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Judicial Reorganization and Arbitration in Brazil: An Analysis of Jurisdiction

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On 25 October 2022, the Brazilian Superior Court of Justice ("SCJ") upheld a decision that suspended the filing of a proof of claim in bankruptcy proceedings and, consequently, prevented the plaintiff from participating in the general meeting of creditors (*see*, Appeal to the SCJ n. 1.774.649, 25 October 2022, *Amapari Energia S.A. v. Zamin Amapá Mineração S.A. (in judicial reorganization)*; "Zamin case").

The SCJ understood that the plaintiff was not able to prove the existence of any debt owed by the debtor (arising out of unpaid sums under a power supply agreement), which should be analyzed before filing its proof of claim. This is of particular importance because the creditors' votes at general meetings are proportional to their credits, pursuant to Article 38 of the Brazilian Bankruptcy and Reorganization Law (Law 11.101/2005; "LREF").

Since the underlying power supply agreement contained an arbitration clause, the understanding of the SCJ was that the discussion regarding the existence of such debt should have been brought before an arbitral tribunal. Because the recovery plan did not include a creditor who potentially holds BRL 71,751,468.35 (equivalent to more or less US$ 14,350,000.00) in claims against the debtor, the decision resurfaced the discussion about the coexistence of arbitration and judicial reorganization, as well as the limits of each institute's jurisdiction.

In this post, we discuss the position taken by Brazilian courts in the Zamin case and how it may influence the path moving forward.

Background

On 17 March 2009, Amapari (plaintiff) signed a power supply agreement with Anglo Ferrous Amapá Mineração, later succeeded by Zamin (defendant), regarding the supply of 21 Megawatts of energy for mining activities. The agreement contained a dispute resolution clause which provided that all disputes relating to the agreement should be submitted to arbitration before the Chamber FGV of Mediation and Arbitration, and be decided by a sole arbitrator.

Amapari delivered energy to Zamin until July 2014, when it suspended the delivery due to an unjustified lack of payments. The supplier sent extrajudicial notices and tried to resolve the dispute

amicably. Nevertheless, the contract was terminated in November 2014 after the issuance of nine unpaid invoices in the combined amount of BRL 30,743,965.04. The alleged credit was later increased due to default interest and termination fines, amounting to BRL 71,751,468.35.

On 28 August 2015, Zamin filed a petition requesting its judicial reorganization, without including Amapari in its list of creditors. Following the public announcement of Zamin's judicial reorganization, Amapari contacted the court-appointed administrator to include its credit in Zamin's list of creditors. The court-appointed administrator refused the request on the grounds that Amapari had not submitted enough documents to support the existence of its claim. Thus, Amapari filed a separate lawsuit to be included in the list of creditors.

In this lawsuit, Amapari attached documents to evidence: (i) the supply of energy; (ii) the invoices issued throughout the period of contractual performance; and (iii) the costs for the acquisition of fuel and energy production. The first instance judge rendered a provisional order to guarantee Amapari's participation in the creditors' meetings in proportion to the "undisputed" amount of BRL 37,179,133.35.

The court-appointed administrator later submitted a petition arguing that the invoices had not been confirmed by the company under reorganization and, thus, the credit did not exist and should be evaluated by an arbitral tribunal. He argued that parties had been discussing (i) whether taxes apply on the total amount; and (ii) which party should bear the fuel's expenses. Relying on such explanation, the judge revoked the provisional order and Amapari's proof of claim was suspended, as the controversy between the parties did not allow the credit to be considered liquid and certain under Article 49 of the LREF. Accordingly, Amapari was prevented from voting in the general meeting of creditors.

In its interlocutory appeal, Amapari claimed that the incidence of tax was insignificant compared to the total claim (BRL 4,852,997.75 out of BRL 71,751,468.35). Moreover, Amapari argued that the existence of the claim had already been proved through the agreement and the invoices previously submitted in the case records.

