Kluwer Arbitration Blog

Exclusive Jurisdiction Agreements in Brazil and Their Impact on Arbitration: A Greater Role for Emergency Arbitration?

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The advantages of exclusive jurisdiction agreements ("EJAs") are well known; chiefly, that of knowing where a party can sue and be sued. In Brazil, EJAs are widely used in both cross border litigation and in the context of domestic contractual relations. Even in contracts providing for arbitration, it is typical for sophisticated parties to agree to submit discrete matters to a specific state court, such as requests for pre-arbitral urgent and interim relief or applications for executory measures. While Brazilian state courts preside over both state and federal law claims, depending on which state they select parties may have their case heard by specialized courts or benefit from less crowded dockets, thus obtaining more adequate or prompter relief.

Recent legislative changes to article 63 of the Brazilian Civil Procedure Code ("BCCP") have nevertheless altered the legal regime of EJAs. This blog post addresses the risks arising therefrom and suggests measures to mitigate them.

Article 63, ss. 1 and 5, of the BCCP in Outline

Brazilian Law recognizes party autonomy in executing EJAs, such that parties can both choose Brazilian courts as the applicable jurisdiction in international contracts and choose, within the Brazilian territory, a specific local court. The former is set forth in article 22(III) of the BCCP, whereby Brazilian courts are competent to judge the disputes "whose parties, expressly or tacitly, submitted themselves to Brazilian jurisdiction". The latter is provided in article 63 of BCCP, which has been recently amended.

Article 63 authorizes the parties to designate a specific local court as the competent venue. The requirements for such an agreement to be valid are further detailed in s1, according to which it was originally sufficient for it to be in writing and to refer to a determined legal transaction. The recently enacted Law No. 14,879/2024 modified the wording of s1 and added a new s5, limiting party autonomy in executing EJAs.

Article 63, s1 now contains an additional requirement for EJAs to be enforceable: the chosen local court must be connected to the location of the parties or the place of performance of the obligation. The new s5 further determines that a suit filed "randomly" (*i.e.*, when the court has no connection with the location of the parties or the place of performance) shall constitute an abuse of law. The

judge is therefore authorized to decline jurisdiction *ex officio*. According to a systematic interpretation of s5 together with ss 3 and 4 of article 63, the judge, however, can only exercise its discretion to *ex officio* deny jurisdiction until the defendant has been served with process, after which moment the judge shall take the issue of abuse of law only if and to the extent it is pleaded in the statement of defence. The amendments apply to all pending and future proceedings at the time of its enactment (article 14 BCCP) and are not excludable by agreement.

Despite their breadth, the necessity for the amendments was not justified as a matter of general public interest, but, instead, arose from targeted efforts to reduce the caseload of a specific state, which is often selected by parties from other state jurisdictions as a result of having one of the country's most time-efficient court systems (for more details, see here). As such, the amendments gave rise to concern across the Brazilian legal community, especially because they backtrack on an ongoing legislative movement in favor of assuring, rather than undermining, party autonomy.

Moreover, as explained below, in purporting to resolve one discrete problem, the Brazilian legislature may have created wider complications, which will ultimately have to be addressed by the courts.

Pitfalls of the New Rules

Under the new ss 1 and 5, courts are invited to consider *forum conveniens* factors when assessing the application of EJAs, namely, the location of the parties and the place of performance. However, at least in the specific context of international contracts, the mandatory consideration of such factors would appear to run counter to article 25 of the BCCP, which expressly excludes the jurisdiction of Brazilian courts where, "*in an international agreement, the parties agree on an exclusive foreign jurisdiction*".

Adding to the uncertainty surrounding the application of the new rules, article 25 s2 expressly prescribes that article 25 must be read together with ss 1 to 4 of article 63 BCCP (but not s5, which, as mentioned above, was introduced by the amendments). Despite the substantial alterations to the existing framework of article 25 BCCP, this provision was nevertheless overlooked by the new rules. It therefore remains to be seen how the courts will address the intersection between these different provisions and what will the ramifications be for international contracts involving Brazilian parties.

Uncertainties also arise in a purely domestic setting. In contrast to common law jurisdictions, judicial jurisdiction in Brazil is not discretionary. The determination of jurisdiction by reference to *Spiliada*-type connecting factors has been hitherto confined to highly specific situations affecting special interests, such as, for example, claims under Brazilian child protection legislation (Federal Law No. 8,069, article 147). The type of enquiry called for by the new rules is therefore not one which Brazilian courts are familiar with, potentially exposing parties to the risk of inconsistent and unprincipled decisions.

