeit often to further important policy interests. In doing so, the Court has left complex and confusing guidance that has made interpretation difficult and has significantly increased procedural litigation. A revised definition of finality that both returns to a narrow interpretation of Cohen's requirements and resolves potential ambiguities, alongside further Supreme Court rulemaking, would return Cohen's collateral order doctrine to a workable standard, resolve current conflicts, and avoid the institutional costs of addressing the issue through fragmentary resolution" (PIKOR, Matthew R. The collateral order doctrine in disorder: redefining finality. *Kent Law Review*, Chicago, v. 92, n. 2, p. 619-651, out. 2017, p. 651).

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

has sought to maintain its interpretation as conservative as possible,[50] including in its most recent jurisprudence[51] – and in that matter it has also been followed by the state Courts.[52]

In a brief synthesis, the jurisprudential inclination – corroborated by the doctrine – leans towards *restricting* the applicability of collateral order doctrine.[53] The evolution of US law has increased the hypothesis of interlocutory appeals, grounded on the necessity of providing effective jurisdictional protection in a reasonable time. However, its unreasonable enlargement has brought to surface its problems, and is now demanding an inflection in reality: allowing *excessive* interlocutory appeals is as pernicious as allowing *almost none* interlocutory appeals.[54]

---

50. "The Court has thus limited Cohen's reach to a carefully considered set of circumstances. Only in cases where section 1291's jurisdictional requirement would, if mechanically applied, eliminate the role of the appellate courts altogether with respect to claims deemed essential to litigants, has the Court countenanced a departure from its rigidities. Where the foreclosure of appellate review has appeared any less stark, however, the Court has maintained a stringent adherence to the finality rule" (KANJI, Riyaz A. The proper scope of pendent appellate jurisdiction in the collateral order context. *Yale Law Journal*, v. 100, n. 2, p. 511- 530, 1990).
51. In Will v. Hallock (546 U.S. 345, 352 (2006)), Supreme Court understood that interlocutory appeals would only be admissible if otherwise a substantial public interest could be jeopardized. In Mohawk Industries v. Carpenter (130 S. Ct. 599 (2009)), the interlocutory appeal was refused in cases concerning rejections of attorney-client privilege claims.
52. Source: <https://www.law.com/thelegalintelligencer/2018/02/15/preservation-and-points-for-charge-important-decis/>, accessed in 20 Aug. 2018.
53. "For these doctrines to make sense, pendent appellate jurisdiction should only be available in collateral order appeals 'where essential to the resolution of properly appealed collateral orders'. Put another way, only where the appellate court cannot resolve the propriety of the collateral order under review without adjudicating a necessarily antecedent legal question should it have interlocutory appellate jurisdiction to resolve that question, as well" (VLADECK, Stephen I. Pendent appellate bootstrapping. *American University Washington College of Law*. Washington, n. 3, p. 199-212, 2013).
54. Thus the proposals presented by Lloyd Anderson: "The Court itself could take the boldest and most sweeping step, the one that will produce the most desirable long-term outcome – rejecting the broad, rights-based formulation developed in the past thirty years and returning to the strict mootness-based formulation originally se forth in *Cohen*, accompanied by a more generous allowance of discretionary interlocutory appeal. In the long run, the strict doctrine would achieve the proper balance between effectuating the policies underlying the final judgment rule and the need to avoid truly irreparable harm resulting from no appellate review at all of issued that, by their nature, would become moot after final judgment. Short of such an ambitious reworking of the doctrine, the Court should at least recognize the true nature of the current doctrine. It is not a formula of set conditions, but a flexible test in which four factors are accorded different weight according to the particular order at issue. Such recognition would be a long step towards the "ABA-Wisconsin" approach advocated by some commentators which allow appeal as of right only from true final judgments and discretionary interlocutory appeal from prejudgment orders. More modest, short-term reform should focus on the most troublesome and costly area of collateral order appeals – denial of qualified immunity. The Court, sooner rather than later, should overrule *Mitchell* and its progeny. Short of that, the dormant rulemaking authority should be activated and serious consideration should be given to the promulgation of a Federal Rule of Appellate Procedure that would permit one, and only one, appeal from a denial of qualified immunity; the scope of which should include both legal and factual issues.

IV. THE BRAZILIAN SUPERIOR COURT OF JUSTICE DOCTRINE

As seen above, Brazilian juridical community has been suffering with the interpretation of article 1,015 of CPC. The legislative orientation changed from permitting appeals of any interlocutory decisions (as prescribed by the former Code) to prescribing one list of appealable interlocutory decisions (and other exceptional hypothesis expressly prescribed in other rules or articles).

