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Brazilian new civil procedure code strengthens cooperation between state courts and arbitral tribunals

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Abstract: Brazil is in the eminence of having a new civil procedure code. Considering this context, the present article wants to demonstrate the interaction between this new code and arbitration. Since the code only rules over court proceedings, the focus lays on how it influences the cooperation between the state courts and the arbitral tribunals. The new code explicitly confirms the jurisdiction of arbitral tribunals and gives it a new communication tool for arbitrators to request courts in Brazil to execute arbitral orders. In particular, these two innovations shows how the new procedure code strengthens a collaborative relationship between courts and arbitral tribunals in the country.

Key Words: Arbitration, Brazil, Arbitral Letter, Carta Arbitral, judicial assistance, arbitral jurisdiction

1. Introduction

Brazil has newly approved a New Civil Procedure Code (hereinafter NCPC). The impact of the NCPC on arbitration is of utmost importance to the institute in the country. Differently from

the German model, where arbitration is ruled in one chapter of the code of civil procedure,[1] Brazil has an Arbitration Law separately from the Civil Procedure Code. That means that the Arbitration Law exclusively rules the proceedings in front of arbitrators and arbitral tribunals and the Civil Procedure Code rules solely over court proceedings. Although these are different and separate proceedings, there are many interfaces between them. Courts cooperate with arbitral tribunals for instance when a party to an arbitral proceeding seeks for interim measures in State courts, or when the party requests the courts to oblige the other party to nominate an arbitrator, or even when courts enforce or set aside the arbitral award. Consequently, changes in the Civil Procedure Code may also affect arbitration, by changing the relationship between courts and arbitral tribunals and the way courts should perform this cooperation. Therefore, it is important to analyze in this paper some of the effects that the NCPC may have on the Brazilian arbitration.

Amongst other important changes brought by the project of the NCPC, two stand out in the field of arbitration. Firstly, Art. 3, §1º NCPC, expressly recognizes the jurisdiction of arbitral tribunals. Secondly, Art. 69, §1º and Art. 237, IV NCPC introduce the Arbitral Letter (*Carta Arbitral*) as a communication tool between arbitrators and courts. Both these articles support a collaborative relationship between courts and arbitral tribunals.

Hereinafter, I will first shortly introduce the legislative process of enacting the NCPC. Then, I will discourse about the cooperation between courts and arbitral tribunals presenting the two aforementioned important changes, where the NCPC not only interacts with arbitration, but strengthens it.

2. The NCPC legislative process

A commission of jurists engaged by the Senate drafted the NCPC project (Law-Project no.

[1] The Arbitration Law is ruled in the 10th Book of the German Code of Civil Procedure (10. Buch der Zivilprozessordnung). Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento, Arbitration in Germany: *THE MODEL LAW IN PRACTIC*e (Kluwer Law International 2007), para General Overview, para. 11.

8046/2010)[2]. Many reasons encouraged the Brazilian legislative to suggest a new Civil Procedure Code. The development of proceedings and dispute resolution methods in the country count as motives. For instance, many petitions nowadays are protocoled electronically. The use of ADR methods in the country raises. The kind of disputes that come to the courts changes in line with the society profile´s modifications. To catch up with all these changes a New Civil Procedure Code had to come in. Moreover, the current Civil Procedure Code (hereinafter CPC) was enacted in 1973.[3]

In these more than 40 years of duty, the CPC has faced many small reforms to catch up with the society´s development.[4] With so many pieces that did not actually connect to the original idea of the CPC, the Law ended up as a patchwork and was mischaracterized as a whole. Hence, Brazilian jurists recommended the proposal of a new CPC in order to bring singularity and freshness back to the procedure law.

