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The Kompetenz-Kompetenz Rule in Brazilian Arbitration Law

Andre Luis Monteiro (Quinn Emanuel Urquhart & Sullivan, LLP) · Wednesday, May 29th, 2019

Introduction

Unlike other pillars of arbitration like recognition-enforcement of foreign awards and independence-impartiality of arbitrators, the *Kompetenz-Kompetenz* rule is far from a universal standard. Each jurisdiction has a particular rule, with clear distinctions between the approaches adopted, for example, by the US, the UK, France, Switzerland and China.[1)]

The aim of this post is to present an overview of the positive and the negative effects of the *Kompetenz-Kompetenz* rule in Brazil, specifically examining the Superior Court of Justice's (SCJ) case law. It also updates and discusses new developments to previous posts in this Blog (here, here and here).

The positive effect of the *Kompetenz-Kompetenz* rule ensures that the arbitral tribunal can rule on its own jurisdiction, while the negative effect implies that that courts cannot decide on arbitral jurisdictional challenges before the arbitrators (chronological priority). In Brazil, the boundaries of these effects have been tested in several cases, as it will be addressed below.

Positive Effect

The Brazilian Arbitration Act 1996 (BAA) sets forth the positive effect of the *Kompetenz-Kompetenz* rule in Articles 8(1)and 20.

> BAA, Article 8(1):
> The arbitrator has jurisdiction to decide *ex officio* or at the parties' request, any issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration agreement.

> BAA, Article 20:
> "The party wishing to raise issues related to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first opportunity, after the commencement of

> the arbitration".

For its part, the SCJ has been interpreting these legal provisions in an arbitration-friendly way. The SCJ affirmed in *Kwikasair v. AIG* that "one of the basic principles of arbitration assigns the arbitrator the power to rule on his/her own jurisdiction, which is why any attempts from the parties or courts to change this reality should be condemned."[2)]

Discussions about the scope of arbitration agreements sometimes end up in court proceedings, generally because parties argue that arbitrators do not have jurisdiction over issues not covered by the arbitration agreement. In *Estado da Bahia v DM*, the SCJ affirmed that "the arbitral tribunal has jurisdiction to define the scope of the arbitration agreement"[3)], fortifying again the positive effect of the *Kompetenz-Kompetenz* rule.

Another common issue in arbitration is the extension of the arbitration agreement to non-signatory parties (and, therefore, who should solve this problem: courts or arbitrators?). In *Agra v. Leal Moreira*, the SCJ held that "this issue, which deals with the extension of the arbitration as well as the jurisdictional limits of the arbitral tribunal, was submitted to the arbitral tribunal, as it was supposed to be".

Jurisdictional issues also arise in cases where cooling-off periods have been disregarded. In these cases, parties usually argue that such disregard results in the inapplicability of their arbitration agreement. In *Ecodiesel v. Dedini*, the SCJ stated that "regarding the defendant's argument that the non-adversarial methods to solve the dispute were ignored (…), this Court understands that any issues concerning the existence, validity and effectiveness of the arbitration agreement shall be ruled by the arbitrators (*Kompetenz-Kompetenz*)", which meant that arbitrators should have the power to decide this issue.

All of these cases illustrate the pro-arbitration approach taken by the SCJ in applying the positive effect of the *Kompetenz-Kompetenz* rule.

Negative Effect

The negative effect of the *Kompetenz-Kompetenz* rule can be found in Article 485(VII)[4)] of the Code of Civil Procedure and also in Articles 8(1) and 20 of the BAA (the two latter provisions are interpreted *a contrario sensu*).

Fortifying these legal provisions, the SCJ has built case law favourable to the negative effect, highlighting the chronological priority of arbitrators to rule on their own jurisdiction. In *SPPATRIM v. BNE*, the SCJ ruled that "as a consequence of the *Kompetenz-Kompetenz* rule, set forth in Articles 8 and 20 of Law n. 9.307/96 [BAA], the Brazilian legislation on arbitration establishes a chronological priority rule in arbitral proceedings, allowing access to the courts only after the issuance of the arbitral award."[5)]

In *Samarco v. Jerson Cruz*, the SCJ adopted a *prima facie* approach deciding that "apart from pathological arbitration agreements, the jurisdiction of the courts provided in the Arbitration Act [BAA] only emerges after the issuance of the arbitral award, as set forth in Articles 32(I) and 33

[setting aside proceedings].”[6] This decision reinforces the negative effect of the *Kompetenz-Kompetenz* rule, prohibiting courts from dealing with arbitral jurisdictional challenges, except for cases of pathological arbitration agreements.

These decisions provide evidence that the SCJ strongly supports the negative effect of the *Kompetenz-Kompetenz* rule and, therefore, the arbitrators’ chronological priority, albeit with a few exceptions based on a *prima facie review* (*v.g.*: pathological arbitration agreements).

No Special Treatment to State Entities

In 2017, the SCJ had to determine the applicability of the *Kompetenz-Kompetenz* rule in a case involving state entities (*Petrobras v. ANP)*.

Petrobras (a state-controlled company) commenced an arbitration under the ICC Arbitration Rules against *ANP* (the Brazilian oil and gas regulatory agency) regarding the distribution of oil fields and corresponding royalties in Brazil. According to *Petrobras*, *ANP* had issued a decree that indirectly changed the concession agreement signed by the parties. In response, *ANP* filed an anti-arbitration injunction against *Petrobras*, arguing that the dispute was not arbitrable since it dealt with the regulatory power of the agency.

Ruling on the case, the SCJ understood that “the arbitral jurisdiction precedes the court’s jurisdiction, which means the arbitrators have the power to decide on the limits of their jurisdiction before anyone else (the *Kompetenz-Kompetenz* rule), as well as ruling any issues concerning the existence, validity and effectiveness of the arbitration agreement”.