That variation led to two different perspectives on article 1,015. The first one concerns to whether an interlocutory appeal not prescribed in the article's list should be admissible. If so, that would maintain the previous reality, in which any interlocutory decision could be appealable.

The second perspective derives from concluding the CPC does not allow interlocutory appeals not expressly prescribed by law. That conclusion leads to discuss whether the items of the article allow *extensive* or *restrictive* interpretations.

In a previous work, we had the opportunity to defend an axiological vector of *non-appealability* of interlocutory decisions. That is, we defended the impossibility of interlocutory appeals outside the boundaries of article 1,015 and, while analyzing the hypothesis of that article, the interpretation should be restrictive:

> The premise adopted there, which is also present here, is that the intention of the legislator with the new Code was to restrict the hypothesis of appealable interlocutory decisions, in order to increase the productivity of the courts. Whether the reader agrees or not with those reasons, it is at least clearly seen that the scope of the Code, ground on a whole legislative environment focused on the same purpose, was to reduce the number of interlocutory appeals, since it prescribed an express list of decisions that can be challenged by them.
>
> Considering that reality, an incorrect understanding started to spread: the existence of non-appealable interlocutory decisions would represent the primacy of the speed--probability binomial, by default of the security-certainty binomial. Three reasons break this conclusion: (i) the decision being interlocutory does not necessarily imply uncertainty over the judge's decision, which should be as certain as its grounds, and the duty of grounds is established in article 93, IX of the Constitution; (ii) the singular judge, being the one who carries out the production of evidence and dialogues with the parties, is the most apt to judge with the necessary certainty; (iii) the non-appealability vector decreases the number of claims in courts, allowing a more detained analysis of questions submitted to them.[55]

Such a rule would eliminate the multiple appeals and much of the procedural litigation that is the single most costly feature of qualified immunity appeals" (ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998).

55. VASCONCELOS, Ronaldo; CARNAÚBA, César Augusto Martins. Efeito suspensivo do agravo de instrumento contra decisão parcial de mérito, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

However, the Brazilian Superior Court of Justice recently decided that question with a different solution, generating a new binding precedent.[56]

The majority of the bench, following the statement of Justice Andrighi, determined the list of article 1,015 was exhaustive (or taxative,[57] to be more literal), but it was *mitigated* because an interlocutory appeal should be admissible – albeit exceptional – when complied the prerequisite of *urgency*.[58]

The resemblance with the collateral order doctrine is, at least, worth noticing. The US solution to the interlocutory decisions appealability was grounded on the same reason that motivated the Brazilian recent positioning: the danger of postponing the discussion of a relevant question to the end of the proceeding and realizing it would be ineffective.

The state of the law that generated this jurisprudential innovation, however, is different in both countries. The American common law had known no interlocutory appeal before collateral order doctrine, and it was not until after the doctrine has spread that Congress created some hypothesis prescribed in section 1,292 – combined with the casuistic hypothesis based on urgency and effectiveness.

On the other hand, Brazil came from a scenario of virtually unlimited interlocutory appeals to a major legislative restriction (through the Code) and that made way for a casuistic analysis, also combined with the expressly prescribed hypothesis of appealable interlocutory decisions.

It is worth noticing the Superior Court of Justice was not unanimous when examining that matter. Justices Moura, Noronha and Martins, for example, considered it was not up to the Court to expand in such a large way the words of the law.[59] It has also been said by Justice Moura that the thesis would bring more problems than solutions.[60]

The peril of the Superior Court of Justice bench decision is that now any interlocutory decision is theoretically appealable – it is up to the appellant's attorney

(coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 14. São Paulo: Revista dos Tribunais, 2018, p. 525-540.

56. STJ, REsp 1.969.396/MT, 3ª Turma, rel. Min. Nancy Andrighi, j. 05 Dec. 2018.
57. A taxative list does not mean anything related to taxation; it is merely the opposite of considering the list consists on examples.
58. As Justice said, "the objective requirement – the urgency the derives from the future inutility of judgement of a final appeal – makes possible the immediate appealability of interlocutory decisions outside article 1,015, always exceptional and only if demonstrated the urgency, independently of extensive or analogical interpretation, because, as demonstrated, not even those techniques are enough to comprehend all situations".
59. And Brazil does not have a normative power granted to the courts in terms of interlocutory appeals such as subsection *(e)*, section 1,292, title 28 of U.S. Code.
60. "It will certainly arise uncountable conflicts regarding casuistic interpretation. How will the urgency analysis be made? Will it be up to each judge to subjectively determine what should be 'urgency'?".

to demonstrate the urgency of the higher court decision on that matter. Also, that orientation literally oblige parties to appeal, because failing to raise that issue in the first possible moment (and postponing the matter to a final appeal) may cause the preclusion and prevents the discussion in higher courts.[61] After all, it leads to a costly procedural litigation.