The NCPC has now made its way through both legislative houses[5] to enter into force in Brazil. On 26 March 2014 the special commission that discusses the law-project in the chamber of deputies approved the Senate´s law project and only made small amendments to it. According to the rapporteur of the commission, Mr. Paulo Teixeira, the amendments do not interfere with the content of the original NCPC project.[6] After that, the project must go for voting in the Senate. The rapporteur of the project in the Senate, Senator Vital do Rêgo, has promised to bring the issue to plenum as soon as elections were over in the end of October 2014.[7] Pursuant to that, in the end of 2014 the law-project was sent to the Senate, which approved the base text of the NCPC on 16th December 2014 and also approved the changes

[2] Senado Federal - José Sarney - PMDB/AP, Projeto de Lei 8046/2010, http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=490267 (accessed 11 Feb. 2015).

[3] *Código de Processo Civil, Lei 5.869 - 11 janeiro 1973, http://www.planalto.gov.br/ccivil_03/leis/l5869.htm (accessed 11 Feb. 2015).*

[4] Bretas de Carvalho Dias, Ronaldo & Luciana Diniz Nepomuceno, Processo Civil reformado (Del Rey 2007), p. 221. Duarte Neto, Bento Herculano, dos Santos Lucon, Paulo Henrique & Sérgio Torres Teixeira, Teoria geral do processo (5th ed., IESDE Brasil 2012), p. 21.

[5] Brazil has a bi-cameral legislative power composed by the chamber of deputies and the senate.

[6] Migalhas, Redação final do novo CPC está pronta, http://www.migalhas.com.br/Quentes/17,MI197872,91041-Redacao+final+do+novo+CPC+esta+pronta (accessed 11 Feb. 2015).

[7] Pedro Canário, Senado deve votar reforma do CPC depois das eleições, http://www.conjur.com.br/2014-set-03/senado-votar-cpc-depois-eleicoes-paulo-teixeira (accessed 30 Oct. 2014).

made by the deputy´s chamber on the following day. After that, the president sanctioned the NCPC on 16th March 2015. On 17th March 2015 the NCPC went from being a project to becoming the Law No. 13.105. It will have a *vacatio legis* of one year. The NCPC will completely revoke the Law 5.869 from 1973, the Civil Procedure Code currently in force.

3. Arbitral Jurisdiction in Brazil

The Jurisdiction of arbitral tribunals in Brazil has not always been uncontested. Although arbitration is a well-recognized dispute resolution method worldwide and since long experiencing a growing significance in Brazil, in the past, many discussions wanted to discredit arbitration in Latin America attributing resistance of domestic courts to recognize the jurisdiction of arbitral tribunals.[8] This is considered an inheritance of the Calvo Doctrine[9] adopted by many Latin American States in the past to regulate disputes regarding foreign investments. Although the doctrine can be considered as a protection for the developing countries against the excessive interference of more powerful countries, it harmed the arbitration´s reputation in Brazil, since foreign investors could not arbitrate their disputes, but had to subject them to national courts. Those foreigners who had to solve investment matters in the national courts regarded them to be favorable to the national companies. This harmed the reputation of arbitration in Latin America, including Brazil. For a long time these countries were not considered as friendly towards arbitration.

[8] Clint A. Corrie, Comparative Law Yearbook of International Business, 113 and 114 (2013). Henri. Alvarez, Recent Developents in International Commercial Arbitration in Latin America.

[9] Calvo Carlos, El Derecho Internacional Teórico y Práctico de Europa y América (1868). Calvo was a scholar from Argentina. His doctrine wanted to protect weaker countries from prejudicial interference of powerful countries. Therefore, he supported that aliens who made investments in a certain country were supposed to be subject to the jurisdiction of the country where the investment was made, in case any disputes arose, consequently protecting the sovereignty of that country. Many Latin American countries adopted this doctrine. Foreign investors who had to solve investment matters in the national courts regarded them to be favorable to the national companies. This harmed the arbitration´s reputation in Brazil and Latin America. For a long time these countries were not considered as friendly towards arbitration.

