

# Kluwer Arbitration Blog

## Brazilian Superior Court of Justice Rules on the Non-application of the Code of Civil Procedure to Arbitration

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In Brazilian domestic arbitrations, it is not uncommon for parties to make arguments or requests based on the Brazilian Code of Civil Procedure (“BCCP”), even though the Brazilian Arbitration Act (“BAA”) does not provide for the application of such procedural rules to arbitral proceedings, not even on a supplementary basis.

The question of whether the [BCCP](#) can be subsidiarily applied to arbitration has sparked much debate. Some argue that when Brazilian law is chosen as the governing law, the BCCP should automatically apply to fill procedural gaps. However, the majority view rejects this position, asserting that neither the [BAA](#) nor any other piece of legislation allows for such application.

In August 2024, the Superior Court of Justice (“STJ”), Brazil’s highest court for non-constitutional statutory matters, specifically addressed this issue for the first time. [In a landmark decision](#), the Court clarified that the BCCP is not applicable to arbitration unless explicitly agreed upon by the parties. This post outlines the STJ’s reasoning and the broader implications of this decision for arbitration in Brazil.

### Background

Citic Construções do Brasil Ltda. (“Citic” or “Claimant”) entered into two service contracts with Usimec Soluções em Engenharia S.A. (“Usimec” or “Respondent”) related to the construction of a power plant in the State of Rio Grande do Sul. A dispute arose and Citic commenced an ICC arbitration against Usimec.

The arbitration agreement provided for the settlement of any dispute arising from or in connection with the contracts by arbitration, to be seated in São Paulo, State of São Paulo, under the Rules of Arbitration of the [International Chamber of Commerce](#) (“ICC”). In the Terms of Reference, the parties agreed: (1) that the dispute would be decided by a sole arbitrator; (2) that Brazilian law would govern the merits of the dispute; (3) to change the seat of arbitration to Porto Alegre, State of Rio Grande do Sul; (4) that Portuguese would be the language of the arbitration; and (5) that the applicable procedural rules would be the Terms of Reference, the 2012 ICC Arbitration Rules, and, in the absence of any rule, the rules deemed appropriate by the Sole Arbitrator.

Citic submitted two Chinese-language witness statements in support of its case, along with their corresponding Portuguese-language translations prepared by one of its representatives. At this time, Claimant informed the Sole Arbitrator that it would provide a Chinese translator for the oral hearing, as these witnesses were not fluent in Portuguese. Usimec did not object to the witness statements prepared by Citic's representative or to the fact that Claimant's representative would serve as a translator for the witnesses called by Citic during the hearing.

During the oral hearing, Respondent's counsel raised concerns about the translator's relationship with Citic. In response, the Sole Arbitrator stated that, in principle, there was no obstacle for such representative to act as a translator, especially since both parties would have the opportunity to review the hearing transcripts and, therefore, Usimec would be able to check the accuracy of the translation. Once again, Respondent did not formally object to the translator's participation. Later, the parties confirmed their agreement with the content of the hearing transcripts via email.

After an award was issued against it on July 31, 2015, Usimec sought its annulment, claiming that the translator's lack of independence and impartiality led to the Sole Arbitrator being influenced by unreliable evidence. Usimec relied on article 138, IV, of the 1973 Brazilian Code of Civil Procedure ("1973 BCCP"), which extends to translators the grounds for disqualification applicable to judges provided under articles 134 and 135 of the 1973 BCCP. Usimec argued that since the parties had chosen Brazilian law as the governing law, the 1973 BCCP should apply to the case, as it was the procedural law in effect at the time.

On April 25, 2017, the lower court granted Usimec's request to annul the award, reasoning that the guarantee of impartiality had been violated because the Sole Arbitrator allowed Citic's representative to serve as a translator for the witnesses called by Claimant, implicitly relying on article 138, IV, of the 1973 BCCP. The Appellate Courts of Rio Grande do Sul upheld this decision on April 26, 2018, asserting that the application on a supplementary basis of the 1973 BCCP was fully appropriate given the parties' choice of governing law (Brazilian law).

On October 22, 2018, Citic filed a special appeal before the STJ, arguing that the Appellate Courts of Rio Grande do Sul had misapplied article 5 of the BAA by disregarding the autonomy granted to the parties under such provision, which allows parties to define the applicable procedural rules.

### **Question in dispute**

Whether the provisions of the BCCP can be applied on a supplementary basis to arbitral proceedings when the parties have elected Brazilian law as the governing law.

### **Judgement of the Court**

On August 20, 2024, the STJ, in a unanimous opinion by Justice Marco Aurélio Bellizze, granted the special appeal and denied the annulment of the arbitral award.

The STJ first noted that, while it may be common to import notions and elements from judicial proceedings into arbitration, this does not mean that an arbitration must comply with the rules of the BCCP, as doing so would distort arbitration itself as a method of dispute resolution. The Court

emphasized that arbitrators are not bound by the procedures set forth in the BCCP and that there is no legal provision for its application to arbitration, even on a supplementary basis. According to the opinion, this is reinforced by the fact the BAA lists the specific circumstances in which it applies to arbitral proceedings.

The Court further affirmed that arbitral procedures are governed by the rules agreed upon by the parties, whether in the arbitration agreement, the Terms of Reference or during the arbitration, as well as by the institutional rules, and by the Procedural Orders issued by the Sole Arbitrator or the Arbitral Tribunal.

After analyzing the facts, the STJ found that Citic's annulment claim to be entirely meritless mainly for two reasons. First, the oral hearing had been conducted in accordance with the rules agreed upon by the parties, as the Terms of Reference established that each party would provide a translator and bear the costs related to the depositions of its own witnesses. Second, the BCCP had not been selected by the parties to govern the arbitration.

The Court also noted that nothing prevented contracting parties, if they so choose, from agreeing that the provisions of the BCCP will apply, on a supplementary basis or not, to their arbitration. However, it reinforced that applying the BCCP when no such agreement exists would violate the parties' autonomy and their expressed intent.

Finally, the Court assessed the translator's relationship with Citic in light of the principles due process and impartiality. The STJ acknowledged that, given the parties' procedural arrangements, it was inevitable that there would be at least a contractual relationship between Citic and the translator. However, the Sole Arbitrator had implemented safeguards, such as allowing the parties to review the hearing transcripts and to raise any concerns about the translation's accuracy. As Usimec had not raised any objections at the appropriate time, either during or after the hearing, the STJ concluded that the translator's participation, under the terms agreed upon by the parties, did not breach such principles.

## **Conclusion**

The STJ's decision reaffirms the principle of party autonomy, which allows parties to determine the rules that govern their arbitration. By upholding this autonomy, the STJ highlights one of the key advantages of arbitration: its procedural flexibility, which enables parties to tailor proceedings to the specific needs of their case. The ruling further sets an important precedent against the annulment arbitral awards, discouraging parties from filing annulment actions based on BCCP violations and preventing judges from annulling awards on these grounds when the BCCP was not part of the agreed procedural framework.

However, this decision does not completely rule out the application of the BCCP to arbitration in certain situations. Its provisions may still apply where: (1) the BAA explicitly provides for their application, such as Article 14, which refers to the arbitrator's independence and impartiality, (2) the parties expressly agree for the application of the BCCP to their arbitration, among other examples.

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