It is also misplaced. Even in those jurisdictions where courts exercise adjudicatory discretion, in circumstances where parties have bound themselves to an EJA "*forum conveniens* considerations are irrelevant" (*Enka v Chubb* UKSC at [184]). Hence, absent strong reasons, courts in England and Singapore, for example, will generally give effect to EJAs (*The Eleftheria*; *Vinmar v PTT* SGCA).

Closely mirroring the common law approach, under the previous legal regime, Brazilian courts would also hold parties to their bargain, subject only to limitations based on public policy and basic procedural fairness. Accordingly, EJAs would be enforced unless (a) there was a more appropriate forum and the dispute involved the interests of groups afforded special protection, especially consumers; or (b) the defendant established that it would be deprived of physical or legal access to justice if the claim was litigated in the chosen forum (*see, e.g.*, AgInt no AREsp No. 2,450,317 STJ regarding EJAs providing for a specific local court; Resp 1,797,109 STJ regarding EJAs providing for a foreign court).

This approach arguably struck a sensible balance between party autonomy and due process considerations.

Key Takeaway: A Greater Role for Emergency Arbitration

Crucially, nothing suggests that the amendments were intended to deny parties the right to, notwithstanding the presence of an arbitration clause in the main contract, agree to submit requests for certain types of relief to a specific local court, as mentioned in the introduction and previously reported in this blog (the validity of so-called "subsidiary" jurisdiction agreements was affirmed by the Brazilian Superior Court of Justice in *Paranapanema v BTG* – Resp 1,639,035 STJ). In principle, therefore, parties may contractually stipulate that their place of domicile and where performance is to be rendered shall be deemed to be the same as the selected forum. Most commodity offtake contracts contain clauses to this effect and similar provisions are also found in various other types of commercial agreements (*see, e.g.*, GAFTA General Feedingstuffs 2022, Clause 27). Given the broad mandate afforded to courts to set aside EJAs under the new rules, the effect of such provisions is, however, uncertain.

In light of this, folk wisdom suggests that when life gives you lemons parties are well advised to make a lemonade. Specifically, quite apart from underscoring the increasing importance of arbitration as an alternative form of dispute resolution, the amendments to article 63 BCCP provide a unique opportunity for parties to explore a widely recognized, albeit underutilized, tool in international and domestic arbitral proceedings, namely: emergency arbitration. The International Chamber of Commerce ("ICC") includes emergency arbitration proceedings in Article 29 of its 2021 Arbitration Rules. Reflecting international practice, major arbitration chambers in Brazil have likewise recently adopted well-crafted rules on emergency arbitration, largely on an opt-out basis.

The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) introduced, in 2018, an Administrative Resolution regulating the proceeding of the Emergency Arbitrator, which was updated in 2020. Most recently, provisions governing the Emergency Arbitrator procedure were incorporated into the 2022 CAM-CCBC Arbitration Rules as Appendix I, with enhancements. The *Câmara de Conciliação, Mediação e Arbitragem Ciesp/Fiesp* ("CMA") and CAMARB – Business Mediation and Arbitration Chamber – Brazil ("CAMARB") have also adopted resolutions to similar effect (CAMARB's Administrative Resolution No. 06/20 and CMA's 4/2018 Resolution).

Brazilian practitioners are already utilizing emergency arbitration for measures such as freezing orders, attachment, seizure, and even evidence production. According to a recent research (*Arbitragem em Números*), parties to proceedings seated in Brazil have used emergency arbitration

in a total of 13 cases in 2022, which were administered by 7 different institutions.

By employing emergency arbitration procedures, the need for state court intervention is markedly reduced, even in situations where the parties are not able to wait until the constitution of the arbitral tribunal to seek relief. Emergency arbitration therefore consists of an attractive alternative to avoid the constraints imposed by the new changes to the BCCP.

Conclusion

The amendments sit uneasily with broader deregulation efforts in Brazil by replacing the well-tested system previously governing EJAs with a wholly novel regime, which will need to be fleshed out by the caselaw. They do so by importing foreign legal concepts into Brazilian law, without due consideration to the potential implications arising from their practical application.

The pitfalls of the amendments underscore the need for careful drafting of arbitration agreements and the deployment of tailored procedural mechanisms. In particular, this is a perfect opportunity for arbitration practitioners to more widely opt for emergency arbitration, thereby leveraging the current scenario to make lemonades (or, as it were, a Brazilian “caipirinha”).

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