Based on its calculations, Amapari claimed that the arbitration would cost at least BRL 1,000,000.00, and it would have to bear these costs by itself due to Zamin's financial condition. Accordingly, Amapari requested the Court of Appeals to attend the general meeting of creditors and exercise the voting rights derived from the "undisputed" credit.

The reporting judge of the Court of Appeals of São Paulo understood that the voting rights regarding the supposedly "uncontroverted" amount could only be provisionally granted if solid proof of the existence of the credit were presented in the case. Because the parties had agreed to submit their dispute to arbitration, the sole arbitrator should be the one to examine such evidence. The reporting judge also recognized the sole arbitrator's jurisdiction to examine the invoices and its correspondent credit.

Amapari then filed an appeal to the SCJ, in which it argued that Articles 9 and 49 of the LREF were misapplied. In sum, Amapari reiterated its previous arguments: the credit it claimed existed, which was proven by the agreement and the invoices previously presented, and therefore should be considered in Zamin's judicial reorganization.

The reporting justice of the SCJ considered that the SCJ was prevented from re-examining the factual background of the case (*see*, SCJ, Summaries 5 and 7). Also, it concluded that the judicial

reorganization's judge and the sole arbitration had concurrent jurisdiction. While the judge should rule on the enforcement of individual claims against bankrupt companies or companies under judicial reorganization, the arbitrator was responsible for analyzing the existence, effectiveness or validity of parties' legal relationship (*see*, Appeal to the SCJ n. 1.953.212, 26 October 2021, *OSX Construção Naval S.A. (in judicial reorganization) v. AGF Engenharia- EIRELI*).

As the parties were litigating exactly on the issue of whether Amapari's credit exists, Amapari would have to submit its claims to the sole arbitrator's analysis. Only the arbitrator would have jurisdiction to decide whether Amapari was entitled to participate in the general meeting of creditors and on its proof of claim.

The reporting justice also issued an addendum based on Article 6, paragraph 3 of the LREF, contemplating the possibility of Amapari asking the judicial reorganization judge to reserve a sum to guarantee the credit discussed in the arbitration.

Render unto Caesar

Although not ground-breaking, the Zamin case resurfaces the debate on jurisdiction in cases where judicial reorganization and arbitration proceedings run in parallel. While the reorganization court has "universal" jurisdiction for established credits, the cognitive court (whether judicial or arbitral) shall verify the existence and extension of the creditor's credits. After all, both procedures are distinct and have different objectives and principles.

In the present case, that was the position taken by the SCJ. Although the SCJ did not analyze the material aspects of the dispute, it recognized the existence of concurring jurisdictions: one the one hand, the arbitral tribunal, as the cognitive court, and, on the other, the reorganization court, as having "universal" jurisdiction for established credits. In this sense, the absence of an arbitral tribunal already constituted stressed the distinction between the concurring jurisdictions to an even greater extent: Amapari was not able to request judicial assistance, ask for a provisional measure or even obtain a partial award regarding the allegedly uncontroversial amount owed by Zamin.

Finally, the lack of sufficient provisions regarding arbitration in the LREF or provisions regarding judicial reorganization and bankruptcy in the Brazilian Arbitration Law (Law n. 9.307/1996) highlights the importance of this issue. One possible solution for the problem is to include specific provisions on arbitration in the LREF bearing in mind that judicial reorganization and bankruptcy regulations involve multiple interest groups. Although of utmost importance, its Article 6, paragraph 9 – which states that judicial reorganization or bankruptcy proceedings do not authorize the trustee to refuse the enforcement of arbitration agreements, and does not prevent or suspend the commencement of arbitration proceedings – is not enough to deal with most problems that can arise as a result of the need to discuss a credit in arbitration that should otherwise be sought in a judicial reorganization or bankruptcy.

Conclusion

Currently, there is an increase of judicial reorganization and arbitration proceedings in Brazil. Even though the SCJ has currently divided the limits and scope of their jurisdictions, it is necessary to

seek alternatives so that both jurisdictions may cooperate in an attempt to remedy, for example, the quantification of a credit whose existence is uncontroversial.

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