

Kluwer Arbitration Blog

State of the Art of Conflict of Competence Related to Arbitration in Brazil

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On June 10, 2022, the Superior Court of Justice in Brazil (“STJ”) ruled on the conflict of competence No. 185.702/DF (“**CC 185.702/DF**”) under the premise that arbitration has a jurisdictional nature and, therefore the STJ has jurisdiction to decide conflict of competences between arbitral tribunals constituted pursuant to the rules of the same arbitral institution when:

1. the applicable institutional rules do not provide for a solution to the deadlock created by arbitral tribunals which, in theory, have rendered irreconcilable decisions;
2. the arbitration proceedings have partially identical claims and cause of action; and
3. the president of the arbitral institution has acknowledged the lack of authority to resolve the conflict of competence, according to the applicable rules.

The matter presented to the STJ is unprecedented in the Court’s case law, particularly following the leading case **CC no. 111.230/DF**, ruled on May 8, 2013 as further explained below.

This post analyzes the state of the art of the matter considering the evolution of case law on the subject in Brazil.

Historical background of STJ’s jurisdiction to rule on conflict of competence proceedings

Brazilian legal system recognizes the jurisdictional nature of arbitration. Nevertheless, there has been an ample debate concerning the equivalence of the arbitrator to a “*judge of fact and law*” under the Brazilian Arbitration Act (**Law No. 9.307/96**, Article 18). That’s an important issue to be considered, because according to the Federal Constitution (“FC”), the STJ has authority to decide “*conflicts of jurisdiction between any courts (...) as well as between courts and judges not bound to them and between judges bound to different courts*” (**art. 105, I, d, FC**). Do arbitral tribunals fall within the scope of this provision?

Within this context, it is worth mentioning two cases that arose before the judgment of CC No. 185.702/DF. The first was **CC No. 113.260/SP**, issued on September 8, 2010, discussed **STJ’s competence to resolve a positive conflict between two different arbitration institutions**, both claiming to have authority to administer their respective arbitration proceedings (which were, in fact, identical). The parties that filed the conflict of competence before the STJ claimed that the arbitral tribunal exercises jurisdiction, and, therefore, it would fall under the STJ’s authority under

article 105, I, d of the Federal Constitution.

However, on that occasion, the STJ concluded, by a majority vote (with a relevant dissenting vote from Justice Nancy Andrigli), that the conflict of competence between arbitration chambers should be settled by the State Court since it involves an incident that would not fall under the STJ's jurisdiction, according to the scope of article 105, I, "d" of the FC.

Four years later, the STJ faced a similar issue, this time concerning the **conflict of competence between a state court and an arbitral tribunal**, in a case regarded as a *leading case* in Brazil, **CC No. 111.230/DF**. In this case, the STJ decided that "arbitral tribunal" falls within the definition of "*any courts*" contained in art. 105, I, d of the Federal Constitution, if one takes into account the jurisdictional nature of arbitration.

In 2022, the STJ ruled the conflict of competence **CC 185.702/DF**. The crux of the matter was whether STJ had jurisdiction to rule on a **conflict of competence between two arbitral tribunals constituted under the rules of the same arbitral institution**, not between an arbitral tribunal and a state court, as discussed in the *leading case* mentioned above.

What was decided on CC No. 185.702/DF?

Based on the premise established in the *leading case* **CC 185.702/DF** – i.e., that the expression "*any courts*" referred to in Article 105, I, d, CF includes arbitral tribunals – the STJ concluded that jurisdictional decisions issued by different arbitral tribunals that mutually exclude each other cannot subsist, "*as if there were a vacuum in the Brazilian legal system*". Parties cannot be deprived of a definition of the (arbitration) body that is effectively competent to solve their dispute, otherwise it would result in a scenario of legal uncertainty.

The STJ therefore confirmed its jurisdiction to rule on conflicts of competence "*between any courts [including Courts of Justice of the States and the Federal District, Federal Regional Courts, and arbitral tribunals]*." This implies that a conflict of competence between arbitral tribunals cannot be resolved by State Courts (as initially held in **CC No. 113.260/SP**, because conflict of competence between arbitral tribunals cannot be resolved by State Courts, even if there is a need for interpretation of the arbitration clause (as arbitral tribunals do not have a hierarchical or subordinate relationship with state or federal courts). The STJ then fixed its competence to decide on **conflicts of competence between arbitral tribunals** according to Article 105, I, d of the FC.

The STJ also noted that the case under consideration was unique. On the one hand, the arbitral tribunals involved were constituted before the same arbitral institution (the **Market Arbitration Chamber – CAM**), and theoretically the arbitral institution itself could decide the conflict of competence, in accordance with the arbitration rules chosen by the parties. On the other, in the case at hand, CAM's rules are silent on how to resolve the deadlock created between the arbitration tribunals that have rendered irreconcilable decisions in arbitration proceedings that have partially identical claims and causes of action. Accordingly, CAM's president rightfully acknowledged the lack of authority to resolve the conflict of competence in accordance with the applicable rules.

In this context, the STJ recognized its competence to rule **CC 185.702/DF**, declaring that one of the arbitral tribunals should prevail over the other, namely, the arbitral tribunal of CAM 186/2021.

State of the art

Given the important decisions previously rendered by the STJ concerning arbitration-related competence conflicts, and absent a change in case law or statutes, the STJ's stance regarding its jurisdiction to rule on jurisdictional conflicts (i) between a court and an arbitration chamber; and (ii) between arbitral tribunals before the same arbitration chamber (in cases where the relevant rules are silent) is unassailable and accurate, taking into account the current state of the art regarding this matter.

One could raise the doubt of whether the STJ has the same evident stance over its competence to decide on conflicts of competence between arbitral tribunals before different arbitration chambers – since this possibility was not expressly approached in the decision. However, based on the reasoning of the judgments mentioned in this post (*e.g.* the jurisdictional nature of arbitration and the equivalence of the arbitral tribunal to any other courts), there seems to be no reason to apply a different solution to this former possibility. After all, what would matter in such situations is precisely the conflict between jurisdictions, regardless of the arbitration chamber in question or its rules.

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