In contrast with this past situation, since the late 80´s Brazil has been experiencing a fast economical growth,[10] what increased the need for an arbitration friendly environment. Consequently, it has become a signatory country of various important conventions for the international trade scenario and for arbitration, like the Panama Convention (1995),[11] the New York Convention (2002),[12] the Mercosur Olivos Protocol for the Settlement of Disputes (2003) and the United Nations Convention on Contracts for the International Sale of Goods (2014).[13] Most importantly, it has enacted its Arbitration Law no. 9.307 in 1996, demonstrating its favorable position towards arbitration.

Additionally, in 2001 the Brazilian Supreme Court has finally overcome an important challenge to arbitral jurisdiction. Arbitration opponents have doubted the constitutionality of arbitral decisions under the fundament that it goes against the State´s guarantee that the law will not exclude any injury or threat to a right from the judiciary´s jurisdiction, present in Art. 5, XXXV of the Brazilian Constitution. The Brazilian Supreme Court had the opportunity to deal with this argument in a constitutional complaint brought to it in 1997. In its decision in 2001, the court reaffirmed the constitutionality of arbitration recognizing the legitimacy of the arbitration clause based on the principle of party autonomy. [14]

Now, the NCPC, reinforces the reasoning of the Supreme Court´s decision about the jurisdiction of arbitral tribunals, eliminating any possibly remaining doubts as to the legitimacy of arbitral decisions for the Brazilian Judiciary. The NCPC in its Art. 3 *caput* clearly states that no threat or harm to a right can be excluded from judicial appreciation, unless the dispute has been voluntarily submitted to arbitration in the terms of the arbitration law. The *caput* of Art. 3 NCPC mirrors the phrasing of the fundamental right to go to courts, expressed in the Brazilian

[10] Brazil has achieved the 7th position in the biggest world economies ranking in 2013. *The first six countries in the ranking are successively: the USA, China, Japan, Germany, France and the United Kingdom. International Monetary Fund, World Economic Database Report, April 2013, www.imf.org/external/pubs/ft/weo/2013/01/index.htm (accessed 18 Jun. 2013).* As a member of the BRICS, the country consolidates its relevance in the global scenario and calls the attention of many investors around the globe.
[11] The Inter-American Convention on International Commercial Arbitration of 16 June 1976.
[12] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.
[13] United Nations Convention on the Contracts for the International Sale of Goods of 11 April 1980.
[14] Supremo Tribunal Federal *SE 5206 (STF - Supremo Tribunal Federal 2001), STF - Supremo Tribunal Federal, SE 5206*.

Constitution in Art. 5, XXXV, which was used as fundament to the constitutional complaint. The exception made for arbitration in the first paragraph of this article is an active recognition of the equivalence of jurisdiction from arbitral tribunals and courts. The NCPC recognizes that the right to go to courts is not harmed by arbitration, on the contrary, the right go to courts essentially expresses the right to have jurisdiction in the etymological sence: *juris* meaning right or law and *dictio* meaning to say. Consequently, the right to jurisdiction expresses the fundamental right to have someone decide what is right in a dispute, someone to "say the right". In this regard, the NCPC identifies that not only State courts can "say the right" but arbitral tribunals that comply with the due process of law are a legitimate alternative to satisfy the right to have jurisdiction, if the parties so wish.

In conclusion, the NCPC strengthens the arbitral jurisdiction, leaving no space for doubts as to the legitimacy of arbitration in Brazil.

4. The new scenario of cooperation between courts and arbitral tribunals with the NCPC

When parties choose arbitration as their dispute resolution method, they are thereby excluding the matter from the competence of the courts.[15] An arbitration agreement or clause expresses the will of the parties not to submit their dispute to the judiciary. However, although courts will not have the decision power over the dispute, there are many contact points between arbitration and court proceedings. Courts maintain a helping function and even a control function over the arbitration proceedings. The control function relates to the objectives of the State as carrier of the order and jurisdiction. Hence, the State verifies if a certain arbitration proceeding complied with the due process of law, *ordre public* and other principles of public interest, for instance in the setting aside and enforcement proceedings.