In the end, the decision made it clear that the pro-arbitration approach regarding the *Kompetenz-Kompetenz* rule is applicable even to cases involving state entities.

Forgery of Signatures in Arbitration Agreements

In jurisdictions where the *Kompetenz-Kompetenz* rule is subject to occasional exceptions, an allegation of forgery of the parties’ signatures is definitely one of them. The reason is simple: a forged signature may mean no consent to arbitrate at all.

The case *KfW v. CGTEE* dealt with this matter. In loan agreements entered into by two Brazilian private companies and a German state-owned bank (*KfW*), a Brazilian state-owned energy company (*CGTEE*) provided the debt security. After a breach of contract by the borrowers, *CGTEE* initiated court proceedings against *KfW* seeking the invalidation of the guarantees based on the alleged forgery of the signatures of its legal representatives.

The question in this case was the following: should the courts dismiss the case at the very beginning in respect of the *Kompetenz-Kompetenz* rule or should the courts look deeply into the case to discover if the signatures were forged?

In a 3-2 ruling, the SCJ understood that the *Kompetenz-Kompetenz* rule should prevail. According to Justice Villas Bôas Cueva, “only by expert evidence is it possible to assert the veracity of the

documents and the signatures of the parties in the contract", which meant this issue had to be submitted to "arbitrators, as set forth in Article 8º, sole paragraph, of the Arbitration Act". In turn, Justice Bellizze reasoned that "the arbitral tribunal has jurisdiction, prior to anyone, to decide on the regularity of the arbitration, even when it involves public policy issues, like the allegation of forgery of the signatures in the contracts".

The case had an extra particularity. In a preliminary criminal investigation, Brazilian Federal Police produced expert evidence demonstrating that the signatures had been forged. This evidence was presented in the case. In my view, the SCJ went beyond reasonable limits by applying the *Kompetenz-Kompetenz* rule, since forgery might be a matter of pure consent to arbitrate.

"Conflito de Competência"

According to Article 105(1)(d) of the Brazilian Constitution, the SCJ decides on conflicts of jurisdiction between judges and/or courts. For example, if a federal judge and a state judge believe they both have jurisdiction over the same case, the SCJ will decide who is right. The legal tool to bring this issue to the SCJ is called "*conflito de competência*".

Since 2013, the SCJ has extended its jurisdiction to also decide conflicts of jurisdiction between judges/courts and arbitrators/arbitral tribunals/arbitral institutions, although Article105 (1)(d) does not make any reference to arbitration. This happens when, *v.g.*, a state judge declares the invalidity of an arbitration agreement while an arbitral tribunal confirms its jurisdiction over the same case.

In *CEB v. SE*, the SCJ ruled that "the activity undertaken in arbitration has jurisdictional nature, so that the conflict of jurisdiction is the suitable legal resource to define who has jurisdiction between a state judge and an arbitral institution". This position has since been applied in other cases (*Agra v. Leal Moreira*, *Astromarítima v. Hornbeck*, *Petrobras v. ANP*, and *Partout v. Belle Comercio*). This quirk of the law is unique to Brazil.

The majority of legal scholars criticise this position, arguing that the "*conflito de competência"* works as a wrongful exception to the *Kompetenz-Kompetenz* rule, since, in the end, the jurisdictional challenges are decided by the SCJ, a judicial body. Although I concur with this criticism, it is also important to highlight that the SCJ's case law has been broadly favourable to arbitration, confirming the jurisdiction of arbitral tribunals in nearly all cases.

Conclusion

In conclusion, based on the case law mentioned above, the *Kompetenz-Kompetenz* rule in Brazil is well-established and contributes to an arbitration-friendly environment. The SCJ's case law expressly recognises both the positive and the negative effects of the *Kompetenz-Kompetenz* rule, even in cases involving state entities. Although this impressive development, there is still room for rethinking the approach to cases involving forgery of the parties' signatures and the so-called "conflito de competência".

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References

?1 For a comprehensive comparison of these legal systems, please see: BORN, Gary B. International Commercial Arbitration. 2nd ed. Kluwer: The Hague, 2014, p. 1.077-1.215; ERK, Nadja. Parallel Proceedings in International Arbitration: A Comparative European Perspective. The Hague: Kluwer, 2014, p. 25-70; BERMANN, George A. International Arbitration and Private International Law. AIL: Brill-Nijhoff, 2017, p. 90-115.

?2 The same reasoning can be found in *Everlast v. Onkoy*, *Samarco v. Ana Pereira*, *Cuiabá Plaza Shopping v. Antônia Barbosa*, *Multigrain v. Portway* and *Germano Sukadolnik v. Baru*.

?3 In the same sense, see *Portal do Café v. Vanilla Caffe*.

?4 CCP, Article 485(VII): “A judge shall not rule on the merits when (…) the arbitral tribunal confirms its jurisdiction”.

?5 In the same sense, see also *Vik-Sandvik v. Vik-Sandvik*, *Agra v. Leal Moreira*, *Everlast v. Onkoy*, *Álvaro Tavares v. Samarco*, *Samarco v. Aristides Vitório*, *Samarco v. Jesus Mayrink*, *Samarco v. Jorge Paiva*, *Samarco v. Maria Nascimento*, *Germano Sukadolnik v. Horacio Quilice*, *Astromarítima v. Hornbeck*, *Paulo Cançado v. MAIO*, *Porcellanati v. Banco Safra*, *Partout v. Belle Comercio*, *Ambev v Cosme e Vieira* and *Haakon Lorentzen v. Hugo Figueiredo*.

?6 To some extent, a similar reasoning can be found in *Odontologia Noroeste v. GOU* and *SPPATRIM v. BNE*.

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