

Kluwer Arbitration Blog

Transmission of the Arbitration Clause to Subrogated Insurers: A Brazilian View

Carlos Eduardo Carvalho, Lucas Russi (Toledo Marchetti Advogados) · Wednesday, August 2nd, 2023

On May 9, 2023, the 4th Panel of Brazilian Superior Court of Justice (“SCJ”) judged the [Special Appeal n. 1.988.894-SP](#) (“Appeal”), reported by Minister Maria Isabel Gallotti. The Appeal was proposed by Mapfre Seguros Generales de Colombia S.A. (“Mapfre” or “insurer”) in an indemnification claim filed against LOG Wisdom S.A., Thorco Shipping S.S and Asia Shipping Transportes Internacionais LTDA. (“respondents”). The SCJ decision addressed a topic constantly discussed by arbitration practitioners and Brazilian scholars: the extent of the rights that are subrogated to the insurer that, on the one hand, compensated the insured in the event of a covered loss and, on the other hand, sought legal actions against the party who caused the damage that gave rise to the insurance payment.

In this post, we discuss this latest decision. We will first address the background of the Appeal, and then analyze the SCJ’s position vis-à-vis other cases on this matter.

Background

The Appeal related to a shipping contract for an international maritime transportation of materials to the construction of a power plant in Colombia. The contract included an arbitration clause that submitted any dispute to arbitration administered by the London Maritime Arbitrators Association – LMAA.

The insurer, Mapfre, was not a signatory to the shipping contract, but rather to a separate insurance policy for the risks related to transportation. As a result of an accident involving the transported cargo, Mapfre indemnified the insured party, subrogating in such a party’s rights. Accordingly, it filed a lawsuit before São Paulo courts against respondents to recover the indemnity paid, which was later appealed to the SCJ.

In brief, one of the respondents alleged that the insurer should have submitted its claims to arbitral jurisdiction due to the arbitration clause mentioned above, alleging that “*the insurer was fully aware of the arbitration clause at the time of issuance of the insurance policy and could not evade it*” (courtesy translation). On the other hand, insurer alleged that the arbitration clause was ineffective in relation to the subrogated party, since it was a non-signatory of the main contract. The SCJ confirmed that the insurer was bound by the arbitration clause inserted in the shipping

agreement (in which Mapfre was not a party) and, therefore, should have initiated arbitral proceedings in order to be compensated.

As the appellate decision emphasized, *“there is no way to rule out insurer’s prior knowledge regarding the existing arbitration clause in the maritime cargo transportation contract covered by the insurance policy”* and, therefore, *“as the contract was previously submitted to the insurer to analyze the risks arising from the insured contract, among which the arbitration clause was or should have been considered, is unavoidable the understanding that such clause must be considered as one of the essential elements of the guaranteed interests and the predetermined risk”* (courtesy translation).

Analysis

Under Brazilian law, subrogation is defined in article 786 of the [Brazilian Civil Code](#), which states that: *“upon payment of the indemnification, the insurer is subrogated, up to the amount of the indemnification paid, in the rights and actions that the insured has against the person who caused the damage”* (ROSE, Leslie. *O Código Civil Brasileiro em inglês: The Brazilian Civil Code in English*. Editora Renovar. Rio de Janeiro. 2008. p. 154).

The discussion is extremely relevant not only for the maritime transportation market, but also for other business relationships that involve insurance bonds. The precedent in question, which addressed peculiarities of the insurance bond, largens the scope for insurers and policyholders to discuss their indemnity rights in the jurisdiction provided in the main contract (executed between the policyholder and the insured party). In this sense, one may argue, in a hypothetical case, that the insurance company of a performance bond for a turn-key pulp mill project shall deploy the arbitration clause agreed by the owner and the contractor in the construction agreement, instead of national courts, to seek its subrogation rights against the insurer that was responsible for delaying the delivery of the project.

The SCJ understanding is not pacific. There are scholars and case law with different views on (i) the extent to which insurers subrogate the insured’s rights, (ii) the limits regarding the transmission of the arbitration clause to non-signatories and (iii) the difference between awareness and consent of the arbitration clause for purposes of submitting a non-signatory party to an arbitration.

The decision handed down by the 3rd Panel of the SCJ on March 22nd, 2022, in the [Special Appeal n. 1.962.113-RJ](#) highlights, for example, that *“the institute of subrogation transmits, solely, the ownership of the material right, that is, the quality of creditor of the debt, so that the choice of forum clause signed only by the perpetrator and the insured (original creditor) cannot be enforced against the subrogated insurer”* (courtesy translation).

As reported [here](#), this debate was also the subject of an award rendered on May 15, 2019 (SEC n.14.930), in which the SCJ Justices, by a 9-3 split decision, rejected the argument that the transmission of the arbitration clause under the subrogation discussion violated public policy, in order to recognize a foreign arbitral award as valid in Brazil.

The recent decision of the 4th Panel of the SCJ, however, may be invoked in analogous litigations, which do not involve shipping contracts, requiring that the policyholder and the insurer, once

subrogates the rights of its insured, observe the arbitration route provided for in the main contract that originated that insurance.

Conclusion

Although the transmission of arbitration agreements to insurers by subrogation is customarily raised in commercial transactions litigations, the issue is still subject to in-depth discussions by Brazilian Courts and scholars with different thoughts. Surely, this debate strengthens the pursuit for greater legal certainty for the relevant stakeholders. In any case, practitioners shall be aware of the ramifications that this discussion can take, in order to prevent risks of time and cost expenditure.


To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator


Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the
newly-updated
*Profile Navigator and
Relationship Indicator*



Wolters Kluwer



This entry was posted on Wednesday, August 2nd, 2023 at 8:53 am and is filed under [Arbitrability](#),

[Brazil](#), [Brazilian Arbitration Act](#), [Brazilian Superior Court of Justice](#), [Latin America](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.