This leads to the very problem that originated the vector of non-appealability of interlocutory decisions: excessive amounts of interlocutory appeals in higher courts and excessive delay in both higher and lower courts procedures.

V. CONCLUSION

This article analyzes the appealability of interlocutory decisions, both in Brazilian and US legal systems, in order to find some kind of parallel between the two scenarios.

Brazil has been going through a major change in its civil procedure rules, since its new Code entered into force in 2015. Determining which interlocutory appeals should be immediate appealable remains as one of the greatest discussions between scholars.

The 2015 Code of Civil Procedure parts ways with the previous 1973 Code, that allowed interlocutory appeals against virtually any interlocutory decisions. Not even legislative efforts and the conversion of interlocutory appeals into withheld ones could diminish the enormous quantity of interlocutory appeals. Hence, the new Code tried to restrict the hypothesis of appealable interlocutory decisions.

In US legal system, the appealability of interlocutory decisions went through a different path. It started from a scenario of a virtually non-existing interlocutory appeal and gradually started to admit those appellate procedures when an appeal against the decision, if presented only at the end of the procedure, resulted ineffective. Nevertheless, that gradual extension of interlocutory appeals hypothesis led to a problem already experienced in Brazil: an exaggerated number of appeals and the consequent ineffectiveness of higher courts. US legal system struggles to return to the beginning of the collateral order doctrine, which means the restriction of appealable interlocutory decisions.

61. "In this context, it should also be noted that certain violations of procedural rules, in particular rules on the form of procedural acts, can only form the basis of a later appeal, regular or miscellaneous, if the aggrieved party neither explicitly waived her right to appeal nor failed to raise the issue in a subsequent hearing. This provision embodies the idea of good faith in proceeding as well as the idea of efficiency and transparency: Parties must give the court the opportunity to correct a purported violation in due time - the idea of cooperating in good faith, - a party loses her rights if she does not intervene, such forfeit limiting future litigation, delay, and cost - the idea of efficiency, - and if timely raised, the court will normally take an outright decision on the issue, which facilitates future determination of what exactly happened in the proceedings" (KERN, Christoph. Appellate justice and miscellaneous appeals – the proposals for a reform of Brazilian civil procedure as compared to the German solution. *Revista de Processo*, São Paulo: Revista dos Tribunais, vol. 188, p. 147-162, out. 2010).

Civil Procedure Review, v. 11, n. 1: jan.-abr. 2020.
ISSN 2191-1339 – www.civilprocedurereview.com

The US experience shows that even when the interlocutory appeal is an exception in the legal system it should be treated carefully. Otherwise, it may evolve to a system that allows appeals against virtually any interlocutory decisions – which is not the intention of the legislator, the courts and not even parties.

The main purpose of this article, as abovementioned, is to identify a parallel between Brazil and US legal systems and, fortunately, find some useful to Brazilian current state of the law. Therefore, we notice that, albeit article 1,015 of the Brazilian Code of Civil Procedure restricts the hypothesis of appealable interlocutory decisions, jurisprudence and doctrine may be careful: the risk of numerous interlocutory appeals is still present. And the power to prevent the Brazilian legal system from that problem lies in the hands of jurisprudence and doctrine, the ones capable of giving to the article 1,015 its most adequate interpretation.

VI. REFERENCES

ANDERSON, Lloyd C. The collateral order doctrine: a new Serbonian bog and four proposals for reform. *Drake Law Review*, Des Moines, v. 46, p. 539-615, 1998.

ARRUDA ALVIM, Teresa. *Os agravos no CPC brasileiro*. 4. ed. São Paulo: Revista dos Tribunais, 2006.

BARBOSA, Rafael Vinheiro Monteiro. *Sistematização das decisões interlocutórias e os regimes de recorribilidade*. Tese (doutorado em Direito), Pontifícia Universidade Católica de São Paulo, São Paulo, 2016, 339 p.

BARBOSA MOREIRA, José Carlos. Brazilian civil procedure: an overview. *A panorama of Brazilian Law*, Rio de Janeiro, p. 183-205, 1992.