On the other hand, the helping function evidences a cooperation between courts and arbitral tribunals. This cooperation is of utmost importance for the efficiency of arbitration,

[15] Art. 485, VII NCPC states that the judge should extinguish the court proceedings without any resolution on the merits, if there is a valid arbitration agreement ruling over the case.

because the arbitrator lacks two of the five elements of the jurisdiction: the *coertio* and the *executio* powers, without which jurisdiction could not be effective.[16] Therefore, the State courts play the helping function, cooperating with the arbitral tribunal to supply them with the necessary assistance when the two elements above are needed. According to the Brazilian Arbitration Law, the courts may help in case one of the parties refuse to arbitrate[17], by nominating the arbitrators to avoid tactic delays from one part [18] and especially by issuing interim measures, even before the tribunal is composed.[19]

Additionally, the court cooperates with the arbitral tribunal by enforcing the arbitral award. Without the courts´ enforcement power the award would be of no avail. Although in most of the proceedings awards are complied with voluntarily by the parties[20], the mere fact that it could be enforced if needed, gives it legitimacy and strength.

Hence, the cooperation between courts and arbitral tribunal plays a significant role in the effectiveness of arbitration and supplies the arbitral proceedings with the necessary coertion and enforcement powers.

Considering the aforementioned importance of cooperation between the judiciary and arbitral tribunals and the increasing use of ADR in Brazil, the NCPC brought up a new communication tool for arbitrators and courts. Thereby, it did not forget to pay due concern to the confidentiality aspect of court proceedings initiated because of arbitration. The sub-points below will give further information on these topics.

4.1 The Arbitral Letter and an analogy to Judicial Assistance

The NCPC brings a great innovation. It creates a tool to facilitate a certain kind of judicial

[16] The other three elements of jurisdiction are *notion*, *vocatio* and *iudicium*.
[17] Art. 7 Brazilian Arbitration Law.
[18] Art. 13, §2 Brazilian Arbitration Law.
[19] Art. 22 Brazilian Arbitration Law.
[20] Michael Dunmore, Chapter III: The Award and the Courts, Enforcement of Awards Set Aside in their Jurisdiction of Origin, in Klausegger, Christian, Klein, Peter (ed), *Austrian Yearbook on International Arbitration 201*4 (: Manz'sche Verlags- und Universitätsbuchhandlung 2014), 285–315 at p. 285.

assistance between the arbitral tribunal and the Brazilian courts.

In court proceedings, judicial assistance takes place in case the taking of evidence or service of process must be done outside the territorial competence of the originally competent court. For instance, if it is necessary to hear a witness in another State, the originally competent court will then formally ask the court competent in the place of residence of that witness to take this evidence and then send the findings to the court to compose to the original process. This is only possible because the States sign a treaty setting their will to perform judicial cooperation and in general, confirm reciprocity. The treaties normally state how this communication between the two courts will occur. Typically, the mean of communication between these two courts is the Letter Rogatory.[21] Letter Rogatory is the name of the formal request that a court send to another court to perform judicial assistance.

Taking the example of the Letter Rogatory, the Brazilian lawmaker proposed the use of an Arbitral Letter (*Carta Arbitral*) in the law-project of the NCPC. The Arbitral Letter will, like the Letter Rogatory, be the mean of communication between the Arbitral Tribunal or the sole arbitrator and the courts. Therewith, the cooperation between courts and arbitral tribunal is fortified and facilitated.

The Arbitral Letter fills a gap between the Civil Procedure Code and the Arbitration Law of Brazil. Art. 22, §§2 and 4 of the Brazilian Arbitration Law allows the arbitrator or the arbitral tribunal to request the court, that would originally be competent to decide the dispute, to issue or enforce interim measures or to take evidence. However, neither the Arbitration Law nor the Civil Procedure Code specifically regulates how this request could be made.

The Arbitral Letter is not new in the sense of enabling the cooperation between courts and arbitration. Courts have been issuing the measures requested by arbitrators, pursuant to Art. 22 of the Brazilian Arbitration Law, already before the introduction of the Arbitral Letter. Yet, this tool facilitates the proceedings by giving it the formal frames it needs to be processed in the courts. Now the court´s administration knows how to name the request coming from the

[21] In Brazil the Letter Rogatory is used solely for communication between courts from different countries. The mean of communication used between two Inland courts is the Letter Precatory.

arbitral authority and how to protocol it and distribute it to the competent judge inside the judiciary. Additionally, the NCPC in Art. 260, §3º NCPC, requires that a copy of the arbitration agreement and a proof of the nomination of the arbitrators must accompany the Arbitral Letter, thus the courts can directly check the competence of the requesting authority under that dispute.

On the other hand, Art. 267 presents three reasons for the refusal of the Arbitral Letter. Pursuant to subsection (i), the judge may decline to comply with the Letter if it lacks the legal requirements, meaning formal defects. Subsection (ii) authorizes refusal if the judge is not competent to comply with the Letter, in which case he/she can forward it to the competent judge. Finally, the Arbitral Letter can be refused if there are doubts as to its authenticity, according to subsection (iii).

Although the collaboration between courts and arbitral tribunals is widely recognized and alive in Brazil, the literature does not identify it as a judicial assistance in its specific sense, but only in a broad sense of cooperation or intersection.[22] This probably originates from the previous lack of formality of the collaboration and the lack of its mention in the civil procedure code. Now, with the new step made by the Brazilian Lawmaker, one could sustain that a certain type of judicial assistance in specific sense will indeed occur in Brazil as soon as the Arbitral Letter starts being used. This is because the procedure code itself introduced a communication tool extremely comparable to that used in cooperation between courts. The fact that the Arbitral Letter figures beside the Letter Precatory in Art. 69, **§1º** and that this provision explicitly verses about jurisdictional cooperation may reinforce this theory.

4.2 Confidentiality in the courts assisting arbitral proceedings

While framing the cooperation of courts to arbitration, the lawmaker did not ignore the important feature of confidentiality in arbitration. Although the principle of publicity rules all acts of the judiciary, with few exceptions, according to Art. 189, IV NCPC, the process arisen out

[22] Karl Heinz Schwab & Gerhard Walter, Schiedsgerichtsbarkeit (7th ed., C. H. Beck 2005), para. 46.

of the Arbitral Letter will be confidential, as long as it remains demonstrated that the arbitral proceedings themselves are confidential[23]. Therefore, it is important to file, together with the Arbitral Letter, a copy of the confidentiality clause stipulated by the parties in their arbitration agreement or of the article of the arbitration rules applicable to the certain arbitration, which imposes on the parties, arbitrators and institution the duty of confidentiality.

5. Conclusion

In conclusion, the will of the lawmaker to strengthen arbitration and give the arbitral tribunal effective means to search for court cooperation is evident in the NCPC. The confirmation of the jurisdiction of duly empowered arbitral tribunals in the law itself marks an express recognition of the legitimacy of arbitration in Brazil. Further, the Arbitral Letter will probably be an effective mean of communication between the arbitral authorities and the courts. By giving the arbitrators a formal tool to make specific requests to courts during the arbitral proceedings, Brazil innovates framing the way assistance should be required between these two jurisdictional bodies.

We hope that the few changes brought in by the NCPC to the court cooperation with arbitration represents an advance to this dispute resolution method in Brazil.

[23] de Paiva Muniz, Joaquim, Katherine S. Spyrides & Graca Prado, Maria da, The Baker & Mckenzie International Arbitration Yearbook 2010- 2011: *BRAZI*l. Brazil (Juris 2011), p. 499.