CARNELUTTI, Francesco. *Diritto e processo*, Napoli, Morano, 1958.

COBB, Dana Livingston. Interlocutory appeals and mandamus in Federal Court. *14th Annual Conference on State and Federal Appeals*, University of Texas Law School, Texas, jun. 2004.

HAZARD JR., Geoffrey; TARUFFO, Michele. *American Civil Procedure:* an introduction. New York: Vail-Ballou Press, 1993.

KANJI, Riyaz A. The proper scope of pendent appellate jurisdiction in the collateral order context. *Yale Law Journal*, v. 100, n. 2, p. 511- 530, 1990.

KERN, Christoph. Appellate justice and miscellaneous appeals – the proposals for a reform of Brazilian civil procedure as compared to the German solution. *Revista de Processo*, São Paulo: Revista dos Tribunais, vol. 188, p. 147-162, out. 2010.

LACERDA, Galeno. O Código como Sistema legal de adequação do processo. *Revista do Instituto dos Advogados do Rio Grande do Sul – IARGS*, Porto Alegre, v. 50, 1976, p. 163-170.

LUCON, Paulo Henrique dos Santos. Agravo de instrumento no Código de Processo Civil de 2015, *in* MENDES, Aluído Gonçalves de Castro *et al*. *O novo processo civil brasileiro:* temas relevantes – estudos em homenagem ao professor, jurista e ministro Luiz Fux, vol. II. Rio de Janeiro: LMJ Mundo Jurídico, 2018, p. 383-398.

LUCON, Paulo Henrique dos Santos. Evolução do agravo no sistema jurídico brasileiro das Ordenações Lusitanas ao novo CPC. *In*: SILVA, José Anchieta da. (Org.). *O novo processo civil*, vol. I. São Paulo: Lex Magister, 2015, p. 591-655.

LUKENS, William M. The collateral order doctrine in California. *The Hastings Law Journal*, São Francisco, v. 15, p. 105-110, ago. 1963.

MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Comentários ao Código de Processo civil*, vol. XVI: artigos 976 ao 1.044, *in:* MARINONI, Luiz Guilherme (dir.); ARENHART, Sérgio Cruz; MITIDIERO, Daniel (coord.). *Comentários ao Código de Processo Civil*. São Paulo: Revista dos Tribunais, 2016.

PARASHARAMI, Archis; RANLETT, Kevin. Chapter 4 Discretionary interlocutory appeals and mandamus, *in* NETTER, Brian (ed.). *Federal Appellate Practice*, 2. ed. Arlington: Bloomberg BNA, 2018.

PIKOR, Matthew R. The collateral order doctrine in disorder: redefining finality. *Kent Law Review*, Chicago, v. 92, n. 2, p. 619-651, out. 2017.

PRITSCH, Cesar Zucatti. The Brazilian appellate procedure through Common Law lenses: how American standards of review may help improve Brazilian civil procedure. *University of Miami Inter-American Law Review*. Miami, vol. 48, issue 3, p. 56-96, 2017.

TUCCI, José Rogério Cruz e. *Tempo e processo:* uma análise empírica das repercussões do tempo na fenomenologia processual (civil e penal). São Paulo: Revista dos Tribunais, 1997.

VASCONCELOS, Ronaldo; CARNAÚBA, César Augusto Martins. Efeito suspensivo do agravo de instrumento contra decisão parcial de mérito, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa (coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 14. São Paulo: Revista dos Tribunais, 2018, p. 525-540.

VASCONCELOS, Ronaldo; GULIM, Marcello de Oliveira. Sistema recursal brasileiro e o vetor da não recorribilidade, *in:* NERY JÚNIOR, Nelson; ARRUDA ALVIM, Teresa (coord.). *Aspectos polêmicos dos recursos cíveis*, vol. 13. São Paulo: Revista dos Tribunais, 2017, p. 503-523.

VLADECK, Stephen I. Pendent appellate bootstrapping. *American University Washington College of Law*. Washington, n. 3, p. 199-212, 2013.

YATES, Jessica E. Knowing when to change trains: the ins and outs of interlocutory appeals. *The Civil Litigator*, Colorado, vol. 41, n. 6, p. 31-37, jun. 2012.

ZIMMERMAN, Erik R. The hidden risks and benefits of requesting a stay pending appeal. *Per Curiam*, North Carolina Bar Association Appellate Section Newsletter, Raleigh, p. 9-11, mar. 2016.